

A light blue world map is centered on the page, serving as a background for the title and subtitle. The map shows the outlines of continents and countries.

I·CONnect

---

# 2021 Global Review of Constitutional Law

Richard Albert, David Landau, Pietro Faraguna,  
Šimon Drugda and Rocío De Carolis  
*Editors*





**UNIVERSITÀ  
DEGLI STUDI  
DI TRIESTE**

Supported by the Constitutional Studies Program at the University of Texas at Austin



Attribution-NonCommercial-NoDerivatives 4.0 International



Under the Patronage of the Department of Legal, Language, Interpreting and Translation Studies

ISBN: 978-0-692-15916-3

ISBN: 978-88-5511-361-8

---

# Table of Contents

## 3 INTRODUCTION

5 A New Beginning in Year Six of the Global Review

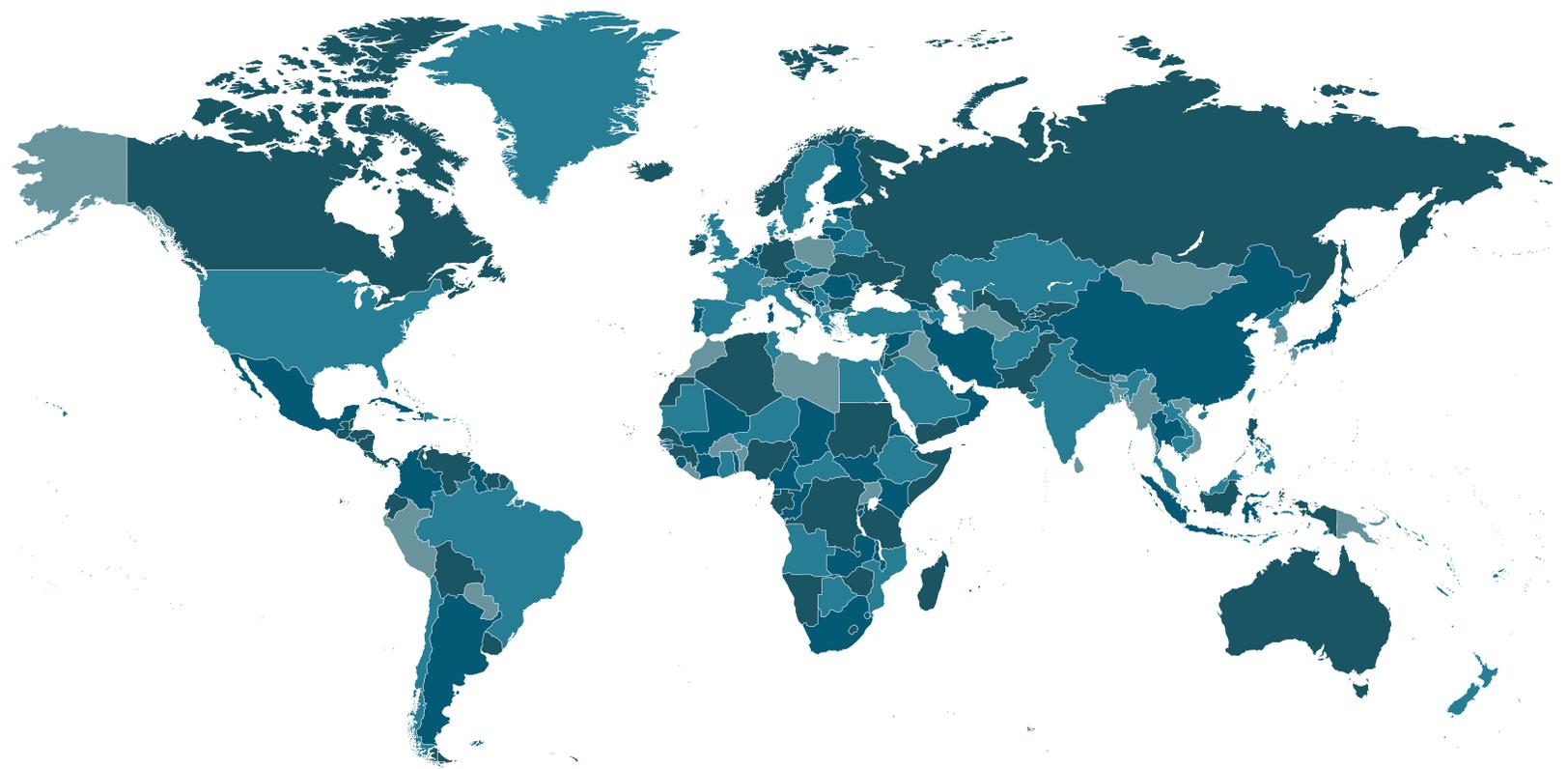
## 7 COUNTRY REPORTS

9	Afghanistan	173	Israel
14	Albania	178	Italy
18	Argentina	183	Japan
23	Austria	188	Jordan
28	Bangladesh	192	Kazakhstan
33	Belgium	197	Kenya
38	Bolivia	202	Kosovo
43	Bosnia and Herzegovina	206	Liechtenstein
48	Brazil	211	Malaysia
55	Cabo Verde	217	Malta
60	Canada	222	Mauritius
65	Cayman Islands	228	Mexico
70	Chile	234	Montenegro
75	Colombia	239	Myanmar
82	Costa Rica	244	The Netherlands
86	Cote d'Ivoire	249	New Zealand
89	Cuba	254	Nigeria
93	Cyprus	259	North Macedonia
97	Denmark	264	Islamic Republic of Pakistan
102	Dominica Republic	269	Palestine
108	Ecuador	275	Panama
114	Egypt	280	Peru
119	El Salvador	284	Portugal
124	Estonia	289	Romania
129	France	294	Russia
133	Georgia	299	The Democratic Republic of São Tomé and Príncipe
138	Germany	307	Serbia
144	Ghana	312	Slovakia
148	Greece	318	Slovenia
153	Honduras	323	South Korea
158	Hungary	328	Spain
163	India	332	Sweden
168	Indonesia		

337	Switzerland
342	Taiwan
348	Thailand
353	Tunisia
357	Turkey
362	Ukraine
367	United Kingdom
372	Uruguay
375	Uzbekistan
379	Venezuela
384	SUMMARY

# INTRODUCTION

---





# Introduction

## *A New Beginning in Year Six of the Global Review*

Richard Albert, David Landau, Pietro Faraguna,  
Simon Drugda and Rocío De Carolis

This year the Global Review marks a significant milestone, with the publication of its sixth volume. When we first launched the Global Review in 2016, we could not have imagined how quickly it would grow to become the leading annual resource for learning about constitutional law developments all around the world. We are especially pleased that this latest edition features reports from 75 jurisdictions, marking the widest coverage since the founding of the Global Review.

The sixth edition also marks a new beginning.

We have partnered with a new publisher, Edizioni Università di Trieste (EUT), an outstanding academic press that will bring new ideas and perspectives to the Global Review.

We thank our previous publishing partner—the Clough Center for the Study of Constitutional Democracy at Boston College—for its generosity and innovation over in our five-year partnership. We thank especially Vlad Perju, former Director of the Clough Center, for helping to bring the Global Review to life with his grand vision at the very beginning for how we could join forces to create something special. We thank also Gaurie Pandey, at the Center for Centers at Boston College, for her invaluable contributions to the success of the Global Review.

We are also thrilled to announce a new member of our editorial team for this year: Rocío De Carolis, currently a graduate student at Leiden University. She has brought so much to our collective efforts. We thank her and wish her well as she embarks on the next chapter in her scholarly career.

Despite these many changes, the core mission of the Global Review remains the same: to offer readers systemic knowledge about jurisdiction-specific constitutional law that has previously been limited mainly to local networks rather than a broader readership. The Global Review is our contribution to an ambitious *weltanschauung*: to make the world of constitutional law smaller, more familiar, and more accessible to all.

We close with a few more thanks. First, to Mauro Rossi of EUT for responding enthusiastically to our suggestion that we might partner together to publish this series. Second, to Elena Tonzar for her magnificent work in designing this latest edition in line with our traditional format. And finally to the Constitutional Studies Program at the University of Texas at Austin for sponsoring the publication of this book, and to Trish Do and Nivedita Jhunjunwala at the University of Texas at Austin for their invaluable contributions to the success of the Global Review.

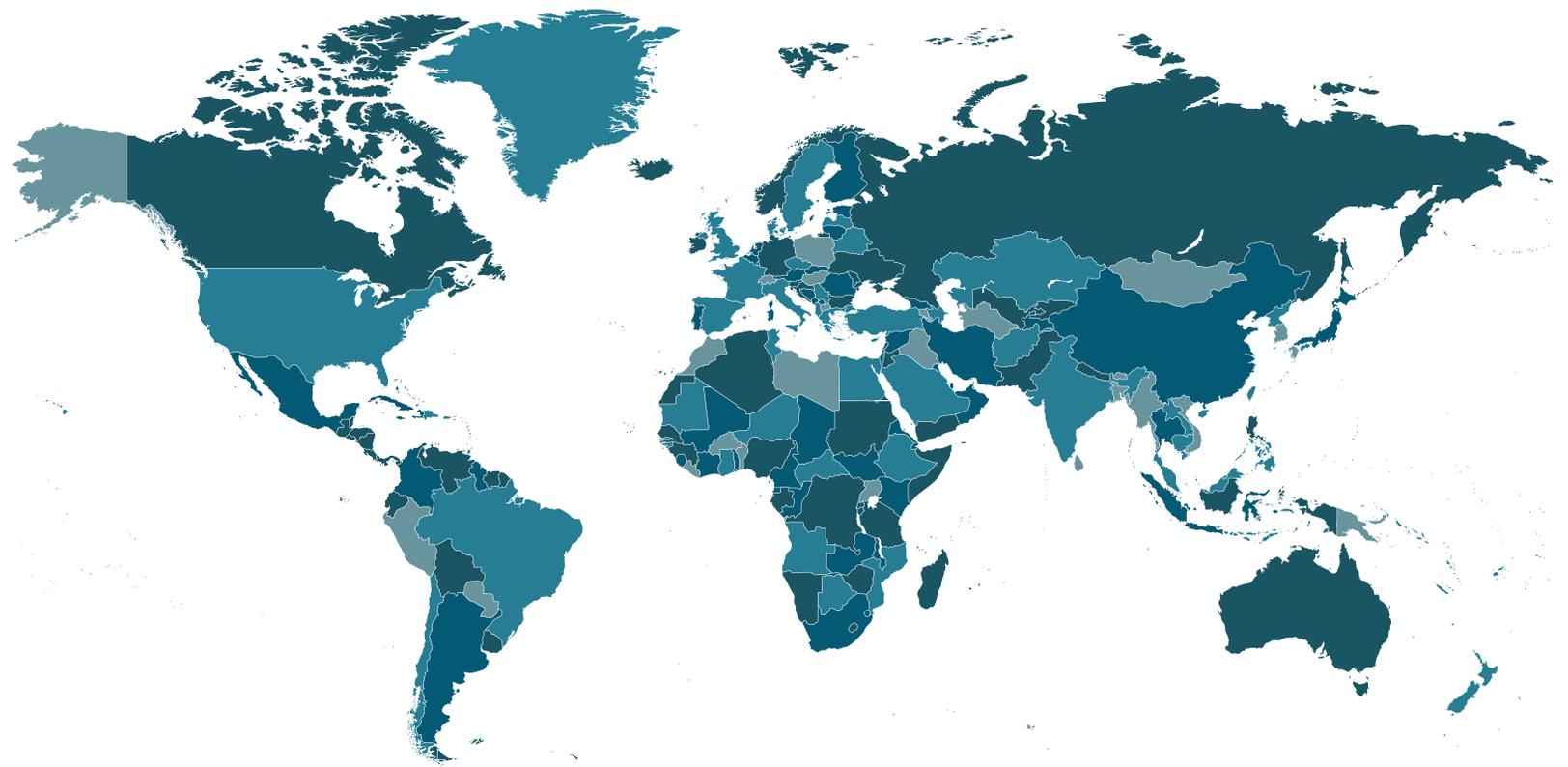
As we share this 2021 edition with the world, we invite any scholars interested in producing a report for the 2022 edition to contact us. And, as always, we welcome feedback, recommendations, and questions from our readers.

Enjoy this new edition!



# COUNTRY REPORTS

---







# Afghanistan

Amal Sethi  
The University of Hamburg

## I. INTRODUCTION

Last year's report discussed the growing influence, power and territorial control of the Taliban. Talks had commenced between the Taliban and the Trump administration. American forces were slowly retreating from Afghanistan. Peace talks with the Ashraf Ghani government had not begun, but there was hope that they would in a manner that would be conducive to Afghanistan's future.

All signs were pointing to 2021 being a watershed year for Afghanistan. It was evident that the Taliban would have a role to play in the country's future. It was also likely that it would want considerable overhauls of the constitutional arrangements put in place in 2004. Per the Taliban, the 2004 Constitution was a Western import, incompatible with local values, and the biggest obstacle to peace. When and in what manner the Taliban could be integrated into formal Afghan politics was a question surrounded by disagreement and uncertainty. There was certainly some hopefulness that the Taliban would be involved in Afghan politics like a normal political party, albeit one that held some hard-line beliefs. Last year's report predicted that there might be no certainty on this front in the near future. Nevertheless, as this year's events have shown, this was not the case.

Very few observers would have anticipated Afghanistan to fall to the Taliban the way it did, and at the speed it did. However, now that the Taliban has a complete grip over power in Afghanistan, several pertinent questions arise not only for peace in the country but also for constitutionalism.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### *The Failure of the Political Order Established by the 2004 Constitution*

Last year's report mentioned how the 2004 Constitution created a unitary and centralized state in a country deeply divided along ethnoreligious lines and largely controlled by warlords and militias who make their earnings from the illegal narcotics trade. When the Taliban was ousted in 2001, the central government-controlled only about thirty per cent of the territory in Afghanistan. Scholars like Shamshad Pasarlay have argued that this political order created by the 2004 Constitution cannot be blamed for the collapse of the government.<sup>1</sup> A centralized state was seen as necessary at the founding to prevent fragmentation and preserve national unity and territorial integrity.<sup>2</sup> In due time, the centralized state could devolve powers to regional governments.<sup>3</sup> Even if this had been the case, a better alternative could have been to use 'sunset clauses' to ensure that this setup was temporary.<sup>4</sup> The plan to leave state building to the benevolence of a few people at the center of a society with very little experience with modern democratic governance always had the odds stacked against it.

However, what made the unitary and centralized state more problematic was its combination with hyper-presidentialism (where excessive power at the center was concentrated in the hands of the president) and the single non-transferable vote (SNTV) electoral system.<sup>5</sup> While the precise reasons for these choices are beyond the scope of this

report, miscalculations, narrow-minded politics and power ambitions played a significant part.<sup>6</sup> These choices were criticized even during the initial years of the 2004 Constitution.<sup>7</sup> There was very little evidence that such systems could work in Afghanistan. In the post-World War II era, no country in the Global South that adopted a presidential form of government has been able to sustain democracy on a continual basis.<sup>8</sup> Every one of them has witnessed a democratic breakdown at some point.<sup>9</sup> Meanwhile, SNTV electoral systems are barely used in successful democracies because they produce strong anti-coalition incentives.<sup>10</sup>

The downsides of these choices began showing within a few years of the creation of the 2004 Constitution. As highlighted in last year's report, presidential elections were contested battles fought along regional and/or ethnic lines and marred by corruption and impropriety allegations. The success of democracy requires the consent of election losers, and in Afghanistan, the losers rarely conceded.<sup>11</sup> The results of these elections were brokered between the top candidates rather than decided by numbers. Given the deep divides in society and the power held by the Office of the President, this would always be the inevitable result of a system that fosters a 'winner takes all' outcome. This system prevented the creation of multiparty coalitions, which could have been of great significance in a deeply divided society like that of Afghanistan. The SNTV system did not help on this front. The net result was that Afghanistan never developed a meaningful party system.

The centralized nature of the government meant that warlords who controlled the bulk of the territory had very little incentive to cooperate with the central government (or change their ways). Without the cooperation of those in control, the central government could barely provide public goods or establish law and order in large parts of the country. This engendered severe public distrust in the central government and led to the creation of parallel state institutions.<sup>12</sup> Even hyper-presidentialism revealed its ugly side early on. Afghanistan's second president, Ashraf Ghani, made no attempts to involve

regional and ethnoreligious elites in his administration and instead tried to entrust power to a close circle of Pashtuns in Kabul.<sup>13</sup> In 2018, in a rather contentious incident, Ghani dismissed the powerful governor of Balkh, Atta Muhammad Noor.<sup>14</sup> This action was seen as an attempt to weaken a political and ethnoreligious rival.<sup>15</sup> Incidents like this one only weakened the legitimacy and popularity of the central government headed by the president in the eyes of the Afghan populace.<sup>16</sup>

This background allowed the Taliban to slowly capture village after village and establish their own justice and security systems. Many in Afghanistan trusted the Taliban to care for them better than the central government.<sup>17</sup> This fact, combined with the severe lack of legitimacy and popularity of the government, resulted in Afghan soldiers being unwilling to fight against the Taliban.<sup>18</sup> Thus, in mid-2022, when the Taliban went on the offensive, major towns and cities fell in quick succession.

While the 2004 Constitution is not the root of all problems in Afghanistan, it arguably ensured that Afghanistan barely ever stood a chance at democratic flourishing.<sup>19</sup>

### The Establishment of a New Political Order

Back in 2019, when the Taliban was entering into negotiations with the Trump administration, it had stated that it did not seek a monopoly on power and hoped to operate inclusively.<sup>20</sup> Whether it would (or could be forced to) stick to its words was always questionable, considering that the Taliban as a group is extremely authoritarian in its internal workings and not familiar with any other approach. Nevertheless, since the Taliban was handed the keys to an autocratic system with no decentralization and no meaningful opposition, it had very little incentive to govern democratically.<sup>21</sup> This is precisely what has been witnessed since it gained control. The Taliban, in fact, reversed all democratic gains Afghanistan made in the last two decades.

Immediately after coming to power, the Taliban started implementing a new political order. In September 2021, it announced an interim government.<sup>22</sup> This interim govern-

ment contains no women or officials from the previous regime and includes very few members of ethnic-minority communities.<sup>23</sup> The interim government comprises of men listed as terrorists by foreign governments and international organisations.<sup>24</sup> It is ultimately accountable to the Taliban's leadership council, with whom actual power rests.<sup>25</sup> An all-powerful religious cleric heads the Taliban's leadership council, and there are no formal rules regarding his tenure or appointment.<sup>26</sup> The leadership council oversees various commissions and administrative organs through which the Taliban operates the interim government.<sup>27</sup> These commissions focus on matters such as economics, education, health and military.<sup>28</sup> Beyond constituting the interim government, senior members of the Taliban have ruled out any democratic governance in Afghanistan on the grounds that it does not have any place in an Islamic society.<sup>29</sup> The Taliban has also remained silent on whether it will hold any elections in the future.<sup>30</sup> It even dissolved the election commission in charge of supervising elections during the previous regime.<sup>31</sup> A Taliban spokesman asserted that *'There is no need for these commissions to exist and operate... If we ever feel a need, the Islamic Emirate will revive these commissions'*.<sup>32</sup>

The Taliban has provided little detail about the legal system under which it will operate beyond stating that it will govern in accordance with Sharia. Not much can be concluded from such a claim in isolation. Sharia, which simply means 'the way' in Arabic, is a corpus of codes and principles drawn from the Quran and the sayings and way of life of the Prophet Muhammad. While Sharia can illuminate a wide range of subjects, including trade and economics, it offers no guidance concerning some of the more complex laws needed by modern states.<sup>33</sup> Much of how things function in practice depends on the interpretation of some of the core tenets of Sharia. However, different branches of Islam have markedly different interpretations of Sharia, to the point that scholars have argued that some interpretations of Sharia can be in line with the principles of the rule of law, democracy and natural justice as understood in the Western world.<sup>34</sup>

Nevertheless, there is little evidence to suggest that the Taliban's version of Sharia attempts (or would attempt) to do so. If anything, it can be argued that the Taliban's version of Sharia is more extreme than any other practiced in the world.<sup>35</sup> While the Taliban has promised to operate less harshly than during its previous rule (and is arguably doing so),<sup>36</sup> it still does not meet even the most modest human rights standards. For illustrative purposes, let us take the issue of women's rights, which has received much international attention. The Taliban certainly passed some decrees that expanded women's rights in areas such as marriage, divorce and property compared to what existed when it was last in power.<sup>37</sup> It has even ordered its government ministries and Supreme Court to enforce these decrees.<sup>38</sup> At the same time, within days of assuming power, the Taliban asked female journalists, judges, bank officials and other professionals to stop reporting to work.<sup>39</sup> Outside Kabul, women have been prohibited from leaving their houses without a male relative escort.<sup>40</sup> The Taliban has also prevented women from entering universities and has closed down some women's clinics and schools.<sup>41</sup> It also shut down the Women's Affairs Ministry and replaced it with a Ministry of Vice and Virtue.<sup>42</sup> The Ministry of Vice and Virtue, which existed during the previous Taliban rule, is a department of religious police that oversees the enforcement of the group's morality codes.<sup>43</sup> In the past, members of the ministry drove around neighbourhoods in pickup trucks and publicly humiliated and whipped women who did not adhere to their rules.<sup>44</sup>

Problematic actions have been witnessed on other fronts as well, like the resumption of public executions and flogging.<sup>45</sup> This begs the question of why the Taliban has developed such an understanding of Sharia. There are three important factors at play here. The first is the idea that harsh punishments are a means to control the population.<sup>46</sup> Since the Taliban does not have a strong state apparatus to control the population, violence and public forms of punishment become a control mechanism.<sup>47</sup> The next reason is that the Taliban rejects anything it views as even remotely Western.<sup>48</sup> Since the Taliban considers progressive values to have Western roots, it seeks to implement the most

extreme, regressive versions of Islam possible.<sup>49</sup> The third reason is that to highlight its victory over the West, the Taliban is more than eager to implement its firebrand version of Islam in a rather public manner.<sup>50</sup>

### III. CONSTITUTIONAL CASES

Last year's report mentioned that the Afghanistan judiciary under the previous regime was one of the least transparent public institutions in the world. The judiciary did not publish or report any of its decisions unless doing so served some ulterior purpose. The ways to gain information regarding judicial decisions were: (1) when the government took a particular action in response to a decision of the judiciary and provided the latter as the justification for their action; (2) press statements by judicial institutions; (3) statements by judges and government officials; (4) news articles; and (5) statements by lawyers and law professors who were in the know of what was happening in judicial institutions.

As stated in last year's report, since two female judges associated with the studies directorate of the Supreme Court and one lower court judge were the victims of targeted assassinations, it was very unlikely that much would change on the transparency front in 2021. In a tense political environment, judicial institutions would be hesitant to publicize the details of their work. This has precisely been the case. The websites of the Supreme Court and the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC)<sup>51</sup>, which have not yet gone offline, contain no information regarding any decisions rendered before the Taliban came into power. Official government gazettes from the first half of the year also provide no information. Based on the limited information available, two significant decisions of the Supreme Court with constitutional elements can be studied. No decisions of the ICOIC were identified. The two Supreme Court decisions are as follows.

#### *The cases of Mohammad Amin Farhang and Wahidullah Shahrani (corruption)*

Wahidullah Shahrani was the Minister of Mines in the Hamid Karzai government. He

was accused of misusing his constitutional authority in awarding the contract for a cement factory and a coal mine in Herat to an Iranian firm.<sup>52</sup> He was sentenced to 13 months in jail and fined \$1,500,000 on charges of misuse of constitutional authority by a special court.<sup>53</sup> This was the first time a special court in Afghanistan sentenced a minister for corruption.<sup>54</sup> The Supreme Court confirmed this decision of the special court.<sup>55</sup> Shahrani did push back against the decision and stated that it contravened the law.<sup>56</sup> He claimed that he was not interrogated and that no notice was served to him.<sup>57</sup> This was believed to be a rather political decision.<sup>58</sup> Beyond this, there is no information regarding the provisions of the law or the legal reasoning behind this case. More details on the legal reasoning could have highlighted interesting constitutional issues regarding fair trial guarantees, the power of special courts and the constitutional authorities and immunities of ministers.

In a similar case (decided by the Supreme Court instead of the special court), Mohammad Amin Farhang was charged with misusing his constitutional authority in handling a raisin export contract.<sup>59</sup> Farhang served as the Minister of Industries and Minister of Commerce in Hamid Karzai's government.<sup>60</sup> In late February 2021, the Supreme Court sentenced Farhang to a one-year prison term and an \$864,000 fine.<sup>61</sup> This information is based on a press statement by one of the judges of the Supreme Court, Abdul Malik Kamawi.<sup>62</sup> Like in Shahrani's case, no information is available regarding the provisions of the law or the legal reasoning regarding this case. Per news reports, Farhang was not present when the Supreme Court handed this sentence.<sup>63</sup> Another case concerning Farhang's mishandling of the import of 100,000 metric tons of oil that resulted in a loss of \$19,000,000 for the government, was pending before the courts as of March 2021.<sup>64</sup> No subsequent information on this case has been made available. Before the Taliban came into power, the Attorney General's office had stated that almost a dozen corruption cases involving former ministers were underway at the special court.<sup>65</sup>

In addition to these corruption cases, cases related to the Kabul University attacks

deserve mention. In November 2020, two gunmen in military uniforms attacked Kabul University, taking at least 22 lives (including 18 students) and injuring 40 people.<sup>66</sup> The Islamic State took credit for these attacks. The Interior Affairs Ministry stated to the press that Mohammad Adil, the mastermind behind the attack, had been sentenced to death by the Supreme Court.<sup>67</sup> Moreover, in a press statement, the Supreme Court mentioned that five other collaborators in the attack had been sentenced to various jail terms on charges of treason, transfer of explosive materials and cooperation with the Islamic State.<sup>68</sup> Although a death penalty case might have raised constitutional rights questions in many other jurisdictions, the Kabul University attacks case was likely treated as an ordinary criminal law issue given that the death penalty was very readily awarded in Afghanistan.

After the fall of the Ghani government, the Supreme Court and ICOIC created by the 2004 Constitution became de-facto inoperative. Many judges associated with courts operating under the Western-backed government fled, fearing retaliation by the Taliban. For months, there was a judicial lacuna in Afghanistan, which created problems. At the time of writing this report, the Taliban has instituted a new Supreme Court with its own social media handles. However, the social media accounts have been silent on whether this new Supreme Court has started issuing decisions.

Nevertheless, the judicial system under the Taliban functioned in a very organised and sophisticated manner even when the Taliban operated in exile. This gives us significant clues as to how the judicial system would work going forward. Like judicial systems in other countries, the Taliban's judicial system was a three-tier system in which appeals from local courts went to a provincial court, above which, at the apex, sat a Supreme Court.<sup>69</sup> During the Taliban government's exile, the Supreme Court operated from Quetta in Pakistan.<sup>70</sup> These courts relied heavily on the judge's own interpretation of Sharia.<sup>71</sup> Although decisions of the lower courts and provincial courts were available in local registers maintained by the Taliban, there was very little information regarding

the decisions of the Supreme Court.<sup>72</sup> Additionally, the lower and provincial courts dealt with simple criminal and civil cases.<sup>73</sup> Issues of constitutional significance were handled in an authoritarian manner by the Taliban leadership. This also speaks to how the Taliban viewed the role of courts and judges in society. The Taliban saw judges as agents of the ruler and, hence, made no effort to create an independent judiciary (both when they were first in power in the 1990s and in exile).<sup>74</sup> Thus, currently, the Office of the Chief Justice of the Supreme Court and the Office of the Minister of Law and Justice are handled by the same individual (Abdul Hakim Ishaqzai). Like many authoritarian regimes, the Taliban often handpicks judges and ensures that they align with its ideology.<sup>75</sup> If judges do not eventually side with it, the Taliban simply ignores them or, worse, retaliates against them.<sup>76</sup>

#### IV. LOOKING AHEAD

The year of 2022 will have a major bearing on constitutional law and politics in Afghanistan. The precise legal and political systems that the Taliban would look to put in place will become clearer in the months to come. This will undoubtedly dictate at least the short-term future of life and peace in Afghanistan. Nonetheless, it is also possible that we might not get a lot of clarity on this front. The Taliban might purposely keep things vague because this serves their interest by preserving a degree of flexibility to do as they please, spin information as they wish and avoid internal disagreements. Another important issue will be how the international community responds to and engages with the Taliban. Experts have cautioned that threats of force and sanctions from the international community might do more harm than good, especially to the rights of the common Afghans.<sup>77</sup> For those of us interested in constitutional law, the operation of the Supreme Court will undoubtedly be of interest. The Taliban has fully embraced social media and technology. Although it would be highly optimistic to expect complete transparency from the Taliban, there always remains hope that we may get more opportunities to study constitutional law in

Afghanistan (even if it is a version of constitutional law that we do not approve of).

#### V. FURTHER READING

Carey J and Reynolds A, 'The U.S. Helped Design Afghanistan's Constitution. It Was Built To Fail.' (Washington Post, 8 September 2021) <<https://www.washingtonpost.com/outlook/2021/09/08/afghanistan-constitution-failure/>>.

Maizland L, 'The Taliban in Afghanistan,' (Council on Foreign Relations, 15 September 2021) <<https://www.cfr.org/background-er/taliban-afghanistan#chapter-title-0-5>>.

Pasarlay S, 'Fatal Non-Evolution: Afghanistan's 2004 Constitution and the Collapse of Political Order' (VerfBlog, 9 September 2021) <<https://verfassungsblog.de/fatal-non-evolution/>>.

Pillalamarri A, 'Afghanistan's Failed Constitution' (The Diplomat, 12 August 2021) <<https://thediplomat.com/2021/08/afghanistans-failed-constitution/>>.

Rahimi H, 'The Taliban, The Afghan State, and The Rule of Law' (Al Jazeera, 1 September 2021) <<https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law>>.

- 1 Shamshad Pasarlay, 'Fatal Non-Evolution: Afghanistan's 2004 Constitution and the Collapse of Political Order' (VerfBlog, 9 September 2021) <<https://verfassungsblog.de/fatal-non-evolution/>> accessed 1 March 2022.
- 2 *ibid.*
- 3 *ibid.*
- 4 Amal Sethi, 'Book Review: Afghanistan Legal Education Project, An Introduction to the Constitutional Law of Afghanistan (Stanford Law School, Rule of Law Program, 2nd Edition, 2015),' (2021) 5(2) *Indian Law Review* 250, 256.
- 5 John Carey and Andrew Reynolds, 'The U.S. Helped Design Afghanistan's Constitution. It Was Built To Fail.' (Washington Post, 8 September 2021) <<https://www.washingtonpost.com/outlook/2021/09/08/afghanistan-constitution-failure/>> accessed 1 March 2022.
- 6 *ibid.* See also Sethi (n 4) 250-259.
- 7 See Barnett Rubin, 'Crafting A Constitution for Afghanistan' (2004) 15(3) *Journal of Democracy* 5; See also Andrew Reynolds, 'Electoral Systems Today: The Curious Case of Afghanistan' (2006) 17(2) *Journal of Democracy* 104.
- 8 Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 633, 646.
- 9 *ibid.*
- 10 *ibid.*
- 12 Akhilesh Pillalamarri, 'Afghanistan's Failed Constitution' (The Diplomat, 12 August 2021) <<https://thediplomat.com/2021/08/afghanistans-failed-constitution/>> accessed 1 March 2022.
- 13 Pasarlay (n 1).
- 14 *ibid.*
- 15 James Mackenzie and Matin Sahak, 'Stand-Off Over Powerful Afghan Governor Foreshadows Bitter Election Fight' (Reuters, 7 January 2018) <<https://www.reuters.com/article/us-afghanistan-governor-atta-noor/stand-off-over-powerful-afghan-governor-foreshadows-bitter-election-fight-idUSKBN1EW07N>> accessed 1 March 2022.
- 16 Pasarlay (n 1).
- 17 *ibid.*
- 18 *ibid.*
- 19 Carey and Reynolds (n 5).
- 20 Kathy Gannon, 'Taliban Say They Are Not Looking To Govern Afghanistan Alone,' (APN News, 19 January 2020) <<https://apnews.com/article/zal-may-khalilzad-taliban-ap-top-news-international-news-asia-pacific-0624283628154a48b09f31f173e3ad9>> accessed 1 March 2022.
- 21 Jennifer Brick Murtazashvili, 'The Collapse of Afghanistan.' (2022) 33(1) *Journal of Democracy* 40, 51-52.
- 22 Lindsay Maizland, 'The Taliban in Afghanistan,' (Council on Foreign Relations, 15 September 2021) <<https://www.cfr.org/background/taliban-afghanistan#chapter-title-0-5>> accessed 1 March 2022.
- 23 *ibid.*
- 24 *ibid.*
- 25 *ibid.*
- 26 *ibid.*
- 27 *ibid.*
- 28 *ibid.*
- 29 Lexi Lonas, 'Taliban Commander Rules Out Democracy In Afghanistan' (The Hill, 19 August 2021) <<https://thehill.com/policy/international/568551-taliban-commander-rules-out-democracy-in-afghanistan-it-is-sharia-law>> accessed 1 March 2022.
- 30 'Who Will Run The Taliban Government,' (International Crisis Group, 9 September 2021) <<https://www.crisisgroup.org/asia/south-asia/afghanistan/who-will-run-taliban-government>> accessed 1 March 2022.
- 31 'No Need: The Taliban Dissolves Afghanistan Election Commission' (Al Jazeera, 25 December 2021) <<https://www.aljazeera.com/news/2021/12/25/taliban-dissolves-afghanistan-election-commission>> accessed 1 March 2022.
- 32 *ibid.*
- 33 Andrew Jeong et. al, 'The Taliban Says It Will Rule Under Sharia Law. What Does That Mean?' (The Washington Post, 25 August 2021) <<https://www.washingtonpost.com/world/2021/08/19/sharia-law-afghanistan-taliban/>> accessed 1 March 2022.
- 34 Noah Feldman, 'Does Sharia Mean the Rule of Law' (The New York Times, 16 March 2008) <[https://www.nytimes.com/2008/03/16/news/16iht-16shariaht.11119704.html?>](https://www.nytimes.com/2008/03/16/news/16iht-16shariaht.11119704.html?) accessed 1 March 2022.
- 35 Ron Synovitz, 'Taliban 'Tribal Version': Shari'a Is Not The Same Everywhere' (RFE/RL, 2 October 2021) <<https://gandhara.rferl.org/a/taliban-sharia-law-afghanistan/31488108.html>> accessed 1 March 2022.
- 36 Murtazashvili (n 19), 51.
- 37 'Taliban's Supreme Leader Issues Decree on Women's Rights' (TOL News, 3 December 2021) <<https://tolonews.com/afghanistan-175725>> accessed 1 March 2022.
- 38 *ibid.*
- 39 Daniel Victor, 'What is Sharia Law, and What Does it Mean for Afghan Women Under Taliban' (The New York Times, 19 August 2021) <[https://www.nytimes.com/article/shariah-law-afghanistan-women.html?>](https://www.nytimes.com/article/shariah-law-afghanistan-women.html?) accessed 1 March 2022.
- 40 *ibid.*
- 41 *ibid.*
- 42 Synovitz (n 35).
- 43 Victor (n 39).
- 44 *ibid.*
- 45 'Kidnappers Body Hung in Public View' (Hindustan Times, 25 September 2021) <<https://www.hindustantimes.com/world-news/kidnappers-body-hung-in-public-view-punishment-that-taliban-are-bringing-back-in-afghanistan-101632588226185.html>> accessed 1 March 2022.
- 46 Ron Synovitz, 'Judge, Jury, And Executioner: Taliban Brings Afghanistan's Justice System Under Its Thumb' (RFE/RL, 1 October 2021) <<https://gandhara.rferl.org/a/taliban-afghanistan-justice-system/31588972.html>> accessed 1 March 2022.
- 47 *ibid.*
- 48 Kali Robinson, 'Understanding Sharia: The Intersection of Islam and the Law,' (Council on Foreign Relations, 17 November 2021) <[www.cfr.org/background/understanding-sharia-intersection-islam-and-law](https://www.cfr.org/background/understanding-sharia-intersection-islam-and-law)> accessed 1 March 2022.
- 49 *ibid.*
- 50 Synovitz (n 35).
- 51 As was discussed in last year's report this is the parallel institution to the Supreme Court that also exercises some power of constitutional interpretation.
- 52 Anisa Shaheed, 'Ex-Mines Minister Criticizes Court Ruling, Pleads Not Guilty' (TOL News, 3 January 2021) <<https://tolonews.com/afghani->
- stan-168967> accessed 1 March 2022.
- 53 *ibid.*
- 54 *ibid.*
- 55 *ibid.*
- 56 *ibid.*
- 57 *ibid.*
- 58 Jamshid Fedaie, 'Wahidullah Shahrani, a Victim of Political Rivalry' (Afghanistan Times, 16 January 2021) <<https://www.afghanistantimes.af/wahidullah-shahrani-a-victim-of-political-rivalry/>> accessed 1 March 2022.
- 59 Haseeba Atakpal, 'Ex-Minister Gets Year in Prison, \$864K Fine' (TOL News, 23 February 2021) <<https://tolonews.com/afghanistan-170242>> accessed 1 March 2022.
- 60 *ibid.*
- 61 *ibid.*
- 62 *ibid.*
- 63 *ibid.*
- 64 *ibid.*
- 65 Shaheed (n 51).
- 66 'Mastermind of Kabul University Attack Sentenced To Death' (TOL News, 1 January 2021) <<https://tolonews.com/afghanistan-168925>> accessed 1 March 2022.
- 67 *ibid.*
- 68 *ibid.*
- 69 Ashley Jackson and Florian Weigand, *Rebel Rule of Law*, (Humanitarian Policy Group, 2020) 4-5.
- 70 *ibid.*
- 71 *ibid.*
- 72 *ibid.*
- 73 *ibid.*
- 74 Haroun Rahimi, 'The Taliban, The Afghan State, and The Rule of Law' (Al Jazeera, 1 September 2021) <<https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law>> accessed 1 March 2022.
- 75 *ibid.*
- 76 *ibid.*
- 77 'The World Must Act Now To Stop Afghans Starving' (The Economist, 13 November 2021) <<https://www.economist.com/leaders/2021/11/13/the-world-must-act-now-to-stop-afghans-starving>> accessed 1 March 2022.



# Albania

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

## I. INTRODUCTION

The year 2021 was an election year, as such characterized not only by political polarization caused by the electoral process, as it normally happens in Albania, but also by the effects of some other political developments that enormously affected the political climate after the election. The parliamentary life remained affected by a prolonged boycott (more than 2 years) from the opposition coalition, which finally returned in parliament in September 2021, after the election in April of the same year.<sup>1</sup> Further, the biggest opposition party (Democratic party) was heavily hit by the official statement of the US State Department sanctioning former Albanian Prime Minister, President and founder of Democratic Party, Sali Berisha and his immediate family members, because of his “involvement in significant corruption.”<sup>2</sup> Right after, the actual leadership of the Democratic party expelled Mr. Berisha from the parliamentary fraction which led to a division of the party in two groups, pro and against the US State Department sanction. The conflict was transferred before the court, both groups claiming formal leadership of the party.

Meanwhile, the difficulties of the pandemic have slowed down the process of vetting judges and prosecutors and the renewal of high courts. Therefore, a two-year length of the mandate of vetting organs was proposed by international partners to verify most of the assessments.

In parallel to that, once again, the parliamentary majority initiated another impeachment procedure against the President of Republic, because of his active support towards the op-

position and continuous attacks against majority and foreign ambassadors in Albania, which according to the latter was not in conformity with the role of the head of the state in general and much less with that of the president in a parliamentary system.<sup>3</sup> After investigations made by an ad-hoc parliamentary commission the majority discharged the President, and passed the matter to the Constitutional Court to confirm or withdraw the decision of the parliament. The Court, after 8 months (in February 2022) repealed the parliament’s decision on the ground of no “heavy breaches” of the constitution by the President of the Republic.<sup>4</sup>

This report will focus on constitutional developments during 2021 that include the general election process, a proposal to change the constitutional mandate of vetting institutions, the continuous renewal of justice institutions (re)designed by the constitutional reform approved in 2016 and some of the most important decisions of the Constitutional Court during 2021.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### *Parliamentary elections*

The political environment remained polarized throughout 2021, during which the general election took place. Previously, during 2020 a constitutional reform on the electoral system was undertaken.<sup>5</sup> The election process took place on 25<sup>th</sup> April, less than 50% (46.33%) of the voters participated to choose between 12 political parties/coalitions. The

campaign period was limited in time and intensity due to the pandemic, yet there was no lack of incidents, as usual.

The final result of elections: the Socialist Party won the majority for the third time with 74 seats out of 140 in the parliament. The biggest opposition party, the Democratic Party won 59 seats, the Socialist Movement for Integration won 4 seats and the Social-Democrats won 3 seats.<sup>6</sup> After 2 years of opposition and boycott of parliamentary life and the 2020 electoral reform, which in addition to amendments to the Electoral Code brought amendments to the Constitution<sup>7</sup>, the result of the elections was not the only concern among opposition parties. Soon after the elections, in May 2021, the former President of the Republic, former Prime Minister, and one of the founders of the Democratic Party, Sali Berisha and his close family, were declared “non grata” by the US State Secretary because of his “corrupt acts [having] undermined democracy in Albania”.<sup>8</sup> This event was followed by another strong reaction of the Democratic Party expelling Mr. Berisha from the parliamentary group, which caused a chain reaction from his side. Mr. Berisha did not accept the official act of the Democratic Party and tried to discharge the Chairman of DP, imposing new elections for the chairman of the party. He went on with his supporters to build/found new decision-making organs of the democratic party, which brought the case before the court to decide the leader of the party. Meanwhile, the effect of this political fight was a reduced number of DP’s seats in parliament (from 59 to 44), the rest followed the former party leadership. This battle is expected to influence the performance of the biggest opposition party during the next partial local election in March 2022.<sup>9</sup>

In addition, the parliamentary activity during 2021 has undergone some restrictions due to measures taken in order to prevent the spread of the COVID-19 pandemic, that have impacted not only the life of people but also institutional activity. As of March 2020, the government reacted swiftly to the COVID-19 pandemic and took stringent measures thus managing the crisis with limited human and financial loss. It issued a series of decrees subsequently endorsed by

the Parliament. The State of Emergency for Natural Disaster was extended repeatedly. The authorities notified a derogation from the obligations under certain articles of the Convention for the Protection of Human and Fundamental Freedoms.

Meanwhile, the implementation of the 2016 Justice Reform<sup>10</sup> went forward slowly in 2021. Its focus was particularly to fill the vacancies of the Constitutional Court and Supreme Court, to become operational after almost three years since its inactivity because of the vetting process.

### *Another impeachment process against the President of Republic*

As presented in the 2019 Global Review (Albanian report), the Parliament initiated an impeachment procedure on the President who was finalized in late July 2020. The ad-hoc inquiry committee of the Parliament concluded that while the President had overstepped his Constitutional competences, the violations did not justify his impeachment. The actions of the President of the Republic that caused the initiation of the impeachment procedure were mostly related to: (i) issuing several decrees on the date of local elections without any consultation with political parties; (ii) refusing to appoint the Foreign Minister proposed by the Prime Minister by arguing that the candidate was not adequate and experienced enough to lead Albania towards European Integration; (iii) the appointment of a Constitutional Court’s judge not in accordance with the Constitution.<sup>11</sup> The investigation committee decided to seek an *amicus curiae* from Council of Europe’s Venice Commission, which stated that even the President needs a specific legal basis to postpone elections.<sup>12</sup> Although the parliamentary committee worked for more than a year, the result was only a recommendation to approve a special law on the competences of the President of Republic, which could have been reached simply via legislative activities, without the need to aggravate the political situation more than usual.

In 2021, although no specific law on the competences of the President of Republic was approved and no other measures were taken to limit his political activity, the Pres-

ident was considerably involved in the electoral campaign favoring the opposition and attacking the majority. Therefore, the latter reopened the impeachment process against him for breaching the constitution because of his political engagement in the electoral campaign.<sup>13</sup> On 9 June 2021, the parliament voted to impeach the President Ilir Meta, after the ruling Socialist Party accused him of meddling in the April 25 national election and violating the country’s constitution.<sup>14</sup> After that, the Constitutional Court had to decide about the constitutionality of the decision of the parliament meaning to see if there were well-founded reasons to discharge him from office. It took almost 8 months to decide on the case which raised a question of legitimacy of oath-taking by the government after the general elections before the impeached President by the same ruling majority. The Constitutional Court decided in February 2022 the unconstitutionality of the decision of parliament. The analysis of the Court’s decision will be part of the 2022 report.

### *The (re)establishment of the Supreme Court*

After the election of the first three judges of the Supreme Court in the beginning of 2020, the High Judicial Council (‘HJC’) elected 4 new judges in April and two in July and September 2021. In 2021, the total number of judges of the Supreme Court reached 9 out of 19. As stated in previous reports, the renewal process of the Supreme Court has been linked with the vetting process which takes a considerable amount of time till the final decision (see the 2019 and 2020 reports). There is still a large backlog of cases waiting to be adjudicated. Meanwhile, the Court has already drafted an action plan with specific measures that are expected to reduce the backlog in the upcoming years.

It is worth mentioning that the Supreme Court, although not in its full capacity, has already marked some important developments related to constitutional control by ordinary courts - especially the incompatibility of national legislation with international agreement - after a decision of the European Court of Human Rights had declared a structural problem and asked Albania to take general measures on that regard.<sup>15</sup> Another

important aspect of this case is the refusal of the Constitutional Court<sup>16</sup> to take a stand on that matter after the request of the Supreme Court to declare the normative act unconstitutional because it breaches the European Convention of Human Rights.<sup>17</sup> It is the first time that an ordinary court – in that case the highest court - took the stand to protect the values of the European Convention and to choose the nonapplication of the legal norm because of its noncompliance with an international agreement.

### III. CONSTITUTIONAL CASES

#### *On limitations due to the pandemic*

The Constitutional Court decided that the normative act of the Minister of Health prohibiting the activity of political parties before the election without foreseeing a time limit of this limitation is unconstitutional.<sup>18</sup> According to the Court, a limitation of fundamental rights such as freedom of association, freedom of expression, particularly during election campaign, without any reasonable time frame to reconsider its necessity, is not proportional with the goal to protect the health of the population.

#### *On the applicability of polygraph tests in hiring police officers*

The Court adjudicated a case on the constitutionality of an obligatory polygraph test for police forces and investigation unit officers which should be passed before being hired/appointed in duty.<sup>19</sup> In that case the Court dealt with human dignity, although not elaborating the meaning and its own approach further on this important topic. Mostly, the Court referred to the ECtHR's and foreign case law (German, Moldavian), which is common but at the end it repeated its previous approach not to elaborate on the effect and importance of human dignity in the personal sphere of a human being, unlike the German Bundesverfassungsgericht. The conclusion of the Albanian Constitutional Court on if human dignity should be considered as a constitutional value or an individual human right has been already confronted and elaborated by Albanian scholars.<sup>20</sup>

Nevertheless, the Court, after verification of the legal provision on the application and use of polygraph test results reached the conclusion that it interferes in the personal sphere of the individual but it is proportional and justified by the interest to fight corruption in police forces and to recruit officers with high integrity.

#### *On the competence of the Prime Minister and the President of the Republic in appointing the Cabinet's members*

As reported previously there is an ongoing conflict between the majority and the President which has escalated throughout the years. It included not only political declarations, but also concrete acts such as the postponement of the date of election by the President without consulting with political parties, the appointment of Constitutional Court judges not in conformity with the constitution, the refusal to appoint a cabinet member proposed by the Prime Minister etc.<sup>21</sup> The latter became a constitutional conflict and ended up before the Court. The Prime Minister asked the Court to interpret the constitutional provision which foresees the competence of the Head of the Executive (which according to Albanian Constitution is the Prime Minister) to nominate the Cabinet's member focusing more on the authority of the President to reject the nomination. This case initiated when the President refused to nominate the Minister of Foreign Affairs because of "his internal conviction that the proposed candidacy, due to lack of political, diplomatic, administrative and state experience, did not justify the public interest, national unity and security of the country to hold the post of Minister for Europe and Foreign Affairs." The majority argued that the President does not have the right to refuse the nomination, because the responsibility to form the government is of the Prime Minister, not of the President, who is a politically neutral institution and so is his/her position in a parliamentary system. The Court stated that more than a clear cut between the Prime Minister, President and Parliament in nominating and approving the Cabinet's members there should be a collaboration during evaluation and verification of the candidates proposed by the Prime Minister, not only by

him but also by the President and Parliament involved in the process, each according to its role and constitutional competencies.<sup>22</sup> This decision did not contribute in clarifying the situation nor gave any further elaboration of the constitutional provision as expected by a constitutional control of the Court. It only reinstated its previous elaborations on separation of powers between executive and legislative focusing on the neutrality of the President and principle of constitutional loyalty (Verfassungstreue). The Court could go a bit further in explaining to what extent the collaboration between three institutions should take place and why the constitution itself foresees the responsibility of the Prime Minister and no responsibility for the President in exercising its power. The evaluation of the President was more about the professional capacities of the candidate, which normally is expected to be checked and taken care of by the Prime Minister and, if not, the Parliament has the right not to give the confidence vote. The same is true also for the rest of Cabinet and even for its political program to be implemented during 4 years of governance. Almost two decades ago the Constitutional Court had stated that it is up to the Prime Minister (not the President of Republic) to select his cabinet's members for whom he/she takes full responsibility, not only for the minister but also for the whole Cabinet.<sup>23</sup> It is not quite clear how this collaboration imposed by the Court could affect the right of the nominated Prime Minister to build his/her cabinet and also his/her responsibility towards the parliament where he/she has to gain the confidence.

### IV. LOOKING AHEAD

The political situation continues to be accompanied by conflicts not only between the majority and opposition but also within the opposition, which negatively influences the pressure towards the majority for better governance. Keeping in mind the difficulties faced because of the pandemic and also the effects of armed conflict in Europe, the vulnerable situation of justice institutions in the country, the prognosis for democratic developments as prerequisites for EU membership seems to not be that promising.

Further implementation of justice reforms and the establishing or renewal of the justice institutions is taking a considerable amount of time, which has led to a complex situation affecting human rights of individuals seeking justice. The full functioning of the Constitutional Court and the Supreme Court is crucial for a democracy. There are pending cases waiting to be adjudicated. There are already cases before the ECtHR against Albania claiming the non-effective domestic remedies because both high courts are out of function for almost 2 years. Despite the action plan approved by the Supreme Court, it remains a challenge to face the upcoming ECHR's decisions on the violation of the right to be adjudicated within a reasonable time.

In 2022, it is to be expected that full composition of both high courts will be reached. Also, in 2022 a new President of Republic is to be elected, which would finally bring some normality for this high public office and also for the political and social life in the country.

## V. FURTHER READING

Aurela Anastasi/Arta Vorpsi, 2020 International Review of Constitutional Reform-Albania

Freedom in the World 2021, Report of Freedom House (Country Report, Albania) <https://freedomhouse.org/country/albania/freedom-world/2021>

Albania Political Briefing [https://china-cee.eu/wp-content/uploads/2022/01/2021p12\\_Albania.pdf](https://china-cee.eu/wp-content/uploads/2022/01/2021p12_Albania.pdf)

Key findings on Albania, Progress Report of EU Commission 2021 [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_5276](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5276)

1 See for more details on that matter: Global Review on Constitutional Law, Albert, Richard and Landau, I-CONnect-Clough Center 2019 Global Review of Constitutional Law (November 26, 2020). Albania Country Report. Available at SSRN: <https://ssrn.com/abstract=3736382>

2 <https://www.euronews.com/2021/05/19/us-sanctions-albanian-ex-pm-sali-berisha-over-corruption>

3 <https://www.euronews.com/2021/05/04/albanian-government-seeks-to-impeach-president-ilir-meta>

4 <https://www.euronews.com/2022/02/17/ilir-meta-constitutional-court-overturns-impeachment-of-albania-s-president>. There is still no reasoned judgement and the hearing before the Court took place in January 2022 therefore it will be reported next year.

5 Aurela Anastasi/Arta Vorpsi, The 2020 Constitutional Reform, Country report-Albania in: Barroso, Luis Roberto and Albert, Richard, The 2020 International Review of Constitutional Reform (September 4, 2021). Published by the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism (ISBN 978-1-7374527-0-6), Available at SSRN: <https://ssrn.com/abstract=3917596>

6 These are the official data published by the Central Election Commission. last checked in February 2022 <http://kqz.gov.al/results/results2021/results2021.htm>

7 Constitutional amendments approved by Law No. nr.115/2020.

8 <https://euronews.al/vendi/politike/2021/05/19/shba-perfshin-sali-berishen-ne-listen-e-personave-qe-i-mohohet-viza/>

9 Although the development on local elections will be reported next year, it can be mentioned that because of the inner conflict the result of the Democratic Party was the worst since its foundation in 1991.

10 See for more details: 2019 Global Review on Constitutional Law (2019), Albert, Richard and Landau, I-CONnect-Clough Center, Albania Country Report prepared by Arta Vorpsi. Available at SSRN: <https://ssrn.com/abstract=3736382>

11 Art. 90, para 2, 3 of Constitution.

12 See FN 9.

13 <https://www.dw.com/en/albania-parliament-impeaches-president-ilir-meta-removes-him-from-office/a-57830015>

14 [https://www.voanews.com/a/europe\\_albania-parliament-votes-impeach-president/6206820.html](https://www.voanews.com/a/europe_albania-parliament-votes-impeach-president/6206820.html)

15 Decision of the Administrative College of Supreme Court No. 00-2021-1317(113), dated 22.07.2021.

16 Decision of the Constitutional Court No. 55, dated 31.03.2021.

17 Decision of the Administrative College of Supreme Court dated 12.10.2020.

18 Decision no.11/2021 of Constitutional Court.

19 Decision no.20/2021 of Constitutional Court.

20 Arta Vorpsi, Human Dignity in Albania, in: Handbook of Human Dignity in Europe (Bechi, Matthis Eds) Springer International (2019), 37-62.

21 These acts were object of an impeachment procedure which failed and again it revived a year later to be quashed by the Constitutional Court. See the previous reports (2019, 2020). On the Constitutional Court decision, it will be reported next year because the decision was deliberated in February 2022.

22 Decision No. 26/2021 of Constitutional Court.

23 Decision No. 28/2002 of Constitutional Court.



# Argentina

Ramiro Álvarez-Ugarte  
Universidad de Buenos Aires  
Juan F. González-Bertomeu  
IIJ UNAM

## I. INTRODUCTION

We devote our 2021 review to the Supreme Court, focusing on two developments. One concerns its internal convulsions and the attacks it once again received, not all of them unjustified. The other consists of an emerging trend in its decision making on federalism and regulatory issues, though we also review other areas.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

We have been highlighting in recent reports the internal squabbles at a fractured Court, which went on during 2021. A Court's President—a figure who has the power to set the agenda and other matters—is selected among the justices for three years by themselves. A president had to be elected in 2021 and Justice Horacio Rosatti was chosen after a messy process. Two of the five justices were not present at the time of selection—likely to protest the denial of a request to briefly postpone it—and the remaining three chose among themselves a president and vice-president.<sup>1</sup> The dispute is not necessarily ideological in the conventional sense. The Court frequently produces unanimous *dispositions* if not opinions. And, except for Justice Carlos Rosenkrantz, its members seem close to each other substantively. The wrangles are instead personal disputes concerning the justices' power at the Court and—perhaps—their relationship with incoming and outgoing administrations. In any case, the selecting process was an odd one and it did not do anything to either promote congeniality

in such a small institution or to legitimize the Court in the context of wide criticism.<sup>2</sup>

The Court sorely needs to strengthen its legitimacy. It has fallen in the crosshairs of voiceful critics within President Alberto Fernández's administration. As we noted in our previous report, the Court has often been accused by members of the ruling coalition of having played a role in a "lawfare" process against some of its members under investigation for corruption. In early February 2022, a demonstration against it was organized by some of these critics. The criticism was partisan and overbroad. Yet some of it resonated well with the reality of a Court at the head of a sluggish and endogamic judiciary, whose independence from political groups and business conglomerates is not assured and which still has a long way to go to open itself to scrutiny. For the time being, the Court appears as relatively sheltered from political backlash since the midterm election of 2021 left the government without much leeway for retaliation or other maneuvers. But polls consistently show that citizens are anything but satisfied with the service of justice.<sup>3</sup>

Last year was also marked by the departure of Justice Elena Highton with 78 years of age, after serving 17 at the Court and becoming the first woman to sit on it in a democracy. Since 1994, the Constitution requires that federal judges receive a new Senate confirmation when turning 75. She attempted to circumvent this mandate by suing and seeking shelter in a Court case that had benefited former Justice Carlos Fayt. The rationale in that case (from 1999) was that the constitutional convention had not been authorized (by the statute setting it up) to introduce that requirement.<sup>4</sup> In February 2017, after a first

instance decision siding with Highton, the national government, the case's defendant, declined to appeal, in what some viewed as a manifestation of the alleged closeness between the Justice and the then sitting M. Macri administration. One month later, the Court changed the criterion in *Fayt* in a decision that did not feature Highton.<sup>5</sup>

Informal pressure against Justice Highton's permanence mounted under the incoming Fernández administration and she eventually yielded. Apart from her often wavering legal views, her presence at the Court was instrumental in bringing women's issues to the forefront. She created an enormously valuable gender violence office at the Court and led a training center on gender perspectives within the judiciary. Her departure leaves a body with four male members - a remarkable step backwards. A divided Senate will probably slow down a new confirmation process, and the executive has failed to show---at least publicly---any interest in filling the position

### III. CONSTITUTIONAL CASES

A thread links many of the Supreme Court cases we deemed important from our review of last year's docket: they either advance or affirm a certain vision of the proper distribution of territorial powers within Argentina's federal structure. Although still at a nascent stage, this case law would seem to propose a new federal equilibrium, less tilted towards the center and more inclined to support provincial and municipal claims of autonomy. (Since cases potentially pitting a municipality against the province in which it is located will rarely make it to the Court, it is unclear which power claim the latter would underscore.) Justices Rosatti (from the province of Santa Fe) and Carlos Maqueda (from Córdoba), and to a lesser extent Justice Ricardo Lorenzetti, also from Santa Fe, are the ones leading this shift. However preliminary this trend may be, 2021 showed signs of it.

We begin with a case involving one response to the Covid-19 crisis---last year we reported on another one. In-person schooling had been suspended at the beginning of the pandemic. After a year of (tiresome) remote learning, schools reopened in February

2021. Yet a few weeks later, upon the emergence of a second wave, the national government paused the reopening for eleven days in an area comprising Buenos Aires City and its populous surroundings because of the spiraling number of infections therein. The City brought the national government to the Court's original jurisdiction; since the 1994 amendment, the City's constitutional status is akin to the other provinces' status, including the power to be a party in an original jurisdiction case. Via three similar opinions, a four-member Court (all but Justice Highton, still presiding) promptly agreed that the rule violated arrangements concerning federalism.<sup>6</sup> The Court accepted that the national government could regulate health-related issues, but said that, in so doing, it could not trespass the subnational governments' autonomy to define the way a school class is conducted. Specifically, the government had not provided a compelling justification of the measure's need apart from generically asserting that the increased demand on the public transport system would drive the spread of the virus. Since the national government and the City are governed by different parties, the reaction to the decision was divided, as expected, according to political leanings, although it was well received by countless exhausted parents.

In *Shi, Jinchui*, an immigrant who owned a market in the small city of Arroyito, in the Córdoba Province, questioned a local ordinance that banned supermarkets from opening on Sundays; the claim was grounded on both the prevalence of federal authority on the matter and economic freedom. The Court dismissed it by resorting to a view of federalism that enshrines the municipality as a central, autonomous player within the scope of territorial powers allocated by the Constitution. The view is grounded in the constitutional text emerging from the 1994 amending convention ensuring the "autonomy" of municipalities. Indeed, its main espousers---Justices Rosatti and Maqueda---played a part in that convention as delegates. Despite this text, municipalities are still legally, politically, and financially dependent on both the province in which they are lodged and the national government, and decisions underscoring their power against one of these actors are not entirely common.

The plurality opinion of Justices Rosatti and Maqueda (Justice Lorenzetti joined them in the outcome) was anything but narrow. It embraced an ideal communitarian vision of small cities or towns, such as Arroyito, in which "neighborly relations are intense" and form a kind of "social coexistence in which the prevailing associative type is 'communitarian'".<sup>7</sup> The opinion emphasized the deliberative and participatory process that led to the questioned ordinance.<sup>8</sup> And, addressing the economic freedom argument, it said that the idea that commerce is affected by the restriction in a constitutionally impermissible manner was "unreasonable". The municipality's regulation allowed "neighbors to channel and develop, over the weekend, their family and community life...", and, in doing so, did not contradict the national government's regulation---prominently including Section 14 bis of the Constitution recognizing "paid rest and vacations", "limited working hours", and "full family protection".<sup>9</sup> In short, for the plurality, the ordinance was the outcome of a democratic procedure that sought to shape how the community should strike the right balance between work and leisure based on municipal autonomy. The dissent by Justices Rosenkrantz and Highton literally interpreted the local ordinance as enforcing a mandatory rule of Sunday rest that both Congress and the national executive had made optional for employers, thus violating federal prerogatives. They added that the challenged ordinance exceeded the municipality's "police power."

While we share with others a sympathetic view of decisions validating the use of local power, we also share a reluctance to praise the Court.<sup>10</sup> The decision evokes discussions at the Court from almost a century ago, where labor regulations were emerging, and local authorities disputed with the national Congress the authority to enact such rules. The majority decision in *Shi* seems to have departed from the prevailing criterion that Congress (and the national government) have the final say on working time regulation. Like Arballo has claimed, a consistent application by the Court of the solution in this case to other spheres would have potentially enormous implications. And we presently believe it is unlikely to happen, which leaves *Shi* in an uncertain place.<sup>11</sup> It will be

of special interest to observe how much consideration the Court will assign in future cases to the local “participatory gymnastics” the plurality underscored in *Shi*.<sup>12</sup>

In *Farmacy*, the Court—formed in the case by two sitting justices and two replacing ones, for two of the remaining justices had business ties with the plaintiff—had to dwell with a 1987 statute from the Buenos Aires Province that regulated who could own pharmacies and under which corporate form. In particular, the statute prevented limited liability companies from controlling a privately-owned pharmacy, which could only be owned by a pharmacist or a group of them. The law was challenged by *Farmacy*, a limited liability company which had started operations in Buenos Aires City and which managed to take a substantial share of the market therein. In seeking to move into the neighboring province of Buenos Aires, the statute stood as an obstacle. Like the plaintiff in the previous case had done, *Farmacy* questioned the province’s authority to enact such a law as well as its reasonableness in its limitation of economic freedom. It failed on both grounds.

In their plurality opinion, Justices Lorenzetti and Highton wrote that the statute was within the provincial power of health regulation (*police power*) and did not infringe on exclusive prerogatives of the national government. They considered that federal and provincial regulations were complementary in their protection of the “especially vulnerable group” of “consumers of pharmaceutical products.”<sup>13</sup> They next subjected the law to a loosely structured *reasonableness analysis*, that, as we noted before, mixes elements of American-style rational-basis review and European-style proportionality analysis. To pass the test, laws must have a legitimate goal and must choose proportional and efficient means to achieve them.<sup>14</sup> Yet the Court adopted a highly deferential standpoint: it sided with the province in considering that limited liability companies were less likely to secure the right to health involved in the activity of selling medicines and that the province was justified in excluding them from this specific market under public health reasons. Unlike a limited liability company, whose *only goal was to maximize profit*, pharmacists also had professional motivations that mitigated their

*private interest*. Finally, the Court swiftly dismissed the plaintiff’s economic freedom arguments by saying that the company regularly did business elsewhere through its over “two hundred” pharmacies.

In *Esso*, another case underscoring local authority, the Court rejected a suit brought by an oil company operating gas stations against a fee imposed by the Municipality of Quilmes, where two stations were located, for hygiene and security services. The company claimed that the Municipality calculated the fee based on *Esso*’s operations in other municipalities, through the value associated to the gross income tax it pays in the province of Buenos Aires. The company claimed that the fee went well beyond the actual services provided to its Quilmes operation, which made it disproportionate. Supporting municipal autonomy, the Court rejected the claim. The main argument developed by the plurality vote of Justices Rosatti and Maqueda (Justices Highton and Lorenzetti each joined them in the outcome) was that the municipality was authorized to use the *contributive capacity* of the company as a *key factor* to set the value of the fee, unless it was proven that the resulting fee was unreasonable—which, for the Court, the plaintiff had failed to do.<sup>15</sup> Critics argued that the Court’s requirement to prove the disproportionality of the fee was next to impossible, for a company cannot ascertain the precise cost of a public service provided by a municipality.<sup>16</sup> The Court’s criterion also may give an untimely incentive for municipalities—always hungry for funds—to claim that the costs of their services have increased in order to justify higher fees.

This case law concerning federalism poses somewhat of an enigma to us. A first look would suggest that the Court is seeking to become a central agent in the re-shuffling of powers from the center to the provinces and municipalities in Argentina’s unbalanced federal structure. But this is an ambitious undertaking that requires both consensus within the Court and consistency from one case to the next, and both factors have been in scarce supply in recent years.

In any case, one important though highly technical decision (in *Price*<sup>17</sup>) escaped this trend of centrifugal redistribution of power. Departing from the U.S. model, the Consti-

tution has always established that the national Congress has exclusive authority to enact uniform legislation including civil, criminal, and commercial codes, and that the provinces retain the power to enact codes of procedure for non-federal litigation in their territory. The southern province of Chubut passed a statute establishing a short time limit—six months plus brief extensions—to regulate the duration of the early stage of a criminal investigation (the so-called “preparatory stage”), which usually takes much longer. If an investigation was carried beyond that period, it was to be closed without the possibility of reopening it. The statute thus aimed to regulate the American Convention on Human Rights’ standard (in Section 8.1) that proceedings are conducted “within a reasonable time”; since 1994, the Convention is on par with the Constitution.

A four-member Court (all but Justice Rosatti) unanimous in the disposition refuted the province’s stance that the subject of regulation was merely procedural and hence under its purview, siding with the private accuser. The Court said that, according to the Constitution, the power to “extinguish” a criminal investigation and the regulation of the statute of limitations (or “prescription”) were substantive legal issues and hence rested with the national Congress. Justice Lorenzetti added that the brief timeframe set by the statute “distorted” the application of the national legislation and could lead to impunity.<sup>18</sup>

The decision was rightly criticized by several commentators for impeding provincial reforms to shorten procedures in line with the American Convention’s requirement.<sup>19</sup> The issue is admittedly debatable, since such decisions have usually been deemed under the aegis of the national Congress and the Convention also guarantees the private accuser’s right to a fair trial. Yet, criminal procedures often go on for many years (sometimes over a decade) without a final decision, and this situation required vigorous and novel solutions. As we reported on previously, the Court is aware of the problem. Indeed, the same day it announced the decision in *Price*, it heard a criminal appeal from the province of Buenos Aires within the context of a case initiated 18 years before; half of that time had been spent on appeal.<sup>20</sup> The Court concluded that this duration was in violation

of the “reasonable time” standard and again reprimanded the province, although it did not acquit the defendant.

Other relevant decisions did not present federalism considerations. In *Etcheverry*,<sup>21</sup> a Court unanimous on the disposition sided with petitioners of a suit to demand the executive to solve a regulatory omission. The work contract law from 1974 required that workplaces offer day care provided they had a minimum number of female workers to be set by the executive. The executive never fixed that minimum, thus blocking in practice the requirement. Justices Highton and Rosenkrantz concisely said that this hindered workers’ right to a service to support them in their caregiving duties. In their longer opinions, both Justices Maqueda, Lorenzetti and Justice Rosatti delved into the nature of regulatory omissions and cited the state’s international duties under treaties on par with the Constitution pertaining to the rights of women and children. The three justices added that the government must consider both female and male workers with caregiving responsibilities, arguing that the rule’s original language was based on inadmissible gender stereotypes. All justices but Rosatti, silent on the issue, said that the omission was to be solved within a reasonable timeframe.

In *Comunidad*,<sup>22</sup> the Court decided a case involving the prior consultation and participation of indigenous peoples, recognized since 1994 in the Constitution as well as binding international instruments such as the ILO’s Convention 169. The southern Neuquén Province had created a municipality ten years before the Court’s decision without consulting the local Mapuche community, represented as petitioner in the case. A divided Court met the parties halfway. The majority opinion of Justices Maqueda, Highton, and Lorenzetti rightly sided with the petitioner in that the consultation requirement had been ignored. (Justice Rosatti agreed on the outcome.) Prior consultation was mandatory because, in Convention 169’s terms, the creation of a municipality could “affect [the community] directly”. The Court added that the community’s rights had also been violated because the municipality’s structure did not ensure for proper participation in local governance. Yet, because of the negative implications that the stronger remedy of in-

validating the rule creating the municipality would have, the Court chose a laxer solution, involving the parties in the design of a participatory framework. Justice Rosenkrantz dissented through a long opinion, saying that the creation of a municipality as such was “a general rule that did not directly affect” the community’s rights.<sup>23</sup> He wrote that ILO’s Convention did not assign communities a right to political self-determination. If, in the future, the municipality were to adopt a decision that directly affected the community’s interests, it should establish a prior consultation. But it was the petitioner’s “mistake to claim that the municipality’s existence must be a matter of prior consultation”.<sup>24</sup>

We finally analyze one of the most important decisions of the year. In *Colegio de Abogados de la Ciudad de Buenos Aires*, the Court struck down a statute from 2006 (#26.080) that modified the structure of the federal Judicial Council. As we noted in previous reports, the Council is a body created by the 1994 constitutional convention in charge of selecting and disciplining judges, among other activities. Its structure was left largely unspecified in the Constitution. Section 114 established that its composition is to be plural, guaranteeing a balance or “equilibrium” between politicians, lawyers, judges, and scholars, but it did not set a precise allocation of members from each group. This decision to avoid detailing the Council’s structure was the cause of recurrent controversy as well as political fights to control it. The Court had already vacated (in *Rizzo*) a 2013 law that pushed for the popular election of Council members.<sup>25</sup> In *Colegio*, via a majority vote signed by Justices Rosatti, Maqueda, and Rosenkrantz, the Court struck down the statute on different but related grounds. The legislation had increased the number of politicians on the Council. It now featured, out of its thirteen members, six legislators and one representative of the executive.

The Court considered that equilibrium meant “the outcome of the tension between opposing forces that counteract or annul each other”.<sup>26</sup> For the Court, the different sectors within the Council must be in a type of relationship with each other in which one cannot “predominate”; i.e., exercise “hegemonic actions”.<sup>27</sup> The Court considered that the political sector could deploy, by itself, such hege-

monic actions (including ensuring a quorum and adopting many decisions), and that this was unconstitutional.<sup>28</sup> It did not matter to the Court that the politicians hardly ever coordinate their actions: because the six legislators were distributed between the two chambers of Congress and between majorities and minorities within each, the sector is often and effectively divided and it is judges—and, to a lesser extent, lawyers—the ones whose votes count on politically sensitive decisions. The Court dismissed this *as applied* defense. It considered that the fact that such concerted action is unlikely to happen does not save the law from constitutional scrutiny, which rendered the law unconstitutional *on its face*. It was the “mere possibility” of coordination that mattered.<sup>29</sup> The Court asked Congress to enact a new statute within a “reasonable timeframe.” And it said that, until that point, the Council would have the organizational structure set up by the statute that the now invalidated legislation had amended. If the Council was not reorganized 120 days after the decision, its acts would be considered null and void.

In his partial dissent, Justice Lorenzetti disagreed with the Court’s chosen remedy. He said that Congress had repealed the previous legislation when it passed the amendment under challenge in the case. He urged Congress to pass a new statute but without reinstating the amended law.

#### IV. LOOKING AHEAD TO 2022

We started penning these reviews in 2018 and this will be our fifth and last one. These years have been marked by turmoil and change at the Court, which places the period within the normal parameters of its convoluted history. While some decisions have been noteworthy, relevant, and produced solid constitutional law, we cannot summon much enthusiasm or hope in relation to the Court or its case law. The Court’s justices are often caught up in personal disputes and calculations, depriving them of the opportunity to develop the kind of institutional legitimacy that is necessary for the body to play a meaningful and transformative role. Of course, this assumes that the justices want it to play that role in the first place, a point which is not straightforward.

In any case, the Court is mostly left in the position of an umpire calling balls and strikes, as in Chief-Justice Robert's unfortunate but famous phrase. This simple image of the Court, that many would deem the right role for judges in a constitutional democracy, is too bland and unambitious to us, and particularly ill-suited to address Argentina's pressing social, economic, and political challenges, which are usually fraught with constitutional connotations. But even under the prism of a simpler view of piecemeal intervention, the Court often performs its role erratically and does not always convey an image of rigor and institutional unity. It remains vague as to the standards it uses and frequently continues to fail to present its decisions in a clear, articulate fashion. While the justices are obviously not expected to reach consensus in every case, they surely are supposed to raise the burdens of argument and judgment, particularly considering that they sit in such a small body, presently featuring only four members. The situation of federal (and local) judiciaries in general is even more serious: key decisions that are seen as politically motivated and more mundane procedures that are arcane, lengthy, and costly. While some of the ailments affecting the service of justice require political action, there is much space for self-improvement and the Court should lead that process. Instead, the silence emerging from the judiciaries is almost deafening. It does nothing to prevent further deterioration of the judiciaries' already poor image and it invites partisan interference. The public deserve better.

## V. FURTHER READING

'Los 10 fallos más destacados de la Corte Suprema en el 2021', *Palabras del Derecho* (29 December 2021) <<https://palabrasdelderecho.com.ar/articulo/3334/Los-10-fallos-mas-destacados-de-la-Corte-Suprema-en-el-2021>>.

Florencia Saulino, 'La Corte reivindicó el federalismo', *La Nación* (6 May 2021) <<https://www.lanacion.com.ar/opinion/la-corte-reivindico-el-federalismo-nid06052021/>>.

1 Irina Hauser, 'La Corte Suprema Queda Fracturada Después de La Elección de Horacio Rosatti Como Presidente' *Página/12* (Buenos Aires, 24 September 2021) <<https://www.pagina12.com.ar/370450-la-corte-suprema-queda-fracturada-despues-de-la-eleccion-de->> accessed 21 February 2022.

2 Ibid.

3 Hernán Capello, 'Tribunales En La Mira: La Mala Imagen Creció En El Último Año y Ocho de Cada Diez Argentinos No Confía En La Justicia' *La Nación* (Buenos Aires, 15 February 2021) <<https://www.lanacion.com.ar/politica/ocho-cada-diez-argentinos-no-confia-justicia-nid2603178/>> accessed 21 February 2022.

4 Fayt, Carlos S. 322 Fallos 1609 [1999].

5 Schiffrin, Leopoldo 340 Fallos 257 [2017]; see our contribution to the 2017 Review.

6 *Gobierno de la Ciudad de Buenos Aires* CSJ567/2021 [2021].

7 Shi, Jinchui CSJ 1751/2018/RH1 [2021], par. 10.

8 Ibid, par. 11.

9 Ibid, par. 15.

10 Gustavo Arballo, 'Federalismo potenciado: el caso de Arroyito', *Saber Leyes No Es Saber Derecho* (22 May 2021) <<http://www.saberderecho.com/2021/05/federalismo-potenciado-el-caso-de.html>> accessed 1 February 2022.

11 Ibid.

12 Ibid, par. 11.

13 Ibid, par. 11-2.

14 *Farmacy SA* CSJ 118/2017/RH1 [2021], par.

14. See also our contribution to the 2021 Review.

15 *Esso Petrolera Argentina SRL* CSJ 1533/2017/RH1 [2021], par. 12.

16 Gisela Hörisch and Harry Schurig, 'Fallo Preocupante. Novedades En Materia de Tasas Municipales' (*Colegio de Abogados de San Isidro*, 6 September 2021) <<https://www.casi.com.ar/FALLOCOMENTADO1>> accessed 21 February 2022.

17 *Price Brian Alan y otros* CSJ002646/2015/CS1 [2021].

18 Ibid, opinion of Justice Lorenzetti, par. 16.

19 'Aplazo al plazo razonable' (*Diario Judicial*, 18 August 2021) <<https://www.diariojudicial.com/nota/89970>> accessed 1 February 2022.

20 Gómez Carlos CSJ 2582/2018/RH1 [2021]; Gabriel Morini, 'La Corte Suprema vuelve a advertir sobre "plazos razonables" para juicios penales' (*Ámbito*, 16 August 2021), <<https://www.ambito.com/politica/corte-suprema/la-vuelve-advertir-plazos-razonables-juicios-penales-n5252083>> accessed 1 February 2022.

21 *Etcheverry Juan Bautista* CAF49220/2015/1/RH1 [2021].

22 *Comunidad Mapuche Catalán* CSJ1490/2011(47-C)/CS1 [2021].

23 Ibid, par. 9.

24 Ibid, par. 14.

25 *Rizzo, Jorge Gabriel* 336 Fallos 760 [2013].

26 *Colegio de Abogados de la Ciudad de Buenos Aires* CAF29053/2006/CA1-CS1 [2021], par 7.

27 Ibid, par 25.

28 Ibid, par 11.

29 Ibid, par 15.



# Austria

Anna Gamper  
Univ.-Prof. Dr.

University of Innsbruck, Austria/Substitute Judge at the Constitutional Court of Liechtenstein

## I. INTRODUCTION

2021 has turned out to be a difficult year in Austria, not just because of the COVID-19 pandemic and the measures taken against it, but also on more general political grounds. Serious corruption charges and criminal investigations against Federal Chancellor Kurz and other members of the Federal Government as well as their subsequent demission, counterattacks against courts and prosecutors accused of having a political bias, the demission of another short-time Federal Chancellor and the appointment of a third Federal Chancellor in late 2021 shook the political landscape. A parliamentary investigation committee established in the aftermath of the so-called “Ibiza scandal”, the delay in submitting certain emails and files by the Federal Minister for Finances to the parliamentary investigation committee, and the Constitutional Court’s request<sup>1</sup> to the Federal President to execute the Court’s order<sup>2</sup> to submit these documents clearly surpassed the constitutional imagination of many. Moreover, several lockdowns and the adoption of other severe COVID-19 measures,<sup>3</sup> increasingly targeted against non-vaccinated persons, against whom a separate “non-vax” lockdown was continued for months, polarized the Austrian society to a hitherto unknown extent: it culminated in the foundation of a new anti-vaccine party, mass demonstrations, counter-demonstrations, institutional mistrust and an increasing inability for a balanced discourse both between political parties and within the society. The Constitutional Court, faced with numerous complaints against the often extremely short-lived measures, usually decided only

retrospectively. While some of the measures were declared unconstitutional because they lacked an explanatory memorandum showing sufficient evidence on the need for such measures, the Court mostly upheld them if the respective regulation was accompanied by such a memorandum. These dramatic developments rather overshadowed smaller political events such as regional elections in the Land Upper Austria or local elections in the Land Carinthia.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In formal terms, federal constitutional law – ie its main document, the Bundes-Verfassungsgesetz (hence: B-VG)<sup>4</sup> as well as other pieces of the highly fragmented<sup>5</sup> Austrian Federal Constitution – was amended only marginally. On the one hand, this concerned the repeated<sup>6</sup> prolongation of several temporary COVID-19 related provisions both within the B-VG and other pieces of federal constitutional law that technically facilitate the Federal Government’s and the local assemblies’ resolutions as well as the administrative and, more specifically, the procurement procedure. On the other hand, a number of constitutional provisions within ordinary federal laws – which, from a comparative perspective, are a unique possibility of entrenching federal constitutional law – were enacted that in a piecemeal way<sup>7</sup> transferred competences from the Länder to the federal level, particularly concerning the fields of green power, power industry and renewable energy. Some constitutional provisions were also enacted in other ordinary federal laws, such as in the

Incompatibility and Transparency Act<sup>8</sup>, in the Protection of the State Act<sup>9</sup> or in the Account Registration and Control Act<sup>10</sup>. However, all these provisions did not concern major constitutional issues.

The Federal Government also proposed a larger constitutional reform project in spring 2021<sup>11</sup> which had already been discussed for a long time: it concerned amendments to the prevailing constitutional obligation to official secrecy and the introduction of a constitutionally guaranteed right of access to freedom of information. The ministerial draft did not only suggest changes to the B-VG, but also to the ordinary Court of Auditors Act<sup>12</sup> and Constitutional Court Act<sup>13</sup>, and further included an envisaged ordinary Freedom of Information Act. The constitutional draft, however, was received controversially<sup>14</sup> and was thus put on ice – at the end of 2021 it was still unclear whether a respective bill would be submitted to Parliament. First, it was considered critically that freedom of information would be subject to numerous reservations, not the least due to the need for data protection, and thus be not so different from the prevailing provision on official secrecy that, in its turn, provides many exceptions. Moreover, questions around responsibility and increased bureaucracy stemming from the need for an information register raised concerns.

The draft also proposed a three-year cooling-off period for the appointment of former politicians as constitutional judges, in response to criticism on the appointment of a former Vice-Chancellor and Federal Minister for Justice as a constitutional judge just a few months after his political function had ended. Shortly after the presentation of the draft, the same judge resigned from office following the publication of indiscrete chat about other constitutional judges and judgments.<sup>15</sup>

Another innovation set forth by the reform draft concerned the possibility of a separate vote for constitutional judges deviating from the Constitutional Court's majority decision. Under the prevailing law, a separate vote is not admitted. The Constitutional Court itself reacted negatively to this proposal,<sup>16</sup> mainly alleging that transparency was already guaranteed by its hearing of the parties and by adequate reasoning and that the opinion of all judges would be

considered before a judgment was taken. Moreover, the acceptance of the Court's decision could suffer if a separate vote was published. This criticism is understandable from the perspective of the Court, even though the topic is controversial. As other courts across the globe show, a separate vote – either as a dissenting or as a concurring opinion – does not necessarily disavow the function of these courts; and as many decisions are not taken unanimously, but just supported by a majority, the reasoning in a uniform judgment does often not express – and cannot even express – what the minority really thinks. The possibility of a separate vote would probably improve the Court's reasoning, since the majority would not like to be outshone by the arguments of one or more overruled judges; this, in turn, could further a general discourse on the case law and possibly on changes, where appropriate. However, it is also true that the personalization of judgments and separate votes respectively might weaken the independence of judges and, as feared by the Court, relativize the Court's authority in the public eye. The writing of separate votes, even though on a voluntary basis, might, moreover, burden judges with further work which, in its turn, could prolong procedures. Due to the critical responses, it seems rather likely that the lawmaker will abstain from enacting this provision, whatever the political destiny of the remaining constitutional reform draft may be.

Another critical issue was the lawmaker's reaction to the Constitutional Court's judgment of 11 December 2020<sup>17</sup>, in which the Court had repealed a provision of the Austrian Criminal Code prohibiting assistance to commit suicide. The judgment received rather critical responses, both politically and from academia<sup>18</sup>, mostly for its thin reasoning; while some at least hailed the result as "progressive", others lamented possible future misuse of "euthanasia" against vulnerable persons. The Constitutional Court had set 31 December 2021 as a time limit for the repealed provision to enter out of force, in order to allow the lawmaker some time for enacting substitute provisions; in the Court's opinion, the lawmaker, while considering the "right to die in human dignity" according to one's "right to free self-determination", both assumed as

constitutionally guaranteed rights by the Constitutional Court, should take sufficient care for persons who might otherwise fall victim to liberalization. In a long and very controversial process, the Federal Government finally produced a bill that was published at the end of 2021<sup>19</sup>. It introduced the new instrument of a "registered deed on the decision to die" for which a couple of strict conditions, such as serious illness, previous medical advice, official registration, time limits etc., apply. While the instrument as such seems suitable to prevent the misuse of an alleged "assistance" to suicide, it is more or less disavowed by a new provision in the Austrian Criminal Code according to which assistance to suicide is permitted even without such a registered deed, if some basic conditions, such as full age, serious physical illness, and previous medical advice, are met. What the reason behind this ultimately needless deed might be, seems not only opaque, but raises further constitutional doubts regarding its rationality and suitability to prevent misuse.

### III. CONSTITUTIONAL CASES

#### *1 General Remarks*

In 2021, the Constitutional Court again had to decide on several thousands of cases, not all of which were published, though. In particular, fast-track decisions on issues without constitutional relevance or without sufficient chance of success are hardly ever published.<sup>20</sup> The published case law was largely concerned with three categories of issues which shall be examined in more detail as follows: firstly, the Constitutional Court dealt with numerous cases regarding COVID-19 measures, especially with direct appeals from individuals or complaints against COVID-19 decisions by the administrative courts. Secondly, the Constitutional Court, as in previous years, dealt with lots of appeals from asylum-seekers, directed against asylum decisions by the Federal Administrative Court. Thirdly, the Constitutional Court had to deal with a smaller, but still remarkable number of cases that concerned the parliamentary investigation committee established after the aforementioned so-called "Ibiza scandal".

## 2. *The Constitutional Court's Case Law on COVID-19 Measures*

Already in 2020, the Constitutional Court had held that COVID-19 measures – mostly enacted by the Federal Minister for Health Affairs in the form of (very frequently amended, renamed or replaced) regulations on COVID-19 measures, sometimes also by other bodies, such as the Länder Governors – needed to be justified by the regulating body in an explanatory memorandum.<sup>21</sup> If such an explanation was lacking, which regularly happened in the initial phase of the pandemic, the Constitutional Court declared the respective measures constitutional, even though it also stressed that the Federal Minister could, considering the particularly difficult situation of a pandemic, rely on widely formulated laws that allowed him a wide margin of appreciation.

In 2021, the Constitutional Court continued this line of reasoning, but was increasingly faced with regulations that were indeed based on such a memorandum. In most of these cases, the Constitutional Court therefore upheld the respective measures because they had been explained in the memorandum that itself was frequently based on advice by a semi-political, semi-expert body called “Corona Commission”. The reliance on the explanatory memorandum usually implied that the Constitutional Court considered the regulation lawful and applied the rationality and proportionality tests needed for the assessment of fundamental rights infringements rather casually. This is understandable as the Constitutional Court, like other constitutional courts, does not itself possess medical expertise that would allow its own assessment on the suitability, ensuing effectiveness and the necessity of such measures. However, heavy reliance on such memoranda could turn out problematic, which, for example, became evident in a judgment in which the Court upheld the obligation to wear FFP2 masks in a closed or covered cable car.<sup>22</sup> The applicants had considered this requirement as, *inter alia*, a violation of the equality principle since, at the same time, people were only obliged to wear “normal” masks in all other means of mass transport. The Court, however, relied on the Federal Minister’s explanation that persons sitting in a cable

car produced increased aerosol emissions because of their “expected” sporting activity. Why such people – that were actually just sitting in the cable car and had possibly not even yet skied down the slope – should already produce increased emissions, remains enigmatic. It is also obscure what the Court means by adding that the applicants were “wrong in assuming that the transmissibility of the disease was the only – even though important – criterion for such measures”.

Based on the existence of an explanatory memorandum, the Constitutional Court, *inter alia*, considered the following measures constitutional: the obligation to wear FFP2 masks in a closed or covered cable car,<sup>23</sup> the obligation to wear masks at school,<sup>24</sup> online distance learning for pupils,<sup>25</sup> prohibited access to cultural institutions,<sup>26</sup> compulsory testing before leaving the Land Tyrol,<sup>27</sup> the prohibition to pick up goods<sup>28</sup> or to enter certain shops,<sup>29</sup> the obligation to wear masks in shops,<sup>30</sup> the prohibition to enter restaurants,<sup>31</sup> a night-time curfew<sup>32</sup> or prohibited access to certain places in an Austrian city<sup>33</sup>.

Due to a lacking explanation and/or lacking legal basis, the Constitutional Court, *inter alia*, considered the following measures unconstitutional: the prohibition to enter playing and sporting grounds in an Austrian city,<sup>34</sup> the obligation to consume meals and drinks in restaurants only while sitting, and the prohibition for groups surpassing a certain number of persons to enter a restaurant,<sup>35</sup> the obligation for restaurant owners to submit personal data of guests to the health authority in order to facilitate contact tracing,<sup>36</sup> the prohibition of take away services in skiing resorts,<sup>37</sup> the prohibition to enter leisure time and sporting enterprises,<sup>38</sup> the prohibition to leave an asylum center<sup>39</sup>, the limitation of the number of persons attending a funeral<sup>40</sup> and the obligation to wear masks in shops<sup>41</sup>.

As this survey shows, the Constitutional Court sometimes considered one and the same measure constitutional in one judgment and unconstitutional in another, depending on the time period for which the respective measure had been enacted and on the existence of an explanatory memorandum. Regarding the quality of the memorandum, the Constitutional Court held in one judgment<sup>42</sup> that it ought not to be a “mere collection and

submission of every available data and studies on the effects and spread of COVID-19”. Rather, the memorandum should comprehensibly document the reasons that had been relevant for the enactment of the regulation, such as by a plausible summary of the most significant circumstances, in particular, the applied reasons for the balancing of interests and the proportionality test respectively.

In most of the COVID-19 related cases – many of which were, moreover, rejected by the Constitutional Court without much reasoning in fast-track procedures – judgment was taken after the respective measure had already entered out of force. As measures were updated continuously, the respective provisions entered in and out of force almost every other week. Since the Constitutional Court is neither entitled to the *ex-ante* scrutiny of the lawfulness of such regulations nor to grant preliminary injunctions against regulations or laws, it was thus mainly competent to decide retroactively.

## 3. *The Constitutional Court's Asylum Decisions*

As in previous years, the Constitutional Court was faced with an enormous number of complaints from asylum seekers directed against the Federal Administrative Court’s negative decisions on their applications regarding the granting of asylum, subsidiary legal protection, or related rights. In almost all the published cases at least, the Constitutional Court repealed the respective decision on account of arbitrariness, which constitutes a violation of the equality principle and/or, sometimes, a violation of Art 3 or 8 of ECHR respectively. After the repeal, the Federal Administrative Court needs to resume the respective procedure and enact a new decision in accordance with the Constitutional Court’s legal opinion. In the “arbitrariness” cases, however, this does not necessarily imply that the Federal Administrative Court has to take a positive decision, but that it needs to reconsider the case giving sufficient reasons in line with the administrative records, that it ought to apply the most recent official reports on the situation in the countries of origin, that it ought to give individual reasons and not just copy text blocks from previous decisions and that it should not delay in submit-

ting the written judgment (including its reasons). However, the “arbitrariness” formula as applied in these cases rather differs from the “arbitrariness” formula in the prevailing case law which had been traditionally confined to gross, even “subjectively” arbitrary procedural blunder that violated the equality principle, while the Court now obviously subsumes sundry procedural irregularities under this term.<sup>43</sup> As a consequence, the Federal Administrative Court is obliged to minutely inquire into past private events of asylum seekers in their countries of origin, to keep up to date regarding the most recent developments of these countries, to actively conduct research on possible return routes and consider whether certain places in such a country might be acceptable to the respective asylum seeker. Naturally, this will rather prolong the procedures, which are further complicated by political changes (and updated reports) in these countries, translation problems and an extraordinary caseload. Moreover, even though the Constitutional Court so far seems to limit its thin-type “arbitrariness” test more or less to asylum cases, its use challenges the Court’s traditional role vis-à-vis the administrative courts and the Supreme Administrative Court that would normally be responsible to consider the general lawfulness of asylum procedures whilst the Constitutional Court is responsible to examine constitutional rights infringements.<sup>44</sup>

#### 4. The Constitutional Court’s Case Law on a Parliamentary Investigation Committee

Since 2014, the Constitutional Court has been responsible under Art 138b B-VG to decide on certain issues in the context of parliamentary investigation committees established by the National Council. On the one hand, this relates to appeals made, in particular, by the parliamentary minority (one fourth of the members), and, on the other hand, complaints from persons such as informants that claim to have been violated in personal rights during the course of a parliamentary investigation procedure. The Constitutional Court had already dealt with such issues in the context of previous parliamentary investigation procedures,<sup>45</sup> but was confronted with a wide range of new applications in 2021: these concerned

the so-called “Ibiza Investigation Committee”<sup>46</sup> which was established in the aftermath of the aforementioned “Ibiza” bugging affair concerning a former Austrian Vice-Chancellor. The affair had entailed his resignation but also revealed further – at least alleged – scandals involving several other persons and parties against whom criminal proceedings had been launched, which are partly still ongoing, but were partly abandoned. The parliamentary “Ibiza Investigation Committee” was dealing with these issues in a very confrontational way which ultimately ended in a number of appeals lodged at the Constitutional Court.

In some cases, the Constitutional Court dismissed or rejected complaints from informants because of alleged violation of their personal or fundamental rights.<sup>47</sup> In several cases, however, the Constitutional Court requested the Federal Chancellor, the Federal Minister for Finances and a governmental staff unit to submit certain emails and files to the “Ibiza Investigation Committee”.<sup>48</sup> The situation culminated in the aforementioned Constitutional Court’s request<sup>49</sup> to the Federal President (Art 146 B-VG) to execute a former judgment<sup>50</sup> in which the Court had – without success – ordered the Federal Minister for Finances to submit the email accounts and files of certain ministerial employees as well as emails received from certain persons by ministerial employees to the “Ibiza Investigation Committee”.

Very shortly after the request had been submitted, the Federal Minister complied with it despite his previous privacy concerns so that the Federal President did not have to execute the judgment formally, but just announced his intention that he would do so if the Federal Minister did not react in the desired way. Whatever the concrete instruments might have been for the Federal President to execute a judgment of the Constitutional Court, the case was considered extraordinary within Austria’s constitutional culture but also a token of an increasingly polarized and – seemingly at least – corrupted political landscape that also entailed the establishment of a new parliamentary investigation committee on alleged corruption in the People’s Party<sup>51</sup> and triggered a popular initiative on anti-corruption formally scheduled for 2022.

## IV. LOOKING AHEAD

Many of the aforementioned problems remained unsolved at the end of 2021 and will have to be settled in 2022: this will particularly concern COVID-19 measures such as the continued lockdown for non-vaccinated people or the new law on compulsory vaccination, as well as their handling by the Constitutional Court. In the political arena, regular elections for the Federal President and local elections in some of the Länder are expected, but, due to the fragile coalition government, even early elections for the National Council are not improbable. While Austria, as other European countries, will have to deal with general issues such as climate change, migration, European integration etc., big reforms of the Federal Constitution seem unlikely under the present political circumstances. Whether the hoped-for end of the pandemic will help settle the people’s shaken trust in Austria’s political and legal institutions is yet uncertain.

## V. FURTHER READING

Anna Gamper/Giacomo Delledonne/Peter Bußjäger (eds), ‘A Centenary of Constitutional Review: The Austrian Legacy to Constitutional Courts in Europe’ (2021) 76 ZöR 309-490.

András Jakab/Sebastian Schmid (eds), ‘Rundfrage 100 Jahre VfGH-Rechtsprechung’ (2021) 76 ZöR 1-155.

Arno Kahl/Lamiss Khakzadeh/Sebastian Schmid (eds), *Kommentar zum Bundesverfassungsrecht. B-VG und Grundrechte* (Jan Sramek Verlag 2021).

Verfassungsgerichtshof (ed), *100 Jahre Verfassungsgerichtshof 1920-2020* (Verlag Österreich 2021).

- 1 VfGH 5 May 2021, UA 1/2021-39.
- 2 VfGH 3 March 2021, UA 1/2021-13.
- 3 In more detail, Reinhard Klaushofer and others, 'Ausgewählte unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus' (2020) 75 ZöR 649; Reinhard Klaushofer and others, 'Unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus (II)' (2021) 76 ZöR 613.
- 4 BGBl 1930/1 as amended by BGBl I 2021/235.
- 5 See, for an overview, Anna Gamper, 'The Centennial of the Austrian Federal Constitution' (Int'l J. Const. L. Blog, 1 October 2020) <[www.iconnect-blog.com/2020/09/the-centennial-of-the-austrian-federal-constitution](http://www.iconnect-blog.com/2020/09/the-centennial-of-the-austrian-federal-constitution)> accessed 11 January 2022.
- 6 See BGBl I 2021/2, I 2021/5, I 2021/107, I 2021/235.
- 7 BGBl I 2021/12, I 2021/17, I 2021/150, I 2021/181.
- 8 BGBl I 2021/70.
- 9 BGBl I 2021/148.
- 10 BGBl I 2021/25.
- 11 95/ME XXVII. GP.
- 12 BGBl 1948/144 as amended by BGBl I 2015/143.
- 13 BGBl 1953/85 as amended by BGBl I 2020/24.
- 14 See the various statements at <[www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME\\_00095/index.shtml#tab-Stellungnahmen](http://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00095/index.shtml#tab-Stellungnahmen)> accessed 11 January 2022.
- 15 Following this resignation, a new constitutional judge had to be appointed. As the newly appointed judge had just been appointed as a new substitute judge in 2021, his appointment as judge entailed the appointment of another new substitute judge in 2021.
- 16 53/SN-95/ME XXVII. GP 2 f.
- 17 VfGH 11 December 2020, G 139/2019.
- 18 See, eg. Anna Gamper, 'Gibt es ein „Recht auf menschenwürdiges Sterben“? Zum Erkenntnis des VfGH vom 11.12.2020, G 139/2019' [2021] JBI 137; Magdalena Pöschl, 'Sterben mit Würde?' [2021] EuGRZ 12; Lamiss Khakzadeh, 'Das Recht auf selbstbestimmtes Sterben. Verfassungsrechtliche Überlegungen zu VfGH 11.12.2020, G 139/2019' [2021] RdM 48.
- 19 BGBl I 2021/242.
- 20 See the Constitutional Courts annual reports including more statistical detail at <[www.vfgh.gv.at/verfassungsgerichtshof/publikationen/taetigkeitsberichte.de.html](http://www.vfgh.gv.at/verfassungsgerichtshof/publikationen/taetigkeitsberichte.de.html)> accessed 11 January 2022.
- 21 See already Anna Gamper, 'Austria' in Richard Albert and others (eds), *2020 Global Review of Constitutional Law* (I•CONnect and the Clough Center 2021) 30.
- 22 VfGH 3 December 2021, V 617/2020-7, V 618/2020-4.
- 23 VfGH 3 December 2021, V 617/2020-7, V 618/2020-4.
- 24 VfGH 23 September 2021, V 155/2021-8.
- 25 VfGH 10 March 2021, V 574/2020-15, V 575/2020-16, V 577-578/2020-14, V 595-596/2020-14, V 598/2020-14.
- 26 VfGH 06 October 2021, V 86/2021-19.
- 27 VfGH 24 June 2021, V 87/2021-12.
- 28 VfGH 24 June 2021, V 592/2020-12.
- 29 VfGH 24 June 2021, V 593/2020-10; 30 November 2021, V 47/2021-7.
- 30 VfGH 10 June 2021, V 35/2021-7.
- 31 VfGH 30 November 2021, V 31/2021-7.
- 32 VfGH 29 November 2021, V 606/2020-8.
- 33 VfGH 10 March 2021, V 583/2020-16, V 584/2020-17.
- 34 VfGH 15 December 2021, V 229/2021-11.
- 35 VfGH 15 December 2021, V 560/2020-10.
- 36 VfGH 10 March 2021, V 573/2020-16.
- 37 VfGH 23 September 2021, V 5/2021-7; 6 October 2021, V 7/2021-8, V 8/2021-8, V 9/2021-8, V 10/2021-8, V 12/2021-8, V 13/2021-8, V 14/2021-8; 6 October 2021, V 17/2021-10, V 18/2021-10; 6 October 2021, V 58/2021-7; 6 October 2021, V 74/2021-8, V 75/2021-8, V 76/2021-8, V 77/2021-8.
- 38 VfGH 9 March 2021, V 530/2020-11.
- 39 VfGH 30 September 2021, V 88-89/2021-17.
- 40 VfGH 24 June 2021, V 2/2021-12.
- 41 VfGH 8 June 2021, V 587/2020-8.
- 42 VfGH 10 March 2021, V 573/2020-16.
- 43 See Ulrich Wagrاندl, 'Willkür: Geschichte und Gestalt eines verfassungsgerichtlichen Maßstabs (1. Teil)' [2021] JBI 569, 570 ff.
- 44 See Ulrich Wagrاندl, 'Willkür: Geschichte und Gestalt eines verfassungsgerichtlichen Maßstabs (2. Teil)' [2021] JBI 637, 646 f.
- 45 Anna Gamper, 'Austria' in Richard Albert and others (eds), *2018 Global Review of Constitutional Law* (I•CONnect and the Clough Center 2019) 17.
- 46 See, with more detail, <[www.parlament.gv.at/PAKT/VHG/XXVII/A-USA/A-USA\\_00002\\_00906/index.shtml](http://www.parlament.gv.at/PAKT/VHG/XXVII/A-USA/A-USA_00002_00906/index.shtml)> accessed 11 January 2022.
- 47 VfGH 24 February 2021, E 27/2021-6; 25 September 2021, UA 6/2021-8; 6 October 2021, UA 2/2021-23.
- 48 VfGH 3 March 2021, UA 1/2021-13; 10 May 2021, UA 3/2021-16; 10 May 2021, UA 4/2021-18; differently: VfGH 5 May 2021, UA 1/2021-40; 10 May 2021, UA 5/2021-11.
- 49 VfGH 5 May 2021, UA 1/2021-39.
- 50 VfGH 3 March 2021, UA 1/2021-13.
- 51 See, with more detail, <[www.parlament.gv.at/PAKT/VHG/XXVII/A-USA/A-USA\\_00003\\_00906/index.shtml](http://www.parlament.gv.at/PAKT/VHG/XXVII/A-USA/A-USA_00003_00906/index.shtml)> accessed 11 January 2022.



# Bangladesh

## Chronic Marginalisation of the Accountability Institutions

Dr M Jashim Ali Chowdhury  
Lecturer in Law, University of Hull, UK

### I. INTRODUCTION

2021 marked the fiftieth year of the independence of Bangladesh. 2020 marked the birth centenary of the Father of the Nation. While both the occasions could have generated some honest self-reflection, the Covid-19 pandemic laid bare the hollowness of the country's constitutional commitment to the rule of law, fundamental liberty, limited government, equality and social and economic justice.<sup>1</sup> The pandemic potentially exposed Bangladesh as one of the most extreme examples of executive aggrandisement and non-accountable governance. It started rolling out in Bangladesh in early 2020. In 2021, it continued to officiate the deinstitutionalisation of the country's constitutional institutions. This essay reviews the overall state of constitutional governance in Bangladesh during the period. It also briefly outlines some significant judicial decisions of the time. During this period, the legislative branch remained effectively muted. The judicial branch continued to be weak on executive accountability and fundamental freedom issues. Though there have been several judicial decisions touching upon individual rights, those fell well short of asking critical questions to the regime. Freedom of expression, opinion and the press continued to be circumscribed by the patriarchal approach of the government.

### II. STATE OF CONSTITUTIONAL GOVERNANCE

#### A Pandemic in an Unequal Society

As part of the pandemic response, the government issued strict lockdowns, social

distancing guidelines and mask mandates. Other than the school closure (one of the most extended closures globally), the lockdowns and mask mandate were primarily honored in the breach. However, the most visible ramification of the covid measures have been the grossly disproportionate effect it caused on the poor. As soon as the lockdowns rolled in, the small and large industries, especially the readymade garments industries, went for the termination of thousands of employees. The market went into a wild spree of price hikes and rampant profiteering. Prices of food grains, medicines for respiratory diseases, or even essential medicines and other commodities almost tripled without government control over the market. The millions of dollars-worth bailout packages offered for the small and private industries were distributed in largely unaccountable and non-transparent ways and through clientelist channels.<sup>2</sup> The government also officially raised diesel prices, citing global fuel prices. It hit the country's transport, wholesale and retail trade sectors and, ultimately, the household budgets. Private transport companies used the excuses of increased fuel prices and social distancing measures to raise the fares whimsically. The World Bank data suggested that the pandemic caused around 48.9% of Bangladeshi citizens to slip below poverty. 12% of those fell into extreme poverty.<sup>3</sup>

The country's chaotic health care system also came to a breaking point. Bangladesh has been privatising the health care industry since the democratic revolution of 1990. The state-run hospitals and doctors employed therein were undernourished, neglected and systematically ignored for decades. During

the initial scare of the pandemic, the private hospitals, clinics, and diagnostic centres literally shut down their doors to the patient. The private practising doctors stopped seeing the patients. The state-run hospitals were overrun. The scarcity of much-needed intensive care facilities exacerbated the existing disparities in access to healthcare. The cost of oxygen cylinders and essential medications went to an exorbitant and hostage-taking level. All of these exposed decades of political mishandling, poor governance, rampant corruption and unprincipled profit-driven privatisation of the country's healthcare system.<sup>4</sup> By the end of 2021, the country somehow managed to withstand deadly waves of Delta and Omicron variants of the Covid-19 virus, thanks mainly to a herd immunity approach to the pandemic management. Thereby, any critical debate on the peoples' equitable access to health care and the profiteering tendencies of the private health care system was conveniently silenced.

#### An "Unofficial Emergency Approach"

Bangladesh witnessed severe political polarisation, sectarianism, and authoritarianism even before the pandemic. The country effectively turned into a *de facto* one-party state in 2014. In tackling the pandemic, the government took a "sub-constitutional, undeclared, or quasi emergency approach."<sup>5</sup> The country operated in an "unofficial emergency" set up where the executive branch made crucial state policies without the involvement of accountability institutions, including the legislature, judiciary, fourth branch institutions and citizens voices.<sup>6</sup>

Bangladesh *Jatya Sangsad* (Parliament) remained practically shut down. Despite the current regime's signature rhetoric of "Digital Bangladesh", the parliament sessions were not moved to virtual platforms.<sup>7</sup> It continued physical sessions with limited attendance, reduced time and a severely restricted agenda. Almost all pandemic time sessions (fifth-fourteenth) were held merely to fulfil the constitutional obligation of holding parliamentary sessions every sixty days.<sup>8</sup> With the attendance of the minimum number of MPs required for fulfilling quorum in the House,<sup>9</sup> the MPs were "asked" to attend the parliament session on a

rotation basis. The senior or unwell MPs were "discouraged" from attending.<sup>10</sup>

The fifth session lasted only an hour and 26 minutes, the ninth for five days<sup>11</sup>, the eleventh for 15 days<sup>12</sup> and the twelfth for three days.<sup>13</sup> The seventh session did not deal with anything remotely related to the pandemic.<sup>14</sup> The tenth session was a special session commemorating the birth centenary of the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman.<sup>15</sup>

The government declared and implemented million-dollar coronavirus stimulus packages unilaterally.<sup>16</sup> In 2021, the government approved two stimulus packages worth BDT 270 billion.<sup>17</sup> The government announced at least 23 stimulus packages worth BDT 1240 billion that occupied 4.44 per cent of the country's GDP during the health emergency.<sup>18</sup> The package included a staggering amount of liquidity support and fiscal stimulus. Still, the pandemic year budget of 2020 generated a discussion lasting only for around five hours on the parliament floor.<sup>19</sup> While many parliaments worldwide set up specialised research offices or committees to advise the legislatures on public spending and economic challenges,<sup>20</sup> Bangladesh did not adopt the approach. Instead, the regular ministerial and prime ministerial question sessions were suspended.<sup>21</sup> The ignorance of the parliament, even as an institution of relevance during the pandemic, further aggravated the legislative branch's pre-existing marginalisation.

#### The Virtual Court System

Unlike the Parliament, Bangladesh's highest and subordinate judiciary went virtual during the pandemic.<sup>22</sup> That, however, followed months of indecisiveness and hesitation on part of the judicial leadership. The Supreme Court primarily looked toward the government for decisions and budgets required for the virtual court system. The virtual court system started on 12 May 2020. The decision again did not involve any parliamentary input. President issued the Use of Information and Communications Technology in Court Ordinance on 9 May 2020. Under Article 93(1) of the Bangladesh Constitution, ordinances are issued only when

the parliament is not in session and "circumstances exist which render immediate action necessary". Much later, the legislature approved the Ordinance and incorporated it into an Act of Parliament.<sup>23</sup>

The Ordinance consisted of only five sections. The two branches of the Supreme Court (Appellate Division and High Court Division) issued Practice Directives to operate the virtual court system.<sup>24</sup> The lower courts were instructed to hear only the "urgent" matters, especially the bail petitions by the prisoners awaiting formal trial. Bail is a highly sensitive matter for Bangladesh's criminal justice administration. Statistics show that 81.3 per cent of Bangladesh's prison population are pretrial detainees.<sup>25</sup> However, the High Court Division of the Supreme Court considered some public interest litigations of symbolic value. One of the earliest PIL cases entertained in the virtual bench was about the killing of endangered dolphin species in the Halda River.<sup>26</sup>

Though the litigants and practitioners hailed the introduction of the virtual court system, the system raised critical questions about data privacy, storage and security. The Ordinance and Practice Direction lacked guidelines about the issue. There was also a need for necessary amendments in the Supreme Court and Subordinate Court Rules, Civil and Criminal procedure laws, and evidence laws.<sup>27</sup> Critical questions also arose about the institutional and human capacity of establishing and continuing with a virtual court system. Absent any comprehensive plan for these matters; the pandemic-era virtual court system was more likely to thrive only as a temporary measure. Like the debate on the country's chaotic health care system, the advocacy for a sustainable, efficient, accessible and poor-friendly e-judiciary gradually slipped into silence once the pandemic started waning. The lower judiciary started regular court proceedings with physical appearances again since then.

#### Enforced Disappearances and Extra-judicial Killings

The government showed a general disregard for the allegations of grave abuses, including

extra-judicial killings, torture, and enforced disappearances by the security forces. Authorities cracked down on critics and journalists who criticised or dared to question the government's response to the Covid-19 pandemic. One of the most notable incidents of the period involved a writer named Mushtaq Ahmed. In February 2021, Ahmed died in prison after being held in pretrial detention for around nine months. Mushtaq and fellow cartoonist Ahmed Kabir Kishore were held in custody for allegedly posting satirical sketches of the head of the government and mocking the government's pandemic response on social media. The lower judiciary had consistently refused Mushtaq and Kishore's bail petitions. The government abused the Digital Security Act (DSA) 2015 to prosecute them. The DSA has been widely criticised for its chilling effect on the expression of dissent. Kishore was granted bail amid the criticism following Mushtaq's death. He then filed a suit claiming redress for the torture he suffered at the hands of the security forces. The case is still pending in court. By the end of 2021, the American government issued a ban on several top-level officers of RAB and Police on the charge of torture and extra-judicial killings.

In May 2021, a female journalist, Rozina Islam, working with the nation's leading newspaper Prothom Alo, was harassed within the premises of the government secretariat. She was arrested on the spot. Later, a false case was lodged against her, citing "theft" of confidential government documents.<sup>28</sup> Earlier, Mrs Islam covered a series of stories featuring the unfair practices and corruption within the Ministry of Health in various Covid related purchases and projects.<sup>29</sup>

### Allegations against the Chief Election Commissioner

On 14 December 2020, forty-two prominent citizens of Bangladesh wrote to the President asking for an investigation and removal of the then Chief Election Commissioner.<sup>30</sup> They followed up their letter with a second one in February 2021. Citizens demanded that a Supreme Judicial Council be constituted to probe allegations of "serious financial corruption and gross election-related mis-

conduct" by the Chief Election Commissioner. They cited credible allegations of financial mismanagement reported in the national dailies and the audit report by the Comptroller and Auditor General (CAG). The Chief Election Commissioner allegedly took an "honorarium" for speaking to the local election official at some pre-election training programmes. The citizens argued that receiving an additional "honorarium" for the Chief Election Commissioner's routine administrative work was corrupt and constituted financial misconduct. The Chief Election Commissioner issued a defiant statement claiming "no scope for financial irregularities" in the Commission.<sup>31</sup> The Chief Election Commissioner being a political favorite of the government, the President ignored the call and remained out of accountability.

## II. IMPORTANT COURT DECISIONS

In 2021, the Supreme Court issued several important individual rights decisions. Some of those decisions involved pure individual rights. Some involved the limits of state institutions, and others were of merely symbolic values. The most sensational judicial decision, however, came from a subordinate court. The decision and its resulting reaction raised critical questions about judicial independence and harmful populist pressure upon the judiciary.

### The "Raintree Hotel" Judgement

In November 2021, District and Sessions Judge of Dhaka, Mosammat Qamrunnahar, passed a judgement in a much-publicised rape case known as – The Raintree Hotel Rape case.<sup>32</sup> Three young people were prosecuted for raping two university students at a late-night birthday party held in private and in a hotel named Raintree. Judge Qamrunnahar presided over the case as a sitting judge of the Women and Children Repression Prevention Tribunal-7 of Dhaka. Judge Qamrunnahar, however, found the allegations untrustworthy and discharged the accused. She emphasised some crucial facts like filing the case after forty-five days of the incident. She also believed that the sexual activity on that

night was consensual. Judge Qamrunnahar is reported to pass some "derogatory comments" about the disposition of the accusing female students. She also allegedly directed the police not to take cases filed after a long inordinate delay. However, those comments and directions were not found in the written judgment issued several days later.

However, the liberals, feminist groups, and civil society members were quick in denouncing the court's decision and alleged "observations". Extreme opinions about the judge were expressed in public forums, including a call for her removal. The Law Minister seized the opportunity and publicly called out the judge. Within hours of the Law Minister's public call, the Chief Justice rang the judge to tell her that she would no more sit as a judge of the Tribunal. Judge Qamrunnahar was transferred to the law ministry within the next few days. While the judges' alleged comments on the disposition of the rape victims and direction to the police, if there be any, were subject to judicial scrutiny in the appellate stage, the civil society, government and the Chief Justice did not wait for the normal appeal process to roll out. The "remedial action" that the Chief Justice took at the apparent behest of the law minister showed the hollowness of judicial independence and autonomy in Bangladesh.

### Limiting the Anti-Corruption Commission's Investigation Power

There were two cases decided by the High Court Division that sought to limit the powers of the Anti-Corruption Commission while investigating corruption allegations against individuals. The Commission had grown in issuing asset and bank account freezing orders pending the investigation against suspected individuals. In a writ petition filed by one Belayat Hossain, the court reminded the Commission about a mandatory requirement of the law – the requirement of prior judicial confirmation before issuing a confiscation or asset freeze.<sup>33</sup> This being directly related to the citizen's constitutional right to property and due process, the High Court Division declared the order of the ACC officer confiscating the petitioner's asset illegal and without effect.

In another writ petition filed by Mr *Ahsan Habib*,<sup>34</sup> the Commission's power to impound passports and bar individuals from leaving the country was considered. The ACC seized the petitioner's passport and barred him from leaving Bangladesh pending the conclusion of its investigation. The HCD directed the ACC to seek approval of a Senior Special Judge/Special Judge for such orders at the earliest possible opportunity, preferably within 15 days of the order. The Senior Special Judge/Special Judge shall then notify the accused of the ACC's application. It will hear both parties on the matter before ordering to approve or reject ACC's decision at the earliest possible time, preferably within 60 days of receiving ACC's application. The accused must submit their address, mobile number, and email to ACC so that ACC can contact them for any assistance or cooperation regarding the inquiry/investigation.

#### Limits of the government's taxation power

The Private University VAT case involved the National Board of Revenue (NBR).<sup>35</sup> The NBR imposed 15% VAT on private universities in July 2007. Later the income tax was imposed upon other privately owned education providers like the private medical, dental, engineering colleges, ICT institutes, etc. Challenged in the court in 2016, the High Court Division declared the 15% VAT on private universities illegal.<sup>36</sup> The court also ordered the refund of the money already realised under the decision. In 2021, the Appellate Division accepted the government's appeal against the High Court Division (HCD)'s decision. It stayed the HCD's order to refund the money until the disposal of the appeal. The case is pending disposal. It is likely to involve a critical question over the government's power of taxation and the need for the legislative branches' participation in the process.

#### Banning Harmful Games and Applications

In June 2021, a rights organisation demanded the ban of dangerous online games and social media-based mobile applications like TikTok, PUBG, Free Fire, Bigo Live, and Likee.<sup>37</sup> Receiving no response from the

government, the organisation filed a writ petition to the HCD. During the hearing in August, the HCD ordered the government to ban all types of violent games and applications, including the ones mentioned above, for three months. The HCD is yet to dispose of the writ.

#### Asking for the accountability of law and order forces

One of the most significant cases of 2021 involved the question of accountability of law and order forces. One hundred and two lawyers jointly filed a writ petition seeking the formation of an independent commission to investigate complaints against law enforcement officials. They raised concern over the widespread allegations of torture and abusive exercise of police power. The government opposed the petition arguing that the existing processes and structures (based on the Inspector General of Police's Complaint Cell) and laws (the Torture and Custodial Death (Prevention) Act, 2013) were adequate to ensure accountability for custodial torture and deaths. However, the complaints lodged with the IGP's cell are rarely investigated. The police officers charged with the investigation of their colleagues are less likely to be objective and fair to the accuser. The processes and preconditions of the 2013 Act have been largely ineffective. The High Court Division issued a rule upon the parties, and the matter is still awaiting a decision. If the court can decide the matter objectively, it could potentially be a milestone judgement for Bangladesh.

#### Preventing Wrongful Imprisonment

Stories of a wrongful person being prosecuted, arrested and jailed are relatively frequent in Bangladesh. The Police Bureau of Investigation issued an arrest warrant against one Zahir Uddin instead of the real accused in the case, Modasser Ansari.<sup>38</sup> Zahir learned that Modasser had impersonated him earlier to secure bail in the case and had gone into hiding since then. Zahir filed a writ petition challenging the legality of the arrest warrant. After hearing the petition, HCD declared the arrest warrant illegal. The court issued three

directions to the government for avoiding similar scenarios in future. Firstly, the police should record the accused's fingerprints, palm prints, and iris scans once brought to police stations. Secondly, the police should take full-face mugshots of the accused after arrests and preserve those photographs. Thirdly, the government should introduce a biometric registration system in all prisons across Bangladesh by collecting fingerprints, palm prints, and iris scans.

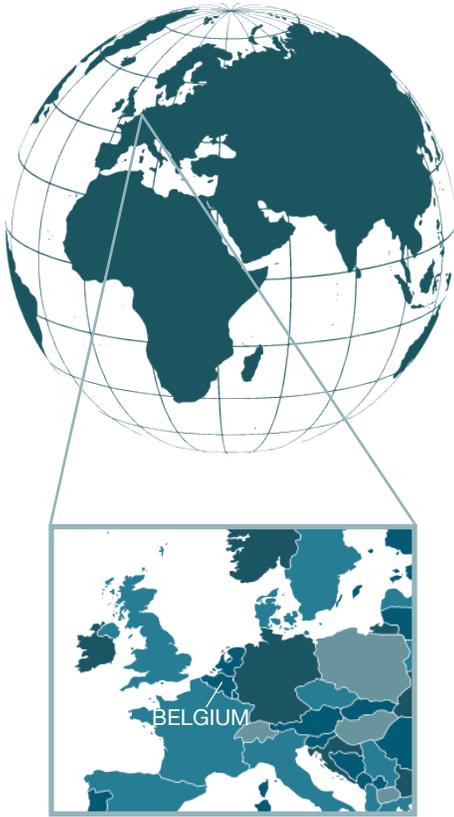
## IV. CONCLUSION

The role of Bangladesh's accountability institutions during the pandemic probably marks what could be called a "creeping loss of power".<sup>39</sup> During the public health emergency, the legislative branch had nothing to offer in terms of questioning or scrutinising the government's stimulus packages, lockdowns and social distancing measures, vaccine roll outs and other public health management strategies.<sup>40</sup> Like the parliament, the judiciary also remained tame. It did not entertain any case that could have scrutinised the fundamental rights implications of the pandemic time actions taken by the government. It also utterly failed to protect journalists and online activists against the suppressive techniques of the government. The sorry state of independence of the judiciary also got exposed in the controversial move of the Chief Justice after the Rain Tree Incident. The several individual rights cases mentioned in this essay seem to fail to bite a strong nail upon the executive's accountability. Overall, the state of constitutional governance in Bangladesh remained gloomy, and the prospect of its recovery faded even further.

## FURTHER READING

M Jashim Ali Chowdhury and Raihan Rahman Rafid, 'Parliament during the Pandemic: A "Dual State" explanation of Bangladesh *Jatya Sangsad*', (2020) 18(1-2) *Bangladesh Journal of Law* 25.

- 1 The Constitution of the Peoples' Republic of Bangladesh 1972; Preamble, arts 8, 19 and 27.
- 2 Selim Raihan, 'Anatomy of the Stimulus Package in Bangladesh', (2020) 63(1) *The Indian Society of Labour Economics* 37.
- 3 Joyti Rahman, in 2021: Bangladesh Turns 50: Economy, Politics, International Relations', (2022) 62(1) *Asian Survey* 185.
- 4 Md. Sayeed Al-Zaman, 'Healthcare Crisis in Bangladesh during the COVID-19 Pandemic', (2020) 103(4) *American Journal of Tropical Medicine and Hygiene* 1357.
- 5 E.L. Windholz, 'Governing in a pandemic: from parliamentary sovereignty to autocratic technocracy', (2020) 8(1-2) *The Theory and Practice of Legislation* 93.
- 6 Ridwanul Hoque, 'Bangladesh's Unofficial Emergency: Managing the COVID-19 Crisis by Notifications', *Verfassungsblog* (6 May 2020) <<https://verfassungsblog.de/bangladeshs-unofficial-emergency-managing-the-covid-19-crisis-by-notifications/>> accessed 25 March 2022.
- 7 K. Hasan, 'Coronavirus Outbreak: How is govt preparing to tackle potential crisis?', *Dhaka Tribune* (Dhaka: 7 February 2020) <<https://www.dhakatribune.com/bangladesh/2020/02/07/coronavirus-outbreak-how-is-govt-preparing-to-tackle-potential-crisis>> accessed 12 March 2022.
- 8 Constitution (n 1); art 72(1) requires that the time gap between the end of one session and the first sitting of the next session must not exceed sixty days.
- 9 Online Report, 'Budget session to be held with minimum JS attendance, no Q/A session', *The Daily Star* (Dhaka: 1 June 2020) <<https://www.thedailystar.net/bangladesh-budget-session-be-held-minimum-parliament-attendance-no-qa-session-1907425>> accessed 13 April 2022.
- 10 Staff Report, 'JS session begins today', *The Daily Observer* (Dhaka: 1 April 2021) <<https://www.observerbd.com/details.php?id=306011>> accessed 13 March 2022.
- 11 Staff Report, 'Six bills passed in five days as parliament ends', *Bdnews24.com* (Dhaka: 10 September 2020). <<https://bdnews24.com/bangladesh/2020/09/10/six-bills-passed-in-five-days-as-parliament-ends>> accessed 16 March 2022.
- 12 UNB, 'President to address maiden JS session of 2021', *United News of Bangladesh* (Dhaka: 17 January 2021) <<https://www.unb.com.bd/category/Bangladesh/president-to-address-maiden-js-session-of-2021/63428>> accessed 12 March 2022.
- 13 Staff Report, '12<sup>th</sup> parliament session begins Speaker nominates 5-member panel of chairmen', *The Financial Express* (Dhaka: 1 April 2021) <<https://thefinancialexpress.com.bd/national/12th-parliament-session-begins-1617260826>> accessed 2 March 2022.
- 14 Staff Report, 'Parliament goes into 7<sup>th</sup> session Saturday', *Dhaka Tribune* (Dhaka: 17 April 2020) <<https://www.dhakatribune.com/bangladesh/parliament/2020/04/17/parliament-goes-into-session-on-saturday>> accessed 13 March 2022.
- 15 UNB, 'Mujib Borsha: Parliament goes into special session', *United News of Bangladesh* (Dhaka: 21 October 2020) <<https://unb.com.bd/category/Bangladesh/mujib-borsha-parliament-goes-into-special-session-nov-8/59294>> accessed 12 March 2022.
- 16 F. Khatun, 'How effective have stimulus packages been? And what more should be done?' *The Daily Star* (Dhaka: 28 December 2020) <<https://www.thedailystar.net/opinion/macro-mirror/news/how-effective-have-stimulus-packages-been-2018197>> accessed 7 March 2022.
- 17 Online Report, 'Govt approves 2 new stimulus packages of Tk 2,700 crore: Cottage, Small and medium enterprises to be benefited', *The Daily Star* (Dhaka: 17 January 2021) <<https://www.thedailystar.net/business/news/govt-approves-two-new-stimulus-packages-tk-2700-crore-2029281>> accessed 11 March 2022.
- 18 H. Rahman, (ed), 'Policy Measures of Bangladesh Bank in Response to the COVID-19 Pandemic', *Chief Economist's Unit of Bangladesh Bank* (Dhaka: January 2021) <[https://www.bb.org.bd/pub/special/covid19\\_policymeasures.pdf](https://www.bb.org.bd/pub/special/covid19_policymeasures.pdf)> accessed 7 March 2022.
- 19 Standard Report, 'Tk568,000cr budget for 2020-21 FY passed', *The Business Standard* (Dhaka: 30 June 2020) <<https://www.tbsnews.net/economy/budget/parliament-passes-budget-2020-21-fy-99934>> accessed 21 March 2022.
- 20 C. Roy, 'Budget Session Review: Parliament In The Pandemic, Where Is The Scrutiny?', *Bloomberg Quint* (27 March 2021) <<https://www.bloomberquint.com/opinion/budget-session-review-parliament-in-the-pandemic-where-is-the-scrutiny>> accessed 13 March 2022.
- 21 Online Report (n 9).
- 22 M. Murshed, 'Virtual Courts in Bangladesh: Prospects and challenges', *The Daily Star, Law and Our Rights* (Dhaka: 18 May 2020) <<https://www.thedailystar.net/law-our-rights/news/virtual-courts-bangladesh-prospects-and-challenges-1903678>> accessed 23 March 2022.
- 23 Online Report, 'Ordinance passed allowing courts to function digitally', *The Daily Star* (Dhaka: 9 May 2020) <<https://www.thedailystar.net/country/news/ordinance-passed-allowing-courts-function-digitally-1901107>> accessed 14 March 2022.
- 24 Taqbir Huda, 'Virtual courts and the future of justice', *The Daily Star* (Dhaka: 21 May 2020) <<https://www.thedailystar.net/opinion/news/virtual-courts-and-the-future-justice-1904500>> accessed 28 March 2022.
- 25 Mohammad Iqbal Hasan and Badsha Mia, 'Initiation of Virtual Court System during COVID-19 Pandemic and E-Judiciary: Challenges and Way Forward', (2021) 1(1) *Journal of Humanities and Social Sciences Innovation* 8.
- 26 TBS Report, 'Stop killing dolphins in Halda, High Court orders in first virtual hearing', *The Business Standard* (Dhaka: 12 May 2020) <<https://www.tbsnews.net/bangladesh/court/stop-killing-dolphins-halda-high-court-orders-first-virtual-hearing-80416>> accessed 18 March 2022.
- 27 Hasan and Mia (n 25).
- 28 Staff Correspondence, 'Prothom Alo reporter Rozina Islam's family to file 'harassment' case', *Bdnews24.com* (Dhaka: 18 May 2021) <<https://bdnews24.com/bangladesh/2021/05/18/prothom-alo-reporter-rozina-islam-s-family-to-file-harassment-case>> accessed 15 March 2022.
- 29 Manzur H Maswood, 'COVID-19 exposes deep-rooted corruption in Bangladesh health sector in six months New Age Bangladesh', *The Daily New Age* (Dhaka: 7 September 2020) <<https://www.newagebd.net/article/115657/covid-19-exposes-deep-rooted-corruption-in-bangladesh-health-sector-in-six-months>> accessed 20 March 2022.
- 30 Online Report, 'Corruption allegation against EC: 42 eminent citizens urge President to constitute Supreme Judicial Council', *The Daily Star* (Dhaka: 19 Deember 2020) <<https://www.thedailystar.net/country/news/42-eminant-citizens-urge-president-constitute-supreme-judicial-council-probe-corruption-allegations-2013881>> accessed 21 March 2022.
- 31 Online Report, '42 eminent citizens' allegations against Election Commission baseless, motivated: CEC', *The Daily Star* (Dhaka: 24 December 2020) <<https://www.thedailystar.net/country/news/42-eminant-citizens-allegations-against-election-commission-baseless-motivated-cec-2016673>> accessed 18 March 2022.
- 32 Staff Correspondent, 'Raintree rape verdict: Judge Kamrunnahar stripped of judicial power', *Banglanews24.com* (Dhaka: 14 November 2021) <<https://www.banglanews24.com/english/national/news/bd/92295.details>> accessed 15 April 2022.
- 33 Staff Correspondent, 'The ACC does not have power to freeze bank account and seize property', *Barta24.com* (Dhaka: 26 August 2021) <<https://barta24.com/details/national-en/134382/the-acc-does-not-have-power-to-freeze-bank-account-and-seize-property>> accessed 20 March 2022.
- 34 *Md Ahsan Habib v. Bangladesh*, High Court Division of Bangladesh Supreme Court Writ Peition No 1046/2021, Full text Judgement <[http://supremecourt.gov.bd/resources/documents/1823009\\_Writ\\_Petition\\_1046\\_of\\_2021.pdf](http://supremecourt.gov.bd/resources/documents/1823009_Writ_Petition_1046_of_2021.pdf)> accessed 15 March 2022.
- 35 Staff Correspondent, 'No VAT from private univs: HC tells govt authorities', *The Daily Observer* (Dhaka: 21 September 2021) <<https://www.observerbd.com/details.php?id=332072>> accessed 15 March 2022.
- 36 Ashif Islam Shaon, 'SC stays HC verdict declaring 15% tax on pvt universities illegal', *Dhaka Tribune* (Dhaka: 7 September 2016) <<https://archive.dhakatribune.com/bangladesh/2016/09/07/sc-stays-hc-verdict-declaring-15-tax-pvt-universities-illegal>> accessed 15 March 2022.
- 37 Online Report, 'Writ petition seeks HC directive to stop use of Tiktok, Bigo, Likee' *The Daily Star* (Dhaka: 30 December 2020) <<https://www.thedailystar.net/high-court-directive-stop-use-tiktok-bigo-likee-2019665>> accessed 15 March 2022.
- 38 Digital Report, 'Introduce biometric data management in jails to identify prisoners: High Court' *The Daily Star* (Dhaka: 28 June 2021) <<https://www.thedailystar.net/news/bangladesh/crime-justice/news/introduce-biometric-data-management-jails-identify-prisoners-high-court-2119825>> accessed 15 March 2022.
- 39 B. Ridard and A. Fourmont, 'Parliamentary Oversight in the Health Crisis' 558 (2020) *European Issues*. <<https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-558-en.pdf>> accessed 18 March 2022.
- 40 Independent Review of Bangladesh Development (IRBD), 'An Analysis of the National Budget for FY2020-21', *Center for Policy Dialogue (CPD)* (Dhaka: 12 June 2020) <<https://cpd.org.bd/wp-content/uploads/2020/06/CPD-Budget-Analysis-FY2021.pdf>> accessed 21 March 2022.



# Belgium

Luc Lavrysen

President of the Belgian Constitutional Court and Professor Emeritus at Ghent University

Jan Theunis

Associate Professor at Hasselt University and Law Clerk at the Belgian Constitutional Court

Jurgen Goossens

Full Professor at Utrecht University

Toon Moonen

Assistant Professor at Ghent University

Sien Devriendt

Assistant Professor at Open University Heerlen

Benjamin Meeusen

Ph.D. Researcher at Ghent University

Viviane Meerschaert

Legal Officer at the Belgian Constitutional Court

## I. INTRODUCTION

In this contribution, we firstly address the discussions on and the adoption of the so-called ‘Pandemic Act’. It raised important questions about the relation between the Parliament and the Government in the Belgian parliamentary system. Next, the article provides an overview of the main cases of the Belgian Constitutional Court over the past year that may be of interest to an international audience. Those concern management of the COVID-19 pandemic, labor issues, protection of privacy and personal data, freedom of religion, and freedom of speech. Finally, we look ahead to several interesting pending cases, as well as to evolutions in the composition of the Constitutional Court.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In our 2020 Overview, we already addressed several aspects regarding the management

of the COVID-19 pandemic. Among others, we observed that constitutional scholars criticized the approach of the federal government to combat the pandemic mainly through ministerial decrees.<sup>1</sup> The government mostly relied on the Civil Security Act of 2007 as the legal basis of the corona measures, which grants powers to the Minister of the Interior to take protective measures in case of *acute and temporary emergencies* (such as fires, explosions, or the release of radioactive materials). Even though the general assembly of the Administrative Litigation Section of the Council of State<sup>2</sup> stated that the protection of civil security in the meaning of the 2007 Act can also include catastrophes like virus infections, the Minister of the Interior Verlinden announced at the beginning of 2021 to submit a draft Pandemic Act to parliament in response to the growing criticism. This finally resulted in the Federal Act of August 14, 2021, on administrative police measures during an epidemic emergency (Pandemic Act). The *Pandemic Act* introduces a uniform

legal framework for administrative police measures in case of an ‘epidemic emergency’, such as the current COVID-19 pandemic. Article 2, 3° of the Act contains a comprehensive definition of ‘*epidemic emergency*’. This emergency must be based on an (objective) risk analysis and can only be declared after consultation of the Council of Ministers and advice from the Minister of Health. It can be declared by the federal government via Royal Decree for a limited and strictly necessary period, and for a maximum of 3 months. It can be extended by a new Royal Decree for another 3 months after a new risk analysis and new advice.

Following strong criticism from experts and advice of the Legislative Division of the Council of State (n° 68.936/AV), the Act from now on clearly states that *administrative police measures* necessary to prevent or limit the consequences of the emergency for public health should be taken by a *Royal Decree* and are thus a collective decision of the government (i.e., no longer by ministerial decree).<sup>3</sup> Such a Decree must first be submitted for consultation to the Council of Ministers and the bodies competent for crisis management that also involve the necessary experts in the field of fundamental rights, economy and mental health. Moreover, if the measures have a direct impact on policy areas that fall within the powers of the federated states, the federal government is required to consult with them in advance to discuss the consequences of these measures for their policy areas, unless in case of urgency. The Royal Decree has immediate effect but must be *ratified by law* within a period of 15 days from its entry into force.

Nonetheless, in case of *imminent danger* the Minister of the Interior can exercise these powers alone and take all necessary administrative police measures that “do not tolerate any delay”. These measures must be submitted to the Council of Ministers for consultation. Moreover, in the event local circumstances require so, the governors and mayors can take – in accordance with possible instructions of the Minister of the Interior – measures applicable to their own territory that are stricter than the Royal or Ministerial Decrees.

The *administrative police measures* can only have effect for the future and for a period of maximum 3 months, which can be extended each time by a maximum of 3 months and only insofar as the emergency is declared or sustained. Besides this limitation in time, the measures must be necessary, appropriate, and proportionate to the intended purpose. Article 5 of the Pandemic Act provides a list of 8 possible categories of measures that can be taken. On October 28, 2021, 2 Royal Decrees were published, which entered into force immediately. The first one declared the epidemic emergency and the second one contained corona measures to further combat the COVID-19 pandemic. Hitherto, a first extension has also been ratified by Parliament, so that the epidemic emergency for now lasts until April 28, 2022, at the latest.

### III. CONSTITUTIONAL CASES

In 2021, the Constitutional Court delivered 193 judgments and handled 246 cases in total. Regarding the nature of the complaints, conflicts of competencies between the federated entities and the federal state only represent 4% of the judgments in 2021. The majority of cases concern infringements of fundamental rights. In 2021, the principle of equality and non-discrimination was still the most invoked principle before the Court (46%), followed by review of compliance with the right to private and family life (7%), socio-economic rights (7%), guarantees in taxation matters (7%), property rights (5%), the principle of legality in criminal matters (5%), jurisdictional warranties (4%), the principle of legality in criminal matters (3%), the freedom of religion and freedom to hold opinions (3%), the rights of the child (2%), and the freedom and equality in education (2%).

References were made to the jurisprudence of the ECtHR in 57 cases. Moreover, the jurisprudence of the CJEU is also regularly reflected in the judgments of the Constitutional Court, with references to this case law in 38 cases. References to other sources of international law can be found in 44 cases.

Last year, the Court referred 1 case for preliminary ruling to the CJEU.

#### 1. Management of the COVID-19 pandemic

As has been indicated in our 2020 Overview, the pandemic in Belgium is mainly managed through executive regulations from the federal, regional and community governments. This has given rise to many cases before the Council of State and the ordinary judiciary, as well as important opinions of the Legislative section of the Council of State, in which constitutional issues were decided.<sup>4</sup> Some of the measures to combat COVID-19 have however been adopted by Acts of the federal, regional and community parliaments and have been challenged directly before the Constitutional Court. Some of those cases have been decided in 2021, others are pending.

With its judgment n° 32/2021, the Court suspended Article 46 of the federal Act of December 20, 2020, containing various temporary and structural provisions on justice in the context of the fight against the spread of COVID-19. Six detainees requested the Court to suspend and annul the provision under which the Chamber for the Protection of Society of the Criminal Enforcement Court, for an extendable period, was no longer under an obligation to hear the detainee in person, but only his lawyer and the public prosecutor. The Court ruled that internment, as a specific method of detention, requires that the judge who decides on the continuation or the modalities of the internment, personally ascertains the condition of the internee. In its judgment n° 76/2021 the Court subsequently also annulled that provision for violation of the Articles 10 and 11 of the Constitution, read in conjunction with Article 5 (4) of the ECHR. In doing so, the Court expressly relies on case law of the ECtHR, according to which special procedural guarantees may be necessary in the event of detention based on mental illness. While measures involving reduced physical contact can legitimately be imposed to protect public health, the suspension of the right of the detainee to be heard in person is not necessary for that objective. Hence, the Court found that there was a lack of consideration of less restrictive alternatives (such as videoconferencing).

In its judgment n° 56/2021 the Court dismissed the application against a federal Act

of November 6, 2020, that allows other persons than nurses to perform nursing activities under certain conditions in the context of the COVID-19 pandemic. Neither the principle of equality nor the fundamental right to health protection were violated. The Court found that the contested Act imposed various cumulative conditions for non-nurses to perform nursing activities (shortage of nurses, complexity of the activities, supervision of a coordinating nurse...), so that there was a justified difference in treatment of both categories of staff. The contested Act aimed to relieve the overburdened healthcare staff temporarily and imposed strict conditions. The Court concluded from this that the contested Act did not reduce the level of protection of the right to health protection, but on the contrary protected that right.

By its judgments nos. 88/2021 and 89/2021 the Court rejected the demand to suspend the Flemish Act introducing contact tracing and quarantine and isolation obligations in the context of COVID-19. A number of individuals requested the suspension of the mandatory temporary seclusion which was imposed in case of contamination or high-risk contacts, and the associated monitoring and sanctions. The Court inferred from the case law of the ECtHR that the classification of a freedom-restricting measure as a restriction on freedom of movement or as a deprivation of liberty depended on various factors, which were always to be examined in concrete terms. The Court concluded that compulsory seclusion, despite its drastic nature and possible criminal sanctions in case of violation, was a restriction on freedom of movement within the meaning of Article 2 of the Fourth Additional Protocol and not a deprivation of liberty within the meaning of Article 5(1) of the ECHR.

## *2. Port labor: protection of dock workers*

The Court of Cassation asked the Constitutional Court to rule on the constitutionality of the obligation for employers in port areas to call on recognized dockers for activities which, strictly speaking, were unrelated to the loading and unloading of ships and could also be carried out outside the port areas. Before ruling on that question,

the Constitutional Court asked the CJEU whether the national system of recognized port labor infringed the freedom of establishment or the free movement of services (see our 2019 Overview). In its decision of 2021<sup>5</sup>, the Court of Justice held that a law which reserves port activities to recognized dockers may be compatible with EU law if its objective is to ensure safety in port areas and prevent accidents at work. Taking that ruling into account, the Constitutional Court in its judgment n° 168/2021 examined the activity in dispute at the origin of the question: the preparation of trailers on a quay for shipment using a vehicle specifically designed for the purpose (a ‘tug master’). According to the Court, the extent of the risks involved was not significantly different from the risks involved in loading and unloading ships in the strict sense. The obligation to have recourse only to recognized dockers was motivated precisely by the need to ensure safety in port areas and to prevent accidents at work. Therefore, it was not considered discriminatory that the obligation to use recognized dockers should apply to both types of port activities.

## *3. Protection of privacy and personal data*

In its judgment n° 2/2021, the Constitutional Court assessed the constitutionality of a federal Act of November 25, 2018, that imposed the integration of a digital fingerprint image into identity cards. That image could subsequently be consulted by several government agencies, including police and border authorities. Several applicants questioned the compatibility of this measure with the right to private life and the protection of personal data, including the rights provided under the GDPR. The Court found the aim of the Act, which was to combat identity fraud, legitimate and concluded that the measure was relevant, even if digital fingerprints could not completely rule out identity fraud. Concerning proportionality, inclusion of digital fingerprints on identity cards required stricter scrutiny than was needed with regard to passports, as the former are mandatory documents and are used daily. Nevertheless, according to the Court, taking fingerprints was not an intimate matter and did not cause physical or psychological discomfort. More-

over, the Act did not create a central register of digital fingerprints. Whereas their temporary storage during the production process could create a risk of identity theft, the Act required the executive branch to take sufficient security measures. Finally, the Court was satisfied that the authorities permitted to read the digital fingerprints were not allowed to store them either.

Still in the context of the protection of the right to privacy, the Court in its judgment n° 52/2021 examined an Act that limited the professional secrecy of participants in a newly established form of local security bodies aimed at preventing terrorist crimes. The establishment of those bodies, which performed a consultation function, was a result of the 2016 terror attacks in Brussels. Upon invitation by the mayor, personnel of local services (such as schools, hospitals or welfare) could be invited. Participants held by professional secrecy were not required to adhere to that obligation in the context of those meetings. The Court did not consider that situation unconstitutional. It argued that participation in such a meeting was voluntary, as was disclosing information. Moreover, the participants in the meeting were themselves required to observe professional secrecy with regard to the information they obtained. Also, the information shared was not registered in a database. Finally, given the diversity of local situations, it was reasonable to leave it to the mayor to decide who to invite precisely.

In its judgment n° 57/2021, the Constitutional Court investigated the Act of May 29, 2016, concerning the collection and retention of data in the sector of electronic communications (Data Retention Act), which provided for the general and undifferentiated collection and storage of data by network providers. In a prior judgment of 2018 (n° 96/2018), the Court, by means of a preliminary question, inquired with the CJEU whether this requirement was in accordance with the directive on privacy and electronic communications, read in light of the Charter of Fundamental Rights. In the decision following that request (*La Quadrature du Net* e.a.; 6 October 2020; C-511/18, C-512/18 and C520/18), the CJEU ruled that

EU law does preclude legislative measures that provide for the preventive, general and undifferentiated retention of traffic and location data, except in limited circumstances. More specifically, the preventive and general collection of data is only allowed for a period no longer than strictly necessary and with the aim to prevent serious crimes or for the protection of public safety. Since the legislator pursued more general aims than the ones indicated by the CJEU, the Constitutional Court in its final judgment concluded that the Data Retention Act violated EU law.

#### 4. Freedom of religion

Legislative Acts of the Walloon and Flemish regions prohibit the slaughter of animals without prior (reversible) stunning, to meet animal welfare standards. The lack of religious exemptions was challenged before the Constitutional Court by Jewish and Muslim litigants. At the request of the Constitutional Court in its judgment n° 53/2019, the CJEU ruled that Regulation 1099/2009 (which protects animal welfare at the time of killing but permits religious exemptions to the prior stunning requirement) authorizes the Member States to adopt stricter national rules on animal welfare in relation to religious slaughtering. Thus, a Flemish<sup>6</sup> ban on non-stun religious slaughter is valid. In its ensuing proceedings, judgments nos. 117/2021 and 118/2021, the Constitutional Court followed the CJEU. The Constitutional Court argued that the Acts were compatible with EU Regulation 1099/2009. The Court further held that the Acts were constitutional, provided that the legislators (in order for a State to fulfil its ‘duty of neutrality and impartiality’) refrained from judging on the content of methods of slaughtering animals prescribed by religious rites. The Court found that the Acts did not violate the right to freedom of religion. It stated that promoting animal welfare was a legitimate objective of general interest. Furthermore, the Court held that the Acts struck a fair balance between animal welfare and the freedom to manifest one’s religion. The Court concluded that the alternative stunning procedure was proportionate. It also emphasized that the Acts resonated with the wider sensitivity for animal welfare. Furthermore, the Court held that the

Acts did not infringe the right to work and to the free choice of occupation, the freedom to conduct a business and the free movement of goods and services. It underlined the possibility to import *kosher* and *halal* meat without prior stunning from abroad. The Court also did not consider the Acts to be discriminatory, finding that ritual slaughtering is not comparable to the killing of animals for hunting and fishing.

#### 5. Freedom of speech

The Act of January 24, 1977, concerning the health protection of consumers regarding food and other products, included a ban on tobacco product advertising, except that point-of-sale tobacco *brand* advertising was exempt from that requirement. An Act of March 25, 2020 (in effect since January 1, 2021), abrogated that exemption. The petitioner (a tobacco company) submitted an application for annulment of the 2020 Act. In its judgment n° 183/2021, the Constitutional Court upheld the regulation, as it did not violate constitutional rights (e.g., the right to freedom of expression, the right to property, the freedom of enterprise and the principle of equality and non-discrimination). In that context, the Court held that exposure to point-of-sale tobacco promotion elicited cravings and inhibited quitting. Especially adolescents may be vulnerable to exposure to tobacco advertisements. As such, the 2020 Act aimed to protect public health and was justified. The Court underlined that the prohibition therefore applied to all retail outlets that sold combustible or non-combustible tobacco products or tobacco-free alternative products. The Court’s justification for equal treatment lied in the harmful effects of those products.

In its judgment n° 4/2021, the Constitutional Court rejected an application for annulment of Article 115 of the Act of May 5, 2019, that amended Article 20 of the Act of July 30, 1981, concerning criminalization of offences motivated by racism or xenophobia. This provision criminalizes anyone that denies, grossly minimizes, approves, or justifies acts constituting genocide or crimes against humanity and war crimes. This provision also protects the right of

privacy, as stipulated in Article 8 of the ECHR, which includes the right of preservation of identity. The Court considered this provision also from the perspective of Article 10 of the ECHR and Article 19 of the Belgian Constitution, which both protect the right to freedom of expression. If the right of privacy and the right to freedom of expression are at odds with each other, a fair balance must be struck between those fundamental rights to resolve any potential conflict. The reservation that it will make punishable crimes referred to in the provision, only if these crimes relate to genocides that have been established by final decision of an international court, allowed, so the Court argued, to determine when a particular event can be legally described as a negationist statement.

In its judgment n° 157/2021, the Constitutional Court investigated whether the Act of April 6, 1847, concerning the criminal punishment for insulting the King, violated the Constitution. This judgment was rendered in response to a preliminary question concerning the execution of a European arrest warrant. The warrant, which demanded the extradition of a Spanish citizen who was convicted for insulting the Spanish Crown, could only be executed if the facts supporting that conviction were also punishable under Belgian criminal law. While the 1847 Act indeed provided for criminal sanctions for insulting the King, the defendant argued that it should not be applied, as he believed it violated the right to freedom of speech. The Constitutional Court confirmed that this was the case. The Act did not meet a compelling interest and was disproportionate to the aim of protecting the reputation of the head of state. The Court ruled that the penalty of imprisonment (6 months to 3 years) was contrary to the right to freedom of speech, since it could be imposed for opinions expressed in the context of a political debate or debates on matters of public interest. Furthermore, the Court criticized the fact that the reputation of the King was more broadly protected than that of other persons, as the offence had a broader scope than similar crimes of general application and did not require malicious intent.

## IV. LOOKING AHEAD

On January 1, 2022, 246 cases were pending before the Constitutional Court. Some of these cases are of interest to an international audience. In a case directed against the Federal Act of December 25, 2016, concerning the processing of passenger data that imposes an obligation on carriers and travel operators to transfer PNR data and transposes various EU Directives, the Court by its judgment of 2019 (n° 135/2019) referred some questions on the interpretation and the validity of different EU Law provisions dealing with that matter to the CJEU. AG Pitruzzella has delivered its opinion early 2022<sup>7</sup>, so that a CJEU judgment may be expected during 2022. In a case concerning legislation on the administrative cooperation in the field of taxation, which provides for mandatory automatic exchange of information on cross-border constructions, the Court referred by its judgment of 2020 (n° 167/2020) the question to the CJEU asking whether the implemented Directive infringes the right to a fair trial and the right to respect for private life.<sup>8</sup> Other pending cases concern the relaxation of the legislation on euthanasia, the management of the COVID-19 pandemic, including the Pandemic Act, obligations concerning tax information of Airbnb platforms, restrictions of Uber services and the compatibility with the active and passive freedom of education and the rights of the child to quality education of the new educational objectives in the Flemish Community.

The renewal of the composition of the Constitutional Court is going ahead. By Royal Decree of June 22, 2021, Sabine de Bethune, a former speaker of the Senate, has been appointed as Judge replacing retiring Judge Trees Merckx-Van Goey, while Emmanuelle Bribosia, a European Law Professor at the *Université Libre de Bruxelles* (ULB), has been appointed by Royal Decree of October 29, 2021, to replace Francophone President Daoût, who retired upon reaching the mandatory retirement age of seventy. His peers have elected Pierre Nihoul as French-speaking president from mid-September onwards. In 2022, there will be 2 vacancies, due to the retirement of Judge Riet Leysen in March and Judge Jean-Paul Moerman in August.

As the Covid-19 waves seem to be winding down slightly, the Court is preparing for the wave of applications directed against the pandemic legislation. We will report further on this in our 2022 Overview, as well as on the large-scale citizens' enquiry into institutional reform and democratic innovation that is currently in preparation.

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

2 E.g., judgments nos. 248.818 and 248.819 of October 30, 2020

3 Article 108 of the Constitution states that regulatory powers should be exercised by Royal Decree.

4 J. Velaers, "Constitutionele lessen uit de COVID-19-crisis", *Tijdschrift voor Bestuurswetenschappen & Publiekrecht* (2021), 532-552.

5 Joined cases C407/19 and C471/19.

6 The legislative Act of the Walloon region was not subject of the case before the CJEU.

7 Case C-817/19, "Ligue des droits humains", ECLI:EU:C:2022:65.

8 Case C-694/20, "Orde van Vlaamse Balies and Others".



# Bolivia

Cristina Pazmiño

Lawyer

Law clerk/ Constitutional Court of Ecuador

## I. INTRODUCTION

Without any doubt, the constitutional development of Bolivia is intimately related to its political and social context. The Bolivian Constituent Assembly (2006-2007) drafted the actual Constitution (2009) which meant to solve the problems of social inequality, exclusion and aimed for a change. It recognized a huge catalog of rights as well as the indigenous justice systems and incorporated many social improvements. However, as indicated, the experience has shown that politics play a major role in Bolivia even over its Constitution and 2021 has not been an exception.

In 2021, Bolivia continued facing the effects of the pandemic. In fact, the country experienced a third wave of Covid-19 infections, which caused the collapse of the public health system. Yet, this was overshadowed by Bolivia's structural problems related to corruption, the lack of judicial independence and transparency, as well as the aftermath of the crisis caused by the 2019 Bolivian general elections, all of which, certainly, traced the judicial and political panorama of 2021.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

This section will provide a brief overview of the 2019 Bolivian general elections as they had judicial and constitutional consequences in 2021 that will be discussed. Secondly, it will deliver an outline on how the Plurinational Constitutional Court handled controversial cases in the year under analysis.

Gender violence also played a key role in the judicial context of Bolivia in 2021 so it will also be discussed in this section.

### I. The general elections in 2019

During the 2019 Bolivian general elections, the opposition accused the ruling party of fraud because the unofficial transmission of the count was interrupted. Until that moment, the results showed that although the candidate for the ruling party, *Movimiento al Socialismo – Instrumento Político por la Soberanía de los Pueblos* (“MAS-IPSP” or “MAS”), Evo Morales, led the vote, he did not reach the necessary difference to avoid a second electoral round with the opposition candidate, Carlos Mesa. Despite this, the Supreme Electoral Tribunal of Bolivia declared the victory of Morales in one round.

The Organization of American States (“OAS”) issued a preliminary report<sup>1</sup> that stated that there were irregularities in the electoral process. After that, on a final report<sup>2</sup>, OAS concluded that “*the findings detailed also reveal the bias of the electoral authority*”. The claims of fraud from the opposition increased, society became more polarized, and violence escalated around the country.

Amidst this crisis, the commander of the Armed Forces, as well as the Bolivian police chief, suggested President Morales should take a step aside to unblock the political crisis. On November 10, 2019, President Evo Morales and Vice President Álvaro García Linera resigned from their positions. This decision later led to the resignation of the leading heads of the State's Legislature: the

presidents and vice presidents of the Senate and the Chamber of Deputies, thus, leaving a vacuum of power. Days later, the Second Vice president of the Senate Jeanine Áñez assumed the interim presidency of Bolivia. In February 2020, an article published in the Washington Post questioned the alleged fraud of 2019 based on a statistical analysis made by researchers of the Massachusetts Institute of Technology whose work was commissioned by the Center for Economic and Policy Research<sup>3</sup>.

General elections were held again in October 2020 and MAS returned to power. With the ruling party again in the government, political and judicial actions were taken against the people accused of the so-called 2019 coup. In March 2021, pretrial detention was ordered for former Senator Jeanine Áñez. The former President was accused of sedition, terrorism, and conspiracy in the case called “Golpe de Estado” by the State Prosecutor’s Office. The arrest of former ministers of the State’s portfolio in 2019 was also ordered. The European Parliament and international human rights organizations questioned the impartiality of the legal proceedings due to the interest of the government and the charge of terrorism against Áñez<sup>4</sup>. Likewise, the use of pretrial detention against the former President has been condemned as it has been considered abusive and a violation of human rights. According to Bolivian law, pretrial detention cannot last more than six months, however, in August 2021, a judge ordered Jeanine Áñez’s pretrial detention to be extended for another six months.

## 2. The Plurinational Constitutional Court

The 2009 Constitution created the Plurinational Constitutional Court as the country’s highest judicial tribunal. The Court has nine judges who are elected through general elections for a period of six years. Since its creation to date, the Tribunal has not been able to achieve legitimacy and the main reason is that its decisions have been controversial because they play a key role in legitimizing the acts of power. Also, the independence of the Tribunal is put into question because of its close relationship with the Executive.

For instance, in 2016, Bolivia held a constitutional referendum that proposed constitutional amendments that allowed President Morales to run for a third consecutive term. The elections concluded with the rejection of a fourth term. However, the ruling party in an unexpected movement used the justice system to inquire about the possibility of reelection, consequently, filed an unconstitutionality lawsuit against many articles of the Electoral Regime Law that stated that reelection could only be possible for once as indicated in the Bolivian Constitution. In 2017, through Judgment 0084/2017, the Plurinational Constitutional Court declared the unconstitutionality of many articles of the Electoral Regime Law. According to the Tribunal, although the electoral law and the Constitution did not have incompatibilities between them, the article 23 of the American Convention on Human Rights was more “favorable” to political rights; hence, the Court opened the door for indefinite reelection. This decision helped current president Evo Morales to run for another term.

The few constitutional judges who have questioned the government or decided against its interests have been subject of removal proceedings and political persecution. In 2014, a claim of unconstitutionality was filed against several articles of the Law of Plurinational Notaries for allowing the interference of the Executive<sup>5</sup>. The lawsuit was admitted by constitutional judges Soraida Cháñez, Ligia Velásquez and Gualberto Cusi. The Chamber of Deputies and the Chamber of the Senate initiated criminal sanctions and the dismissal for prevarication and breach of duties against the judges. The senators and deputies accused them of having created a “legislative vacuum”. Velásquez resigned from her position while Cháñez and Cusi were sanctioned with dismissal. During the process, public opinion condemned the systematic persecution of Gualberto Cusi, who had previously disapproved the reelection of Evo Morales and had openly expressed concerns about the interference of the Executive in the Plurinational Constitutional Court. The government violated Cusi’s rights to intimacy and privacy because Health Minister Juan Carlos Calvimontes revealed, in a press conference, the private health details, includ-

ing the specific disease, that the magistrate suffered.

Moreover, the Court’s behavior has also changed according to the political moment as could be seen after Judgment 0052/2021. As established in the previous section, the 2019 Bolivian general elections divided public opinion and caused a vacuum of power after the resignation of the elected authorities. Minutes after the Second Vice President of the Senate Jeanine Áñez proclaimed herself President, the Court issued a statement which indicated that according to Judgment 0003/01 presidential succession operates immediately. In that sense, due to the serious situation in the country, the Tribunal endorsed the presidential succession. However, after the return to power of the ruling party in 2021, with Judgment 0052/2021, the Court changed its criteria and made clarifications that contradict the statement issued in 2019.

Many jurists as well as public opinion claimed that the lack of consistency of the Court’s reasoning regarding its own precedents caused legal insecurity; however, it is not the only setback regarding the behavior of the Court. Another aspect that complicates its legitimacy and puts into question its independence is related to the lack of processing speed of controversial causes. Often, courts are accused of not solving pending cases in a reasonable time or delaying its decision on purpose and the Plurinational Constitutional Court has not been an exception. However, there are also allegations that the Court changes the dates of its decisions and delays its notification to the parties. For instance, a group of jurists filed an annulment claim against judgment 0084/2017 in which indefinite reelection was allowed on the grounds that the Judgment affected human and constitutional rights<sup>6</sup>. Despite the insistence for an answer, the Court remained silent. For this reason, in October 2020, the jurists filed an amparo action, a judicial mean for protection, in which they alleged the violation of their rights due to the lack of response from the Court. One day before the amparo hearing, on April 20, 2021, the inadmissibility of the annulment lawsuit filed in 2019 against Judgment 0084/2017 was notified. Consequently, the Court denied the amparo,

considering that the decision had indeed obtained a response. The Court argued that the inadmissibility was resolved on December 24, 2019, with number AC 126/2019-CA/S. However, it was criticized that it was notified on April 20, 2021, just one day before the amparo hearing. Because of this, the jurists filled a complaint appeal, but it was denied by the Court.

### 3. Gender violence

Violence against women is one of the most serious problems in Bolivia. Even though there is a legal framework that protects women such as Law 348, more cases of domestic violence, sexual abuse, and femicide are reported every year. The Specialized Prosecutor's Office for Gender-Based Crimes reported that in 2021 there were about 2,541 cases of sexual abuse, 2,138 cases of rape, and 2,007 cases of child and adolescent rape. Also, during this year, 108 cases of femicides and 46 infanticides were registered. Consequently, the government announced that structural measures would be taken in 2022 and it would be a year of "Cultural Revolution for Depatriarchalization" so as to achieve a life free of violence against women.

The judicial handling of cases of gender violence is seen as one of the main challenges to solve the problem. Wilma Flores denounced her ex-partner Marcelino Martínez twice for domestic violence and serious and minor injuries and requested a restraining order. Martínez, who already had a history of violence, was arrested, however, he was released by Prosecutor Gerardo Balderas. Later, Martínez murdered Wilma Flores. This case caused outrage and a commission of the Chamber of Deputies requested the immediate dismissal of the prosecutor for having released Martínez. But this was not the only case in which the handling of gender violence cases by the authorities was questioned.

In 2021, a judge of the Sala Penal Primera de Cochabamba revoked the pretrial detention of a member of a gang called "Wander Rap" who was accused of the femicide and gang rape of 16-year-old María del Carmen Carvallo Reyes in 2016. Following the de-

cision, the mother of the victim proposed an amparo action and the Sala Constitucional Primera del Tribunal Departamental de Justicia de Cochabamba annulled the decision. However, by then, the defendant was already a fugitive from justice. The Sala Constitucional recalled that the judicial authority must apply a gender perspective in its analysis and decision, according to Bolivian legislation and specifically, according to the Protocol to judge with a gender perspective developed by the Supreme Court of Justice, Ministry of Justice and Institutional Transparency, the Gender Committee of the Judicial Branch, and the Mission of the Office of the United Nations High Commissioner for Human Rights. Likewise, the Sala Constitucional stressed that the judge's decision lacked motivation. Subsequently, the judge was accused by the Prosecutor's Office of prevarication and breach of duty.

## III. CONSTITUTIONAL CASES

### 1. *The unconstitutionality of trials in absentia: ¿A lost judgment?*

On March 11, 2021, through ruling 0012/2021, the Plurinational Constitutional Court resolved an unconstitutionality lawsuit filed in 2019. The decision declared the unconstitutionality of articles 91 BIS and 344 BIS of the Code of Criminal Procedure, which were incorporated by article 36 of Law No. 004. The articles declared unconstitutional referred to the trial in absentia in cases related to corruption crimes. This judgment has important procedural implications for the judicial system because, as it is no longer possible to judge a person in his or her absence, those accused of corruption must be extradited to guarantee their rights.

This case was surrounded by much controversy because of the legal insecurity created by the declarations of the authorities and how the case was handled. Hence, public opinion, as well as the media, referred to the Judgment as "the ghost sentence" ("la sentencia fantasma") or the "lost judgment". On March 25, 2021, Justice Minister Iván Lima criticized Judgment 0012/2021 in the media because extradition would be necessary to

continue the trial in cases of corruption. He said that it was "no good news", and that the constitutional decision had many implications on the pending cases.

Two months after the declarations of Lima, the President of the Plurinational Constitutional Court Paúl Franco denied the existence of the Judgment even though it had already been circulating and had the signature of six of the nine judges of the Court. According to Franco's statements, this was a preliminary version and would not be official until the interested parties were notified<sup>7</sup>. However, many argued that if the decision would only have an effect until the notification, then, the rights of those whose cases were pending will remain in legal indetermination<sup>8</sup>. Also, they insisted on the fact that the judgment was already available for the public.

In May 2021, Paúl Franco announced that the lawsuit filed in 2019 would be known again, despite the critics, that there was already a judgment over that case. Nonetheless, in September, Senator Andrea Barrientos of the opposition requested the TCP a report on the "lost judgment" 0012/2021. However, the Tribunal refused to offer an answer arguing its independence and autonomy. The Court indicated that it would provide information if the president of the Senate refers the queries.<sup>9</sup>

### 2. *Ipsa facto succession is not possible after the resignation of elected authorities*

Through Judgment 0052/2021<sup>10</sup>, the Plurinational Constitutional Court resolved an appeal for annulment proposed by former Deputy Margarita del Carmen Fernández Claire against former Deputy Susana Rivero Guzmán and former Deputy Simón Sergio Choque Siñani for having usurped functions in 2019 as Vice president and President of the Chamber of Deputies of Bolivia, respectively. The Judgment was preceded by the serious political situation that the country experienced after the tumultuous crisis of the 2019 general elections and was issued precisely at a time of high political tension.

Deputy Susana Rivero Guzmán (MAS), First Vice President of the Chamber of Deputies, announced through Twitter her

resignation from her position and did not perform her duties for six days in a row. Given this, Deputy Margarita del Carmen Fernández Claure, Second Vice President of the Chamber of Deputies, and member of the Unidad Democrática, an opposition party, requested the presidency of the Chamber by succession. However, on November 13, 2019, Susana Rivero issued the Comunicado SG 0010/2019-2020, through which she assumed the presidency of the Chamber of Deputies due to the resignation of Víctor Borda, the former president. Subsequently, Rivero issued a chamber resolution, Resolución Camaral 062/2019-2020, in which she assumed the power to elect the new presidency of the Chamber. In the early hours of November 14, 2019, Rivero swore in Deputy Simón Sergio Choque Siñani as President of the Chamber of Deputies.

On November 19, 2019, Deputy Fernández filed an appeal for annulment, an action contemplated in the Bolivian legal system against all acts that are issued without jurisdiction or competence, against Susana Rivero for having issued the Comunicado SG 0010/2019-2020 and Resolución Camaral 062/2019-2020 despite having resigned from her position, as well as against Simón Sergio Choque, for all their actions after November 12, 2019.

The Tribunal specified that, through Judgments SC 0748/2003-R of June 4, 2003, and SCP 1708/2013 of October 10, 2013, as well as in other judgments, that for the resignation of an elected authority to be valid, it must follow the formalities established in the Constitution and legislation. Also, the TCP highlighted that in the Judgment 1708/2013 the Court previously referred to the “Ley Contra el Acoso y Violencia Política Hacia las Mujeres” (Law Against Harassment and Political Violence Towards Women), according to which, female elected candidates must deliver the resignation to their candidacies or their positions, in the first place, to the Órgano Electoral Plurinacional, which is the electoral institution in Bolivia.

According to the TCP, any action that deviates from the conditions established for the termination of a mandate of elected authorities by resignation is considered a *de facto*

route. In this case, as said by the Reglamento General de la Cámara de Diputados, the regulation of the Chamber of Deputies, all resignations will only become effective after the discussion of the Chamber of Deputies in a plenary assembly. The deputies must decide the situation through a resolution and accept or reject the resignation. Consequently, the TCP considered that the resignation of Deputy Susana Rivero, through Twitter, was invalid because it did not fulfill the established requirements. Regarding the allegations of Deputy Margarita Fernández that Susana Rivero did not hold public office for six days in a row and, thus, incurred in a cause for cessation of mandate, the Court considered that the Ethics Commission of the Chamber of Deputies should have made a report, after which, the Assembly of Deputies had to decide about the cessation of mandate. The TCP stated that as Ethics Commission never submitted any report about former Deputy Susana Rivero, the Court could not make a statement about that allegation.

On the other hand, the TCP stressed that the *ipso facto* succession only operates from the presidency to the vice presidency of the Republic of Bolivia, as well as to the presidencies of the Chambers of Senators and Deputies because of the impediment to continue in functions or for the definitive absence of the person who is in office. As for the first vice and second presidency of the Chamber of Deputies, the Court stated that the deputies only replace temporarily and circumstantially their president or vice president when they are absent, but they do not take on that position. Therefore, Deputy Margarita del Carmen Fernández Claure never assumed the presidency of the Chamber of Deputies and, on the contrary, Susana Rivero issued the Comunicación SG 0010/2019-2020 and Resolución 062/2019-2020 in legitimate use of her attributions.

One of the controversial aspects around this Judgment is that the Plurinational Constitutional Court took nearly twenty-two months to resolve the appeal which was proposed in November 2019. In the same way, the Judgment was issued in a highly political context and made references that have implications for the current situation in Bolivia. In the

first place, it referred to the *ipso facto* presidential succession, despite not being part of the facts of the case or the allegations, precisely, when judicial proceedings are pending against Jeanine Áñez, who assumed the presidency *ipso facto* after the resignation of the elected authorities in 2019. In the same way, the Judgment was pronounced after the Prosecutor’s Office closed the case on the alleged electoral fraud in the 2019 elections in favor of Evo Morales and after the State Attorney, Wilfredo Chávez, who was previously a government minister of Bolivia between 2011 and 2012, announced that there was no electoral fraud in the 2019 elections after five days of reviewing the acts.

#### IV. LOOKING AHEAD

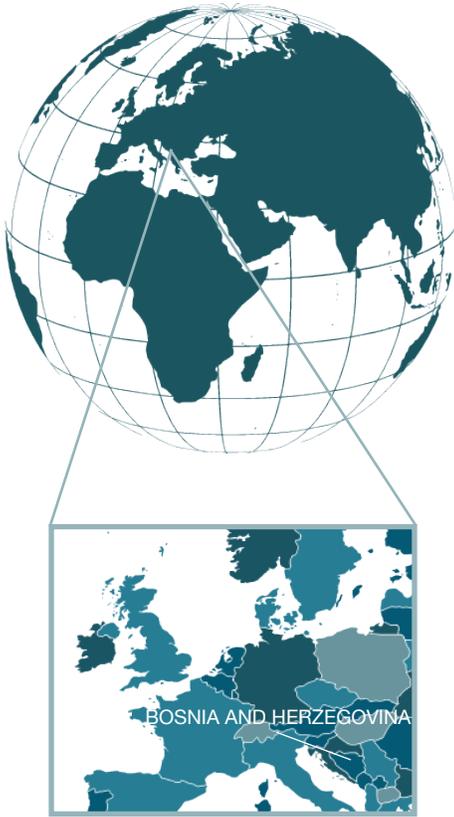
In 2022, political and judicial processes against the people accused of the so-called 2019 coup should continue. In this context, the greatest challenge for justice and for the authorities will be to guarantee judicial independence, as well as to respond to the call of international human rights organizations regarding due process and transparency and avoid political persecution. Meanwhile, the situation of the defendants who remain in pretrial detention is pending, including former President Jeanine Áñez.

On the other hand, there is expectation in this year for legislative and judicial measures that will be adopted to solve the structural problems related to gender violence, especially after the announcements of the government and the alarming violence rates.

#### V. FURTHER READING

Michael Vega, ‘The rule of law in jeopardy?: The constitutional judge against the Constitution and in favor of indefinite presidential reelection: Bolivian case’ (2021) 32 *Revista Boliviana de Derecho* <[https://www.revista-rbd.com/wp-content/uploads/2021/09/29.\\_Michael\\_Juan\\_Ram%C3%83%C2%B3n\\_Vega\\_pp.\\_862-899.pdf](https://www.revista-rbd.com/wp-content/uploads/2021/09/29._Michael_Juan_Ram%C3%83%C2%B3n_Vega_pp._862-899.pdf)> accessed 10 March 2022.

- 1 OAS. Electoral integrity analysis General Elections in the Plurinational State of Bolivia: Preliminary Findings. <<http://www.oas.org/documents/eng/press/Electoral-Integrity-Analysis-Bolivia2019.pdf>> accessed 8 March 2022.
- 2 OAS. Electoral integrity analysis General Elections in the Plurinational State of Bolivia: Final Report. < <https://www.oas.org/fpdb/press/Audit-Report-EN-vFINAL.pdf>> accessed 8 March 2022.
- 3 John Curiel and Jack R. Williams, 'Bolivia dismissed its October elections as fraudulent. Our research found no reason to suspect fraud.' *The Washington Post* (Washington 27 February 2020) <<https://www.washingtonpost.com/politics/2020/02/26/bolivia-dismissed-its-october-elections-fraudulent-our-research-found-no-reason-suspect-fraud/>> accessed 8 March 2022.
- 4 César Muñoz and José Miguel Vivanco, 'La justicia como revancha' (Human Rights Watch, 22 March 2021) < <https://www.hrw.org/es/news/2021/03/22/la-justicia-como-revancha> > accessed 8 March 2022.
- 5 Mabel Azcui 'Bolivia suspende a dos magistradas del Constitucional que detuvieron una ley' *El País* (Cochabamba 30 July 2014) <[https://elpais.com/internacional/2014/07/30/actualidad/1406733535\\_345999.html](https://elpais.com/internacional/2014/07/30/actualidad/1406733535_345999.html)> accessed 24 February 2022.
- 6 Juan del Granado. ¿Falsificaciones en el Tribunal Constitucional? *Los Tiempos* (Cochabamba, 25 April 2021) <<https://www.oas.org/fpdb/press/Audit-Report-EN-vFINAL.pdf> > accessed 24 February 2022.
- 7 Marco Chuquimia 'Sentencia 0012 del TCP tiene tres decisiones y ministro de Justicia dice que es un proyecto' *El Deber* (Santa Cruz de la Sierra, 15 May 2021) <[https://eldeber.com.bo/pais/sentencia-0012-del-tcp-tiene-tres-decisiones-y-ministro-de-justicia-dice-que-es-un-proyecto\\_232084](https://eldeber.com.bo/pais/sentencia-0012-del-tcp-tiene-tres-decisiones-y-ministro-de-justicia-dice-que-es-un-proyecto_232084)> accessed 6 March 2021.
- 8 Vivian Ramírez. 'Sentencia TCP sobre Juicios en Rebeldía. Acciones del TCP y del Ministerio de Justicia que socavan el Estado de Derecho' (Fundación Observatorio de Derechos Humanos y Justicia, 13 May 2021) <<http://ddhyjusticia.org/2021/05/13/sentencia-tcp-sobre-juicios-en-rebeldia-acciones-del-tcp-y-del-ministerio-de-justicia-que-socavan-el-estado-de-derecho/>> accessed 8 March 2021.
- 9 Página Siete Digital. 'TCP se ampara en su autonomía y elude responder sobre el «desaparecido» fallo de los juicios en rebeldía' <<https://www.paginasiete.bo/nacional/2021/9/30/tcp-se-ampara-en-su-autonomia-elude-responder-sobre-el-desaparecido-fallo-de-los-juicios-en-rebeldia-310726.html>> accessed March 2021.
- 10 Tribunal Constitucional Plurinacional, Judgment 0052/202, Court file 31743-2019-64-RDN, Sucre, September, 29 2021



# Bosnia and Herzegovina

Maja Sahadžić

Visiting Professor and Researcher/Senior Research Fellow

University of Antwerp/Law Institute in B&H

## I. INTRODUCTION

In 2021, Bosnia and Herzegovina (B&H) experienced a major political crisis as the Serb member of the Presidency, Milorad Dodik, intensified rhetoric on the independence of the Republic of Srpska (RS) and pushed for withdrawing from state-level<sup>1</sup> institutions such as armed forces, the judiciary, and tax authorities. The European Union (EU) grappled to maintain the delicate *status quo* captured in the 1995 General Framework Agreement for Peace in B&H (Dayton Peace Agreement) amidst increasing polarization among the three constituent peoples (the Bosniaks, Croats, and Serbs). The crisis also resulted in a request to the Constitutional Court of B&H to initiate a procedure to determine the temporary incapacity of Milorad Dodik regarding the functions he performs.

2021 was also the year of further political divisions grounded in ethnic differences. Wearing a beard on duty in uniform in the Armed Forces as well as the permanent residence of citizens of B&H has been heavily politicized. As it proved to be controversial, it has resulted in cases being brought before the Constitutional Court of B&H.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2021, B&H experienced one of the biggest political and constitutional crises ever since the Dayton Peace Agreement has been signed in 1995. In October 2021, the leadership of the RS (RS), led by Milorad Dodik, the Serb member of the Presidency of B&H, present-

ed a critical document that laid the groundwork for (1) the declaration of independence of the RS if the powers that have been transferred to the state level are not returned to the RS within six months (such as Armed Forces of B&H, the High Judicial and Prosecutorial Council of B&H, the Court of B&H, and the Indirect Taxation Authority), (2) abolishing the Intelligence-Security Agency of B&H and withdrawing the consent for the establishment of the State Investigation and Protection Agency of B&H, (3) forming similar and additional agencies in the RS within a month, and (4) abolishing a large number of decisions of the High Representative of B&H in the National Assembly of the RS. The state level in B&H has narrow exclusive powers while the Entities have vast residual powers. Based on constitutional provisions, the state level can assume additional powers over the matters necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of B&H respecting the distribution of powers and mutual agreement of the Entities. Exceptionally, in 2006 an agreement between the Entities was reached, establishing unified armed forces at the state level. Importantly, the Entities, especially the RS, have not been driven to transfer the powers to the state level. Hence, the High Representative of B&H initiated the transfer of powers by imposing several laws regulating areas contested by Milorad Dodik. Over time, this has caused resentment in the RS. What triggered the crisis last year was the introduction of a new law on the denial of genocide by the High Representative. This is closely related to the fact that many officials in the RS continue to reject the evidence that the Srebrenica genocide happened. One of the most vocal offi-

cial is Milorad Dodik. The announcement of the law incited him to hold a press conference and declare that the law will never be accepted in the RS. The document Milorad Dodik presented was met with vehement criticism within and outside of B&H as it put at stake fragile peace brokered in Dayton. It also resulted in a case before the Constitutional Court of B&H in which the Minister of the Ministry of Interior of the Federation of B&H initiated a procedure to determine the temporary incapacity of Milorad Dodik regarding the functions he performs.

Before erupting, the brewing tensions in B&H confirmed that the country still maintains a fragile and unbearable *status quo in which divergent ethnopolitical positions have been used as leverage for political gains. For example, the case before the Constitutional Court of B&H which tackled wearing a beard in the Armed Forces divided the public in B&H along ethnic lines. The public discussion revolved around questioning whether there should be an exception based on religious beliefs for wearing a beard or whether wearing a beard should be a personal choice. The discussion on religious beliefs extended to the discussion on beards worn by Wahhabis and Chetniks (implying the link with the Bosniaks and Serbs) as well as to hijabs. The Constitutional Court was forced to issue a clarifying statement that, in the specific case, the Court decided only and exclusively on the right of the soldiers of the Armed Forces to wear a beard and that the Court did not decide on the issue of wearing a hijab. The Court also made it clear that the decision that was made was not partial in the way that another decision is expected in the case. Another case on the permanent and temporary residence has also resulted in public discussion and division as it appealed to the returnee population in B&H. Unfortunately, more than twenty years after the Bosnian War from 1992 to 1995, B&H still features a considerable number of internally displaced persons and refugees. The present law on residence requires proof of a valid basis for residence such as proof of ownership or possession, a lease or tenancy agreement, etc. The fact that some returnees have not been able to rebuild their housing units for objective reasons precluded them from*

registering their pre-war places of residence. Their return, however, is closely linked to the implementation of Annex 7 of the Dayton Peace Agreement regulating the return of refugees and displaced persons in B&H.<sup>2</sup> Some state officials presented that the contested provisions are an attempt to legalize the demographic changes created during the conflict, especially in Srebrenica which, yet again, divided the political establishment and public along the ethnic lines. Interestingly, residence registrations in Srebrenica increase before every election. In 2014, the Constitutional Court of B&H heard a case U-5/15 that argued that the law on residence puts returnees at a significant disadvantage however, in 2021, the court was faced with yet another merely identical case on the same issue.

### III. CONSTITUTIONAL CASES

#### *1. U-11/21: Temporary incapacity of the member of the Presidency of B&H*

This case aimed at initiating a procedure for the determination of temporary incapacity of a member of the Presidency of B&H. The case emerged amidst previously described growing tensions posed by Milorad Dodik, the Serb member of the Presidency, who intensified independence claims of the RS and posed threats of abolishing or withdrawing from several state-level institutions and agencies. The request was founded on Article 8 Paragraph 8 of the Election Law of B&H indicating the competence of the Constitutional Court of B&H to decide that a member of the Presidency is temporarily incapable of performing their function.

The appellant (Minister of the Ministry of the Interior of the Federation of B&H) filed a request in which they urged the Constitutional Court to initiate a procedure for the determination of temporary incapacity of Milorad Dodik to perform the function he holds as a member of the Presidency. The appellant asserted that Milorad Dodik was blocking the functioning of the state-level institutions by openly derogating the competences of the state level in B&H. The ap-

pellant also alleged that Milorad Dodik endangered peace, coexistence, and political and economic stability of the country and the Dayton Peace Agreement by announcing the withdrawal from the Armed Forces of B&H, the State Investigation and Protection Agency, the Intelligence and Security Agency, the High Judicial and Prosecutorial Council, the Border Police, and the Indirect Taxation Authority.

The Constitutional Court evaluated whether the competences given by the Constitution of B&H allow the Constitutional Court to accept the competences which are not prescribed by the Constitution but are prescribed by the acts of lower legal forces than the Constitution. The Constitutional Court referred to its earlier case law and reiterated that it must always adhere to the text of the Constitution of B&H, which in the present case does not allow for a wider interpretation of its jurisdiction. Also, the Constitutional Court noted that the principle of independence of the Court, though it is not explicitly enunciated in the Constitution of B&H, represents a general principle that must be complied with even when not explicitly enunciated in the constitutional text since it is inseparable from the principle of the rule of law. Therefore, the Constitutional Court points out that no law can “transfer” any type of jurisdiction to the Constitutional Court, because such a possibility does not follow from the text of the Constitution of B&H. The Court concluded that, in this particular case, it was not competent to decide on the temporary incapacity of a member of the Presidency of B&H, because such jurisdiction is not prescribed by the Constitution of B&H. The request was rejected as inadmissible.

#### *2. U-9/21: Wearing a beard on duty in uniform*

This case challenged the constitutionality of the Rules of Service of the Armed Force of B&H. Paragraph (2) and Paragraph (4) of Article 12 of the Rules define that wearing a beard in Armed Forces shall be permitted only to the religious servants, but the beard must be well-groomed while all military personnel must be always shaved when on duty in uniform.

The appellant (Chairman of the House of Peoples of the Parliamentary Assembly of B&H) requested to render ineffective the abovementioned provisions. The appellant asserted that the provisions are not following (1) the Constitution of B&H regarding the right to private and family life, home, and correspondence and freedom of thought, conscience, and religion and (2) the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) regarding the right to respect for private and family life and freedom of thought, conscience, and religion. The appellant argued that the Standard Operating Procedure on Wearing Unique Uniform and Insignia in the Armed Forces of B&H allowed wearing a beard to all members of Armed Forces under defined conditions while the Rules banned it except for the religious servants. The appellant claimed that personal choices concerning the desired appearance relate to the expression of their personality and therefore fall within the notion of private life as established in the case law of the European Court of Human Rights (ECtHR) that have taken the position in their case law that wearing a beard is an aspect of private life (*Biržietis v. Lithuania*). The appellant also argued that the issue is linked to the wearing of religious symbols or clothing by an individual's faith and their desire to express their faith is a manifestation of their religious belief (such as a wish of a Muslim male to wear a skullcap). According to the appellant, it is not clear what is the purpose and interest of imposing the ban on beard concerning all members of the Armed Forces except the religious servants. Also, the appellant did not find convincing the fact that a beard interferes with the proper use of a protective mask since the appropriate analysis on that issue does not exist and because the wearing of a beard is permitted in many armies which are using the same or similar protective equipment. This is especially given the fact that there are opinions of experts that wearing a beard is not incompatible with wearing a protective (gas) mask.

The Constitutional Court emphasized that the word “only” appears in the Bosnian text of the Rules and as such appears to restrict the rights exclusively to religious servants.

The Court noticed that, although essentially identical, the Rules in the Serbian and Croatian languages does not prescribe the word “only” and reads as follows: “Wearing a beard shall be permitted to the religious servants, but the beard must be well-groomed.” Here, the substance of the cited provision does not imply the conclusion that that right is reserved exclusively for religious servants, as in the text of the Rules in Bosnian. In evaluating the case, the Constitutional Court followed its case law in the case U-8/17 in which it considered wearing a beard while in uniform on duty regarding the Border Police. The court held that a beard, as part of the body and physical appearance of a person, is a form of expression of one's religion only where the beard is worn for religious reasons, but it is also an aspect of one's private life, as it is not associated only with religious symbols. Hence, the Court prescribed that a well-groomed beard and mustache are now permitted, and that the limitation was arbitrary and irrelevant. The Court pointed out that although understandable that military personnel of the armed forces of any country in the world ought to look uniform and orderly, this does not explain why wearing a neat, short, and well-groomed beard would violate that general objective. The Constitutional Court agreed that it is understandable that in military service there are restrictions on certain rights and freedoms, but also that any restriction must pursue legitimate aims. Finally, the Constitutional Court concluded that the absolute ban on soldiers of the Armed Forces to wear a beard when on duty in uniform violates the right to respect for private life and the right to freedom of religion safeguarded by the Constitution of B&H and the ECHR.

### *3. U-1/21: Permanent and temporary residence of citizens*

This case challenged the constitutionality of the Law on Permanent and Temporary Residence of Citizens of B&H (the Law). The Article 8 Paragraphs 2, 3, 4, 5 and 6, Article 8a and Article 32 Paragraph 3 Subparagraph d) define that in the procedure of registration of residence and residential address, citizens are obliged to enclose proof that they have a

valid basis for residence at the address where they register, such as proof of ownership or co-ownership or possession, a certified lease agreement or a certified tenancy agreement, or confirmation that a dispute over ownership is being conducted before the competent authority.

The appellant (Member of the Presidency of B&H) requested the constitutional review of the provisions of the Law and the Constitution of B&H. The appellant alleged that the above-mentioned provisions are not following (1) the Constitution of B&H regarding the right to freedom movement and residence, (2) the ECHR regarding the right of residence, (3) the International Covenant on Civil and Political Rights (ICCPR) regarding the right to residence and freedom of movement, and (4) Annex 7 of the General Framework Agreement for Peace in B&H. The appellant argued that the provisions resulted in a significant amount of people who do not meet rather restrictive criteria for the registration of residence and residential address. The appellant considered “valid grounds” and “valid evidence” for registering and acquiring the right to residence a precedent in standardizing this type of right as it is restrictive, conditional, and exclusive because: (1) particularly vulnerable groups, displaced persons and returnees, members of the Roma national minority are especially affected as they cannot exercise the right to register residence according to the criteria of truthfulness, accuracy, and intention of permanent residence – especially given the real social, property, historical, traditional, economic, social, and other circumstances that legislators ignored, (2) the restriction of registering residence restricts the possibility of enjoying other rights and freedoms, and (3) by enacting the contested provisions the previously acquired rights which were valid were denied.

The appellant argued that prescribing certain conditions such as the right of ownership of residential real estate or the existence of a lease agreement may appear only as a mitigating and referring circumstance, and not as a decisive circumstance to be fulfilled beforehand, as a condition on which the exercise of the right to residence and formal registration

of residence crucially depends. The appellant pointed out that this especially concerns the returnees or persons whose property was destroyed during the war and who, for objective reasons (for example, they were not allocated funds for reconstruction) and due to ethnic cleansing, failed to rebuild their housing units. According to Annex 7 of the Dayton Peace Agreement, this should not have been an obstacle to registration at pre-war addresses of residence (this caused, for example, numerous cases of annulment of residence from Srebrenica but also in other places). Also, the appellant alleged that it is well-known that the citizens of the Roma national minority in many cases do not have personal identification documents and in a significant number of cases they are not even registered, so they are not able to enjoy numerous rights, such as the right to health insurance (for example, there are particularly vulnerable groups within this population, mothers and pregnant women that bear the most serious consequences). Further on, in many cases, the factual situation regarding the disorder of land registers, unresolved inheritance legal relations, traditional circumstances of “community life”, housing facilities are registered on deceased relatives because of which many citizens are brought into a position of not being able to register their residence. Finally, the applicant pointed to a huge number of illegally built facilities. Based on this, the appellant argued that the freedom of movement does not only include the possibility of permanent or temporary residence, meaning the change of location in a purely physical sense within a certain space/state or outside, but it also implies the possibility of continuity of unhindered enjoyment of all rights and fundamental freedoms of citizens guaranteed by the Constitution.

The Constitutional Court recalled that in Decision U-5/15 it ruled on the constitutionality of the provisions of the same Law, which were again challenged by the present request, and decided that the challenged provisions were constitutional. The Court still examined the provisions which have been challenged again, given the allegations were similar but not the same. The Constitutional Court stated that the legislator, in prescribing evidence that can be a valid legal basis

for registration of residence, also prescribed a wide range of evidence that the Constitutional Court considers to be reasonable and objective. For example, the legislator left the possibility for persons who are conducting a dispute over ownership or who have initiated the legalization or registration procedure to use certificates of initiated procedure as evidence for registration of residence. Also, the Court held that possession is the de facto authority over things so the registration in the land register is not required, while marital and extramarital relationships, kinship, and adoption allows registration of residence at the address of already registered spouse, relative, etc. The Court stated that the “abuse of rights” can be far greater if there is a possibility for residence registration without any proof than when compared to the situation where certain evidence is required. The Court also noted that in its previous case-law it interpreted the case encompassing the principle of the rule of law which requires that a legal norm must be (1) adequately accessible to the individuals to whom it applies, and it must be (2) foreseeable, meaning that it must be formulated with sufficient precision that individuals could actually and specifically know their rights and obligations to a degree that is reasonable in the circumstances, to regulate their conduct accordingly. However, the law does not have to be perfect to be compatible with the Constitution. This means that it cannot be challenged in terms of whether it is the best possible solution or whether a different solution would be fairer or better. Finally, the Court held that the legislator in no way called into question the right of any citizen of B&H to freely choose a place of residence, nor did it restrict their freedom of movement, especially referring to allegations of discrimination against returnees (for example, Bosniaks and Croats who intended to return to the territory of the RS). The Constitutional Court noted that the members of the Roma national minority have the same rights to register residence as other citizens of B&H and under the same conditions. The fact that members of the Roma national minority in many cases are not registered indisputably poses a problem that the State should take care of. The Court concluded that the provisions of the Law are compatible with the Constitution of B&H

concerning the right to liberty of movement and residence as they are prescribed in the public interest and pursue a legitimate aim.

#### IV. LOOKING AHEAD

Just like in the previous years, in 2021, the Constitutional Court continued to hear numerous cases where it ruled on: (1) a violation of the right to a fair trial concerning the adoption of a decision within a reasonable time limit; and (2) a violation of the right to effective legal remedies. It is expected that in 2022 the Court will continue to be overburdened with cases that require its consideration of whether constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, etc.) have been violated or disregarded, and whether the law of the land was applied in either an arbitrary or discriminatory manner.

However, one long-term issue which gained momentum recently is an election reform needed to address several ECtHR judgments (Sejdić and Finčić, Zornić, Pilav, Šlaku, and Pudarić). This issue results in volatile disputes between the Bosniaks and Croats who prefer different solutions, especially on the election of presidential candidates. Since 2022 is the election year, it is expected that the Constitutional Court of B&H will be under pressure to evaluate electoral rights.

#### V. FURTHER READING

Sahadžić M, “Subnational Constitutionalism in Bosnia and Herzegovina: Towering Sub-National Autonomy and a Loose Clamp of the Central Level to All Intentions and Purposes” In: Aroney N et al. (eds.), *Handbook on Subnational Constitutions and Constitutionalism* (Routledge 2021: 80-95).

Sahadžić, M, “Constitutional Asymmetry and Equality in Multinational Systems with Federal Arrangements” In: Belser EM and Beachler T (eds.), *The Principle of Equality in Diverse States – Reconciling Autonomy with Equal Rights and Opportunities* (Brill 2021: 36-61).

Sahadžić M, “Ethno-Territorial Politics and Sub-national Constitutionalism” In: Belov, M (ed.) *Territorial Politics and Secession, Constitutional and International Law Dimensions* (Springer 2021: 245-263).

Sahadžić M, “The Constitutionalism of Emergency, The case of Bosnia and Herzegovina and Beyond: Multinationalism behind Asymmetrical Constitutional Arrangements” In: Albert R and Roznai Y (eds.), *Constitutionalism under Extreme Conditions* (Springer 2020: 247-266).

Sahadžić, M, “L’asymétrie constitutionnelle comme outil de gestion de la diversité” In: Mathieu F et al. (eds.), *Cinquante déclinaisons de fédéralisme: théorie, enjeux et études de cas* (Presses de l’Université du Québec 2020: 113-122).

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

2 It is necessary that the Office of the High Representative of B&H delivers a decision confirming the implementation of Annex 7, in line with Annex 10 to the Dayton Peace Agreement on the civilian implementation of the peace settlement.



# Brazil

Juliana Cesario Alvim Gomes

Visiting Professor at Central European University. Professor at the Federal University of Minas Gerais

Diego Werneck Arguelhes

Associate Professor, Insper Institute for Education and Research

Thomaz Pereira

Professor of Law, Fundação Getulio Vargas Law School, Rio de Janeiro (FGV DIREITO RIO)

## I. INTRODUCTION

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Two factors shaped the Brazilian Supreme Court's environment in 2021: first, the Jair Bolsonaro presidency. Second, the covid-19 pandemic. While most courts in the world have faced the latter factor to some extent, Covid-19 has transformed the STF's internal rules of procedure (and ultimately its decision-making process) in specific, consequential ways. And, while the extreme, illiberal right has reached key legislative and executive offices in several other countries, the specific interaction between Bolsonaro and the Covid-19 pandemic has made the Brazilian case somewhat singular. As we will see, Bolsonaro's stance in the pandemic was unexpected from a president that had campaigned in 2018 under statements like "the minority must give in to the majority will". As we write, the death count in Brazil due to Covid-19 has reached 650,000. Since the beginning of the pandemic, and throughout the mounting tragedy, Bolsonaro has consistently adopted a "denialist" approach. He publicly positioned himself to undermine beliefs in the severity of the health crisis; in the safety of vaccines; in basic scientific knowledge and procedures; in the good faith of experts and international organizations, the WHO; and even in the official number of death counts released by other Brazilian authorities. He campaigned against government-imposed

restrictions on individual freedom - such as social distancing and mandatory vaccination. Surprisingly, then, on matters related to the pandemic this illiberal president seemed to deny any relevant scope for executive power.

In doing so, the President clashed with local governments, including key states and municipalities, on which measures should be adopted to prevent contagion and on who should get vaccinated and how. These disagreements inevitably became lawsuits and appeals before the Supreme Court (*Supremo Tribunal Federal*, or "STF"), in several cases due to the Bolsonaro government's own initiative. In the STF, however, the president lost almost all cases involving the Covid-19 pandemic in 2021, just as it had happened the year before.

This pattern of executive and federal defeats is unusual in Brazil. The country has a strong system of vertical and horizontal separation of powers, with various checks and balances between Congress and the President, independent judges and expansive mechanisms for judicial review (including a very powerful Supreme Court). Moreover, federative arrangements relatively empower smaller, less populous states vis-à-vis their larger counterparts. Traditionally, however, the observable effect of such veto points and players tends to be blended into the broader dynamics of coalitional presidentialism. Between 1992 and 2018, with the exception of the second Rousseff presidency (2015-2016), presidents had been largely able to negotiate support in Congress and enact the central aspects of their policy programs. In this context, before

Bolsonaro, the STF seldom blocked a government's key policy and legislative agenda, and it more often than not sided with the central government against local and state governments. While the specific mechanisms by which the STF is integrated in the broader dynamics of coalitional presidentialism are not yet fully mapped, the court's track record shows overall judicial deference to presidents who succeeded in the legislative arena.

The current deviation from these patterns can be at least partially explained by Bolsonaro's specific stance in the pandemic. In a surprising twist, considering his political trajectory, he did not use the health emergency to aggrandize the powers of the executive branch. Rather, he denied the severity of the emergency from the outset, and publicly campaigned for a radical *laissez-faire* against even the most basic restrictions, such as wearing masks. While he made cryptic, vague threats involving the adoption of "harsh measures" and even a state of siege, these usually appeared in the context of Bolsonaro's campaign against local governments adopting restrictive public health measures. From a legal point of view, his rhetoric centered on an absolute conception of individual freedom, which, he claimed, no governments could restrict to face the pandemic. But this stance proved to be unpopular across the political spectrum and this illiberal president ended up making judges, public opinion, and many politicians on the local and national level converge against himself.

Bolsonaro's extreme denialism created the opportunity, and perhaps the need, for the activation of the strong judicial checks embedded in Brazilian constitutionalism. Beyond Covid-19, in 2021, another aspect of the Bolsonaro presidency has been decisive: his open agenda of attacks on the court and on the electoral system. In the Independence Day demonstrations (September 7<sup>th</sup>), more than 120,000 people protested against the Supreme Court. In the preceding weeks, Bolsonaro had mobilized his followers to attend the protests by attacking specific STF judges, in particular Alexandre de Moraes and Luís Roberto Barroso.

These two judges became specific targets for several reasons. Moraes has presided over a

series of criminal investigations on the dissemination of fake news, which began in 2019 with a focus on anti-court materials and threats against the STF judges. In 2021, the seeds created by that original investigation greatly expanded. The court, and Moraes in particular, now oversee a series of proceedings on a wide array of attacks on democracy and political institutions involving the Bolsonaro presidency and his allies - especially on disinformation on the pandemic, and on the safety of the electronic voting system the country has employed in elections since the 90s. Such investigations have ultimately led to the courts adopting restrictive measures against several digital influencers, activists, and politicians in the Bolsonaro camp, and have ultimately involved the president and members of his family as well. The Independence Day demonstrations were part of Bolsonaro's reaction. A furious president Bolsonaro told the crowd in São Paulo that Judge Moraes would have to either "back off" or leave the court.

Judge Barroso appeared in Bolsonaro's crosshairs mainly as the then-president of the Superior Electoral Court (TSE). In Brazil, the TSE is the main player when it comes to organizing, regulating, policing, and executing elections all over the country - and its ranks include a rotating roster of three Supreme Court judges, one of which sits as its president. Reawakening one of the many false claims made during his 2018 electoral campaign, in 2021 Bolsonaro began to insist that the system of electronic voting was unsafe and open to manipulation. Moreover, he claimed to have evidence of fraud in the 2018 elections (according to Bolsonaro, if it was not for the alleged manipulation of the results, he would have won in the first round), and that the TSE itself was behind the fraud. Weeks before the September demonstrations, Judge Barroso had played a key role, representing the TSE, in a wide alliance of high profile authorities who successfully mobilized support against amendment proposals (supported by Bolsonaro) that would include "print receipts" of individual votes in the electronic ballot system.

In 2020, the speaker of the House of Representatives was not allied with Bolsonaro.

But, in February 2021, Representative Arthur Lyra was elected to this position with open political (and budgetary) support from Bolsonaro. At the same time, one of Bolsonaro's closest and most radical allies in Congress (Rep. Bia Kicis) was elected chair of the House judicial affairs commission. Kicis gained popularity in the Bolsonaro camp for her public commitment to passing reforms that would limit the STF's power.

The current Congress is conservative and right-leaning, and in this favorable environment Bolsonaro was able to build an effective "legislative shield". In Brazil, both impeachment trials and criminal law proceedings against a sitting president must be authorized by a 2/3 majority of the House. So far, Bolsonaro could count on enough votes to discourage any such attempts. Still, he never succeeded in transforming this legislative shield into a legislative sword, to be used against the court. Indeed, even in this otherwise ideologically favorable congress, Rep. Bia Kicis and other politicians aligned with Bolsonaro against the court have been so far unsuccessful in promoting any court-curbing reforms.

Moreover, Congress has sent explicit signals that it will not support attacks on the STF coming from the Bolsonaro camp. For example, the House of Representatives has endorsed the detention of Representative Daniel Silveira, who had posted a video threatening Supreme Court judges. The constitution grants to each house of Congress the power to suspend judicial orders to detain its members. Silveira could have been released by a simple majority vote of the House (presided over by Lyra, who is favorable to Bolsonaro). However, in choosing not to use this power in Silveira's case, legislators signaled they will not shield colleagues who align with Bolsonaro's most radical attacks on the court. Judicial measures against extremists in the Bolsonaro camp seems to have spread to other institutions as well, as even Bolsonaro's own Attorney General eventually brought charges against Rep. Silveira.

However, Bolsonaro did not, or would not, immediately acknowledge these political messages. A month before the Independence

Day protests, he filed an impeachment petition against judge Moraes in the Senate - a move no other president had ever done before. But, in another example of congressional refusal to support attacks on the Supreme Court, the Senate's president quickly dismissed the petition, without even sending it to a commission, arguing that it contained charges lacking legal substance.

In October 2021, a Senate investigation committee on governmental mishandling of the pandemic published its final report, recommending criminal prosecution of key players in the Bolsonaro government, as well as the president himself. More recently, the committee's president asked the court - and judge Moraes specifically, as part of the existing proceedings on anti-democratic threats - to initiate investigations on Bolsonaro's most recent wave of public health disinformation, in which he associated vaccines with increased chances of contracting HIV. In doing so, these senators tried to channel the STF's recent expansion of its investigative powers against Bolsonaro himself.

The current Congress still supports the Bolsonaro government, but his and his allies' attacks on the court are a different matter. One last factor in explaining the STF's success in building a legislative shield against Bolsonaro is the court's change of heart concerning ongoing corruption investigations and proceedings against the politicians. The court's support for the "Car Wash operation" (2014-2021) had always been divided at best, based on a slight majority in highly divisive rulings. In 2021, however, the court went full circle, and a new slight majority reversed key judicial outcomes of the operation.

As we will see below, the main example of this transformation is the fate of former president Lula. Still, this is not something specific to the STF's stance toward Lula or the Workers' Party. Rather, this is best understood as a more general transformation in the court's position on criminal prosecution of politicians. Whatever the legal controversies at stake, the Court's recent change of heart regarding the "Car Wash" operation can also be read as part of a broader judicial movement to pick its fights against the political

establishment.<sup>1</sup> The Court was able to use its criminal jurisdiction in an expansive controversial way against actors and politicians in the Bolsonaro camp, justifying these measures in the logic of militant democracy. But, at the same time, it decreased its support for prosecutions of politicians in the anti-corruption perspective.

One last development of the Covid-19 pandemic in the court is worth mentioning. Since 2007, the court's plenary (11 judges) and two panels (with 5 judges each) have coexisted with something called the "Virtual Plenary" (*Plenário Virtual*, "PV") - a digital, asynchronous voting platform in which judges upload their opinions within a certain timeframe. Until recently, the PV had limited relevance both in terms of scope and output. The pandemic completely changed this scenario, however. Early in 2020, the Court formally expanded the PV's scope to include *any* type of case or procedure. Since the pandemic started, case reporters could then freely choose whether they would have a case decided synchronously, in the plenary, or asynchronously, in the PV. Recent official data from the court shows how this new system led to a great expansion in the PV's output. In 2019, more than 1 out of 5 collective decisions by the STF were taken in the PV (81,9%); in 2020 and from January to June 2021, the PV accounted for 95,5% and 98,4%, respectively, of all collective STF decisions. Note that, considering the formal expansion of the PV's scope, comparisons between those figures must take into account that, from 2020 on, the likelihood of high profile cases being decided in the PV has become much higher.

This expansion of the PV was initially justified in the context of the pandemic. The STF presented itself as a "digital court", that would use remote work mechanisms to keep deciding cases while protecting its judges and staff, as well as the lawyers and parties, from exposure to Covid-19. Over time, however, it became clear that this expanded PV is here to stay, and court officials publicly celebrate this decision-making environment as a tool that would allow the STF to deal with its huge backlog of cases, beyond the pandemic. This development is relevant because de-

cision-making in the PV is markedly different from the "synchronous" decision-making in the plenary and the panels. First, in the PV, judges do not interact with each other, but simply upload their opinions, within a fixed number of days, after the case reporter presents her report and opinion. Second, since there is no face-to-face simultaneous interaction, there is no live broadcast of judicial deliberations (which the Court had adopted for plenary sessions since 2002). Third, the PV greatly changes the internal dynamics of agenda-setting in the STF. The Chief Justice or the panel's presiding judge used to be the ultimate gatekeepers of the court's agenda of collective rulings, with the sole power to decide which cases would be called for deliberation (within a pool of hundreds of others selected by the respective reporting judges). However, with the expanded PV, each case reporter can now choose between decision-making environments. If they choose to send a case to the plenary, they will have to wait for the Chief Justice to include it in the agenda for deliberation. But they can now simply begin deciding any case in the PV, uploading their opinion, after which other judges have a deadline to present their own opinions. That is, the PV has considerably decentralized agenda-setting powers in the STF, and scholars, practitioners and even the judges themselves are still trying to understand the implications of this change for the court's dynamics.

### III. CONSTITUTIONAL CASES

The STF decided multiple relevant cases in 2021. The already high rates of annual decisions have erupted since the expansion, in 2020, of the digital voting environment (*plenário virtual*) due to Covid-19.

Regarding fundamental rights, for example, the court ruled, among others, (i) that the constitution protects freedom of the press and the right to memory, which are incompatible with claims to a "right to be forgotten". Therefore, the court decided that the family of the victim of a brutal crime cannot prevent the broadcasting of a TV show, a decade later, with true information on that

episode (RE 1.010.606, the *Aida Curi* case, decided 02/11/2021); (ii) that the constitutional rights to housing and to health do not allow for collective evictions and evictions of vulnerable persons while the effects of the COVID-19 health crisis persist (ADPF 828 TPI-Ref, individual injunctions granted on 06/04/2021 and 12/01/2021, confirmed by the Court on 12/09/2021); (iii) that, in light of the constitution and the lack of implementation of existing legislation, the federal government should institute a basic income for Brazilians in poverty and extreme poverty, beginning in 2022 (MI 7300, decided 04/27/2021); (iv) that the crime of “racial slur” must be equated with the crime of racism, with the implication that the former should also be imprescriptible, that is, the statute of limitations would not be applicable to the crime of racial slur (HC 154.248, decided 10/28/2021).

As mentioned in the last section, the Court adjusted to Covid-19, actually increasing its output in comparison to previous years. There are multiple relevant cases decided last year, for varied areas of law. In this section, we will focus only on those that illustrate three relevant aspects of the court’s performance in 2021.

## 1. STF and politics

### 1.1 Annulment of criminal lawsuits against former President Lula da Silva

On March 2021, judge Fachin issued a momentous individual ruling in a Habeas Corpus petition filed by former president Lula. According to Fachin, the 13<sup>th</sup> Federal Trial Court of Curitiba lacked jurisdiction over criminal lawsuits against Lula, due to the absence of coordination between Lula’s cases and the cases under that court’s jurisdiction. With this individual decision, all of Lula’s convictions were annulled, allowing him to be eligible again. (HC 193726, individual injunction 03/08/2021)

Because of Fachin’s decision, other pending appeals and petitions by Lula could be considered moot. One such procedure in particular was very consequential: the Habeas Corpus petition arguing that the then trial

court judge, Sergio Moro, could not have decided the case due to his lack of impartiality. The judge had sentenced Lula in 2017, and the confirmation of this decision in 2018 by a federal court of appeals barred the defendant from participating in the elections that year; Moro would later join the government of Jair Bolsonaro as Minister of Justice. Fachin’s decision sparked internal conflict in the court, both from judges who disagreed with its merits and from judges who wanted the Court to issue a decision on Moro’s lack of impartiality. Despite Fachin’s decision, however, this last case was brought to trial by another judge, Gilmar Mendes, in a decision full of clashes between members of the court. In the end, the STF ruled that Moro was biased and annulled not only the conviction, but all acts of the former judge related to Lula (HC 164.493, decided 03/23/21, HC 193.726, decided 06/23/21).

### 1.2 The “Secret” Federal Budget

The STF suspended the payments of non-budget earmarks managed by the Federal Budget General-Rapporteur in Congress. According to the arguments presented by Judge Rosa Weber, the secrecy and lack of transparency in the transfer of funds, as well as their unequal allocation among congresspersons, violated constitutional requirements for legislative procedures. The court was also determined to make public all the documents related to these transactions, including the names of the requesting legislators (ADPFs 850, 851 and 854, individual injunction 11/05/2021, decided 11/11/2021).

In response, Congress adopted some measures, such as limiting the amount of resources subject to this type of transfer (PRN 4/2021), but alleged the factual and legal impossibility of disclosing all the documents that supported the past transactions of the rapporteur-general (Act Set No. 01/2021).

In view of this reaction and the information provided by Congress according to which the suspension would affect the provision of public services to the population, including healthcare services, the STF issued a second decision reestablishing the execution of these expenses in 2021 (ADPFs 850, 851

and 854, individual injunction 12/06/2021, decided 17/12/2021).

## 2. Covid-19 and defeats for Bolsonaro

In the peak of the Covid-19 pandemic, the STF decided that, considering the population’s right to health, decrees from states and municipalities that determined the temporary ban on in-person religious services and masses did not violate the Constitution.

The case was decided by the full court a few days after an individual decision by Judge Nunes Marques, who at that point was the first and only judge appointed by Bolsonaro. In his individual ruling, Marques had authorized Easter celebrations in temples and churches on the eve of the religious holiday, but his position was defeated in the full court by 9x2. During the trial, the other judges spoke out in defense of science and evidence-based policy-making, criticizing the Federal Government’s response to the pandemic (ADPF 811, individual injunction 04/03/2022, decided 08/04/2021).

Other relevant decisions involved the invalidation of Bolsonaro’s attempt to overturn responses to the pandemic adopted by local and state authorities, for example, limitations on the operation of commerce, on the circulation of citizens in public areas, and curfews (ADI-MC 6855, individual injunction 06/23/21). Another relevant decision authorized the purchase and application of vaccines by states, if there was a failure to comply with the national vaccination plan against Covid-19, or if the federal government did not make vaccines available quickly and in the necessary quantity (ACO-MC 3.451 and ADPF-MC 770, individual injunction 12/17/2020, decided 02/24/2021).

Many cases throughout the year involved the Senate’s investigation committee on government responses to the Covid-19 pandemic. The first one, in April, the STF applied its long-standing case-law determining that, if the constitutional requirements for starting a congressional investigation were fulfilled, the opposition had a right to demand the immediate creation of the investigative committee in the respective house of Congress. The president of

the Senate had been obstructing the creation of the committee, but immediately complied with the STF's decision. (MS-MC 37.760, individual injunction 08/04/2021, decided 04/14/2021). Two exceptions to the general pattern of government defeats (section 1, *supra*) can be found in: (i) an individual decision by Judge Lewandowski, denying a request to remove the then Minister of Health, Eduardo Pazuello, based on his conduct during the pandemic; Judge Lewandowski said it would only be up to the President of the Republic to appoint and remove from office a minister of state (ADPF 754, individual injunction 02/14/2021); (ii) the decision in which the STF denied requests to bar the America Soccer Cup from taking place in Brazil, which Bolsonaro had agreed to host (MS-MC 37.933, decided 06/11/2021). In this case, despite criticisms directed at the federal government's handling of the pandemic, the majority of the court understood that it would be up to the governors to accept or not the event to be held in their territories, as well as to define which measures should be taken to prevent contagion.

### 3. Criminal agenda and clashes with the Attorney General (PGR)

Throughout 2021, there was a clash between the STF and the Attorney General (*Procurador-Geral da República*, or "PGR"), Augusto Aras. He was appointed in 2019 by Bolsonaro, who, since then, publicly signaled he was considering Aras for a future vacancy in the STF. On several occasions, members of the court criticized the PGR's passive conduct in the face of the Federal Government's responses in the pandemic, as well irregular conduct by cabinet members and the President himself. In judge Rosa Weber's words, the PGR seemed to have become the "Spectator-General of the Republic" (Pet 9760, individual decision 06/01/2021). In response to this largely passive PGR, the STF stepped in, making extensive and expansive use of its criminal powers to provide political answers, often raising the costs of inaction on the PGR's part.

For example, on July 2021, the PGR requested the Court to close an investigation on organized attacks against Congress, the STF, and the democratic regime itself. The usual path would be for the STF to simply

acknowledge the PGR's decision and file away the investigation. But Judge Moraes, who was presiding over those proceedings, did not immediately accept the PGR's decision and requested additional reasons, while also making public documents related to the investigation (Inq 4828, individual decision 06/04/2021). On another occasion, Judge Moraes authorized a Federal Police operation against the Minister of the Environment and other government officials suspected of crimes of corruption, malfeasance, and facilitation of wood-smuggling. The PGR, which in the past had requested that these investigations be closed, had not been even previously informed that those police operations would take place under Moraes's authorization. (Pet 8.795, individual decision 05/13/2021).

At other times, the STF took the step of initiating investigations against Bolsonaro, mentioning as justification for this unprecedented move the PGR's inertia, which the judges considered unorthodox (e.g. Inq 4.781, individual decision 08/04/2021). The use of his criminal powers on the basis of political and institutional calculation can also be observed in the case of Rep. Daniel Silveira (mentioned in section II, *supra*), who was arrested after uploading videos with offenses and threats to STF judges (Inq 4.781, individual decision 02/16/2021).

## IV. LOOKING AHEAD

As we look to developments in 2022, the fundamental political fact is the approaching national elections. In October, Brazilian citizens will be able to elect (and, in some cases, re-elect) State Governors, State Legislators, House Representatives, Federal Senators and the President. Many of the conflicts that have marked Brazilian politics during the past year are going to be at the center of the political debate.

Jair Bolsonaro, who was elected as an outsider, will now have to run on his record as the incumbent president - on his management of the economy and of the pandemic. Moreover, Bolsonaro will reach the elections after years of conflict with several institutions and politi-

cal actors - legislators who did not pass some of his initiatives and overturned some of his vetoes; Senators that conducted an inquiry on his actions to fight Covid-19; Governors who assumed powers and enacted measures against which he protested; and with the Supreme Court, which is constituted by some judges that also sit at the Superior Electoral Court and will be operating the very electoral system Bolsonaro has called fraudulent and adjudicating violations of electoral rules.

This scenario provides momentum for two contradictory actions. On the one hand, there are new incentives for Bolsonaro to moderate his behavior, as he has to appeal for the votes of the center, if he wants to be reelected. On the other hand, there are yet more incentives for Bolsonaro to radicalize his discourse to appeal to his base, both to mobilize them for the elections and, in case of defeat, to maintain their support once he is out of office. If the past is a reliable indicator of what is to come, it is likely that Bolsonaro will oscillate between these two opposing behaviors at least until the election is over.

But Bolsonaro will not be the only one moderating his behavior with an eye on the oncoming elections. Legislators and Governors are likely to be more preoccupied with their own campaigns than with larger political issues. They will adjust their support of the president and his agenda according to his poll numbers, and depending on how his support might help or hinder their own electoral chances. Similarly, the STF will likely beware of deciding cases in areas that could help Bolsonaro to garner electoral support by mobilizing his base against the court.

Over the past couple of years, the Supreme Court has been mostly preoccupied with three central issues: (i) the constitutionality of governmental actions and omissions related to the Covid-19 pandemic; (ii) attacks against democratic institutions, specially the court itself; and (iii) the related issue of fighting disinformation, specially as it spreads through messaging apps. It is probable that 2022 will see the first of these losing its centrality and a growing concern with the last two, be it during the electoral campaign, be it in the months after it - when Bolsonaro

will either be empowered by his reelection, or a lame duck president concerned with the judicial repercussions of his behavior once his presidential immunities vanish.

As the Supreme Court strategically chooses how to intervene in order to protect democratic institutions and fight misinformation, it will have to mind the difficult task of being effective without seeming partisan - something that can always be used against the court itself -, while it keeps in mind the January 6<sup>th</sup> invasion of the US Capitol by Donald Trump's supporters as a constant reminder of the risks of misstepping.

Irrespective of the relevance of the elections regarding the behavior of multiple political actors - including the court - during this year and, relatedly, of who eventually wins the presidential race, two fundamental changes that happened during the last few years will continue to significantly shape constitutional law in Brazil.

Firstly, the new possibility of judging any constitutional case in the *Plenário Virtual* (section II, *supra*). This procedure has allowed the court to, as long as it so wishes, quickly and collectively decide recently initiated cases and to dispose of long overdue ones. These changes, which seem to be here to stay, beyond the pandemic, have empowered individual reporters (at the expense of the Chief Justice's power) regarding the court's agenda. They also brought a significant increase in the number of final collective decisions on relevant cases every week, making it harder for citizens, the press, experts, and even the judges themselves to keep track of everything that is being decided. The Brazilian legal community is still coming to terms with what the *Plenário Virtual* means for judicial institutions and constitutional adjudication in the long run.

Secondly, Bolsonaro will have a lasting impact in Brazilian constitutional law through the appointment of two STF judges, who will have the opportunity to influence constitutional interpretation in their expectedly long tenures. Kassio Nunes Marques and André Mendonça have shown, through their conduct before taking office and through their behavior as judges,

consistent alignment with Bolsonaro's policy preferences and interests. It is possible that this will continue to be so even after he leaves office. Even though two nominations out of eleven judges might seem little, the STF's configuration is particularly empowering of its individual judges. Beyond the fact that, in areas where the court is typically divided (such as criminal prosecutions against politicians) one or two votes might be enough to change a previous minority position in a new majority. Each case reporter has significant docket control and individual decision-making powers, and all judges have veto-like powers to suspend deliberations on any case being decided. In this scenario, even a single justice in STF can have a deep impact on what gets decided and when, even when they are otherwise unable to determine a final outcome if a case reaches collective deliberations.

## V. FURTHER READING

ARGUELHES, Diego Werneck. Public Opinion, Criminal Procedures and Legislative Shields: How Supreme Court Judges Have Checked President Jair Bolsonaro in Brazil, *Georgetown Journal of International Affairs* (April 2022), at: <https://gjia.georgetown.edu/2022/04/25/public-opinion-criminal-procedures-and-legislative-shields-how-supreme-court-judges-have-checked-president-jair-bolsonaro-in-brazil>.

BENVINDO, Juliano Zaiden, The Historian of the Future in Brazilian Democracy: The Challenges of Interpreting and Comparing Events of Our Own Time, *Int'l J. Const. L. Blog*, Feb. 24, 2021, at: <http://www.iconnectblog.com/2021/02/the-historian-of-the-future-in-brazilian-democracy-the-challenges-of-interpreting-and-comparing-events-of-our-own-time>

BENVINDO, Juliano Zaiden, A "Hybrid Coup" in Brazil? Bolsonaro in Desperation Mode, *Int'l J. Const. L. Blog*, Aug. 25, 2021, at: <http://www.iconnectblog.com/2021/08/a-hybrid-coup-in-brazil-bolsonaro-in-desperation-mode>

DA ROS, Luciano. TAYLOR, Matthew. "Bolsonaro and the judiciary: between accom-

modation and confrontation", in BIRLE, Peter; SPECK, Bruno (eds.) *How Endangered is Democracy?* (Berlin, 2022).

FIGUEIREDO, Iara Veloso Oliveira et al., Judicialization of administrative measures to tackle the COVID-19 pandemic in Brazil, *Revista do Serviço Público*, v. 71, p. 189-211, 2020.

GOMES, Jose; CARVALHO, Ernani; ANDRADE BARBOSA, Luis Felipe, Políticas Públicas de Saúde e Lealdade Federativa: STF afirma protagonismo dos governadores no enfrentamento à covid-19, *Revista Direito Público*, v. 17, n. 94, 2020.

MELLO, Patrícia Perrone Campos; BUSTAMANTE, Thomas Da Rosa De (Orgs.), *Democracia e resiliência no Brasil: A disputa em torno da Constituição de 1988*, Barcelona: Bosch, 2022.

MEYER, Emilio Peluso Neder, *Constitutional Erosion in Brazil: Progresses and Failures of a Constitutional Project*, Oxford: Hart Publishing, 2021.

MEYER, Emilio Peluso Neder; BUSTAMANTE, Thomas da Rosa de, Academic Freedom Must be Protected in Brazil, *Int'l J. Const. L. Blog*, Aug. 10, 2021, at: <http://www.iconnectblog.com/2021/08/academic-freedom-must-be-protected-in-brazil>

OLIVEIRA, Fabiana Luci de. Judicialização da política em tempos de pandemia. *Contemporânea*, v. 10, n. 1, p. 389-398, jan.-abr. 2020.

OLIVEIRA, Vanessa Elias; MADEIRA, Lígia Mori, Judicialização da política no enfrentamento à Covid-19: um novo padrão decisório do STF? *Revista Brasileira de Ciência Política*, n. 35, 2021.

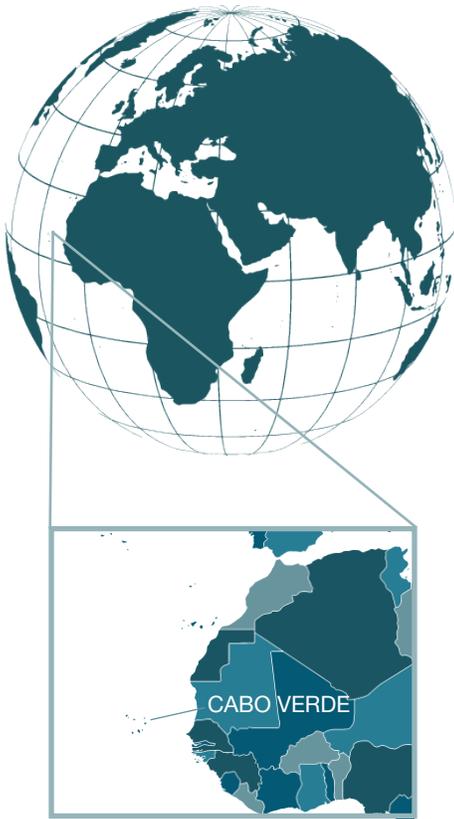
SOUSA, Felipe Oliveira de, Lula is Free: The Brazilian Supreme Court's Habeas Decision and the 2022 Election, *Int'l J. Const. L. Blog*, Mar. 17, 2021, at: <http://www.iconnectblog.com/2021/03/lula-is-free-the-brazilian-supreme-courts-habeas-decision-and-the-2022-election>

VASCONCELOS, Natalia Pires de; ARGUELHES, Diego Werneck, Covid-19, fed-

eralismo e descentralização no STF: reorientação ou ajuste pontual? *In*: Laura Machado, Legado de uma pandemia: 26 vezes discutem o aprendizado para política pública, Rio de Janeiro: Autografia, 2021.

1 DA ROS, Luciano. TAYLOR, Matthew. “Bolsonaro and the judiciary: between accommodation and confrontation”, in BIRLE, Peter; SPECK, Bruno (eds.) *How Endangered is Democracy?* (Berlin, 2022)

SUPREMO TRIBUNAL FEDERAL (STF), O plenário virtual na pandemia da Covid-19. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2022. Available at: [http://www.stf.jus.br/arquivo/cms/codi/anexo/Pesquisa\\_Plenario\\_Virtual.pdf](http://www.stf.jus.br/arquivo/cms/codi/anexo/Pesquisa_Plenario_Virtual.pdf)



# Cabo Verde

José Pina-Delgado, Associate Professor-ISCJS  
Associate Justice - Constitutional Court of Cabo Verde

## I. INTRODUCTION

This report aims at presenting the political, legislative, jurisprudential, and doctrinal developments of CV Constitutional Law in 2021. The state of the liberal democracy remained stable, at least according to major international indexes<sup>1</sup> and perceptions on the ground. Thus, no major constitutional changes or political frictions were noticeable. Furthermore, the legislative agenda led to the approval of relevant acts, and the CCCV delivered important opinions and maintained the number of decisions as compared to 2020. Relevant scholarship on CV political and constitutional matters was also published.<sup>2</sup> The conclusion is that there were no substantive changes to the constitutional system.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

As in 2020, the SarsCov2 Pandemic continued to set the pace of the political year, leading to the adoption of a series of measures for health control, social protection and economic stabilization, which were continuously adjusted according with the evolution of the spread of the disease. The measures concerned the protection of families, companies, charities, and social economy entities;<sup>3</sup> Social and Income Protection;<sup>4</sup> safeguard of employment<sup>5</sup> and economically disadvantaged young people's jobs; support of micro and small businesses;<sup>6</sup> and subsidizing of imported essential goods.<sup>7</sup> The Cabinet kept using executive resolutions based on the Civil Protection Act provisions to adjust pre-

viously broad measures that were approved last year,<sup>8</sup> with impact on personal rights;<sup>9</sup> to impose new restrictions – namely related to the creation of a COVID-19 vaccination certificate;<sup>10</sup> and to the obligation of workers whose job require contact with other people to present it as an alternative to PCR or antigen negative tests<sup>11</sup> - and to soften others.<sup>12</sup> For a small developing island nation, highly dependent on tourism and migrant remittances, the effects of the international travel restrictions on the economy were substantial and led to an estimated contraction of 15% of the country's GDP.<sup>13</sup> Nevertheless, the country managed to run an effective National Program of Vaccination,<sup>14</sup> based on the procurement of vaccines through the COVAX scheme or through international cooperation. By the end of the year, according to official data, 83% of the adult population were inoculated with the first dose of the vaccine and 70% with the second dose and vaccination of teenagers had just begun.<sup>15</sup>

Despite the challenging environment,<sup>16</sup> the two national elections were held in compliance with the legally established schedule. The first one, for the National Assembly (NA), witnessed a major increase of the number of female lawmakers elected,<sup>17</sup> due to the application of the Parity in Access to Public Office Act.<sup>18</sup> Secondly, while it is true that the main opposition party, PAICV, (center-left) managed to improve its poll numbers, the same as the junior parliamentary party, Democratic Christians UCID, rather surprisingly, considering the dire economic situation of the country, the elections led to a clear victory of the incumbent center-right party led by PM Correia e Silva: MPD. This political party managed to elect the majority of MPs with 50.04% of the votes and kept

its majority in the NA.<sup>19</sup> Nevertheless, this success was overshadowed by internal party struggle between two of the party factions to elect the Chairperson and members of the board of Parliament.<sup>20</sup> This led to the departure of Mr. Santos, the former holder of that position, to be a member of the Cabinet and the election of Mr. Correia as the new Speaker.<sup>21</sup> Thirdly, following what was seen as a personal defeat, the President of PAICV, Ms. Hopffer Almada, stepped down,<sup>22</sup> and ultimately was replaced after internal elections by Mr. Semedo,<sup>23</sup> a veteran lawmaker of the party and very close to the former leadership. A new Cabinet led by MPD leader, Mr. Correia e Silva, mostly composed of former Ministers and new Secretaries of State, took oath of office in May.<sup>24</sup> Before the elections, one of its most prominent members, Minister of Foreign Affairs, Communities and Defense, Mr. Tavares, was forced to resign<sup>25</sup>, after news reporting that Mr. De Paço, the CV Honorary Consul in Florida appointed by the Ministry, had links with the Portuguese right-wing party, Chega. He was replaced by Mr. Figueiredo Soares, former Minister of Regional Integration.<sup>26</sup> Another member of the Cabinet, Minister of the Sea, Mr. P. Veiga, quit after the elections, apparently unsatisfied with what he saw as a lack of commitment of the party leadership to effectively back the presidential candidate that the party was formally supporting.<sup>27</sup> After the two terms of Mr. Jorge Fonseca, who could not seek a third term of office, because of constitutional restraints, presidential elections were held in October. A record of eight candidates from different backgrounds tried to contest the election, but one of them was not accepted by the Chief Justice (CJ) of the CCCV. Mr. Neves, who previously held the position of PM in three consecutive cabinets (spanning from 2001 to 2016), supported by the main opposition party, PAICV, that he chaired from 2000 to 2014, was elected in the first round of the election.<sup>28</sup> With a total of 51.75% of the suffrage, he was ahead of Mr. C. Veiga, also a former PM from 1991 to 2000 supported by MPD and UCID, who managed to attract 42.39% of the votes.<sup>29</sup> Jointly, the other candidates were not able to gather more than 6% of the ballot.<sup>30</sup> It will be the second time that Cabo Verdeans will be ruled under a ‘cohabitation system’ after the

period of 2011-2016 (when, interestingly, Mr. Neves was PM), which is always challenging for a semi-presidential system of government.

Three other public issues marked the political agenda in 2021. Firstly, the Saab case, wherein a Venezuelan national was arrested in the previous year in CV,<sup>31</sup> following a request of extradition made by the United States of America (USA). In addition to personal efforts through international and national legal fora, Caracas, politically and publicly raised its understanding on the detention of its national and of the legality of the extradition and its effects on the peace talks with the opposition.<sup>32</sup> Close allies of that South American country (like Russia)<sup>33</sup> or geopolitical rivals of Washington (as China)<sup>34</sup> presented their concerns using different levels and tones, sometimes directing their criticisms at the USA. Secondly, the detention and bringing to justice of elected MP and attorney critical of the judicial system, Mr. Oliveira,<sup>35</sup> accused of ‘crimes against the rule of law’. The Permanent Commission of the NA authorized his detention and he was arrested and kept under pre-trial detention by an order issued by a court of appeal. Until the end of the year, all challenges he brought to different courts were unsuccessful, but one is still in the docket of the CCCV. Thirdly, the contentious renationalization of the air transportation company,<sup>36</sup> CV Airlines, previously privatized and controlled by Iceland’s Lofleidir.<sup>37</sup>

Important legislative work is worth highlighting. Acts amending the Criminal Code<sup>38</sup>, the Criminal Procedure Code<sup>39</sup> and the Civil Procedure Code<sup>40</sup> were approved by the NA and promulgated by the President of the Republic (PR). A major amendment of the Personal Data Protection Act was also enacted,<sup>41</sup> with changes being brought to the Data Protection National Commission Act too.<sup>42</sup> The Criminal Identification Act was approved<sup>43</sup> and a Center of Police Data Collection and Registration and a System of Police Information Mechanism were established as well.<sup>44</sup> An Act on Cybersecurity was also passed.<sup>45</sup> A procedure to guarantee job stability to public servants with precarious contracts with the administration also came into force.<sup>46</sup> Legislation related to social rights and protection of vulnerable groups were

also promulgated, namely aiming at fixing fees applied in the national health system,<sup>47</sup> reducing red tape in the social security system,<sup>48</sup> expanding the beneficiaries of state pensions,<sup>49</sup> establishing financial support for uninsured persons that require medical treatment in Portugal,<sup>50</sup> permitting extraordinary regularization of foreigners,<sup>51</sup> approving policies targeting sexual violence in general<sup>52</sup> and sexual violence against children in particular,<sup>53</sup> and regulating children caretakers’,<sup>54</sup> as well as elderly and disabled persons caretakers’, professional requirements.<sup>55</sup>

At the diplomatic and international legal level, several tax and customs conventions were concluded with Community of Portuguese Speaking Countries partners, namely with Angola, Sao Tomé and Príncipe (STP) and Equatorial Guinea, covering mutual assistance in fiscal matters, tax evasion and elimination of double-taxation, as well as recognition of driving licenses with STP.<sup>56</sup> An agreement to establish diplomatic relations with San Marino was signed and duly approved as well.<sup>57</sup> A representative diplomatic step was the installation of a new embassy in Abuja to cover both Nigeria and ECOWAS,<sup>58</sup> signaling the declared intentions of strengthening relations with African countries and African regional entities. Seemingly, the most important international instruments signed were the mobility agreement of the Community of Portuguese-Speaking Countries, promoted under CV’s Presidency of the organization, which was subsequently approved for ratification by the National Parliament,<sup>59</sup> and the amendment agreement to the Agreement on Visa Facilitation with the European Union and approved by the same constitutional organ.<sup>60</sup> The First National Determined Contributions under the Paris Agreement on Climate Change was also drafted.<sup>61</sup>

With the exception of the election of Judge Lima as a member of the Judicial Council,<sup>62</sup> none of the positions vacant at important judicial and administrative bodies, namely at the CCCV, at the National Electoral Commission (NEC), at the Personal Data Protection National Authority, and at the Media Authority, were filled, despite declarations of the two main political parties announcing negotiations to propose suitable candidates.<sup>63</sup> The two vacant positions at the SC, which are chosen by a competitive selection among

career judges organized by the Judicial Council, were not filled as well.

### III. CONSTITUTIONAL CASES

The number of constitutional decisions remained steady with the CCCV delivering a total of sixty-two decisions and the CJ deciding, under its legal powers, eight requests of presidential candidates, rejecting one of the candidacies by reason of dual-nationality of the candidate; lack of proof of residency in the country in the three years prior to the presentation of the candidacy and lack of sufficient proposing signatures.<sup>64</sup> The majority of the decisions – forty-one – were rulings or judgments related to constitutional complaints, leading to eighteen admissibility rulings (R-3/2021; R-4/2021; R-7/2021; R-8/2021; R-9/2021; R-11/2021; R-16/2021; R-18/2021; R-20/2021; R-21/2021; R-22/2021; R-23/2021; R-24/2021; R-28/2021; R-31/2021; R-32/2021; R-52/2021; R-53/2021), ten inadmissibility rulings (R-29/2021; R-33/2021; R-34/2021; R-40/2021; R-41/2021; R-45/2021; R-46/2021; R-50/2021; R-51/2021; R-56/2021) and two rulings allowing plaintiffs to correct or complete their files (R-17/2021; R-19/2021). Of the seven requests for adoption of provisional measures, two were granted (R-7/2021; R-28/2021) and five were rejected (R-8/2021; R-21/2021; R-32/2021; R-50/2021; R-52/2021). The CCCV decided ten constitutional complaints on the merits, which dealt with issues of interpretation of ordinary courts of rules of the Criminal Procedure Code in alleged violation of constitutional rights of defendants, mostly related to excessive pre-trial detention periods imposed to accused persons, rights to hearing, right to be informed of judicial decisions, right to appeal, inadmissibility of evidence, presumption of innocence and due process. Two of the judgments favored the plaintiffs at least partially (J-25/2021; J-55/2021), and eight found no violation of rights (J-2/2021; J-5/2021; J-6/2021; J-43/2021; J-49/2021; J-54/2021; J-58/2021; J-59/2021). A first-ever habeas data was also filled, but it was ruled incomplete, leading to the adoption of a decision allowing the correction of the memorial (R-35/2021). For this reason, a decision on its admissibility was postponed up until 2022.

Five electoral cases were decided by the CCCV. Some of them concerned lists or candidate's rejection by courts by reason of lack of documentation. The justices were split in those appeals. The majority understood that requirements made by courts imposing the presentation of records of decisions of national political party organs that proposed a list and of the identification card of candidates, were illegal (J-10/2021, written by AJ Lima, with AJ Pina-Delgado dissenting<sup>65</sup> and J-12/2021, written by CJ Semedo, with AJ Pina-Delgado dissenting).<sup>66</sup> The dissenting justice argued that the approach was based on an isolated and literal interpretation of the norms, that led to an incorrect determination of law, contributing to a deterioration of the mechanisms of control of fulfillment of electoral candidacies requirements. In a different case, related to time-limit to insert changes in the list of eligible voters, the justices unanimously decided that an appeal put forward by a regional organ of the electoral administration against a local court decision rejecting any alteration to erase double-inscriptions of the Voters List, could not be granted (J-15-2021, written by AJ Lima).<sup>67</sup> However, one of the justices didn't agree with the *ratio decidendi* presented by the majority and appended a concurrent vote stressing that the norm applied by the local court and confirmed by the CCCV according to which electoral lists are unalterable thirty days before the day of the suffrage was unconstitutional by reason of disproportionality and could not be used as grounds of the decision.<sup>68</sup> A fourth judgement decided that a deliberation of the NEC to forbid electoral debates on grounds of violation of the equality clause – because it adopted a model according to which leaders of parties that presented lists in all electoral districts and leaders of parties that were contesting the election only in some of the electoral districts would debate separately – , was illegal and should not bar the realization of those debates, gathered the full support of the bench (J-14-2021, written by AJ Lima).<sup>69</sup> The same as other decision considering that the NEC could not order the removal of political posters and billboards on grounds of contravention of the general principle of equality of opportunities between the contestants. Considering that protected political speech was at stake, that possibility would only be legit-

imate if such restriction was clearly established by a clear rule, that not being the case (J-13/2021, written by AJ Pina-Delgado).<sup>70</sup>

#### Major decisions

##### 1. Advice 1/2020 (Referral by the PR on the Constitutionality of Certain Norms of the Code of Criminal Procedures Amendment Act): Preventive Review of Constitutionality<sup>71</sup>

The PR asked the CCCV to evaluate the constitutionality of certain norms of the Criminal Procedure Amendment Bill. The judgement, written by CJ Semedo, found unanimously that the rules that, a) protected the image of the accused exclusively before its condemnation by a trial court; b) didn't require police authorities to inform suspects of their rights; c) extended the situations that enable courts to order pre-trial detention with an imprecise formula; d) instituted a presumption of continuance of criminal activity for pre-trial detention purposes to anyone previously convicted or suspected of the practice of a crime; e) allowed the use of summary procedures to prosecute domestic violence and sexual crimes against children and other vulnerable persons, were unconstitutional on grounds of incompatibility with, aa) the right of freedom of the person; bb) criminal procedure guarantees; cc) the principle of presumption of innocence.

##### 2. J-39 (Saab v. SC): Concrete Review of Constitutionality<sup>72</sup>

Mr. Saab, besides other appeals that the CCCV found inadmissible (R-1; R-40; R-41, R-46-2021), challenged the decision of the SC that confirmed his extradition to the USA (J-28/2021). The appellant argued that the SC applied unconstitutional norms and unconstitutional normative interpretations of national and international law. Even before the deliverance of the opinion on the merits, he asked the CCCV to suspend the process on grounds that the Human Rights Committee had granted him provisional measures that determined the suspension of his extradition, but the justices understood that they had no obligation to follow such a request of that UN organ. Specifically, because they found no treaty base for that power, and be-

cause the arguments put forward were not persuasive enough (R-30/2021, written by AJ Pina-Delgado, for a unanimous court, and also R-35/2021, written by the same justice, rejecting a request to declare the nullity of the former). He also unsuccessfully challenged a decision of the Judge-Rapporteur to allow the Public Prosecutor's Office, as the representative of the state requesting extradition in the procedure under the CV legal system, to present a brief and documents responding to his thesis and allegations (R-37, 2021, written by AJ Pina-Delgado, for a unanimous court, and R-38/2021, rejecting a request to declare the nullity of the former). After considering segments of the appeal to be inadmissible, on the merits, the CCCV, in a decision drafted by all the Justices, judged, that, a) the normative interpretation of a customary international rule applied by the CCCV according to which CV, as a transit state, had no obligation to recognize immunities of criminal jurisdiction of a special envoy simply because he was sent by a State to another State that accepted him as such if the country was not informed in advance of his arrival was not unconstitutional; it also determined that, b) rules of the International Judicial Cooperation on Criminal Matters Act (IJCCM Act) that legitimate the detention of a person wanted for prosecution in foreign jurisdictions after an urgent request sent through the INTERPOL mechanism of communications, was not unconstitutional, despite the fact that the foundational instrument of that organization was not ratified by CV and that the requests were not accompanied by judicial warrants; c) a rule of the IJCCM Act that allows the Minister of Justice to waive the promise of reciprocity of the requesting state requirement, was also not unconstitutional; d) likewise with another rule of the IJCCM Act that doesn't allow local courts to scrutinize the merits of the accusation made against the person in the requesting state, but only the fulfillment of extradition formalities and the constitutional and legal limits to extradition related to political motives, penalties applicable and due process. Concerning an interpretative norm according to which there was no requirement to conduct a public extradition trial, two of the justices deemed it to

be compatible with the Basic Law, but one dissented. Finally, regarding an interpretative norm according to which CV courts were bound to execute a decision of the ECOWAS Court of Justice that ruled that the detention the plaintiff was contrary to the African Charter on Human and People's Rights, which the SC refused to apply on grounds of incompatibility with the sovereign clause of the Constitution, the CCCV confirmed the understanding of the national court. This, on grounds that CV had neither signed nor ratified the treaty that recognized jurisdiction to that regional court to deal with individual requests on human rights matters and because non-application of the rule of exhaustion of local remedies was also unconstitutional. Subsequent requests of clarification or nullity of J-39/2021 (dealt with by R-42/2021 and R-47/2021, respectively) and to question an act of the Clerk of the Court that certified that J-39/2021 was final and definitive (decided by R-57/2021) also failed.

### 3. J-60/2021 (Referral by the Ombudsman on the Constitutionality of the Age Limit to Access Non-Qualified Jobs in the Public Administration (PA))<sup>73</sup>

The Ombudsman referred a rule of the Public Service Act that established a limit of thirty-five years for a citizen to be hired for a non-qualified job in the PA to the CCCV. The opinion, written by AJ Pina-Delgado for a unanimous Court, despite accepting the idea that the State could, in limited cases, establish age limits requirements for the access to certain public functions, stressed that the challenged norm was contrary to the equality clause because it was disproportional and based in age prejudices lacking scientific basis on the capacity of work of older persons. Therefore, it found a case of direct discrimination on grounds of age for the first time in its history, but declined to evaluate a possible effect of indirect discrimination on economic grounds arguing that that determination was unnecessary. It also found that the rule was contrary to the right to equal access to public service and to the criteria established by the constitution to be employed by the PA. For those reasons, it judged that the norm was unconstitutional.

## IV. LOOKING AHEAD

In 2022, amendments to the Labor Code and to the Public Service Act are expected. Discussions are under way between parliamentary groups to fill vacant positions in different organs, namely the CCCV, the Data Protection Authority, the Media Authority, the NEC, the Judicial Council and the Public Prosecutors Council. Two judges of the SC can also be appointed by the Judicial Council, and subsequently the plenum of the court will be able to elect a new president. Apparently, decisions of human rights bodies, namely the Human Rights Committee and the African Commission on Human and Peoples' Rights on complains that Mr. Saab has arguably brought against the State of CV, can be delivered next year.

- 1 CV is classified as free by the *Freedom of the World 2021 Report* (FH 2022), 16; as a flawed democracy by the *Democracy Index 2021* (Economist 2022), 9, and as an Electoral Democracy by the *Autocratization Changing Nature. Democracy Report 2022* (V-Dem 2022), 45.
- 2 See J. Pina-Delgado, "Cape Verde" in: L. Barroso and R. Albert (eds.), *IRCR 2020*, 2021, pp. 60-64; J.F. Cardoso, *Especial complexidade do processo no ordenamento jurídico cabo-verdiano* (Ise Editorial 2021); C. Pina, *Textos de Direito de Emergência e outros estudos* (Chefia do Governo 2021); A.R. Gil, *O Provedor de Justiça nos Países de Língua Portuguesa* (ICJP-CDP 2021), 49-55.
- 3 Law-Decree [LD] 4/2021, Oficial Journal [OJ], I-S, no. 5, 15/01/2021, 104-106; LD 48/2021, OJ, I-S, no. 60, 16/06/2021, 1858-1859.
- 4 Council of Ministers Resolution [CMR] 9/2021, OJ, I-S, no. 11, 04/02/2021, 336; CMR 14/2021, OJ, I-S, no. 13, 09/02/2021, 376-377.
- 5 Law 126/IX/2021, OJ, I-S, no. 43, 23/04/2021, 1504; Law 1/IX/2021, OJ, I-S, no. 76, Sup., 06/08/2021, 2.
- 6 CMR 9/2021, OJ, I-S, no. 22, 25/02/2021, 733-734.
- 7 CMR 36/2021, OJ, I-S, no. 30, 19/03/2021, 913.
- 8 See *GRCL 2020*, 54-55.
- 9 CMR 4/2021, OJ, I-S, no. 5, 15/01/2021, 110-112, CMR 13/2021, OJ, I-S, no. 11, 04/02/2021, 338-339, CMR 38/2021, OJ, I-S, no. 30, 19/03/2021, 916-917, CMR 108/2021, OJ, I-S, no. 118, 01/12/2021, 3001, CMR 116/2021, OJ, I-S, no. 118, 28/12/2021, 3090-3092.
- 10 CMR 78/2021, OJ, I-S, no. 75, 30/07/2021, 7-20.
- 11 CMR 82/2021, OJ, I-S, no. 81, Sup., 23/08/2021, 2.
- 12 CMR 98/2021, OJ, I-S, no. 106, 28/10/2021, 2734-2735.
- 13 See <https://www.worldbank.org/en/country/caboverde/overview#1>.
- 14 NA Resolution 18/2021, OJ, I-S, no. 19, 18/02/2021.
- 15 See Covid-19 Vaccination Bulletin, no. 23, 19/12/2021 (English), available at the homepage [https://covid19.cv/wp-content/uploads/2022/01/Vaccination-Bulletin-No-23\\_Ingles.pdf](https://covid19.cv/wp-content/uploads/2022/01/Vaccination-Bulletin-No-23_Ingles.pdf).
- 16 <https://www.aljazeera.com/news/2021/4/18/cape-verde-holds-parliamentary-vote-amid-major-recession>.
- 17 <https://fr.africanews.com/2021/05/20/cap-vert-record-de-femmes-au-parlement-avec-27-deputees/>.
- 18 *GRCL 2019*, 58.
- 19 <https://www.aljazeera.com/news/2021/4/19/cape-verde-ruling-party-set-to-keep-majority-in-election>.
- 20 <https://www.anacao.cv/noticia/2021/05/23/escolha-do-presidente-da-an-agudiza-disputa-entre-veiguistas-e-ex-militantes-do-pcd/>.
- 21 <https://expressodasilhas.cv/politica/2021/05/19/austelino-correia-o-setimo-presidente-da-asmbleia-nacional/74839>.
- 22 <https://inforpress.cv/legislative-2021-janira-hopfer-almada-announces-resignation-as-paicvs-president/>.
- 23 <https://inforpress.cv/rui-semedo-elected-president-of-the-paicv-with-about-99-of-the-votes-provisional-results/>.
- 24 PD 10/2021, OJ, I-S, no. 53, 20/05/2021.
- 25 [https://inforpress.cv/luis-filipe-tavares-resigns-prime-minister-accuses-paicv-to-creating-a-soap-opera-for-their-own-advantage/PD\\_5/2021](https://inforpress.cv/luis-filipe-tavares-resigns-prime-minister-accuses-paicv-to-creating-a-soap-opera-for-their-own-advantage/PD_5/2021), OJ, I-S, no. 4, 14/01/2021, 96.
- 26 PD 6/2021, OJ, I-S, no. 4, 14/01/2021, 96.
- 27 <https://www.asemana.publ.cv/?Baixa-no-Governo-Paulo-Veiga-confirma-pedido-de-exoneracao-do-cargo-de-ministro&ak=1>.
- 28 <https://www.reuters.com/world/africa/oppositi-on-candidate-neves-wins-cape-verde-election-2021-10-18/>.
- 29 See the official electoral results in the OJ, I-S, no. 105, 25/10/2021.
- 30 Id.
- 31 See *GRCL 2020*, 55.
- 32 See Joshua Goodman, Venezuela halts talks after Maduro Ally's extradition to US, available at <https://apnews.com/article/venezuela-us-extradition-alex-saab-nicola-maduro-fc8f533592b1d-933c6c78f900c290534>.
- 33 See <http://saharareporters.com/2021/08/12/russia-knocks-us-over-planned-%E2%80%98illegal%E2%80%99-extradition-alex-saab>.
- 34 Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on September 17, 2021, available at <https://www.mfa.gov.cn/ce/cgmb//eng/fyrth/t1907901.htm>.
- 35 <https://inforpress.cv/sao-vicente-amadeu-oliveira-prison-was-revenge-and-an-attempt-to-silence-him-antonio-monteiro/>.
- 36 <https://globalarbitrationreview.com/coronavirus/cabo-verde-faces-icc-claim-over-airline-nationalisation>.
- 37 LD 50/2021, OJ, I-S, no. 66, 06/07/2021, 1922-1924.
- 38 Law 117/IX/2021, OJ, I-S, no. 15, 11/02/2021, 428-515.
- 39 Law 122/IX/2021, OJ, I-S, no. 35, 05/04/2021, 1058-1087.
- 40 Law 129/IX/2021, OJ, I-S, no. 54, 26/05/2021, 1064-1760.
- 41 Law 121/IX/2021, OJ, I-S, no. 28, 17/03/2021, 876-882.
- 42 Law 120/IX/2021, OJ, I-S, no. 28, 17/03/2021, 883-906.
- 43 LD 25/2021, OJ, I-S, no. 33, 26/03/2021, 960-964.
- 44 LD 24/2021, OJ, I-S, no. 32, 25/03/2021, 950-953.
- 45 LD 9/2021, OJ, I-S, no. 9, 29/01/2021, 200-206.
- 46 LD 33/2021, OJ, I-S, no. 9, 14/04/2021, 1274-1278.
- 47 LD 2/2021, OJ, I-S, no. 4, 14/01/2021, 96-100.
- 48 LD 5/2021, OJ, I-S, no. 5, 15/01/2021, 106-108.
- 49 Law 115/IX/2021, OJ, I-S, no. 10, 02/02/2021, 214.
- 50 CMR 23/2021, OJ, I-S, no. 22, 25/02/2021, 734-735.
- 51 LD 72/2021, OJ, I-S, no. 101, 18/10/2021, 2677-2680.
- 52 CMR 101/2021, OJ, I-S, no. 115, 19/11/2021, 2914-2931.
- 53 CMR 102/2021, OJ, I-S, no. 115, 19/11/2021, 2931-2926.
- 54 LD 79/2021, OJ, I-S, no. 127, 28/12/2021, 3080-3085.
- 55 LD 80/2021, OJ, I-S, no. 127, 28/12/2021, 3085-3089.
- 56 See the texts in OJ, I-S, no. 34, 31/03/2021, *passim*.
- 57 Decree 5/2021, OJ, I-S, no. 30, 19/03/2021, 912.
- 58 LD 6/2021, OJ, I-S, no. 5, 15/01/2021, 109.
- 59 Resolution 14/X/2021, OJ, I-S, no. 76, 06/08/2021, 2092-2098.
- 60 Resolution 24/X/2021, OJ, I-S, no. 127, Sup., 28/02/2021, 2-10
- 61 CMR 107/2021, OJ, I-S, no. 118, 01/12/2021, 2996-3000.
- 62 OJ, I-S, no. 70, 16/07/2021, 1970.
- 63 <https://expressodasilhas.cv/pais/2021/12/11/negociacoes-adiadas-para-janeiro/77910>.
- 64 See <https://www.tribunalconstitucional.cv/index.php/decisoes/>.
- 65 OJ, I-S, no. 57, 31.05.2021, 1794-1802.
- 66 OJ, I-S, no. 57, 31.05.2021, 1807-1817.
- 67 OJ, I-S, no. 57, 31.05.2021, 1830-1836.
- 68 Id., 1836-1838.
- 69 OJ, I-S, no. 57, 31.05.2021, 1827-1830.
- 70 OJ, I-S, no. 57, 31.05.2021, 1817-1826.
- 71 OJ, I-S, no. 25, 08.03.2021, 814-832.
- 72 OJ, I-S, no. 100, 15.10.2021, 2508-2570.
- 73 OJ, I-S, no. 5, 17.01.2022, 130-141.



# Canada

Han-Ru Zhou  
Associate Professor  
Université de Montréal

Jean Leclair  
Professor  
Université de Montréal

## I. INTRODUCTION

There has been an unusually rich array of events and developments of constitutional significance in the past year. Part II recounts a series of ‘firsts’, among others the appointment of the first Indigenous Governor General of Canada, the appointment of the first person of colour to the Supreme Court of Canada and the first use of the ‘notwithstanding clause’ by the government of the most populous province of Canada. Part III begins with a report of what is probably the most politically and constitutionally momentous case of the past decade, *References re Greenhouse Gas Pollution Pricing Act*, in which the Supreme Court dismissed a series of constitutional challenges to the federal ‘carbon tax’ legislation. The second case, *Toronto (City) v Ontario (AG)*, marks the final chapter of the controversy surrounding the redrawing of Toronto’s electoral boundaries midway through the municipal election campaign. Finally, the report concludes with the uncommon Supreme Court case of two persons convicted of an offence that had already been declared unconstitutional in 2013.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### Federal Constitutional Politics

On July 1, 2021, Mahmud Jamal was appointed to the Supreme Court of Canada, replacing Rosalie Abella, who had reached

mandatory retirement age after serving nearly 17 years on the Court. Born in Kenya into an Indian Muslim family of Ismailis, Jamal J became the first person of colour appointed to the Supreme Court. Jamal J is Liberal Prime Minister Justin Trudeau’s fourth Supreme Court pick. A few days later, PM Trudeau announced that Mary Simon would become the 30<sup>th</sup> Governor General of Canada, making her the first Indigenous person and fifth woman to occupy the post since Confederation in 1867. Governor General Simon was sworn in on July 26.

The new Governor General had not taken office for a month when, on her Prime Minister’s advice, she dissolved Parliament and called a snap election. Although the duration of the election campaign was fixed to 36 days, the minimum length required by law, it was the most expensive election in Canadian history with an estimated cost of C\$630 million. In the end, the Liberal Party’s hope of turning its minority government into a majority government did not materialize, as the electors returned all the political parties to the Commons with an almost identical number of seats. The country is now under its fifth federal minority government since 2004. Before then, the previous one was in 1979-80. For the Conservative Party, the loss of a third consecutive federal election since 2015 (despite receiving the greatest number of votes) eventually caused some members of the caucus to trigger, for the first time in February 2022, a statutory ‘leadership review’<sup>1</sup> that resulted in the resignation and replacement of their party leader.

On June 14, 2021, the Legislature of Ontario enacted the Protecting Elections and Defending Democracy Act, the purpose of which was to use its override power pursuant to s 33 of the Canadian Charter of Rights and Freedoms to shield the province's restrictions on third-party 'political advertising' from Charter challenges. The Act was a response to *Working Families Ontario v Ontario*,<sup>2</sup> where the Ontario Superior Court struck down, as a violation of freedom of expression, several of those restrictions, in particular the spending limits of C\$24,000 in one electoral district and of C\$600,000 in total on political advertising by a third party during the year prior to a provincial election campaign.

Following the government's decision to use its override power, the applicants from *Working Families Ontario* launched a new constitutional challenge against the 2021 Act on the basis that it violated the right to vote guaranteed by s 3 of the Charter, which cannot be subject to the notwithstanding clause. On December 3, 2021, the Ontario Superior Court ruled that the impugned Act did not infringe on the right to vote.<sup>3</sup>

The 2021 Act marks the first time in nearly two decades that an override has come into force outside Québec.<sup>4</sup> In that province, the government inserted an override in the Act respecting the laicity of the State 2019 (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. In *Hak v Québec (AG)*,<sup>5</sup> the Québec Superior Court upheld the constitutionality of Bill 21, except as applied to English language educational facilities, on the basis that s 23 of the Charter guarantees minority language education rights and cannot be subject to the notwithstanding clause. The decision is under appeal.

In May 2021, the Québec government decided to resort again to the notwithstanding clause in introducing Bill 96, an important reform that seeks to strengthen the Charter of the French Language (the latter also known as Bill 101). Doubtless, the government is

poised to pass the law before the next provincial general election set for the fall of 2022.

### III. CONSTITUTIONAL CASES

#### 1. *References re Greenhouse Gas Pollution Pricing Act: The Federal 'Carbon Tax' and the National Concern Doctrine*

After the federal and provincial governments failed to negotiate the introduction of a pan-Canadian benchmark for carbon pricing, Parliament enacted the Greenhouse Gas Pollution Pricing Act 2018, whose primary aim is to set minimum national standards of greenhouse gas ('GHG') price stringency to reduce GHG emissions. The Act establishes a fuel charge applying to producers, distributors and importers of carbon-based fuel and a pricing mechanism for industrial GHG emissions by large emissions-intensive industrial facilities. Most importantly, the Act only operates as a backstop: it does not come into operation in provinces having an already sufficiently stringent GHG pricing system. And it does not displace provincial jurisdiction over the choice and design of pricing instruments.

As designed, the Act could not be a valid exercise of any of Parliament's enumerated legislative powers, including criminal law and taxation. At issue, therefore, was whether the Act could rest on the second prong of Parliament's residuary jurisdiction under the 'Peace, Order and Good Government' ('POGG') clause of s 91 of the Constitution Act 1867, ie federal power over matters of national concern.<sup>6</sup> In the Court's longest decision ever (88,457 words; 616 paras), a 6.3 majority said that it could.

All division of powers analyses require, at the first stage, the identification of the 'pith and substance', or true subject matter of the contested legislation. Only after then will a court examine whether such a subject matter falls under federal legislative authority. The challenge raised by the national concern doctrine is that courts not only ascertain the dominant feature of an impugned law, but also define the scope and nature of the

'matter of national concern' to which it can be hooked on. In so doing, courts perform a constituent role, adding a new 'permanent' and 'exclusive' jurisdiction, 'including [in] its intra-provincial aspects' (paras 102 and 121) to Parliament's enumerated powers. In assessing the scope of such a matter of national concern, judges must, therefore, bear in mind the potentially centralizing impact of their decision on Canadian federalism.

Speaking for the majority, Wagner CJ defined both the pith and substance of the 2018 Act and the matter of national concern in an identical and very narrow fashion: the establishment of minimum national standards of GHG price stringency to reduce GHG emissions (paras 80 and 119). This strategy enabled him to uphold the Act. In respect of the matter of national concern, Wagner CJ refurbished the test established 33 years earlier in *R v Crown Zellerbach Ltd*,<sup>7</sup> which requires a matter of national concern to be endowed with a 'singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.' To determine distinctiveness, the Court in *Zellerbach* had introduced the criterion of 'provincial inability' according to which 'it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter?.'

First, Wagner CJ found that the Act's regulatory mechanism of GHG pricing satisfied the criterion of distinctiveness because it was 'specific, and limited' (para 175). Second, such distinctiveness was held to exist because the minimum national standards of GHG price stringency, implemented as they were through the backstop architecture of the Act, constituted an identifiable matter 'qualitatively different' from matters of provincial concern (para 176). Finally, in his analysis of the criterion of provincial inability, Wagner CJ emphasized the extra-provincial effects of provincial inaction on a collective national and international action problem such as the fight against climate change (para 187).

Wagner CJ not only confined the new exclusive matter of national concern to the specific and limited regulatory mechanism established under the Act, he also recognized that the national concern doctrine did not prevent the application of the ‘double aspect’ doctrine, which comes into play when ‘the federal and provincial features of the challenged rule are of roughly equivalent importance so that [it] could be enacted by either the federal Parliament or provincial legislature.’<sup>8</sup> Wagner CJ reasoned that ‘[p]rovinces can regulate GHG pricing from a local perspective (under 92(13) and (16) and 92A [of the Constitution Act 1867])’, while ‘Canada can regulate GHG pricing from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach to GHG pricing’ (paras 197-98). Having so concluded, he held that the balance of federalism had not been jeopardized, and added that, ‘[c]onsidering the impact on the interests that would be affected if Canada were unable to address this matter at a national level, the matter’s scale of impact on provincial jurisdiction is reconcilable with the division of powers’ (para 207).

In dissenting judgments, Brown and Rowe JJ<sup>9</sup> argued that ‘courts should look *first* to the enumerated powers, resorting to the residual POGG authority only if necessary’ (para 341). Having concluded that the pith and substance of the Act mainly related to enumerated provincial heads of power, they were of the opinion that the inquiry should go no further (para 348). Still, they went on to examine the national concern doctrine.

Brown and Rowe JJ repeatedly denounced the adoption of a ‘minimum national standards’ criterion in the application of the national concern test. In their view, the ‘injection’ of such a standard ‘adds nothing’ to the qualification of the matter when the latter is falling within provincial legislative authority (para 303).

More importantly, they defined the matter of national concern at stake in a very broad manner: ‘the reduction of GHG emissions’ (para 370). Having thus qualified the matter, they unsurprisingly concluded that such a broad power did not satisfy the requirement

of indivisibility, and that recognizing Parliament’s authority over it has implications that would ‘permanently alter the Confederation bargain’ (para 592).

What is striking in the dissenting justices’ application of the *Zellerbach* test is their next to total indifference to the issue of extraprovincial harm. They basically discarded the provincial inability test by stating that it was not a mandatory criterion, ‘but one indicium of singleness and indivisibility’ (para 383).

## 2. *Toronto (City) v Ontario (AG): Freedom of Expression and Redrawing Electoral Boundaries During a Municipal Election Campaign*

On June 7, 2018, the Progressive Conservative Party won the provincial general election, and its new party leader Doug Ford became premier of Ontario.<sup>10</sup> Shortly after the commencement of the parliamentary session, the government passed the Better Local Government Act 2018, which reduced the number of electoral wards for the City of Toronto from 47 to 25. At the time, the city was in the midst of its mayoral and municipal election campaign. On September 19, 2018, four weeks before election day, the Ontario Court of Appeal denied an application to restore the 47-ward structure, thus allowing the elections to proceed under the 2018 Act.

At Supreme Court level, a 5-4 majority upheld the constitutionality of the Act. Delivering the majority judgment, Wagner CJ and Brown J characterized the freedom of expression claim of the City of Toronto as one seeking the enforcement of a positive obligation on the part of the state to restore or maintain the 47-ward structure. In order to succeed in their Charter challenge, the city had to meet the higher standard of demonstrating substantial interference with freedom of expression, namely that the ‘lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is “effectively preclude[d]”’. Concerning the Toronto’s 2018 local elections, Wagner CJ and Brown J noted that all the candidates still had 69 days of campaign left after the 2018 Act came into force. Therefore, the majority justices were of the view that the complaint

of state interference with freedom of expression was, in reality, a complaint about diminished effectiveness, which did not amount to the level of substantial interference.

Counsel for the City of Toronto submitted a second argument to the Court, namely that the change in ward structure violated an ‘unwritten constitutional principle of democracy’. Neither the majority nor the dissenting justices properly defined what unwritten principles were, but from their discussion of the relevant Canadian case law and commentaries, one could safely assume that they referred to legal norms that ‘are not to be found in the written constitutional text and cannot be derived by normal processes of interpretation from the text’.<sup>11</sup> The majority justices rejected the City’s argument and adopted the position that, while the constitution does include unwritten principles, they cannot be used as a standalone basis for invalidating legislation. In their view, unwritten constitutional principles may assist courts in only two ways: in the interpretation of constitutional provisions and ‘to develop structural doctrines unstated in the Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture’. By contrast, Abella J, who issued the dissenting judgment, opined that unwritten constitutional principles ‘may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution’s “internal architecture” or “basic constitutional structure”[.] This would undoubtedly be a rare case’ (para 170).

For the dissenting justices, the central issue of the appeal was whether the timing of the 2018 Act violated the Charter freedom of expression. The dissenting justices refused to adopt the distinction between positive and negative obligations, observing that all rights have positive and negative dimensions. In any event, they were of the view that the Act did not fall under the narrow category of underinclusive statutory regimes that would have triggered the application of the substantial interference test. Applying that the general framework of analysis for freedom of expression cases, the dissenting

justices concluded that, by redrawing electoral boundaries during a municipal election without serious justification, the Act violated citizens' rights in the electoral process to engage in political discourse.

### 3. *R v Albashir*: Temporal Effects of Judicial Invalidations of Laws

In 1985, the Supreme Court of Canada rendered a landmark judgment in *Reference re Manitoba Language Rights*<sup>12</sup> in which it declared that all the laws passed by the provincial legislature of Manitoba since 1890 were unconstitutional because they had not been enacted in both English and French as required by the Constitution. However, to prevent the province from descending into a lawless state, the Court created a new constitutional remedy, the *suspended* declaration of invalidity, whereby the normal effects of a declaration of invalidity would be temporarily suspended to give the legislature an opportunity to remedy the constitutional infirmity.

Since the Supreme Court's 1985 reference case, suspended declarations of invalidity have become a staple of the Canadian law of constitutional remedies. In a recent case, the Court catalogued 23 decisions where it had issued a suspended declaration of invalidity of a law held to violate the Charter.<sup>13</sup> One such instance was in *Canada (AG) v Bedford*,<sup>14</sup> where the Court struck down the offence of living on the avails of sex work because it prevented sex workers from accessing security-enhancing safeguards, such as drivers and bodyguards, thus violating sex workers' s 7 Charter right to security.

In *Albashir*, the appellants were charged with the offence of living on the avails of sex work after it was struck down in *Bedford*. More specifically, at the time of the indictments, the period of suspension set in *Bedford* had expired although the offences had been committed during that period. In a majority judgment, Karakatsanis J reiterated the general principle that, unless stated otherwise by the issuing court, a judicial declaration of invalidity is retroactive, subject to exceptions such as the principle of *res judicata*. In the context of a suspended declaration of

invalidity, the same question of its temporal character arises as well. When a court did not specify whether its suspended declaration of invalidity would operate retroactively or prospectively, the subsequent determination of the suspension's temporal effects must be made by examining its purpose, namely protection of a compelling public interest. Karakatsanis J added that: '[i]f retroactivity would undermine that purpose, the declaration must apply purely prospectively.'

Applying the principles to the facts of the case, Karakatsanis J stated that the purpose of the suspension of the declaration of invalidity in *Bedford* was the protection of sex workers. Interpreting that declaration as retroactive would amount to conferring criminal immunity to exploitative pimps during the suspension. Therefore, Karakatsanis J held that the declaration of invalidity in *Bedford* operated prospectively. To the extent that the prospective character could leave certain persons liable to prosecution solely because they helped ensure the protection of sex workers, Karakatsanis J observed that they could be entitled to an individual exemption under s 24(1) of the Charter.

In a dissenting opinion, Rowe J (Brown J agreeing) interpreted the declaration of invalidity in *Bedford* to operate retroactively, in the absence of a clear statement to the contrary by the Court in *Bedford*.

### IV. LOOKING AHEAD

Having reached mandatory retirement age, Moldaver J will retire from the Supreme Court in September 2022. Between 2008 and 2015, the Conservative government of Prime Minister Harper was generally able to steer the Court to the right through seven appointments.<sup>15</sup> The current Court looks to be evenly divided on the political spectrum with the Chief Justice seemingly acting as somewhat of a swing vote. In this context, PM Trudeau's next pick to replace one of the four right-leaning justices will be all the more crucial and may provide the left-leaning wing of the Court with a more consistent fifth vote. Thereafter, the next Supreme

Court vacancy may not occur before 2028. Among the upcoming Supreme Court cases of particular interest is *Québec (AG) v Bissonnette*, which will examine the constitutionality of the life sentence without parole that would have been applicable to the respondent, a university student, who opened fire in a mosque in 2017 during Sunday prayer, killing six persons and injuring a dozen. In all likelihood, the constitutional challenge of the Laicity Act (Bill 21) will eventually end up before the Supreme Court. One can also expect a constitutional challenge of the language law reform (Bill 96) as soon as it is enacted.

Finally, we surely have not seen the last of all the legal repercussions of the pandemic. On February 14, 2022, for the first time in over half a century, the Trudeau government decided to invoke the Emergencies Act (which replaced the War Measures Act in 1988) to put an end to the blockades by, and protests of, the self-proclaimed 'Freedom Convoy'.

### V. FURTHER READING

J Borrows, *La Constitution autochtone du Canada* (Presses universitaires du Québec 2021), transl. *Canada's Indigenous Constitution* (University of Toronto Press 2010)

Y Boyer and L Chartrand, *Bead by Bead: Constitutional Rights and Métis Community* (UBC Press 2021)

I Loveland, *British and Canadian Public Law in Comparative Perspective* (Hart Publishing 2021)

M Valois and others (eds), *The Federal Court of Appeal and the Federal Court: 50 Years of History* (Irwin Law 2021); *Cour d'appel fédérale et Cour fédérale: 50 ans d'histoire* (Presses de l'Université de Montréal 2021)

JHA Webber, *The Constitution of Canada: A Contextual Analysis* (Hart Publishing 2021)

1 See s 49(5) of the Parliament of Canada Act.

2 2021 ONSC 4076.

3 *Working Families Coalition (Canada) Inc v Ontario*, 2021 ONSC 769.

4 In 2018, Saskatchewan enacted an override in response to a decision from the Court of Queen's Bench, but the law never came into force after the judgment was overturned on appeal.

5 2021 QCCS 1466.

6 Parliament's emergency power constitutes the second prong and only allows for the adoption of temporary legislation.

7 [1988] 1 SCR 401.

8 WR Lederman, 'Classification of Laws and the British North America Act' in WR Lederman (ed), *The Courts and the Canadian Constitution* (McLelland and Stewart 1964) 193, cited with approval in *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 181.

9 While Brown and Rowe JJ wrote lengthy separate opinions, both concurred with each other's reasons. Côté J agreed with Wagner CJ's reformulation of the national concern test, but refused to consider the establishment of national standards of price stringency as a matter of national concern 'because the breadth of the discretion conferred by the Act on the Governor in Council results in the absence of any meaningful limits on the power of the executive' (para 222).

10 Prior to his entry into provincial politics earlier that year, Mr Ford had served one term as a Toronto City councillor and later unsuccessfully ran in the 2014 mayoral election when his brother, Rob Ford, who was the incumbent mayor, withdrew his candidacy due to health and other personal reasons before passing away later that year.

11 PW Hogg and WK Wade, *Constitutional Law of Canada* (5th edn Carswell, 2007), 15-51 (looseleaf edn). The authors appear to have borrowed the definition by TC Grey 'Do We Have an Unwritten Constitution?' (1975) 27 *Stan L Rev* 703, 703-04.

12 [1985] 1 SCR 721.

13 See *Ontario (AG) v G*, 2020 SCC 38 [118], reviewed in H-R Zhou and D Pomerleau-Normandin, 'Canada', in R Albert et al (eds), *The 2020 I-CONNECT-Clough Center Global Review of Constitutional Law* (2021) 49, 51-53.

14 [2013] 3 SCR 1102.

15 Strictly speaking, the Harper government made eight Supreme Court appointments, but its first appointee in 2006, Justice Marshall Rothstein, was announced only four days after PM Harper took office and following a selection process completed under the previous Liberal government.



# Cayman Islands

Dr Prashant Sabharwal  
Lecturer in Comparative and European Constitutional Law  
Maastricht University

## I. INTRODUCTION

The Cayman Islands are a British Overseas Territory, first discovered by Christopher Columbus in 1503<sup>1</sup> consisting of three islands, Grand Cayman, Cayman Brac and Little Cayman. The governance of the islands is based on the authority granted by the West Indies Act 1962.<sup>2</sup> The Constitution of the Cayman Islands is contained in the Cayman Islands Constitution Order 2009. The 2009 Constitution introduced a legally enforceable Bill of Rights for the first time in the history of the overseas territory.<sup>3</sup> Like other overseas territories, the Cayman Islands have their own government, legislature and court system, all modeled (naturally for a British overseas possession) on the system of government of the United Kingdom.<sup>4</sup> In concrete terms, the Cayman Islands has a government headed by the Governor (the representative of the British monarch in his/her physical absence from the Cayman Islands, with the Governor ordinarily being a career diplomat with the UK Foreign & Commonwealth Office) and the Premier – who also heads the cabinet. The Premier, similar to the UK Prime Minister, depends on the confidence of the Cayman Islands legislature for staying in office. Finally, the Cayman Islands also disposes of its own court system, with the highest courts being the Grand Court and the Court of Appeal.

The Cayman Islands recently enacted a constitutional reform programme, which builds on the previous modernization of the constitutional order of the country over the past decade. Further, the courts of the Cayman Islands have grappled with both the COVID-19 pandemic and the charged dis-

cussion around the possible introduction of equal marriage in the Overseas Territory.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### *Constitutional Reform*

The Cayman Islands witnessed substantial efforts towards constitutional reform come to fruition on 3 December 2020, when the Cayman Islands Constitution (Amendment) Order 2020 went into effect. The constitutional reform programme was essentially a beneficiary of the United Kingdom Government's 2012 White Paper *The Overseas Territories: Security, Success and Sustainability*.<sup>5</sup> The White Paper, three years after the Cayman Islands enacted an entirely new constitution via the Cayman Islands Constitution Order 2009, was the result of wide-ranging process of negotiation between Cayman Islands elected officials and the British government, as well as consultations with the citizens of the Overseas Territory – it was the 2009 constitution that introduced a fundamental rights charter for the first time.<sup>6</sup>

However, with the need for further renewal evident throughout the 2010s, a cross-party delegation from the Cayman Islands negotiated the elements of constitutional reform with the United Kingdom Government in December 2018. Controversially, a major concern of elected officials in the Cayman Islands, namely the residual authority vested in the Governor by virtue of section 81 of the Cayman Islands Constitution, was left unaddressed by the Amendment Order. Under the

section 81 reserve power, the Governor of the Cayman Islands can effectively impose legislation against the will of the local legislature (now renamed “Parliament” under the amendment order) – with this power having been controversially exercised by Governor Martyn Roper in relation to the Domestic Partnerships Bill, which was narrowly rejected by a 9-8 vote by the Cayman Islands Legislative Assembly in July 2020. In putting the new Civil Partnerships Bill (as the legislation had been renamed in response to consultations following the rejection of the original proposal) into effect, the governor referred to his duty to comply with instructions issued by the United Kingdom Government in compliance with section 31(2) of the Cayman Islands Constitution. In September 2019, the Constitutional Commission, a three-person statutory body appointed under the Cayman Islands Constitution to advise the Cayman Islands Government on constitutional matters, assessed the merits of proposals aiming to abolish the gubernatorial reserve power. In this regard, the Commission noted that Bermuda, another British overseas territory, had eschewed royal reserve powers in preparation for independence at some point in the future. However, even bearing that context in mind, the Commission opined that “[t]he preferable approach would be to consider whether such wide-ranging reserve powers continue to be appropriate in the context of a modern constitutional partnership between the United Kingdom and an increasingly sophisticated and mature overseas territory, such as the Cayman Islands”.<sup>7</sup>

In this context, the Commission contemplated alternatives to a complete abrogation of the gubernatorial reserve power, offering its view that specifying the concrete circumstances in which the power could be invoked would go a long way towards “bring[ing] some clarity to the concept of ‘peace, order and good government’, which is, as it stands, somewhat nebulous and conceivably open to an excessively broad interpretation”.<sup>8</sup> Another area reviewed by the Constitutional Commission was the United Kingdom Government’s power of disallowance, permitting it to override the Legislative Assembly. In this regard, the Constitutional Commission noted that the same power had been removed for the overseas territory

of Gibraltar, and furthermore acknowledged that the disallowance power amounted to a countermanning of the popular will. What is remarkable about the Constitutional Commission’s response in general is its use of comparisons between the Cayman Islands and the constitutional orders of other British Overseas Territories to draw conclusions for its own development. This is essentially the approach that was also adopted by the Cayman Islands Government in advocating for the constitutional reform package.<sup>9</sup>

The Constitution (Amendment) Order 2020 generally sought to enhance the constitutional autonomy of the Cayman Islands by tackling a range of issues. Even though the residual authority of the governor under section 81 of the Cayman Islands Constitution was retained, the disallowance authority was scrapped with the new constitutional reform package. In a related matter, the Governor retains his authority under section 55 of the Cayman Islands Constitution, which assigns the competence for external affairs, defence and internal security to him.<sup>10</sup> In the process, the new constitutional arrangement opted for dispensing with the vestigial capacity of the Governor, ordinarily a career diplomat appointed by the UK Foreign & Commonwealth Office, to veto legislation enacted by the Cayman Islands Parliament if the Governor deemed a veto to be in the “best interests of Her Majesty’s Government”. Additionally, the Constitution (Amendment) Order 2020 also opted for a clarification of the autonomous capacity of the Cabinet of the Cayman Islands in relation to domestic affairs<sup>11</sup> and restricted the Governor’s ability to take actions without consulting with Cabinet first. In addition, the Constitution (Amendment) Order 2020 also reworded section 32(5) of the Constitution, which hitherto had used to place any action of the Governor taken in pursuance of the advice given by the UK Government beyond judicial review. More importantly, the amendments inserted into the Constitution by virtue of the new subsections (5) to (8) of section 32 essentially obliges the Governor to consult the Cabinet on foreign policy, defence, internal security and the public service – four matters that had been within the exclusive purview of the Governor. According to the

new Constitution (Amendment) Order 2020, if Parliament seeks to introduce new legislation falling within these gubernatorial competences, then the Governor must consent. In the event of a dispute about the ambit of these gubernatorial powers, the Premier of the Cayman Islands may refer such a dispute to a Secretary of State whose ruling will be final.<sup>12</sup> Further, the Constitution also establishes a duty on part of the Foreign and Commonwealth Secretary to inform the Premier of the Cayman Islands of proposed primary or secondary legislation whose application may be extended to the Cayman Islands.<sup>13</sup> Furthermore, the amended Constitution also features a new institution, the Police Service Commission, whose primary task is to advise the Governor on the appointment of personnel to offices within the Cayman Islands police.<sup>14</sup> Finally, the new Constitution also enables institutional adjustments to the functioning of the Cayman Islands Government – providing for an additional Cabinet member, and establishing the roles of Parliamentary Secretaries to assist Cabinet in the discharge of its functions.<sup>15</sup> Overall, one can observe that the new constitutional arrangements for the Cayman Islands reflect an evolution in the relationship between the Overseas Territory and the United Kingdom – and it will remain to be seen whether this will trigger a desire for broader autonomy and, as per then-Premier Alden McLaughlin, perhaps independence from the United Kingdom.<sup>16</sup>

#### *COVID-19 Vaccine Mandate*

The Cayman Islands Parliament enacted two pieces of legislation, the Immigration (Transition) (Amendment) Act 2021 and the Customs and Border Control (Amendment) Act 2021, which effectively introduced a vaccination requirement for work permit holders, as well as their dependents.

### III. CONSTITUTIONAL CASES

#### *1. Tyler and Dione Anglin v Governor of the Cayman Islands (Propriety of Coronavirus Isolation Orders)*

The coronavirus pandemic has also affected the Cayman Islands. Like other jurisdic-

tions, the Cayman Islands imposed stringent restrictions on the entry of visitors to the Overseas Territory, while also imposing mask-wearing mandates, isolation, quarantine orders, as well as testing requirements. The present case involved an 8-year-old schoolboy who had contracted the coronavirus disease and was subsequently ordered by the Cayman Islands health authorities to isolate for four weeks. According to Cayman Islands regulations, the only way to be released from isolation is through presentation of a negative PCR test, a policy that its critics contend may contravene the civic liberties of the citizens of the Cayman Islands to a disproportionate degree, as it frequently results in isolation periods exceeding a month.<sup>17</sup> Despite the quarantine period being having been shortened, a negative PCR test remains a prerequisite for release from isolation.<sup>18</sup> The applicant contended that undergoing repeated PCR tests over a span of four weeks in order to receive authorization to end isolation was unreasonable and disproportionate. Additionally, the applicant also argued that the enhanced sensitivity of PCR tests might lead to a “false positive”, even if an individual is no longer infectious. In effect, the complainant is seeking a quashing of the PCR exit test policy by the Cayman Islands Grand Court.<sup>19</sup> The outcome of the case is pending at the time of the publication of this country report.

## 2. *Day and Another v Government of the Cayman Islands and Another: Privy Council Ruling on the Constitutionality of Same-Sex Marriage Ban*

The Privy Council, which is the highest appeals court for the Cayman Islands, handed down a ruling<sup>20</sup> on the issue of equal marriage which has proven controversial in the Overseas Territory, especially as a result of the Governor’s use of his residual powers (see also *Major Constitutional Developments*) to unilaterally enact the Civil Partnership Bill, despite the Cayman Islands Legislative Assembly’s (narrow) opposition to the proposed legislation. The appellants had been in a committed same-sex relationship and sought to enter into a legally recognized marriage in the Cayman Islands.<sup>21</sup> This desire to obtain a marriage licence was de-

nied by the General Registry, which justified the denial on the basis of the local marriage legislation in the Cayman Islands, which defines marriage as a union between a man and a woman.<sup>22</sup> The appellants subsequently filed proceedings and argued that the Cayman Islands constitution essentially recognized the right to same-sex marriage, that the rights of the appellants under the Cayman Islands Bill of Rights, Freedoms and Responsibilities (contained within the Cayman Islands constitution, and closely modelled along the lines of the European Convention of Human Rights<sup>23</sup>) had been infringed upon and, therefore, the relevant marriage legislation had to be interpreted in conformity with the Bill of Rights. In concrete terms, the appellants focused their argument on three provisions in the Bill of Rights, namely sections 9, 10, 14, and 16 (dealing with private and family life, freedom of conscience, marriage and non-discrimination, respectively).<sup>24</sup> With the Court of Appeal of the Cayman Islands reversing a contrary ruling of the Grand Court, and thus confirming the prohibition of same-sex marriage in the Overseas Territory on the basis of jurisprudence of the European Court of Human Rights<sup>25</sup>, it fell on the Privy Council to rule on this issue. Essentially, the issue that the Privy Council had to rule on boiled down to a single question: Could the appellants derive a right to marry from the provisions of the Cayman Islands Bill of Rights? If so, was the Grand Court right to construe the Cayman Islands constitution as permitting same-sex marriage?<sup>26</sup> In their submissions, counsel for the appellants maintained that the Cayman Islands constitution did not expressly exclude the right to same-sex marriage, that the belief of the appellants in the institution of marriage was interfered with by virtue of the legal prohibition, and that (also due to the lack of reasonable grounds to exclude same-sex marriage) the appellants were being discriminated against.<sup>27</sup> In response, counsel for the Cayman Islands Government advanced the argument that section 14(1) of the Cayman Islands constitution effectively constituted a *lex specialis*, as it provided for a right to right to marry in specific terms, thus excluding (in this case) the possibility of same-sex marriage within the framework provided by the Cayman Islands Bill of Rights.<sup>28</sup> Given

that section 14(1) already defines the terms of the right of marriage, this (as per the submission of the Cayman Islands Government) excludes reliance on other, more general provisions in the Cayman Islands Constitution to circumvent the *lex specialis*.<sup>29</sup> In the event, the Privy Council agreed with the line of argument advanced by the Cayman Islands Government.<sup>30</sup> In essence, the Privy Council essentially followed the judgment of Lord Hoffmann’s judgment in a case involving the interpretation of the Constitution of Mauritius<sup>31</sup>, in which it was held that constitutional interpretation had to be carried out with substantial fidelity to the constitutional text, lest “the result is not interpretation but divination”.<sup>32</sup> Concluding that the ECHR does not contain a right to same-sex marriage<sup>33</sup>, the Privy Council proceeded to assert that the context of the proclamation of the Cayman Islands constitution in 2009 needed to form a prominent consideration in a process of the purposive interpretation of the constitution.<sup>34</sup> Consequently, the multiple references to the prominent role of Christianity in the Cayman Islands constitution<sup>35</sup> essentially informed the understanding of section 14(1) of the constitution being solely applicable to opposite-sex marriages – with interpretations seeking to read such a right into the Cayman Islands constitution being squarely contrary to the will of the constitutional framers.<sup>36</sup> Even though not essential to its reading of the local marriage legislation, the Privy Council further cited support from the ECHR and its underpinning jurisprudence to establish the proposition that the Privy Council’s interpretation was in conformity with the Convention.<sup>37</sup> Moreover, the Privy Council deemed it unnecessary to refer to the *travaux préparatoires* of the Cayman Islands Constitution, notwithstanding comments made by a Foreign & Commonwealth Office civil servant essentially outlining that section 14 of the constitution had made no determination about the nature of marriage.<sup>38</sup> In this regard, the Privy Council emphasized that when the Cayman Islands population voted to enact the constitution in a 2009 referendum, the *travaux* were not part of the material provided to citizens – hence, the Privy Council did not believe that the comments made by aforesaid civil servant, Mr. Ian Hendry, should be regarded

as an interpretative aid in understanding the intent of the Cayman Islands Constitution.<sup>39</sup> In its concluding comments, the Privy Council emphasized that it was for the Cayman Islands Parliament to recognize same-sex marriage, as opposed to deriving such a right from the text of the Constitution.<sup>40</sup>

The ruling thus firmly pushed the issue of same-sex marriage back into the political square, and it remains to be seen whether any of the current political stakeholders will be willing to advocate for marriage rights of same-sex couples in the Cayman Islands. Furthermore, the *Day* litigation has also raised questions in relation to three aspects: first, the (constitutional) functions of appellate courts and their analyses of contentious constitutional issues; second, the interactions between Parliament and the courts (especially when the latter are called upon by minority interests to restrain parliamentary action); third, the use of the gubernatorial reserve powers under section 81.

## IV. LOOKING AHEAD

2022 has already witnessed an adjustment to the applicable COVID-19 rules, transitioning the Cayman Islands towards less restrictive rules (subject, of course, to any further developments in the pandemic that may necessitate a return to more restrictive regulations). A general vaccine mandate appears unlikely, also given the opposition of substantial segments of the electorate. It will also be interesting to see whether the recently elected government of Premier Wayne Panton (consisting of Independent MPs) will be able to retain office, given the heterogeneous nature of the members of Parliament providing Panton with a 11-7 working majority. Apart from cases pending before the courts on the propriety of COVID-19 legislation, there is another case pending before the courts on the exercise of the Governor's section 81 power in relation to the introduction of same-sex civil partnerships (over the express opposition of the then-Legislative Assembly). The outcome of these proceedings will arguably also have constitutional ramifications, especially the role of Governor and the relationship between the Cay-

man Islands Government and its citizens. The Constitutional Commission also identified residual issues remaining even after the 2020 constitutional reform: among these are questions about the amendment procedure for the Cayman Islands Constitution (which, at present, does not require approval of amendments via a territorial referendum). In principle, the United Kingdom Government has indicated that ordinarily it would be amenable to the idea of the citizens of the Cayman Islands approving "substantial" constitutional amendments – however, reserves for itself the right to refuse honouring a referendum result (conceivably, if a constitutional amendment were to expressly violate human rights, for example).<sup>41</sup> Another, more minor, issue brought to public attention by the Constitutional Commission concerns the establishment of Advisory District Councils aimed at advising the Members of Parliament, as per section 119 of the Cayman Islands Constitution.<sup>42</sup>

## V. FURTHER READING

Cayman Islands Constitutional Commission, *Constitution Day Update, 5 July 2021*

- 1 Ian Hendry and Susan Dickson, *British Overseas Territories Law* (Oxford University Press 2018), 336.
- 2 West Indies Act 1962, s. 5(1) and (2).
- 3 Hendry and Dickson (n 1), at 338.
- 4 Hendry and Dickson (n 1), at 339.
- 5 Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability*, Cm 8374, (28 June 2012)
- 6 Cayman Islands Constitution Order 2009, S.I. 2009/1379 (10 June 2009), s.4, read with Schedule 2; William Vlcek, "Crafting human rights in a constitution: Gay rights in the Cayman Islands and the limits to global norm diffusion", 2(3)Global Constitutionalism (2013), 345-372, 357; see also Vaughan Carter, "Evaluating the Cayman Islands Bill of Rights, Freedoms and Responsibilities: More Evolution than Revolution", 4 Tax A&M L. Rev. 385-415, 390, pointing out that the very idea of human rights was questioned as a Western construct by opponents of marriage equality in the Cayman Islands.
- 7 Constitutional Commission's Responses to Requests for Comments on Potential Revisions to the Cayman Islands Constitution 2009, 27 June 2018, accessed at <https://cnslibrary.com/wp-content/uploads/Constitutional-Commission-Response-to-CIG-re-Potential-Constitutional-Revisions-27-June-2018.pdf>
- 8 Ibid.
- 9 Explanatory Memorandum to the Cayman Islands Constitution (Amendment) Order 2020, para 7.2, accessed at [https://www.legislation.gov.uk/ukxi/2020/1283/pdfs/ukxiem\\_20201283\\_en.pdf](https://www.legislation.gov.uk/ukxi/2020/1283/pdfs/ukxiem_20201283_en.pdf)
- 10 Section 55(1)(a) to (d) of the Cayman Islands Constitution.
- 11 Section 44(5) of the Cayman Islands Constitution, as amended by the Constitution (Amendment) Order 2020.
- 12 Sections 77(4) and (5) of the Cayman Islands Constitution, as inserted by the Constitution (Amendment) Order 2020.
- 13 Section 126(1) of the Cayman Islands Constitution, as amended by the Constitution (Amendment) Order 2020.
- 14 Sections 58A and 58B of the Cayman Islands Constitution, as inserted by the Constitution (Amendment) Order 2020.
- 15 Section 44(1)(b) of the Cayman Islands Constitution, as amended by the Constitution (Amendment) Order 2020.
- 16 Premier's Statement as Parliament Opens (5 December 2020), with Premier McLaughlin stating verbatim: "I have said before, and I say again this afternoon, that I regard Independence for Cayman to be as inevitable as my own death but like my own death, I hope it not to be soon. For the immediate future, I believe Cayman's best interests are served by staying as a member of the United Kingdom family. Not just our economic success but our culture and traditions are bound up in being part of the UK family". Accessed at: <https://www.gov.ky/news/press-release-details/premier's-parliamentary-opening-statement>
- 17 James Whittaker, "Extended 'house arrest' for COVID cases could breach human rights" (Cayman Compass, 20 January 2022), accessed at: <https://www.caymancompass.com/2022/01/20/extended-house-arrest-for-covid-cases-could-breach-human-rights/>
- 18 *Guidance for Deployment of Lateral Flow Tests* (Cayman Islands Government, 29 October 2021), p. 7.
- 19 "Child sues government over lengthy isolation" (Cayman News Service, 28 February 2022), accessed at: <https://caymannewsservice.com/2022/02/child-sues-government-over-lengthy-isolation/>
- 20 *Chantelle Day and Another v The Governor of the Cayman Islands and Another* [2022] UKPC 6 ("Day and Another").
- 21 *Day and Another* (n 20), para 21.
- 22 *Day and Another* (n 20), para 23.
- 23 *Day and Another* (n 20), paras 3 and 11.
- 24 *Day and Another* (n 20), para 24.
- 25 Primarily *Schalk and Kopf v Austria* (2011) 53 EHRR 20 and *Hämäläinen v Finland* (2014) 37 BHRC 55. However, it is worth noting that following *Ollari v Italy* (2017) 65 EHRR 26, the Court of Appeal held that the lack of an alternative to a marriage, such as a civil partnership, in the legal framework of the Cayman Islands constituted a violation of
- 26 *Day and Another* (n 20), para 28.
- 27 *Day and Another* (n 20), para 29.
- 28 *Day and Another* (n 20), para 30.
- 29 Ibid.
- 30 *Day and Another* (n 20), para 33.
- 31 *Matadeen v Pointu* [1999] 1 AC 98.
- 32 *State v Zuma*, 1995 (4) BCLR 401, 412, per Kentridge AJ.
- 33 *Day and Another* (n 20), para 34.
- 34 *Day and Another* (n 20), para 36.
- 35 Most notably, the reference of the preamble to the territory's "Christian heritage" and intent to be "[a] God-fearing country, based on traditional Christian values" and "[a] community protective of traditional Caymanian heritage and the family unit", as well as s. 1(2)(a) of the Constitution, which represents the incorporation of "Christian values" in Part I of the Constitution (namely the Bill of Rights).
- 36 *Day and Another* (n 20), paras 39-40 and 43.
- 37 *Day and Another* (n 20), para 50.
- 38 *Day and Another* (n 20), paras 5 and 57.
- 39 *Day and Another* (n 20), para 57.
- 40 *Day and Another* (n 20), para 59.
- 41 Cayman Islands Constitutional Commission, *Constitution Day Update, 5 July 2021*, accessed at: [https://www.caymancompass.com/wp-content/uploads/2021/07/Constitutional\\_Commission\\_2021\\_Update\\_-Final-\\_compressed\\_file\\_for\\_website....pdf](https://www.caymancompass.com/wp-content/uploads/2021/07/Constitutional_Commission_2021_Update_-Final-_compressed_file_for_website....pdf)
- 42 Cayman Islands Constitutional Commission, *Constitutional Commission Conclusions and Recommendations: Advisory District Councils (15 October 2021)*, accessed at: [https://www.constitutionalcommission.ky/upimages/publicationdoc/Enclosure1-ConstitutionalCommissionConclusionsandRecommendationsonAdvisoryDistrictCouncils\\_151021\\_1643925864\\_1643925864.pdf](https://www.constitutionalcommission.ky/upimages/publicationdoc/Enclosure1-ConstitutionalCommissionConclusionsandRecommendationsonAdvisoryDistrictCouncils_151021_1643925864_1643925864.pdf)



# Chile

Catalina Salem  
Universidad del Desarrollo

Iván Aróstica  
Justice of the Chilean Constitutional Court

Marisol Peña  
Universidad del Desarrollo

Nicolás Enteiche  
Universidad del Desarrollo

Sergio Verdugo  
Universidad del Desarrollo

## I. INTRODUCTION

Our previous reports, starting from 2019, had informed about the constitution-making process that is taking place in Chile. 2021 was an important year for that process, as the members of the Constitutional Convention were elected. In the section on “Major Constitutional Developments,” we summarize the process, and we focus on the elections of the Convention and on some of its recent developments. The reader should be aware, though, that the constitution-making process is still ongoing, and that a constitutional referendum (Chileans call it *exit plebiscite*) is supposed to take place on September 4, 2022, to approve or reject the constitutional proposal that the Convention will present. The rest of the report focuses on the activity of the Chilean Constitutional Court (*Tribunal Constitucional de Chile* – henceforth the CC). We select some cases to illustrate how the CC has continued to be a consequential court that is sometimes at the center of major constitutional debates, despite the continuous criticisms that the CC has received, and the numerous proposals that attempt to remove it or modify its powers and organizational rules.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

On May 15 and 16, 2021, Chilean citizens elected the members of the Constitutional Convention, which started to operate in July. As we reported previously, the 2019 constitutional amendment included the constitution-making process’ main rules in the Constitution. That amendment was the result of the response that political parties agreed to the protests that took over the street in October of that year.<sup>1</sup> In a nutshell, the process would include an *entry* plebiscite, a Convention with the task of drafting a constitutional proposal, and an *exit* plebiscite that was going to reject or confirm the Convention’s proposal. After Congress approved the political agreement in December of 2019, legislators introduced rules to benefit independent candidates and implemented an electoral parity rule for the election of the members of the Convention.<sup>2</sup> Then, the entry plebiscite took place in October of 2020 and, after a large majority of Chilean voters had supported the constitutional replacement agenda, and had also voted in favor of establishing an elected Constitutional Convention—as opposed to a mixed convention partly appointed by the Congress—Chilean legislators introduced other modifications to the process. The most important modification

was the inclusion of seventeen reserved seats for indigenous peoples.<sup>3</sup>

These rules are crucial for understanding how the Constitutional Convention, despite using an electoral formula that resembled the procedure for electing the members of the lower chamber of Congress, has a different political composition. Indeed, even though the rightwing coalition typically elects more than 40% of the Parliament's seats—the lower chamber has 68 rightwing legislators out of 155 members—in the Convention, the rightwing coalition only obtained 37 out of 155 seats.<sup>4</sup> Many elected candidates run as independents, which allowed the creation of new political movements such as the *Lista del Pueblo* and the *Independientes No Neutrales*. The political parties connected to the mainstream center-left coalition that had ruled the country under Presidents Aylwin (1990-1994), Frei (1994-2000), Lagos (2000-2006), and Bachelet (2006-2010, 2014-2018), only got 25 seats. Most of the independent candidates that were elected were from the left, even though many ran with an anti-party platform and promoted specific single-issue agendas such as the feminist, environmental, indigenous and regionalization agendas. The result was a Convention in which none of the particular movements had, by itself, a third of the seats. As the Convention can only approve the norms of the new constitution by two-thirds, none of the factions had veto power, though, if the different movements of the left could unite, those two-thirds can be achieved.

The installation of the Constitutional Convention took place on July 4, and the elected candidates voted for the President and Vice President of the Convention. Elisa Loncón, a female Mapuche scholar that was elected in an indigenous seat, was elected as President. Jaime Bassa, a leftwing constitutional scholar from Valparaíso, was elected as a vice-president. The Convention then elected a larger board, including seven deputy vice-presidencies representing different groups within the Convention, which had the responsibility of putting the Convention into operation, even though there were common political tensions with President Piñera's administration.

During the first months of work, the Convention mostly concentrated on adopting the internal regulations, and adopted a set of rules.<sup>5</sup> Those regulations included issues such as the voting procedure, the rules for the committees, and the participatory mechanisms. The discussion of those procedural rules also called the attention of a larger debate on whether the Convention was bounded by the rules that regulated the process—which were originally enacted by what some constitution-makers called, using the mainstream approach to constitutional theory based on Sieyès and Schmitt, the *constituted power*. Even though there was a general agreement on respecting the procedure, accusations of bootstrapping existed,<sup>6</sup> and tensions involving a call to invoke a sovereign constituent power had a momentum at the beginning of the process.<sup>7</sup> In the end, the Convention formally declared to have the original constituent power<sup>8</sup> but the constitutional drafters that attempted to introduce radical changes, such as lower the majority requirement of the Convention, failed. An example of how the tensions existed is the approval of The intermediate plebiscites, designed to call the people's vote as a means to solve disagreements over norms that did not achieve the required two-third majority—among other requirements—were approved by the Convention.<sup>9</sup> Those plebiscites were supposed to take place in a way that could violate the required supermajorities to approve a constitutional norm. However, even though holding those plebiscites goes against the text of the current constitution, which mandates the Convention to approve norms by two-thirds of its members, it is unlikely that the plebiscites will actually take place. Even the rules approved by the Convention conditioned the call for these plebiscites to the approval of a reform that only the Congress—a *constituted power*—could approve.<sup>10</sup>

In addition, the Constitutional Convention opened unprecedented processes of public participation, including the existence of public hearings.<sup>11</sup> Two of these processes should be highlighted. First, popular initiatives. This first process allowed individuals to present proposals in a bottom-up way. The specific commissions of the Convention were going to discuss and vote all the popular initiatives

that could gather at least 15,000 signatures representing at least four separate regions of the country. 980,332 citizens participated and 78 proposals finally met the requirements. However, only a few were finally approved. In the same way, the Convention regulated a consultation process with the indigenous peoples, which would take place in 2022. It is too early to evaluate how these participatory processes worked, and how inclusive they were.

### III. THE CONSTITUTIONAL CASES

In 2021, the CC received 2,668 cases<sup>12</sup> and released 1,738 final judicial decisions.<sup>13</sup> 2,606 of the cases the CC received were *inapplicability* cases. The inapplicability mechanism is a concrete judicial review power that the CC uses to decide whether applying a specific legal provision in the context of a judicial process of another court—any court—is contrary to the Constitution. During an inapplicability case, the petitioners typically ask the CC to order a particular judge not to use or invoke a specific legal rule in the context of a specific case. Nevertheless, many politically salient decisions are not part of the inapplicability docket, as they focus on abstract judicial review cases, including facial challenges against legal provisions. Even though the number of non-inapplicability cases may be small, they can trigger relevant consequences for the Chilean constitutional system, particularly when they involve reviewing legislative bills that the Congress is currently discussing. We selected three non-inapplicability cases of 2021 that seem particularly important. In the last subsection, we offer a brief examination of a group of cases involving decisions of inapplicability. We ignore concurrent and dissenting opinions to be brief.

#### 1. Another round for the Unconstitutional Constitutional Amendment Doctrine (STC 10,774)

Our previous report showed that the Chilean CC had endorsed the unconstitutional constitutional amendment doctrine in a divided and tied ruling which was finally decided by the swing vote of the President of the Court.<sup>14</sup> The case involved a challenge against a

proposed transitory constitutional rule that aimed at authorizing a withdrawal of part of the mandatory savings that Chileans have to finance their retirement plan, a measure taken by Congress as a part of an economic relief package aimed at responding to the crisis developed in the context of the Covid-19 pandemic. The Constitution had established that social security regulations could only be initiated by the President—and not by members of the Congress—but there is a debate on whether this rule also involves a prohibition against legislators introducing social security rules in the Constitution. Even though Congress had the necessary majorities to support the withdrawals, former President Piñera opposed them. The CC accepted the claim and declared its unconstitutionality in 2020.<sup>15</sup>

However, in 2021, a similar case arose. Legislators approved another constitutional reform authorizing the withdrawal of 10% of the retirement savings, and the President opposed it. However, in this case, the CC did not accept to hear the case and did not admit its processing while releasing an unusually lengthy explanation that argued formal problems regarding the President's petition.<sup>16</sup>

## 2. Case involving the Removal of a Legislator (“cesación de parlamentario”) (STC 8,123)

The CC can remove members of Congress following a constitutionally regulated procedure. According to Article 93, number 14, and Par. 18 of the Constitution, only the President or ten legislators can file a petition and ask the CC to remove a legislator. The removal can only occur by a CC decision based on a specific cause. One of those causes, following Article 60, Par. 5 of the Constitution, is for the accused legislator to have incited the alteration of public order or to have attempted to trigger the change of the legal-institutional order by non-constitutional means.

The 2021 case involved an accusation against Hugo Gutiérrez, a member of the Communist Party and of the House of Representatives (Cámara de Diputados), who was going to run for the Constitutional Convention. The accusation, formulated by a group of right-wing legislators, claimed that, in the context of the protests and riots that took place af-

ter the social outbreak of October 18, 2019, which led to open the constitution-making process—Mr. Gutiérrez allegedly incited the disturbance of the public order by taking place in the manifestations and attacking the Chilean police while encouraging the illegal takeover of public transportation, supporting unauthorized protests, and putting at risk the security of many people.

The CC rejected the rightwing legislators' claim. The CC examined the causes of disturbance of public order in a lengthy decision<sup>17</sup> and examined the evidence.<sup>18</sup> The CC concluded that it could not be convinced that the facts denounced have caused the alteration of public order that deserves the removal of Mr. Gutiérrez from the lower chamber of Congress. The decision attempted to offer an interpretation of the norms that could be reconciled with the freedom of speech clause and made a narrow interpretation of the cause for removing a legislator. It argued that the cause should involve a concrete consequence altering public order and later confirmed previous CC decisions that had used high standards for demonstrating the cause.<sup>19</sup>

## 3. The Statute on Migration (STC 9,930)

The CC can declare the unconstitutionality of legislative bills before the President has promulgated them. Thus, during the legislative procedure, the CC can review those bills in an ex-ante manner, at the request of the President, any chamber of Congress, or a group of legislators equivalent to a fourth of each part chamber of Congress.<sup>20</sup>

Chile is no stranger to the phenomenon of migration, and it is particularly exposed to migratory waves from other parts of Latin America. In the past few years, migrants have come from countries such as Venezuela, Colombia, Haiti, and Peru. When the Piñera administration was promoting the approval of a new piece of legislation to establish a new regulation on migration and reform the current migration statute (Decree Law No. 1,094 of 1975), a leftwing group of legislators that were members of the lower chamber, and that had opposed President Piñera's plan, challenged the constitutionality of 14 provisions included in the legislative bill.

The CC partly accepted the challenge and declared the unconstitutionality of seven provisions. These provisions included an attempt to allow the President to release an executive order to require specific additional requirements for the visa approval for people coming from certain countries specified on the President's decree.<sup>21</sup> The CC's decision also struck down some rules establishing sanctions against companies employing foreigners without authorization,<sup>22</sup> the procedure to return children to their countries of origin,<sup>23</sup> and the execution of the measure expelling the foreigner from the Chilean territory.<sup>24</sup> The CC also declared the unconstitutionality of parts of the deadlines that the prohibition of entry by order of the head of the corresponding administrative agency could last,<sup>25</sup> the length of the residency requirement that non-Chileans can invoke to exercise their right to vote<sup>26</sup>—a matter that is explicitly regulated in the Constitution—and the establishment of a specific rule for the probation of foreigners in criminal cases.<sup>27</sup>

According to the CC, these rules infringed some fundamental rights protected in the Chilean Constitution. These rights included the Chilean equal protection clause,<sup>28</sup> which protects equality between foreigners and Chileans, the due process of law,<sup>29</sup> the freedom to mobilize,<sup>30</sup> and the rule that mandates that every regulation or limitation on fundamental rights should be regulated explicitly in legislative statutes—as opposed to executive orders.<sup>31</sup> The CC also invoked international instruments, including soft law norms such as the Universal Declaration on Human Rights and binding norms such as the American Convention on Human Rights.

## 4. Some Inapplicability Cases

Large parts of our previous reports have focused on the inapplicability decisions. We have tried to use examples to show how the CC has tried to protect fundamental rights in specific trends of cases such as those of Article 1, par. 2, of the Law 18,216 and Article 196 ter, par. 1, final part, of the Law 18,290.<sup>32</sup> Both regulations have attempted to prevent judges from substituting a criminal penalty for lower sanctions and many legislators have defended those rules using a criminal

populism narrative that is generally reluctant to take fundamental rights seriously. In both cases, as reported in previous reports, the CC considers that the violation of the principle of proportionality causes the inapplicability of the articles.<sup>33</sup> It is argued that other principles are violated, such as the person's dignity or equality before the law.<sup>34</sup>

Another group of decisions that come from previous years<sup>35</sup> have challenged a provision that prohibited appealing the prosecutors' authority to refuse to investigate a crime.<sup>36</sup> Instead, the law states that the *Ministerio Público*—i.e., the agency in charge of investigating and prosecuting the crimes, must only communicate the decision not to persist with the criminal judicial procedure, which requires the prosecutors filing a formal accusation.<sup>37</sup> The CC has declared the rule that enables the *Ministerio Público* to make the decision not to persist with the investigation and the criminal procedure and leaves the victim powerless in the process, inapplicable for preventing the exercise of the jurisdiction of the courts of justice.<sup>38</sup>

The remainder of this section focuses on a case unrelated to the previous ones. The decisions that will be analyzed are related to the criminal effect of the Covid-19 pandemic. The Chilean State has used legislation to sanction those who have infringed sanitary measures taken by the central authorities.

One of these regulations comes from the Chilean Penal Code of 1874. Article 318 of that Code punishes, without much precision, anyone who endangers public health by violating hygiene or health rules in times of a pandemic. The penalty associated with the attack on public health can reach the loss of freedom.

A judge filed an inapplicability petition to the CC and challenged Article 318.<sup>39</sup> A case in point consisted of a person caught by the police circulating on public roads while not obtaining and keeping a permit, enabling him to be outdoors. The public prosecutor decided to accuse the person before the Fourth Guarantee Court of Santiago. The Judge of that court, Andrea Díaz-Muñoz Bagolini, decided to request the inapplicability. In this

first case, the CC, in a divided vote, chose to accept the inapplicability petition because, following the CC's argument, the sanction violated the principle of proportionality in its criminal law variant. The ruling pointed out that Article 318 of the Penal Code was inconsistent with the equal protection clause and the due process guarantee.<sup>40</sup> The violation of these guarantees occurs because the sanction of deprivation of liberty concerning the conduct developed lacks proportionality.<sup>41</sup>

After the CC decided on this first case, multiple challenges against Article 318 of the Penal Code were presented to the CC. The CC accepted almost all of them.<sup>42</sup> The arguments for accepting the later petitions changed and adapted to the facts of the new cases. In the following cases, the decisive argument was related to the fact that the challenged legal provision did not sufficiently describe the essential elements of the conduct that constituted the crime, violating the principle of *nullum crimen, nulla poena sine praevia lege*.<sup>43</sup> Therefore, the prevailing argument was that the principle of legality and typicity is violated.<sup>44</sup>

In addition, the CC questioned Article 318's lack of definition of the procedure and of the applicable sanction. Also, the *Ministerio Público and an administrative agency could pursue different sanctions for the same conduct. Therefore, the CC concluded that Article 318 favored the discretion of the State's punitive power and generated legal insecurity for the people.*<sup>45</sup>

#### IV. LOOKING AHEAD

The Convention will release the new constitution proposal in July of 2022, and the exit plebiscite approving or rejecting the new constitution will be held in September. Legally, if they vote to reject the constitutional proposal, the current Constitution will remain in place. The Constitutional Convention is currently discussing many proposals that aim at changing the Chilean constitutional system in essential ways. For example, the proposals attempt to turn the Chilean unitary State into a regional state resembling

the cases of Spain or Italy. They also try to establish a plurinational state recognizing the existence of different peoples (in plural), establishing legal pluralism, indigenous courts, the rights of nature, and reproductive rights. It is likely that the current CC, if the constitutional proposal is approved in September, will either disappear or be replaced by a new court.

1 See the constitutional reform included in the Law 21,200, published in December of 2019. Also, see Iván Aróstica, Sergio Verdugo and Nicolás Entei- che, ‘Chile’ in Richard Albert and others (eds), *2019 Global Review of Constitutional Law* (I-CON- nect-Clough Center 2020).

2 See the constitutional reform of the Law N° 21,216, published in March of 2020.

3 See the constitutional reform included in the Law 21,298, published in December of 2020. For additional modifications to the rules of the constitu- tion-making process, see also the constitutional reforms of the following laws: N° 21,221, 21,261, 21,257, 21,296, 21,315, 21,317, N° 21,324.

4 See electoral results and the composition of these bodies in [www.decidechile.cl](http://www.decidechile.cl) (accessed on April 5, 2022).

5 See all the regulations in <https://www.chilecon- vencion.cl/documentos/> (accessed on April 5, 2022).

6 Benjamin Alemparte and Joshua Braver, *Con- stitutional Boot-strapping in Chile? Int’l J. Const. L. Blog*, Nov. 2, 2021, at: <http://www.iconnect- blog.com/2021/10/constitutional-boot-strap- ping-in-chile/>.

7 See Marcela Prieto and Sergio Verdugo, ‘How Political Narratives Affect the Self-Enforcing Nature of Interim Constitutions’ (2021) 13 *Hague Journal on the Rule of Law* 265.

8 See Article 1 of the *Reglamento General de la Convención Constitucional*, and the Preamble of the *Reglamento de Ética y Convivencia, Pre- vención y Sanción de la Violencia Política y de Género, Discursos del Odio, Negacionismo y Dis- tintos Tipos de Discriminación, y de Probidad y Transparencia en el Ejercicio del Cargo*.

9 See Articles 97 and 102 of the *Reglamento Gen- eral de la Convención Constitucional*, and Articles 37-41 of the *Reglamento de Mecanismos, Orgáni- ca y Metodologías de Participación y Educación Popular Constituyente*.

10 See Article 41 of the *Reglamento de Mecanis- mos, Orgánica y Metodologías de Participación y Educación Popular Constituyente*.

11 See generally <https://plataforma.chileconven- cion.cl/> (accessed on April 5, 2022).

12 See the statistics on the website of the CC: [https://www2.tribunalconstitucional.cl/wp-con- tent/uploads/2022/03/Asuntos-ingresados-men- sualmente-al-31.12.2021\\_DICIEMBRE-pa- ra-WEB-ESTADI%CC%81STICAS.pdf](https://www2.tribunalconstitucional.cl/wp-con- tent/uploads/2022/03/Asuntos-ingresados-men- sualmente-al-31.12.2021_DICIEMBRE-pa- ra-WEB-ESTADI%CC%81STICAS.pdf) (accessed on April 10, 2022).

13 See <https://www.tribunalconstitucional.cl/sen- tencias/busqueda-por-ano> (accessed on April 10, 2022).

14 Iván Aróstica, Sergio Verdugo and Nicolás Entei- che, ‘Chile’ in Richard Albert and others (eds), *2020 Global Review of Constitutional Law* (I-CON- nect-Clough Center 2021) 61–62.

15 See STC 9,797.

16 See STC 10,774.

17 STC 8,123, parts. 3-22.

18 STC 8,123, parts. 65-105.

19 STC 8,123, part. 106.

20 Article 93, number 3, and Par. 3 of the Con- stitution

21 Article 27, par. 2, of the legislative bill.

22 Article 117, par. 8 of the bill.

23 Article 132 of the bill.

24 Article 135, par. 1, of the bill.

25 Article 137, par. 4, of the bill.

26 Article 175, par. 1, of the bill.

27 Article 176, number 16.

28 See Article 19, number 2, of the Chilean Con- stitution.

29 See Article 19, number 3, of the Chilean Con- stitution.

30 See Article 19, number 7, of the Chilean Con- stitution.

31 See Article 19, number 23, of the Chilean Con- stitution.

32 The “Emilia Law” case (Article 196 ter, par. 1, final part, of the Law 18,290, STC 2,983) was analyzed in Iván Aróstica, Sergio Verdugo and Nicolás Entei- che, ‘Developments in Chilean Con- stitutional Law’ in Richard Albert and others (eds), *2016 Global Review of Constitutional Law* (I-CON- nect-Clough Center 2017) 50. The “Weapons” case (Article 1, par. 2, of the Law 18,216, STC 3,095), was analyzed in Iván Aróstica, Sergio Ver- dugo and Nicolás Entei- che, ‘Chile: The State of Liberal Democracy’ in Richard Albert and others (eds), *2017 Global Review of Constitutional Law* (I-CONnect-Clough Center 2018) 58.

33 In the case of Article 1, par. 2, of the Law 18,216, see STC 9,710 and 11,418, part. 10. In the case of Article 196 ter, par. 1, final part, of the Law 18,290, see STC 9,713, part. 10.

34 In the case of Article 1, par. 2, of the Law 18,216, it is argued that the dignity of the person is violated, see STC 9,710 and 11,418, part. 6. In the case of Article 196 ter, par. 1, final part, of the Law 18,290, it is argued that equality before the law is violated, see STC 9,713, part. 30.

35 This jurisprudential line comes from 2019. Spe- cifically, it began in STC 6,718.

36 In Chile, many criminal trials involving serious crimes can only initiate after the *Ministerio Públi- co* has filed a formal accusation. Sometimes the prosecutors make decisions that leave the victim unsatisfied, which is why some people advocate that private parties should also be empowered to file criminal actions. Alternatively, they promote the creation of a mechanism that can force the public prosecutors to continue with the judicial procedure against their will.

37 Article 248, letter c, Procedural Penal Code.

38 See STC 10,060 and 10,826, part. 38.

39 See STC 8,950.

40 Article 19, N°s 2 y 3, of the Constitution.

41 See STC 8,950, part. 2.

42 According to the website of the CC, the senten- ces that accepted the inapplicability during 2021 are the following. A temporal criterion is used to point them out (oldest to newest): see STC 10,296, 9,549, 9,544, 9,620, 9,564, 9,545, 9,506, 9,572, 9,567, 9,882, 10,041, 10,013, 9,683, 10,380, 10,224, 9,212, 9,494, 9,476, 9,881, 9,548, 9,571, 9,568, 9,927, 9,565, 9,786, 9,578, 9,566, 9,546, 9,496, 9,479, 9,387, 9,514, 9,497, 9,547, 9,570, 9,926, 9,569, 9,632, 10,368, 10,716, 10,720, 10,796, 10,639, 9,294, 10,529, 10,379, 10,591, 9,928, 10,297, 10,255, 10,273, 10,134, 10,038, 9,373, 10,274, 10,039, 10,012, 10,149, 10,014, 10,247, 10,722, 10,592, 10,517, 10,437, 10,665, 10,295, 10,500, 10,135, 10,530, 10,223, 10,259, 10,335, 10,590, 10,490, 10,531, 10,489, 10,493, 10,298, 10,492, 10,136, 10,040, 10,491, 10,322, 9,838, 10,637, 10,620, 10,544, 10,721, 10,717, 10,638, 10,390, 9,929, 11,759, 11,414, 11,638, 11,607, 11,891, 11,386. In STC 10,817 and 11,231 the CC rejected the inapplicability for formal reasons.

43 The decisions explain that the forbidden be- havior does not exist and is not specified. The

omission in the precise elements of the conduct implies that the State Administration can deter- mine those elements when publishing the rules on hygienic or health conditions, which are suscepti- ble to infringement.

44 See Article 19 N° 3, par. 9, of the Constitution. Justice Romero was originally absent of the STC 8,950 decision, and his participation in the later cases influenced the doctrine of the CC by focus- ing more on how the legality principle in Criminal Law should operate, and what the constitutional requirements for criminal legislation are.

45 The CC argues that Article 318 allows the *Min- isterio Público* to choose any of the behaviors deter- mined by the State Administration. The choice of conduct implies that a procedure and a pen- alty (including loss of liberty) are arbitrarily deter- mined—the preceding without the rule establish- ing a parameter of reasonableness in the election of the *Ministerio Público*.



# Colombia

Carlos Bernal  
Professor

University of Dayton School of Law & University of La Sabana

Sergio Severiche Velásquez  
Law Clerk  
Constitutional Court

## I. INTRODUCTION

During 2021, three major constitutional debates and political concerns were on the Constitutional Court's agenda of 2021: democracy and political rights; liberties, and equality and economic and social rights. This report discusses how constitutional case law enforcing those rights shaped the main constitutional developments during 2021 in Colombia. First, this report accounts for two core decisions of the Constitutional Court with regards to the democratic principle and the right to political opposition. The decisions were about the recognition of legal status to two political movements: "Nuevo Liberalismo" and "Colombia Humana", for promoting political inclusion and pluralism. The latter movement has special political importance. Its leader, current Senator Gustavo Petro, is the favorite in the 2022 presidential campaign. Second, this report analyzes the decisions of the Court on euthanasia, life imprisonment, and the tensions between the freedoms of the press and information and the rights to honor good name. Third, the report considers decisions about measures in favor of Venezuelan migrants, street dwellers, and tax burdens for women. Finally, the reports account for a decision concerning the transitional justice process, related to the political participation of victims of armed conflict.

## II. MAJOR CONSTITUTIONAL DEVELOPMENT

Before the analysis of those decisions, we will account for the major constitutional developments that provide the relevant context. During 2021, the main cities of Colombia were the locations of massive social protests, followed by demonstrations that had already taken place in 2019 and 2020. In April 2021, the Government presented a tax reform bill, whose main goal was to levy 23.4 billion Colombian Pesos (more than US\$500,000,000). This was a measure for addressing the fiscal deficit deriving from the adverse economic effects of the Covid-19 pandemic. The bill outraged thousands of citizens who took to the streets. The so-called "National Strike" lasted until the end of May and generated serious clashes between the demonstrators and police officers. According to official data, the result of the clashes were 24 civilian casualties, 1,147 injured civilians, 2 dead police officers, and 1,477 police officers injured.<sup>1</sup> In addition, protesters blocked roads and highways across the country. The blocks generated unprecedented shortages of food and basic supplies, including oxygen to Covid-19 patients. They also hindered the mobility of people, gave rise to economic damages to several industries, and public and private infrastructure. In this scenario, civil society organizations requested the Inter-American Human Rights Commission to undertake an official visit to the country. The Commission published a report, which accounted for some of the most salient events, reiterated rules concerning protests as a way

of exercising freedom of expression and stated that government authorities can institutionalize necessary and proportional limitations to that right.<sup>2</sup>

Protesters made demands associated to the political agendas of opposition parties, namely, changes in social policies, advances in the implementation of the 2016 Peace Agreement, and safety guarantees for social leaders. The main opposition leaders questioned the policies of the incumbent Government and actively participated in the demonstrations. Commentators considered that engagement as a preparation for the 2022 legislative and presidential elections.

### III. CONSTITUTIONAL CASES

#### 1. Cases concerning Democracy and Political Rights

This context framed the discussion of two major cases that the Constitutional Court decided in 2021. They related to the exercise of political rights by opposition parties and democratic participation. This issue has developed since 2016 when the Peace Agreement, between the Colombian Government and the FARC Guerilla, institutionalized the promotion of political inclusion by means of the legal recognition of new political forces and movements.

This promotion faces a hurdle with the requirement of article 108 of the Constitution. According to that article: “The National Electoral Council (hereinafter: NEC) will award legal personality to parties and political movements and relevant groups of citizens. The groups may acquire legal personality by obtaining no less than two percent (2%) of the votes validly cast in the national territory in the elections of the Chamber of Representatives or Senate. They will lose it if they do not obtain this percentage in the elections to the same Public Bodies”. As this article provides: “The parties and political movements with recognized legal personality may register their candidates in the elections”.

Within this scenario, and with the perspective of the 2022 congressional and presidential election, the Constitutional Court ought to analyze whether the political par-

ties “Nuevo Liberalismo” (hereinafter: New Liberalism) and “Colombia Humana” (hereinafter: Humane Colombia) had the right to recognition of legal status and whether, consequently, they could participate in the electoral contests by registering candidates for the different popularly elected positions.

#### 1.1. The Recognition of Legal Status to the “New Liberalism”

By means of the *per curiam* Decision SU-257/2021, the Constitutional Court commanded the NEC –which is the highest electoral authority in Colombia– to recognize legal status to the “New Liberalism”.

This party was founded on 30 November 1979 by the prominent liberal leader, Luis Carlos Galán Sarmiento, and other liberal politicians of the time, with the aim to renew the ideology of the traditional Liberal Party. By means of Resolution 006/1986, the NEC legally recognized this political group as an autonomous political organization, which was independent from the Liberal Party. On 19 May 1988, Luis Carlos Galán Sarmiento and the then President of the National Board of the Liberal Party agreed to reunify both parties with the aim of winning the 1990 presidential election. Pursuant to this agreement, Galán requested the NEC to cancel the legal personality of the New Liberalism<sup>3</sup>. On 4<sup>th</sup> July 1989, Galán launched his presidential candidacy for the 1990 election as one of the Liberal Party candidates. He publicly announced that if he were elected as the President of Colombia, he would take drastic measures to combat drug trafficking. The foreseen measures included extraditing cartel leaders to the United States. As a response to his commitments, “los extraditables”, a criminal organization led by Pablo Escobar, threatened Galán. Within this context of political violence, Escobar ordered the assassination of Galán,<sup>4</sup> which took place on August 18, 1989.

In November 2017, twenty-seven years later, former, and current members of the Board of the New Liberalism requested the NEC to recognize legal status to the party founded by Galán in 1979, under the same conditions for recognizing legal status to the political party emerging from the former FARC-EP Guerilla. The claimants grounded their request on

the legal provisions that institutionalized the theme concerning political participation of the Peace Agreement. The NEC rejected that claim because of two reasons: (i) Galán had voluntarily surrendered the legal status of the “New Liberalism” to achieve unification with the Liberal Party for the 1990 electoral contest. Before Galán’s assassination, the NEC had already cancelled the legal status of the “New Liberalism”. Therefore, the political violence of the time, driven by drug trafficking conflicts, was not a cause for the loss of legal status of Galán’s party; (ii) the Peace Agreement is not a normative source applicable to this case.

The State Council – which is the highest judicial authority concerning administrative matters – refused to overrule the NEC’s decision, and instead, agreed with the NEC’s reasoning. It also declared that the chapter on political participation of the Peace Agreement had not been legally implemented yet. Hence, its content was not a relevant normative source for the “New Liberalism” case.

The members of the board of directors of the “New Liberalism” filed a constitutional complaint (*tutela*) against the decision by the State Council. They claim that this decision had violated their fundamental right to due process. They stressed two reasons for grounding their claim: (i) the State Council did not consider the circumstances of political violence, which put the party in an unequal position in the electoral contest; and (ii) although the Peace Agreement does not have direct legally binding force, the NEC ought to comply with it in good faith and ought to enforce the principle of democratic openness in the same way it did when recognizing legal status to the party arising from the former FARC-EP guerilla.

By means of Decision SU-257/2021, the Constitutional Court agreed with the claimants and protected their right to due process. The Court included three reasons in its reasoning.

First, the Court clarified that the Peace Agreement is not directly and immediately applicable. Instead, the Agreement requires implementation by means of constitutional amendments or legislation. Furthermore, a direct application of the Peace Agreement concerning the recognition and loss of legal

status could undermine the legal framework governing political parties and movements. Notwithstanding, authorities ought to comply with the Peace Agreement in good faith when they issue and apply legislation and policies.

Second, the situation surrounding the end of the legal status of the “New Liberalism” is quite different from the circumstances in which the political party emerging from the former FARC-EP guerilla arose. While the cause of the former was the intention of the “New Liberalism” to reunify itself with the Liberal Party, the latter was about the political incorporation in democracy of a guerrilla group with the aim of finishing the armed conflict. Thus, it is inappropriate to treat both cases as similar cases for the sake of applying precedent or analogical reasoning.

Third, despite these two facts, according to the Constitutional Court, the State Council violated the fundamental right of the petitioners to found political parties without any limitation, to be members of them, and to disseminate their ideas and programs. The Court held that the violation arose because the State Council interpreted the abovementioned requirements of article 108 of the Constitution as a rule and not as a principle. According to the Court, the context of political violence outlasted the assassination of Galán. This circumstance was beyond the parties’s control and prevented it to apply for regaining legal status and to obtaining the minimum constitutional threshold of effective elective representatives.

The decision by the Court was *per curiam*. However, it is open to question whether, despite its specificity, it is plausible to interpret article 108 as a principle. Moreover, it is undeniable the Galán himself voluntarily requested the cancellation of the legal status of the “New Liberalism”, and that, due to this cancellation and the reunification with the Liberal Party, César Gaviria, Galán’s follower, was elected President for the term 1990-1994. Hence, it is hard to understand how the Court grounded its assessment of the context of political violence. Back in the nineties, the political violence did not prevent the “New Liberalism” to regain legal status. Instead, within a context of political violence, the leaders of the “New Liberalism” - beginning with Gaviria - overtook control of the Liberal Party. This

strategy led Galán’s follower to victory in the 1990 presidential election.

## 1.2. The Recognition of the legal status to the “Humane Colombia”

By means of Decision SU-316/2021, with a vote of 8 to 1, the Constitutional Court recognized and ordered the NEC to recognize the legal status to the “Humane Colombia”. This is a political movement, led by the left-wing opposition leader, Gustavo Petro Urrego, who is currently a presidential candidate.

Petro obtained the right to occupy a seat as Senator of the Republic for the period 2018-2022 as per articles 112 of the Colombian Constitution and 24 of the Statute of the Opposition. According to those provisions, the candidate who obtains the second highest vote in the presidential elections will have the right to occupy a seat in the Senate during the corresponding term. Interestingly, in the 2018 congressional election, “Humane Colombia” did not meet the threshold of that article 108 of the Constitution required for a political party or movement to maintain its legal status. The NEC argued the reasons for justifying Petro’s request for recognition of legal status to “Humane Colombia”.

Petro challenged that decision by means of a constitutional complaint. The petitioner argued that the NEC’s decision violated the fundamental right to participate in the formation, exercise, and control of political power of: (i) a significant group of citizens associated in “Humane Colombia”, (ii) people who voted for the candidates of this movement for the Presidency and Vice-Presidency of the Republic; and (iii) the founders of that movement. The petitioner highlighted that this violation was particularly severe because that movement holds the right to exercise political opposition to the current government.

By means of Decision SU-316/2021, the Constitutional Court issued a final ruling concerning that complaint. According to the Court, the Senator seat that the Constitution grants to the forerunner in the presidential election allocates several rights to the opposition leader. Those are the rights to: (i) join the board of their political party or movement if it already exists; and (ii) participate in the exercise of political op-

position. Those rights guarantee that the people who voted for the defeated option also have political representation in Congress. The party or movement to which the defeated forerunner for president belongs enjoys automatic recognition of its legal status. In Petro’s case, this amounts to recognizing legal political representation to more than eight million citizens who voted for Petro as President and for his program and his ideology. The Court remarked that recognizing this status of the opposition political movement enables the emergence and consolidation of new political forces, which is an imperative in a pluralist framework of government.

Decision SU-316/2021 gives rise to serious concerns about the enforcement of the subsidiarity of the constitutional complaint proceedings. Along these lines, Lizarazo, J., dissented from the majority. He claimed that the constitutional complaint was inadmissible because the primary judicial mechanism before the administrative jurisdiction was appropriate and effective in the present case. Indeed, the petitioner could have even requested precautionary measures to avoid a possible imminent irremediable harm, that is, the participation of “Humane Colombia” in the 2019 territorial elections. Besides this argument, the Court’s decision also raises the question of whether the Constitutional Court has the power to rule about political disputes with direct electoral consequences. Affirming that power might sharpen the politicization of constitutional justice and the judicialization of politics.

## 2. Cases Concerning Liberties

In various 2021 decisions, the Constitutional Court also analyzed the collisions arising between liberties and other fundamental rights such as life, honor and good name and the constitutional duty to protect the rights of children. These decisions raise fundamental questions about: (i) the limits of judicial review of constitutional amendments passed by Congress; (ii) the flexibility of constitutional *res judicata* and its effects to the principles of the Rule of Law and legal certainty; and (iii) the role of the constitutional judges for addressing matters giving rise to fundamental disagreements in society.

## 2.1. A Decision on Euthanasia

By means of Decision C-233/2021, the Constitutional Court analyzed (for the second time) the constitutionality of the crime of mercy homicide, which article 106 of Law 599/2000 (Criminal Code) foresees. According to this article, mercy homicide to end intense suffering resulting from bodily injury or serious and incurable disease is punishable by imprisonment from 16 to 54 months. The petitioners in this case requested the Constitutional Court to overrule a previous ruling on the matter, namely, the Decision C-239/1997. In that judgment, the Court had upheld the above-mentioned article and had authorized mercy homicide when: *(i)* a physician carries out the conduct, *(ii)* at the request and with the consent of the patient and, *(iii)* and the patient is terminally ill. The petitioners requested the Court to reassess that ruling. They argued that criminalizing euthanasia when, although suffering from intense pain, the patient is not terminally ill, violates the prohibition of cruel and unusual punishments, the right to free development of personality, and the principle of human dignity.

In a controversial 6–3 decision, the Constitutional Court held that it could weaken the *res judicata* and rule again on the matter because of new legal elements: *(i)* a change in the normative context; and *(ii)* an update concerning the meaning of the Constitution. First, there was a change in the normative context concerning euthanasia, due to the issuance of Acts 599/2000,<sup>5</sup> 972/2005,<sup>6</sup> 1733/2014,<sup>7</sup> and 1996/2019,<sup>8</sup> and their regulatory implementation. Second, there was an update in the “material meaning of the Constitution” acknowledging a fundamental right to die with dignity.

According to that alleged right, the Court ruled that the crime of mercy homicide is not enforceable when: *(i)* a physician carries out the conduct, *(ii)* with the free and informed consent of the patient, prior or after diagnosis, and provided that *(iii)* the patient suffers from intense physical or mental suffering, resulting from bodily injury or a serious and incurable disease. Hence, the Court eliminated the requirement concerning the terminal illness. The majority argued that the principle of human dignity forbids requiring a per-

son to continue living with intense suffering deriving from a serious and incurable illness. Pardo, J., Ibáñez, J., and Meneses J. dissented because of three reasons. First, the *res judicata* of the 1997 ruling disempowered the Court to rule again about this matter. That previous ruling had already assessed the requirement about terminal illness. Second, there is no evidence of a social change concerning the principle of inviolability of life, as article 11 of the Constitution provides. Third, the acceptance of euthanasia itself does not follow from a defense of autonomy. Consent to such conduct is usually given under circumstances that, by definition, hinder free consent.

## 2.2. A Decision on Life Imprisonment

In Decision C-294/2021, the Constitutional Court decided on a claim against the constitutionality of Constitutional Amendment 1/2020. By means of this amendment, Congress created an exception to the prohibition of life imprisonment, provided by Article 34 of the Constitution. The amendment empowered Congress to punish with life imprisonment crimes against the life and sexual integrity of children and adolescents. It also foresaw a possible review of the sentence after twenty-five years of imprisonment.

The petitioners appealed to the doctrine of unconstitutional constitutional amendments. They claimed that the amendment was a constitutional replacement. The exception to the life imprisonment prohibition allegedly substituted essential constitutional elements: the rule of law, the principle of human dignity, and the possibility of re-socialization of people deprived from liberty.

In a 6-3 decision, the Court agreed and highlighted three points. Firstly, the right to the resocialization is the primary purpose of the sentence of intramural imprisonment. This purpose derives from the principle of human dignity and from the prohibition of cruel and unusual punishment, because life imprisonment marginalizes individuals from society forever. Second, the possibility to review the sentence after twenty-five years of imprisonment is indeterminate. It substitutes two essential constitutional elements concerning criminal law: the humanization of punishments and the purpose of

resocialization of the convicted persons. Finally, life imprisonment is not an appropriate measure to ensure the protection of children and adolescents who are victims of the crimes that the constitutional amendment regulates.

Ibáñez, J., Meneses, J., and Ortiz J., dissented. They argued that the aim of resocialization is not an essential constitutional element. They also claimed that the use of that aim to apply the doctrine of unconstitutional constitutional amendments unjustifiably limits the congressional power to amend the constitution.

## 2.3. A Decision Concerning Free Speech

In Decision C-135/2021, the Constitutional Court reviewed the constitutionality of articles 55 and 56 of Act 29/1944. Under a regimen of fault liability, these articles created presumption of fault against journalists and media, which caused damages to third parties when exercising the freedom of expression. In virtue of these statutory provisions, journalists and media have the burden to prove diligence, if third parties sue them in civil liability processes. The petitioners in this case argued that the presumption of fault violated the fundamental rights to freedom of expression, freedom of press, and due process, because it generated self-censorship and obstructed the free flow of information. In a 9-0 decision, the Court declared the unconstitutionality of the statutory presumption of fault. The Court applied a proportionality analysis under a strict scrutiny because the presumption implied an intense limitation to the alleged constitutional rights. In its analysis, the Court concluded that the statutory provisions pursued an imperative constitutional purpose, namely, protecting the fundamental rights to honor good name of third parties. However, the Court established that the measure was not adequate to achieve the intended purpose. The presumption of fault for journalists or media outlets leads them to reveal their sources to prove that they meet the requirements of truthfulness and impartiality. This violates the constitutional protection of professional secrecy. To avoid this effect, journalists and media outlets could refrain from issuing information about which they are not willing to reveal their sources

in the event of a civil liability lawsuit. This causes an unconstitutional chilling effect.

### III. CASES CONCERNING EQUALITY AND ECONOMIC AND SOCIAL RIGHTS

#### 3.1. A Decision Concerning Equality Rights

In 2021 the Constitutional Court also issued key decisions concerning equality rights and economic and social rights.

An interesting case about equality relates to the recognition of the Colombian nationality to children of Venezuelan nationals. In Decision C-119/2021, the Constitutional Court analyzed the constitutionality of article 1 of Act 1997/2019. This article added a section to article 2 of Act 43/1993, which foresaw the requirements for obtaining the Colombian nationality by birth. The added section allowed, exceptionally, to presume the residence and intention of permanence in Colombia to Venezuelans that find themselves in a regular or irregular migratory situation, or who are refugee applicants, whose children were born in Colombia since the 1st of January 2015 and up to 2 years after the enactment of Act 1997/2019. This statutory amendment aimed at solving the problem of statelessness of children of Venezuelan migrants, who are in an irregular migratory situation.

The petitioner claimed that the statutory expression ‘Venezuelans’ violated the right to equality. It allegedly contradicts the duty of equal treatment to all migrants and asylum seekers, concerning the recognition of Colombian nationality by birth. The alleged violation would arise from an unjustified preferential treatment in favor of children of Venezuelans. Despite the legitimate end of protecting children from statelessness, the privilege would imply a discrimination of children of people from other countries based on their national origin.

In a 9-0 decision, the Constitutional Court upheld the statutory provisions as compatible with the right to equality and with the duty to protect the rights of foreigner citizens in Colombia. According to the Court, the measure pursues an imperative constitutional purpose, namely, preventing the

risk of statelessness faced by the children of Venezuelans who: (i) request refuge or who are in a regular or irregular migratory situation and (ii) were born in Colombian territory between 2015 and the term of validity of Act 1997/2019. This objective is consistent with the right to protect foreign citizens in Colombia, as institutionalized in article 44 of the Colombian Constitution. Moreover, the legislative measure is suitable to achieve that goal because it prevents the risk of statelessness by facilitating the recognition of nationality by birth in favor of children of Venezuelan parents in a regular, irregular or refugee migratory situation. Furthermore, the measure is necessary because of the disproportionate restrictions existing in Venezuela to recognize the nationality of children born abroad and the lack of alternative equally suitable measures. Finally, the measure is balanced and strictly proportionate, because: (i) it is exceptional and is temporarily limited to the circumstances related to the serious humanitarian crisis suffered by the Venezuelan population, (ii) it is not the only alternative for children of foreigners to gain Colombian nationality and (iii) domestic legislation has an adequate mechanism to prevent the statelessness of other national groups that do not face the same restrictions as the beneficiaries of the measure analyzed. In conclusion, the benefits of the measure justify not granting identical treatment between children of Venezuelan citizens and children of citizens of other national groups.

#### 3.2. A Decision Concerning the Constitutional Protection of Street Dwellers

An important ruling about economic and social rights related to the constitutional protection of street dwellers was decision C-062/2021 wherein the Constitutional Court reviewed the constitutionality of Section 11 of Article 140 of Act 1801/2016 (National Code of Citizen Security). This rule foresees two kinds of sanctions, namely, fines and participation in educational programs, to individuals who perform their physiological needs in public space. The petitioners requested that section to be declared unconstitutional, because it violates the rights to human dignity, equality, privacy, and autonomy

of the street dwellers, who do not have the possibility of fulfilling their physiological needs in places different to public areas. The petitioners requested the Court to condition the constitutionality of the statutory prohibition to the understanding that only the duty to participate in community programs or pedagogical activities can apply to street dwellers who perform their physiological needs in public spaces.

The petitioners stressed two arguments. First, according to studies on the subject, it has been shown that street dwellers do not have options to fulfill their physiological needs in conditions of dignity. This is due to the lack of public toilets in the cities and the refusal of commercial shops that have toilet facilities to open them to the public so that homeless people can use them. Therefore, the only possibility for street dwellers is the use of public areas. Second, imposing a sanction on that group of people under those circumstances of vulnerability violates their right to human dignity and equality because it constitutes degrading and humiliating treatment.

In a decision 7-1, the Constitutional Court agreed with the petitioners, and conditionally upheld Section 11 of Article 140 of the National Code of Citizen Security. The Court also urged municipal authorities to design and implement a public policy that guarantees universal access to health infrastructure in the public space that is available to people who live on the street. The Court clarified that generally prohibiting and sanctioning people who make their physiological needs in the public space is justified and proportional because that conduct affects the integrity of the public areas. Therefore, it is necessary to impose these punitive measures to achieve a better coexistence in society and to protect the right to a healthy environment for the exercise of other fundamental rights. Notwithstanding, the imposition of sanctions on street dwellers violates their rights to equality and privacy. Fining those individuals violates the right to equality. Due to their exclusion, street dwellers constitutionally deserve a special treatment. In addition, the norm violates their right to privacy, because the absence of health infrastructure for these people does not allow them to fulfill a biological need inherent to

human beings privately. Therefore, imposing a sanction in this circumstance is contrary to the dignity of people.

### 3.3. Value-Added Tax Exemption for Menstrual Cups

In Decision C-102/2021, the Constitutional Court reviewed the constitutionality of Section 96.19 of Article 477 of Act 1819/2016 (Tax Statute), which provides that sanitary napkin are exempt from VAT. The petitioners argued that regulation violates women's rights to equality, free development of personality, health, and a healthy environment. In addition, they affirmed that the rule ignores the obligations of the State derived from different international treaties ratified by Colombia.<sup>9</sup> This is because the legislator unjustifiably omitted to include products similar to sanitary napkins, such as menstrual cups, within the scope of the VAT exemption. First, they affirmed that the legislator's omission violates the right to equality, to non-discrimination based on gender, and to the free development of the personality. Second, not including menstrual cups within the VAT exemption violates the rights to health and a healthy environment, because it affects the possibility that women can access healthier menstrual hygiene alternatives than sanitary napkins or the tampons without additional barriers.

In an 8-0 decision, the Court upheld the provision at stake, only under the understanding that the VAT exemption must also include menstrual cups and similar products for menstrual hygiene. The Court concluded that not including menstrual cups within VAT exemptions violates the principles of material equality and tax equity for five reasons. First, because it applies the full VAT rate of 19% only to women who choose menstrual cups to meet a biological need. Second, because it provides discriminatory and inequitable tax treatment to analogous menstrual management products for women, who, in addition to seeing their personal finances affected, suffer salary gaps with respect to men. Third, because it discourages and makes it difficult to access menstrual cups and similar products as an alternative to manage the menstrual cycle. Fourth, since in Colombia there are no effective public policies that compen-

sate for the impact on economic subsistence caused by the higher value that women must pay for that product due to VAT. Finally, because it imposes a barrier to access to an essential product for the exercise of women's right to dignity.

### 3.4. Political Participation of Victims of the Armed Conflict

Decision SU-150/2021 is the first Constitutional Court ruling on the legislative process of a Constitutional Amendment. In this case, the Court reviewed a tutela action filed by Senator Roy Barreras, who acted on his own behalf and on behalf of 6.670,368 inhabitants of about 166 municipalities that would make up the Special Transitory Districts of Peace for the House of Representatives, which were created by the Peace Agreement. The petitioner requested the Court to protect the rights to equality, due process in the legislative process, and the right to political participation of the victims of the armed conflict. The petitioner claimed that in the plenary session of the Senate on November 30, 2017, the Board of Directors of the Senate of the Republic decided not to approve the conciliation report to the project of Legislative Act 05 of 2017 Senate, 017 of 2017 House of Representatives "[p] by means of which 16 Special Transitory Districts of Peace are created for the House of Representatives in the periods 2018-2022 and 2022-2026", because did not obtain the required majorities. Contrary to that decision, the petitioner claimed that the necessary majority was confirmed at the time the report was voted on.

In a 5-3 decision, the Court ruled that the right to due process was violated in the legislative process, because the conciliation report had been approved by the plenary session of the Senate of the Republic with the necessary majorities. The Court argued that for the calculation of the quorum and the majorities, the seats that could not be replaced should be discounted as provided in article 134 of the Constitution, which establishes that the members of the public institutions of popular election will not have alternates. Therefore, the constitutional reform could be approved with an absolute majority, that is, any number equal to or greater than 50 affirmative votes. The Court concluded that at the time of the

events, the Senate of the Republic was made up of 102 senators, three of whom had been suspended from their investiture and could not be replaced. In this sense, there was a re-configuration of the Senate and, consequently, the quorum and majorities had to be calculated on a total of 99 senators.

The Court commanded: (i) to assemble the final approved document of the constitutional reform project according to the reconciled text so that the President of the Republic proceeded to sign and promulgate it; (ii) that all the electoral authorities adopt the necessary measures to allow the registration and election of the candidates for the Special Transitory Districts of Peace for the House of Representatives in the elections of March 13, 2022. Finally, (iii) it adopted an unprecedented, extraordinary, and structural order that consisted of modifying the original text of the constitutional reform to change the validity of those seats for the periods 2022-206 and 2026-2030, which was initially planned by the Congress for the periods 2018-2022 and 2022-2026.

Judges Ibáñez, Ortiz and Meneses filed dissenting opinion. They argued that the constitutional complaint (tutela) is not the appropriate judicial means to resolve the discrepancies that arise during the constitutional or legislative processes, which have their own means of control provided for by the Constitution.

## IV. LOOKING AHEAD

In 2022, the Constitutional Court have addressed the constitutional debate on the decriminalization of abortion. Since the end of 2021, two unconstitutionality lawsuits have been filed that ask the Court to overrule Decision C-355/2006 to fully decriminalize abortion, in all cases. In addition, the Court must finally decide on the cases that refer to the limitations on the freedoms and the right to education of children derived from the measures ordered to deal with the containment of the Covid-19 pandemic. It is also foreseeable that the Court will decide on the constitutionality of the Draft Electoral Code in the context of the legislative and presidential elections.

1 See: General *Balance*- National Strike 2021, April 28 to June 27, 2021. Ministry of National Defense. Retrieved from: [https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/estudios\\_sectoriales/info\\_estadistica/InformeCorrido\\_Balance\\_Paro\\_2021.pdf](https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/estudios_sectoriales/info_estadistica/InformeCorrido_Balance_Paro_2021.pdf) .

2 See: [https://www.oas.org/es/cidh/informes/pdfs/ObservacionesVisita\\_cidh\\_Colombia\\_spA.pdf](https://www.oas.org/es/cidh/informes/pdfs/ObservacionesVisita_cidh_Colombia_spA.pdf)

3 See. Colombian Constitutional Court, Decision SU-257/2021, para. 179.

4 See: Colombian Supreme Court of Justice, Criminal Cassation Chamber, Judgment of August 31, 2011, in the proceeding against Alberto Rafael Santofimio Botero.

5 This Act is the Criminal Code.

6 This Act includes regulations to improve the care of people suffering from catastrophic diseases, especially HIV/AIDS .

7 This Act regulates palliative care services for a comprehensive management of patients with terminal, chronic, degenerative, and irreversible diseases, in any phase of the disease with a high impact on quality of life.

8 This Act institutionalizes a regulation for the exercise of legal capacity by persons with disabilities.

9 The Convention on the Elimination of All Forms of Discrimination against Women; the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women; and the International Covenant on Economic, Social and Cultural Rights.



# Costa Rica

Bruce M. Wilson

Professor, University of Central Florida & Associated Research Professor, Chr. Michelsen Institute

Olman A. Rodríguez L.

Senior Law Clerk, Constitutional Chamber of the Supreme Court of Costa Rica

Sigrid Morales Carrasco

Law Clerk, Constitutional Chamber of the Supreme Court of Costa Rica

## I. INTRODUCTION

Throughout 2021, the global COVID-19 pandemic continued to dominate Costa Rica's social, political, economic, and constitutional landscape. President Alvarado's measures designed to combat the pandemic continued to generate backlash both in the political and judicial spheres from diverse groups of people and organized interests impacted by the measures. This disquiet was amplified by political parties and presidential candidates who sought to use the negative impacts for political gain during the general election campaign that was in full swing for much of 2021.

As in 2020, challenges to the government's "National Emergency"<sup>1</sup> decree (promulgated at the end of March 2020) continue to fill the docket of the Constitutional Chamber of the Supreme Court (commonly referred to as the *Sala Cuarta* or Forth Chamber, in English). As the pandemic continued into its second year, many working people, especially those in the education sector, were particularly hard-hit. Many workers, including the ones who were able to keep their jobs, found their incomes reduced and their allotted working hours significantly cut due to the anti-Covid measures. The situation was compounded by emergency legislation that served to legitimize and permit worsening labor conditions and wages as part of the government's strategy to address the deteriorating economic situation brought on by the pandemic. Many of the workers who lost their formal sector jobs sought employment in the largely unregulated

informal sector where they lacked the state's social security protections they had previously enjoyed in their formal sector employment. Numerous economic, social, and cultural (ESC) rights were similarly negatively impacted by the government's policy responses to the Covid-19 pandemic; however, education is an area that was particularly badly impacted. In this year's report we focus on the constitutional developments as they pertain to the education sector since it affects a large percentage of the population (students, parents, and employees) and was especially hard hit by the pandemic and the corresponding government policies. Lockdowns in 2020 and again in 2021 resulted in formal face-to-face classes being replaced by quickly designed "home" schooling and/or mixed mode educational programs. Many experts believe that the consequences will include long-term impacts on students' education levels, especially for the most vulnerable sectors of society: poor families in marginalized urban and rural communities that lack the adequate infrastructure and resources to effectively teach students in an online modality.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### a. Reelection of Magistrates

One significant constitutional issue, flagged in last year's edition of the Global Review, concerns the long running political hurdle

of maintaining a full complement of magistrates on the Constitutional Chamber of the Supreme Court. The Constitutional Chamber is composed of seven magistrates who are elected to eight-year terms by a two-thirds super-majority of the Legislative Assembly (38 of the 57 members). After their eight years on the bench, magistrates are automatically reelected unless a two-thirds super-majority of deputies vote against renewal. To date, no magistrate has ever been denied reelection at the end of their eight-year term, which creates the reality of magistrates effectively enjoying life tenure.<sup>2</sup>

In 2021, the Legislative Assembly, which is required to elect a replacement justice within thirty calendar days of being notified of a vacancy on the court,<sup>3</sup> failed to comply with the said term. In the case of the most recent vacancy, Magistrate Nancy Hernández López<sup>4</sup> notified the assembly in November 2021 that she would resign from the Constitutional Chamber to take up a position as magistrate on the InterAmerican Court for Human Rights starting on December 1, 2021. Five months later the Legislative Assembly has yet to fill her position, thus forcing the court to use “part-time” (*suplente*) magistrates to fill in for the missing fulltime magistrates. This reflects the continued political impasse in appointing magistrates to the Constitutional Chamber of the Supreme Court in accordance with the constitutional requirements and the willingness of elected representatives to ignore those constitutional mandates.

## b. Education rights

Costa Rican constitutions have recognized the importance of universal, free education since the 1841 Constitution first delineated a state duty to use state funds to “enlighten” the people. In 1869, a new constitution made primary education compulsory for boys and girls and required it to be funded by the state. Due to a lack of schoolteachers, this constitutional right was more aspirational than real until the 19<sup>th</sup> century, when concrete steps were taken to address the issue. Teacher shortages and poor training created many of the problems in realizing the right to education until 1941 when the University of Costa Rica was created with a Faculty of Education as a central department.

The realization of the right to education strengthened when the current 1949 Constitution was amended in 1997 to constitutionally guarantee the education sector a budget allocation of 6 percent of the GDP annually. In 2011, this was increased to 8 percent of the country’s GDP. However, the *Estado de la Nación*,<sup>5</sup> a national think tank, reported a troubling conclusion revealing that the public investment was not matched by the delivery of education. This, it has been argued, has become tantamount to putting Costa Rican students’ constitutional right to education in peril.

As noted in last year’s report, in 2020, the government’s health measures designed to control the Covid-19 virus suspended all face-to-face classes and introduced distance learning for all students. In 2021, schools reopened, but were again suspended for over six weeks due to an increase in Covid-19 cases. Replacing traditional face-to-face classes with virtual classes unintentionally harmed the educational rights of thousands of Costa Rican students who lacked the necessary resources to reliably access the internet and lacked functioning computers to do their schoolwork. This was to the detriment especially for economically marginalized children and families, creating a new educational achievement gap between poorer and better off households. The government’s measures to control the pandemic, including social distancing practices, had a severe impact on education, which is well-documented in a report from the *Estado de la Nación*. Clearly, there was little room to adapt to the challenges for education in response to the pandemic, as these systematic problems were later referred to as an “*educational blackout*”.

## III. CONSTITUTIONAL CASES

### 1. The Constitutional Right to Education

The Constitutional Chamber has frequently interpreted Article 78 of the Constitution as requiring the state to meet key minimum infrastructure conditions that effectively guarantee the enjoyment of the constitutional right to education. The right to education is contained in Articles 76 through

89 and includes requirements to supply and train teachers (Article 86) at the levels that meet the educational needs of the country (Decisions: 2021-19098, 2021-23006). Court decisions have previously recognized specific requirements including state-funded buildings, furniture, teaching materials, teacher training, and stipends for students from marginalized backgrounds. Constitutional Chamber decisions from 2021 re-emphasized the court’s recognition of a strong obligation on the state to provide free public education using government funds (Decisions: 2021-12765, 2021-21915, 2021-15765, 2021-17797, 2021-14303, 2021-14966, 2021-13845, 2021-9261). But, because of the financial stress caused by the Covid-19 pandemic, the government took stringent financial measures including passing a law to enforce a hiring freeze that would prevent schools from replacing any teacher who resigned, retired, or was fired. The constitutionality of the legislation was successfully challenged at the Constitutional Chamber of the Supreme Court resulting in a suspension of the application of the law. In accordance with this constitutional process, the Constitutional Chamber of the Supreme Court reserved the right to examine every individual claim by students or their parents, to allow the continuation of the educational process for all minors who attend school and who saw their lessons suspended (Decision 2021-6984).

### 2. Right to education

In another important case, a mother refused to allow her child to attend face-to-face schooling as is required by law. She argued that in a previous case she almost lost her child to the *Patronato Nacional de la Infancia* (state agency for Child welfare) for not allowing the child to attend school in 2020 (Decision # 2021-03967). In 2021, she argued again that because of the child’s severe autism, brain injury, and physical illness he was “*educationally, non-functional*.” According to the Constitutional Chamber, though, the determination of the “*functionality*” of the child in face-to-face educational process was not a question for the Court to determine. Instead, the court argued, the assessment of the child’s situation should be

taken by the public-school authorities or in a different judicial arena. It is normal for the Court to avoid lengthy proofing procedures that are incompatible with the quick and informal nature of the writ of *amparo* (a highly informal writ of protection). However, the Constitutional Chamber noted that the right to education is a fundamental constitutional right that must be secured for *all* children without discrimination, and it must be pursued on a continuous basis from pre-school to university, as mandated by article 77 of the Constitution (Decision # 2001-04339). The court also noted that in an earlier decision (2008-9759), the state has an obligation to guarantee continuous enrollment and secure for all students who have been regular students of educational institutions, the possibility of fulfilling all stages of their comprehensive education. The court did recognize the scale of the problems faced by the mother taking care of this special needs child and reminded school authorities of their duty to provide accompaniment and help manage the child's behavior to ensure that he can remain in the educational system.

### 3. Schooling districts

Because some schools and school districts perform better than others, some parents seek to enroll their children in a public school with higher educational reputation. In many cases, this type of “school shopping” practice is blocked by school authorities who refuse to enroll the students. The Constitutional Chamber in previous jurisprudence (Decisions #1998-000735, #2015-04838, 2021-19487) upheld the school districts' decisions (Decision #2021-009676). The Court has indicated that the right to education guarantees everyone access to the appropriate level of educational instruction, but that right does not extend or imply an automatic right to enroll a student in a specific educational institution of their choice. That is, for the court, it is constitutionally legitimate for the state to arrange the enrollment of students under objective criteria such as the district of residence of the student or the capacity of the school (Decision #2016-002815). Parents with necessary personal resources can still send their children to any licensed private school if they so choose.

### 4. Professional training for sentenced criminal offenders

According to the Constitutional Chamber, criminally sentenced offenders are entitled to certain fundamental rights, however attenuated, and housed in accordance with the terms of their custodial sentence. Under this doctrine prisoners have the right to be enrolled in certain professional training programs to prepare them for life after they are released from prison. These programs are conducted by a branch of the state university system through a state-funded university specializing in distance education, the Universidad Nacional de Educación a Distancia (UNED). The Court has emphasized that access to education for the prison population, a vulnerable population group, is a human right and serves as a fundamental tool for social inclusion (Decision #2021-18159). For that matter, 19 prison students claimed that they were not given their handout materials, so they filed an *amparo* (writ of protection) for the university to comply with their right to education. For this reason, the Court said that to effectively guarantee the exercise of this right, it is very important that the resources required are provided in a timely manner during all the educational processes. In this sense, the Court protects the right to education of even some of the most marginalized citizens from harm caused by the late delivery of necessary class materials.

### 5. The new reality and adaptation of the educational system to Covid-19

Parents also have brought cases before the Constitutional Chamber to highlight the disparities between the face-to-face schooling and the virtual system of classes for students and to seek remedy for what they consider harm to their children's education experience. One family, for example, argued that their child was being discriminated against due to the fewer numbers of contact hours of formal schooling dedicated to students forced into online, virtual classes as a result of the government's Covid-lockdown measures (Decision #2021-005747). In their defense, the school authorities argued that they are following the guidelines established by the Ministry of Public Education

entitled “*educational support at a distance*”, as part of the strategy designed to teach the school courses during the Covid-19 crisis. The Court, for its part, followed its earlier jurisprudence that held that reviewing the dynamics, organization, schedules, and evaluation of the virtual classes implemented by the Ministry of Public Education exceeds the competences of the Constitutional Chamber. It further argued that the *writ of amparo* is designed to provide timely protection against infractions or direct threats to fundamental rights and freedoms and should not be used as a generic legal instrument to channel petitions and disagreements of other types of issues, such as the ones in these claims (Decision # 2020-20103). It also cited another decision concerning complaints that alleged that the online model of education was not quality education where it had previously refused to assess whether online classes and homework are or are not pedagogically appropriate or efficacious replacements for traditional classroom teaching for students' learning (Decision #2020-18242). The Court concluded that both systems were not comparable and responded to different teaching methodologies that do not need the same quantity of hours in direct contact with the professor due to the differences in the pedagogical modalities.

What these cases in 2021 have made very clear in the Constitutional Chamber's jurisprudence is that the court is not willing to discuss or accept claims that lead to technical discussions or assessments of the curricula for students. The court in these decisions emphatically states these types of claims are incompatible with the nature of the *writ of amparo*. *Amparos*, it argues, are meant to be quick, low-cost remedy to claim rights enshrined in the Constitution, including human rights instruments applicable in Costa Rica, rather than technical discussions on the appropriate pedagogical modality. These types of cases do not reach that threshold to be considered by the court and should instead be directed to the educational authorities that are better positioned to address these claims. It is also always possible for the parties in a case to file their claims in the ordinary court system, where they can be discussed at full length, rather than with the Constitutional Chamber of the Supreme Court.

The right to education is a formally protected constitutional right. These cases from 2021 show that the Constitutional Chamber remains committed through its jurisprudence to protect the population's enjoyment of its constitutionally protected right to education, but it also continues to rely on education authorities to design and implement the specific education policies. This is particularly apparent when examining how the Court decided cases concerning education policies designed to address teaching students during a pandemic. The cases also continue to highlight the Constitutional Chamber's willingness to protect the educational interests of unpopular and marginalized groups such as prisoners.

#### IV. LOOKING AHEAD

Elections for all 57-members of the Legislative Assembly and the executive branch took place in February 2022. No candidate secured more than 40% in the first-round election in February, which animated a second round between the top two candidates in April. The ultimate winner, Rodrigo Chaves, campaigned as a maverick outsider and clashed with the Tribunal Supremo de Elecciones (Supreme Election Tribunal, TSE) and the Constitutional Chamber and promised to use referenda to circumvent the Congress; however, it is not actually constitutionally possible to use the referendum process to do so. This governance strategy will likely create a tumultuous year of numerous constitutional challenges and possibly more clashes with the government employee unions, particularly in the educational sector.

Also, in 2022 public education will continue to be of central concern correcting for deficiencies created by the Covid-19 pandemic and the state's response and addressing concerns about how students can reach their real educational goals. It is still not clear if the proposed measures for 2022 will be appropriate and suitable, as it is argued that this year's program lacks mechanisms to evaluate the past and present curricula, measure their gains, and supervise them, among other fundamental conditions.

During 2021, the Constitutional Chamber had a very active year reviewing bills of

laws relating to public employment; the year 2022 will possibly witness more political efforts to harness public spending through targeting entitlement rights like pensions and amendments to the public employment legislation, which will be challenged in the Constitutional Chamber. Similarly, the new Chaves administration has promised to use unorthodox governance techniques including referenda, to pass legislation. It has been argued that some of these techniques are unconstitutional and will likely end up in the court.

As already noted, the Constitutional Chamber ended 2021 with a vacancy when Justice Hernández López left the court to join the Inter-American Court of Human Rights on December 1, 2021. Having failed to elect a replacement magistrate within the constitutionally mandated 30-day period, the Legislative Assembly, appears to face political momentum to appoint a new magistrate in the closing weeks of the current congress, all of whom will be replaced on May 1, when the new Congress, elected in February 2022 starts its four-year term (2022-2026).

#### V. FURTHER READING

- 1) *Revista de la Sala Constitucional Corte Suprema de Justicia*. Available at: <https://revistasalacons.poder-judicial.go.cr>
- 2) Wilson B. M. & E. Villarreal. 2021. "Anti-Corruption Whack-a-Mole: Costa Rica's De-Centralized Agencies and Increasingly Sophisticated Corruption" in *The Politics of Anti-Corruption Agencies in Latin America*. Joseph Pozsgai-Alvarez (Ed.). Routledge. Pp. 16-32.
- 3) Ovares Sanchez, C. 2021. "Dialogic Constitutionalism, Ex Ante Review of Legislation and the Case of Costa Rica." 49 *Rev. Derecho del Estado*. Pp. 215-240.
- 4) Wilson, B. M., O. Rodriguez & S. Morales. 2021. "Costa Rica." *Lex-Atlas: Covid-19 Oxford UP* <https://lexatlas-c19.org/costa-rica/>

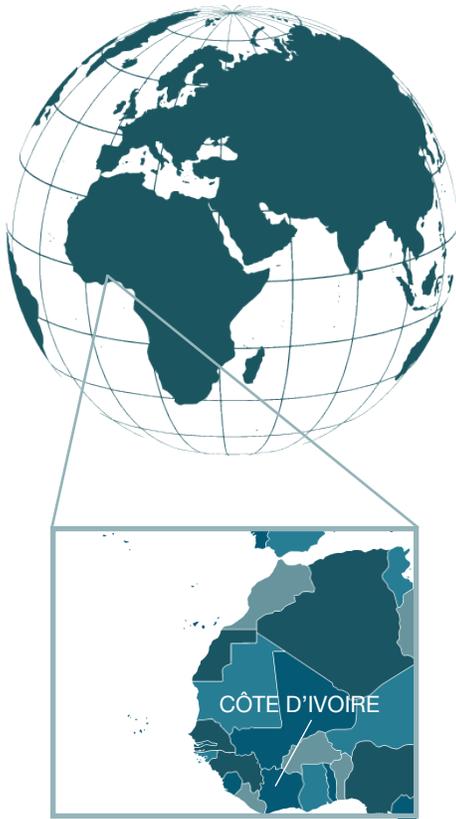
1 National Emergency Decree. March 31, 2020. Available online at [http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm\\_texto\\_completo.aspx?param1=NRTC&nValor1=1&nValor2=90991&nValor3=120051&strTipM=TC](http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=90991&nValor3=120051&strTipM=TC)

2 In 2012, Justice Cruz became the first Constitutional Chamber justice to be denied reelection by a vote of 38 deputies in Congress. After an appeal, the vote to not renew his tenure on the court was dismissed on a technicality. At the end of his subsequent eight years in 2020, he was reelected despite a majority vote of 29 against reappointment, which was 9 votes short of the 2/3<sup>rd</sup> majority vote to deny reelection.

3 Constitution Article 163

4 Sala Constitucional. 2021. Magistrates." <https://salaconstitucional.poder-judicial.go.cr/index.php/magistrados>

5 Octavo Informe Estado de la Educación [2021] Programa Estado de la Nación; Consejo Nacional de Rectores (San José, C.R. : PEN). Available online at <https://repositorio.conare.ac.cr/handle/20.500.12337/8152>. (Last accessed April 10, 2022)



# Côte d'Ivoire

Lou Tina Nicole Nelly YOUAN  
PHD student  
Paris 3 Sorbonne Nouvelle

## I. INTRODUCTION

It is not possible to make a 2021 report about Ivorian constitutional law without talking about the constitutional changes and the presidential election which happened in 2020. Firstly, the Ivorian constitution was amended by the law n°2020-348 of March 2020 modifying the n°201-886 of November 08, 2016, provided by the Constitution. Numerous articles were amended. Specifically, Article 55, 56, 57, 59, 62, 74, 78, 79, 90, 94, 101, 109, 134, 137, 143, 144, 146, 147, 148, 149, 150, 151, 160, 177, 181 et 182 182 and the chapter IV of title IX. As far as the report is concerned, we will talk about the amendment of article 62 which deals with the vice president and article 137 which deals with the Conseil Constitutionnel, the Ivorian constitutional court.

Secondly, in 2020, a presidential election took place - the first after the 2016 revision which established the third republic. This election has been won by Alassane OUARTARA, the outgoing president. And this election was highly disputed and considered “unconstitutional”.

This report will be focused on the following effects of the law n°2020-348 of March 19, 2020, modifying the n°201-886 of November 08, 2016, on the Constitution and on the 2020 election.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

After the 2020 election, a crisis took place. The opposition contested the election's re-

sult. The main argument was that Alassane Ouattara's candidacy was unconstitutional. President Ouattara was elected after a controversial election which was followed by a civil war that caused approximately 3000 deaths. It was his first presidential term which effectively started May 6<sup>th</sup>, 2011, after the Conseil constitutionnel declared that he won the election. His second presidential term started when he was reelected on October 25, 2015. It was his second presidential term during which he modified the constitution and established the 3<sup>rd</sup> Republic.

He announced to not run for the presidential election of October 31, 2020, in front of the two parliamentary committees of the Senate and the National Assembly<sup>1</sup>. However, after the death of his designated successor, Amadou Gon Coulibaly, he announced his candidacy for the 2020 election. Even though he publicly said that he won't be a candidate after two mandates, he argued that his candidacy will be his first one of the 3<sup>rd</sup> Republic. The opposition feared this interpretation during the debates on the new constitution<sup>2</sup>. The Conseil constitutionnel in its decision N° CI -2020-EP-009/14-09/CC/SG<sup>3</sup>, declared that Alassane Ouattara's candidacy “meets all the conditions required by law, must be declared admissible;”. On the question of his eligibility, the Conseil analyzed the petitions of Henri Konan Bedie and Affi N'Guessan, candidates in the said election. The petitions argued that “in application of the principle of legislative continuity set forth in article 183 of the Constitution, the outgoing President of the Republic cannot run for a new term, having already served the two terms to which article 55 paragraph 1 of the Constitutional law entitles him”. The Conseil constitutionnel replied that “the question of whether or not the

outgoing President of the Republic can run for a new term must be analyzed in the light of the adoption of a new Constitution". In conclusion, the Conseil validated the interpretation that the adoption of a new constitution sets the record straight. This new constitution is therefore a new beginning that allows to "declare Mr. Alassane Ouattara eligible, and to register him on the final list of candidates for the election of the President of the Republic on October 31, 2020". The Conseil was staking its independence and integrity on this issue. Its reasoning, which has been much criticized, has shown that there is work - a lot of work - that needs to be done on these issues.

In addition to his contested candidacy, his election was boycotted and followed by numerous protests that resulted in arrests and deaths.

This election reveals another problem with the office of vice president. This function was introduced by the 2016 constitution. According to its article 55, the Vice president must be elected at the same time as the president. Except that the 2016 Constitution came into effect during the second term of Alassane Ouattara, who will appoint his first vice president. He chose Daniel Kablan Duncan who resigned in July 2020.<sup>4</sup>

A strict interpretation of the Constitution would have required that the first vice president be nominated and elected in the following election. Yet, the article 179, exceptionally, empowered the President to appoint a Vice president on a transitional basis.

For the 2020 election, Alassane Ouattara didn't choose a vice president when he presented his candidacy. The new article 55 modified the designation mode of the vice president. Now, he must be chosen by the President in agreement with the parliament<sup>5</sup>. Since he was elected, Alassane Ouattara didn't choose a vice president. This is very problematic when we know that the vice president is the designated successor of the President. This statute, also, has been modified by the 2020 amendment. According to the former article 62, the vice president became president "by right" in case of the presidency's vacancy<sup>6</sup>. The 2020 amendment deleted the mention "by right" in the Constitution. We can deduce that the vice president becomes acting president in case of vacancy of power. However,

this does not change the problematic nature of the absence of a vice president.

Côte d'Ivoire is an heir of the French legicentrism tradition due to its colonization by France. This has resulted in the fact that for a long time the law has been the guarantor of freedom.<sup>7</sup> The 2000's constitution doesn't specify it. Thus, until 2000 there was no constitutional court in Côte d'Ivoire. The first constitutional court, the Conseil constitutionnel, was the constitutional litigation under the jurisdiction of ordinary judges and was used as a last resort by the Constitutional Chamber of the Supreme Court introduced by the 2000 constitution. However, even if article 88 mentions that it is the judge of the constitutionality of the laws, it limited itself to be the judge of the elections, another of its competences. The fact that article 96 provides for the mechanism of the exception of unconstitutionality has not changed anything.

Every good constitutionalist has hoped that the 2016's Constitution, by reintroducing that mechanism<sup>8</sup>, would have allowed the birth of a constitutional litigation dealing with the rights guaranteed by the Constitution. The context of the adoption of the 2000 constitution may not have been conducive to it being seen as a guarantee for fundamental rights and freedoms. This mechanism opens the courtroom of the Conseil to citizens. However, no significant litigation emerged until the 2020 amendment. The 2020 amendment inserted a new paragraph to the article 137. This paragraph specified the authority of the Conseil decision in the field of the exception of unconstitutionality. Unfortunately, this was not enough to make a control of constitutionality of the rights emerge.

The problem is that a constitutional amendment is not sufficient to create real constitutional litigation in a context where citizens believe that the Constitution is only a political instrument. Especially since the institutional communication around the adoption or revision of the constitution focuses only on electoral issues: length of the presidential mandate, conditions for being a candidate, etc. The guarantee of rights is secondary. Expectations of constitutional progress after the 2020 constitutional re-

view and the presidential election remain unfulfilled.

### III. CONSTITUTIONAL CASES

The website of the Constitutional Council only provides decisions on elections and opinions requested by the Government. No significant decisions were issued in 2021.

### IV. LOOKING AHEAD

Some questions deserve to be asked: Will the Constitutional Council really seize the opportunity to become truly independent in all the disputes that fall within its competence? Will the Constitutional Council take over the control of the constitutionality of the law to guarantee the fundamental rights and liberties?

### V. FURTHER READING

1 Pas de 3eme mandat Alassane Ouattara, le président de la Côte d'Ivoire ne se présentera pas pour un 3ème mandat <https://www.bbc.com/afrique/region-51755532>

2 "In its eyes, this reform of the constitution is a maneuver by Alassane Ouattara to keep power. At 75 years of age, he can run again in the next presidential election. And since the two-term limit is not retroactive, he would be able to run for another term."

<https://www.la-croix.com/Monde/Afrique/En-Cote-dIvoire-Alassane-Ouattara-fait-adopter-nouvelle-constitution-2016-10-11-1200795465>, in French

3 DECISION N° CI -2020-EP-009/14-09/CC/SG du 14 septembre 2020 portant publication de la liste définitive des candidats à l'élection du Président de la république du 31 octobre 2020

4 <https://information.tv5monde.com/afrique/cote-d-ivoire-demission-du-vice-president-daniel-kablan-duncan->], in French

5 Article 55 nouveau, Loi constitutionnelle n°2020-348 du 19 mars 2020 modifiant la loi n°2016 du 8 novembre 2016 portant constitution de la République de Côte d'Ivoire.

6 Article 62 de « En cas de vacance de la Présidence de la République par décès, démission ou empêchement absolu du Président de la République, le vice-Président de la République devient, de plein droit, Président de la République. » de la Constitution Ivoirienne issue de la Loi n° 2016-886 portant Constitution de la République de Côte d'Ivoire, Journal officiel de la République de Côte d'Ivoire, 58e année, n° 16, n° spécial, mercredi 9 novembre 2016.

7 Article 57 de la Constitution ivoirienne de 2000

8 Article 135 de la Constitution ivoirienne de 2016 telle que modifiée par la Loi constitutionnelle n°2020-348 du 19 mars 2020



# Cuba

Raudiel Peña Barrios

Master in Constitutional and Administrative Law, University of Havana. Student of Master in Political Science in El Colegio de México (COLMEX). Doctoral candidate in Legal Sciences at the University of Havana.

## I. INTRODUCTION

The year 2021 was complex for Cuba in all aspects. The effects of the COVID-19 pandemic continued to be felt in the country, while laws that complement the 2019 Constitution continued to be adopted, and as part of this process a procedural reform was implemented that covered civil, administrative, criminal, and family matters, among others. In the midst of this context, the most important anti-government demonstrations were registered since 1959, the year in which the current political regime was established. These demonstrations occurred on July 11, 2021 and generated various reactions in civil society - including the attempt to organize peaceful demonstrations in several provinces of the country on November 15. The requests were rejected by several municipal governments, without the organizers having the resources to challenge this decision in court. The refusal of the authorities was based on article 45 of the constitution.

Related to this, during the December session of the National Assembly of People's Power (NAPP), the national legislative organ, reformulated the legislative schedule for the adoption of new laws and decree-laws, and as part of this adjustment the approval postponed a law to protect the right to demonstrate. The Family Code project was also approved during this period of sessions, and it is currently being submitted to popular consultation, and it will be put to a referendum in accordance with the provisions of the Constitution. Another important aspect is that the VIII Congress of the Communist Party of Cuba (CPC) was held in April, in which Miguel Díaz-Canel Bermúdez was

elected Secretary General to replace Raúl Castro Ruz. This aspect is important due to the political-legal relevance of this political organization, which is based on article 5 of the constitution.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most important developments in constitutional matters were related to the adoption of laws and decree laws, whose objective is the legislative complementation of some precepts of the Cuban Constitution.<sup>1</sup> As part of this process, a procedural reform was implemented, which included the adoption of a new law of courts of justice. Similarly, specific laws were approved for the military sphere, such as the law of the military courts and the military process.<sup>2</sup> Another law was adopted for the territorial and urban organization.<sup>3</sup> Regarding the decree laws, it is appropriate to mention one, which was approved with the aim of establishing restrictions on freedom on the Internet. In addition, the readjustment of the legislative schedule for the year 2022 was made public at the end of 2021, and contemplates intense legislative activity.

### *The procedural reform*

The procedural reform was based on the adoption of procedural laws for the criminal and administrative spheres, as well as a Code of Procedures that regulates civil, family, commercial, labor, social security matters and the execution of judicial decisions issued in related processes with these subjects. In the case of Law No. 143, Criminal Proce-

dure Law,<sup>4</sup> it regulates novel aspects for the Cuban context. For example, an article is included that refers to the constitution as a formal source for the regulation of the criminal process (article 1), the criminal process is defined (article 2.1), and it is specifically established that no one can be subjected to forced disappearance, torture or cruel, inhuman or degrading treatment or punishment (article 4.1). In addition, access to criminal justice is recognized for people who have been victims or harmed by a crime (article 138). In the criminal procedural law, they are defined as the natural or legal persons who, as a result of a crime, have suffered physical, mental, moral, or patrimonial damage (article 139). This new criminal procedural legislation regulates four types of basic procedures. The first of these is the ordinary procedure, with which criminal proceedings filed for crimes with a sanction of more than three years of imprisonment or a fine of more than one thousand quotas, whose perpetrator is known and has been captured (article 167.1). In addition, a procedure is included for crimes whose maximum penalty is up to three years of imprisonment or fines of up to one thousand quotas or both (articles 394-400), and another called Abbreviated Attestation for the processing of crimes punishable by up to one year of imprisonment or a fine of three hundred quotas or both, provided that the act is flagrant, the intervention of the accused is evident or he has confessed, and the characteristics and circumstances so advise (articles 401-406). Finally, it is worth mentioning the procedure for the imposition of therapeutic measures, which constitute post-criminal security measures, regulated in articles 678 to 699 of Law No. 143. To these procedures are added others of a special type, related to the requirement of criminal responsibility to the main figures of the state, the government and the CPC, the judges and prosecutors, as well as for the cases in which the Chamber of Crimes against State Security of the People's Supreme Court claims the knowledge of the causes for crimes against state security and terrorism (articles 658-677).

For its part, Law No. 142, Administrative Process Law,<sup>5</sup> also establishes some novel issues. Article 4.1 establishes that the administrative procedural rules are interpreted in such a way that they favor the effective judi-

cial protection of the rights and legitimate interests of the people and the pronouncements on the merits of the claims made. In this way, this law complements the content of articles 92, 98 and 99 of the 2019 Constitution. In addition, the administrative responsibility of bodies that are part of the public administration, and of others that, even if they are not, may be recognized, incur administrative responsibility, as is the case of the NAPP or the presidency of the republic (articles 7 and 8). Another novel aspect is that claims against administrative omissions are recognized, which allows citizens to act against omissions by the public administration or other defendant entities (articles 49 and 50). Lastly, it highlights the supplementary character that is granted in this law to the Code of Processes and the Law of Courts of Justice. In the case of Law No. 141, Code of Procedures,<sup>6</sup> the recognition of several formal sources for the processing and decision of cases submitted to the courts of civil jurisdiction stands out, including the Constitution, international treaties in force, and the general principles of Law and others established in the code itself (article 4.1). Another important aspect is that the courts are empowered to consider, in addition, the judicial resolutions issued in the matters of the matters regulated by the Code of Processes, containing reiterated criteria issued by the rooms of the People's Supreme Court, those that do not have binding force, but can be invoked by the parties in support of their claims (article 4.2). This element is very important, because in Cuba jurisprudence is not recognized as a formal source of Law. However, in this code the courts are empowered to consider those criteria of the chambers of the country's highest body of justice, which are alleged by the parties in a judicial process. Instead, article 5 of this code establishes as a rule of interpretation that the norms contained therein are interpreted in accordance with the provisions of the Constitution, depending on whether effective judicial protection and due process guarantees prevail. Thus, articles 92, 94, 95, 98 and 99 of the Constitution are complemented. In this sense, rules are established to resolve potential conflicts of attributions between the judicial and administrative authorities (articles 37-40).

On the other hand, Law No. 140, Law of

Courts of Justice, establishes the organization of the Cuban judicial structure. The recognition that the judicial function implies an exercise of authority and, in turn, the provision of a public service (article 4.1) stands out. The consideration of the judicial function as a public service is in accordance with the rights recognized in articles 92, 98 and 99 of the Constitution. In addition, it is indicated that the courts recognize the alternative methods of conflict resolution and use conciliatory formulas to resolve the matters that are attributed to them, according to their nature, in accordance with the Constitution and the normative provisions established for that purpose. This precept is related to the right recognized in article 93 of the Constitution, relative to the fact that people can resolve their controversies using alternative methods of conflict resolution, in accordance with the Constitution and the legal norms established for such purposes. In accordance with articles 454.2 and 609.1 subsection b) of the Code of Procedures, the agreements derived from the alternative methods of conflict resolution are comparable before the courts and are executed in the same way as the judicial resolutions, and said agreements are part of voluntary jurisdiction.<sup>7</sup>

To end, they highlight two important aspects in terms of judicial integrity and quality of the processes. The first is that several principles that support the judicial function are recognized, among which constitutional supremacy, independence, impartiality, equality and legal certainty stand out, among others (article 13.1). In addition, several guarantees of said function are included, including access to justice, due process, effective judicial protection, transparency, responsibility and accountability (article 15).

#### *Restrictions on freedom of expression on the Internet*

In the case of the decree-laws issued by the Council of State, it is appropriate to highlight Decree-Law No. 35, On Telecommunications, Information and Communication Technologies and the use of the Radio Electric Spectrum.<sup>8</sup> It is a normative provision that restricts freedom of expression on the Internet, and in which a sanctioning regime is established to penalize people who publish content contrary

to the government. One of the most questionable precepts of this decree law is article 14, paragraph f), which indicates that public telecommunications services cannot be used for actions or transmit offensive or harmful information related to, among other aspects, collective security, general welfare, public morality, and respect for public order. These vague legal concepts have been used to fine independent journalists, political opponents and human rights activists.<sup>9</sup>

### *Readjustment of the legislative schedule for the year 2022*

On this subject, it is only necessary to limit that for the year 2022 intense legislative activity is expected, both from the NAPP and from the Council of State. The adoption of fifteen laws is planned, including a new Penal Code, the first Transparency and Access to Information Law in the history of Cuba, a new Law on Associations, and a new Tax Law, among others. For its part, the Council of State must adopt a total of eleven decree-laws, including one on the use of video surveillance and others on the protection of official information. In all cases, it will be necessary to be aware of the correspondence of the content of these and other laws and decree-laws with the constitutional contents, as well as the possible contradictions between these normative provisions. In particular, I believe it is important to verify the possible restrictions that can be imposed from the decree-law on the protection of official information to the right to information, recognized in article 53 of the Constitution, and its correspondence with the future Law of Transparency and Access at the information.<sup>10</sup>

## CONSTITUTIONAL CASES

The first aspect to point out is that Cuba lacks a constitutional jurisdiction. Consequently, there are no special legal actions and procedures in court for the defence of constitutional rights, such as the amparo trial or the action of unconstitutionality.<sup>11</sup> However, as part of the content of the Law on Courts of Justice, has contemplated the creation of a Constitutional Rights Amparo Chamber in the People's Supreme Court.<sup>12</sup> In accordance

with article 35.3 of this law, the Chamber for the Protection of Constitutional Rights may be chaired by the President or a Vice President of the People's Supreme Court and also made up of the presidents of the other court chambers of that body, when the nature of the matter requires it, due to its complexity or the matter on which it falls, in accordance with the provisions of the regulations of this Law. In addition, a similar room will exist in the provincial courts, as stipulated in article 45.1, and it will be presided over by the president or a vice-president of the People's Provincial Court and also integrated by the presidents of the other courts of that body, when the nature of the matter requires it, due to its complexity or the matter on which it falls, in accordance with the provisions of the regulations of this Law.

### *The preliminary draft of the Law of the Process of Protection of Constitutional Rights*

Related to this issue, it is appropriate to mention that in March 2022 the preliminary draft of the Law of the Process of Protection of Constitutional Rights was published, which must be approved in the course of this year.<sup>13</sup> I think it is necessary to refer to this bill, because it is complementary to the Constitution and because it shows the lack of commitment of the Cuban authorities with the judicial defense of constitutional rights. In the first place, its explanatory statement indicates that, although article 99 of the Constitution establishes that people have the right to file a judicial claim against the violation of constitutional rights, the precision of the rights is reserved for a later law covered by that guarantee. In addition, this law must regulate the preferential, expeditious and concentrated procedure for its fulfillment since none of the judicial processes currently in force are adequate for these requirements and purpose. Consequently, all the rights recognized in the Constitution, which do not have a means of defense in judicial proceedings on other matters (civil, family, administrative, labor and social security, commercial and criminal) and which have been or are being violated from the entry into force of the Constitution. Two aspects are derived from this provision that contradict or do not consider constitutional principles. The first is that not all the

rights recognized in the Constitution can be defended before the constitutional jurisdiction, since preference will be given to the ordinary jurisdiction. In this way, the principle of interdependence of human rights is contradicted, by virtue of which all rights are linked to each other and are indivisible, so they cannot be fragmented from each other. All human rights, civil, political, economic, social and cultural, must be understood as a whole. That is why the defense of some should not be privileged over others before the constitutional jurisdiction.<sup>14</sup> In accordance with the draft presented, only when the significance of the alleged violation of constitutional rights requires urgent action by the court, the claim will be processed through this process, given its preferential nature, in accordance with the constitutional mandate. However, it will be the power of the court to decide whether the claim proceeds by this mean or if, on the contrary, it must be presented by another of the means provided for in the procedural legislation.

The second aspect that affects the protection of constitutional rights is that only violations that have occurred or are occurring after the entry into force of the Constitution in 2019 can be alleged. Thus, violations committed under the 1976 Constitution will not be heard by the constitutional jurisdiction, which in practice leaves those who have been victims of violations of their constitutional rights before 2019 defenseless. Constitutional Rights would have been retroactive, in accordance with the provisions of article 100 of the Cuban Constitution.

Another important matter is that the declaration of unconstitutionality of laws and other legal norms, being an exclusive power of the NAPP, cannot be the object of the constitutional process. In this way, the courts are expressly excluded from the control of the constitutionality of the laws. This derives in the existence of an exclusive political control in the matter concentrated in the NAPP. Thus, this body will be judge and party in the analysis of the constitutionality of the laws it issues, so it is very possible that the draft that I have commented on will be approved, despite the shortcomings indicated. This approval may not be challenged by citizens in court.

In addition, the commented draft establishes that judicial decisions adopted in other mat-

ters cannot be claimed in the constitutional jurisdiction, since, for this, there are corresponding resources and review procedures. This pronouncement is contrary to one of the essential characteristics of due process in the constitutional sphere. I am referring to the opposition of the constitutional jurisdiction to material *res iudicata* (*res iudicata*), since it can review the constitutionality of a judicial decision.<sup>15</sup> In other words, in the event that a person is not satisfied with the judicial pronouncement in the face of what they consider to be a violation of their constitutional rights, they should have access to the constitutional jurisdiction.

Finally, claims related to defense and national security do not proceed through the constitutional process either, as well as the measures adopted in exceptional and disaster situations to safeguard the country's independence, peace and security, taking into account articles 217 and 222 of the Constitution. This means that the constitutional jurisdiction will not hear claims against actions taken by the authorities during the occurrence of emergency situations, such as State of War, General Mobilization and State of Emergency that affect constitutional rights. It is worth noting that the draft that I have commented on does not mention the Disaster Situation recognized in article 223 of the Constitution, which is decreed in the event of disasters that exceed the usual response and recovery capacity of the affected country or territory.

#### IV. LOOKING AHEAD

For the year 2022, the adoption of new laws and decree-laws is planned, which will complement constitutional precepts. However, considering the events that occurred in 2021 and the government response to them, it has been shown that the fundamental problem for the construction of a rule of law in Cuba is not the construction of a new legal system. The main obstacle in this sense is the existence of an authoritarian regime, which conceives the Law as an instrument for preserving the status quo, and not as a mechanism to promote a democratization process, of which the liberalization of the exercise

of rights would be a fundamental component. In the short and medium term, it is to be hoped that the normative provisions that are adopted will not allow Cuban citizens to have more scope to exercise their rights. The presentation of the preliminary project of the Law of the Process of Amparo of the Constitutional Rights is a proof of this.

Beyond the declaration of Cuba as a socialist state of law in article 1 of the constitution, political practice continues to be characterized by the impossibility of opposing individual rights to state interests. In this way, the image of the rule of law that the Cuban government provides constitutionally is weakened, since the practices of the government authorities correspond to that of the prevailing authoritarianism in the country.

1 Todos los artículos de la Constitución cubana citados en este artículo pueden verificarse en <[https://www.gacetaoficial.gob.cu/sites/default/files/goc-2019-ex5\\_0.pdf](https://www.gacetaoficial.gob.cu/sites/default/files/goc-2019-ex5_0.pdf)> accessed 11 April 2022.

2 <<https://www.gacetaoficial.gob.cu/sites/default/files/goc-2022-ex11.pdf>> and <<https://www.gacetaoficial.gob.cu/sites/default/files/goc-2022-ex12.pdf>> accessed 11 April 2022.

3 <<http://www.acn.cu/cuba/88863-aprueban-primeraley-cubana-sobre-ordenamiento-territorial-y-urbano-y-gestion-del-suelo>> accessed 11 April 2022.

4 <<https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o140.pdf>> accessed 11 April 2022.

5 <<https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-0139.pdf>> accessed 11 April 2022.

6 <<https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o138.pdf>> accessed 11 April 2022.

7 <<https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o138.pdf>> accessed 11 April 2022.

8 <<https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o92.pdf>> accessed 11 April 2022.

9 <<https://latamjournalismreview.org/es/articles/cuba-multa-a-periodista-independiente-basandose-en-reciente-decreto-que-regula-el-internet/>> and <<https://www.bbc.com/mundo/noticias-america-latina-58272680>> accessed 12 April 2022.

10 <<https://www.parlamentocubano.gob.cu/index.php/cronograma-legislativo-brujula-para-la-actividad-normativa-del-pais>> accessed 12 April 2022.

11 See articles from 154 to 167 of Law No. 131/2019 Law on the Organization and Functioning of the National Assembly of People's Power and the Council of State of the Republic of Cuba <[https://www.gacetaoficial.gob.cu/sites/default/files/goc-2020-ex6\\_0.pdf](https://www.gacetaoficial.gob.cu/sites/default/files/goc-2020-ex6_0.pdf)> accessed 21 March 2022.

12 See article 35. 1 of Law 140/2021 of the Courts of Justice <<https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o137.pdf>> accessed 21 March 2022.

13 <<https://www.tsp.gob.cu/sites/default/files/documentos/Ley%20de%20amparo%20constitucional%20%281%29%20%281%29.pdf>> and <<https://www.granma.cu/cultura/2022-03-18/disponibles-proyectos-de-leyes-sobre-amparo-de-los-derechos-constitucionales-y-proteccion-de-la-creacion-literaria-y-artistica>> accessed 12 April 2022.

14 See F. Piovesan and M. Morales Antoniazzi, (2020). 'Interdependencia e indivisibilidad de los derechos humanos: Una nueva mirada frente al covid-19' [2020] Anuario de Derechos Humanos.

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



# Cyprus

Constantinos Kombos  
Associate Professor of Public Law and EU Law  
University of Cyprus

## I. INTRODUCTION

The principle of separation of powers has been central to Cypriot constitutional jurisprudence for the year 2021. The Supreme Court delivered two judgments that examined the application of the principle in the context of the legislature intervening with the competences of the judicial branch. The Supreme Court found in both cases that the separation of powers had been infringed and reiterated in its reasoning the cardinal status of the principle in the legal order of Cyprus.

Of great significance is also the majority (7-6) ruling of the Supreme Court on data retention where it was held that acts that were based on national legislation establishing a general body of rules for the indiscriminate and general retention of communications data, were incompatible with EU law. This has had a significant impact on criminal prosecutions and streamlined Cypriot case law with that of the CJEU.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2021 two major constitutional developments can be noted.

Firstly, in two<sup>1</sup> separate occasions the Supreme Court examined the constitutionality of legislation on the basis of the principle of separation powers and for encroachment by the legislature on the competences of the judicial branch.

In procedural terms, the two cases arose under article 140 of the Constitution. The

laws under review were adopted by the House of Representatives after being tabled as private members' bill (article 80 of the Constitution), that is with the legislative initiative being exercised by the House and not the executive. It is noted that Cyprus has a presidential system whereby both the executive and the legislature can table Bills, yet no Bill relating to an increase in budgetary expenditure can be introduced by any member of the House. This results in broader empowerment of the executive and in reflection to the presidential system of governance. Moreover, in political terms the President does not have control of the House, thus the adoption of legislation is often the result of negotiations and compromise. In the two cases that are examined *infra*, the executive was not in agreement with the law that the legislature had adopted and the President of Republic triggered a procedure for preventive constitutional review that takes place after the legislature has adopted a law and before that law comes into effect. In specific, the President made use of the constitutional procedure of article 140 whereby at any time prior to the promulgation of any law or decision of the House of Representatives, the President can refer to the Supreme Court for its opinion the question as to whether such law or decision or any specified provision thereof is repugnant to or inconsistent with any provision of this Constitution. In effect, the two cases are examples of a dispute between the executive and the legislature, with the affected party being the judiciary. In this triangular situation, the executive brings the matter before the Court - that is also the branch whose powers are directly affected by the law adopted by the legislature. The

Court held both laws to be unconstitutional for respectively interfering with: (a) the exclusive competence of the courts to conclude proceedings pending before them (*Referral 1/2020, President v. House of Representatives*); (b) the exclusive power of the Supreme Court to make the ‘Rules of Court’ regulating the judicial practice and procedure for all the courts of the Republic (*Referral 2/2021, President v. House of Representatives*).

Secondly, the Court (Applications 97 et al/2018)<sup>2</sup> nullified judicial orders authorizing access to communication data of individuals under criminal investigation. In procedural terms, that case arose in certiorari proceedings.

The broader issues that arise in relation to the separation of powers are primarily centered around Referral 2/2021 where the Court excluded the legislature from interfering in effect with the way in which the procedure before courts take place. The House of Representatives introduced an amendment to Law 14/1960 whereby it was provided that the Supreme Court’s Rules of Procedure must enable the electronic filling of any document relating to judicial proceedings and that for one year from the issuing of such a Rule of Procedure, the filling of both electronic and hard copies would apply simultaneously. In effect, the legislature was attempting to introduce a significant reform for the archaic system that was in operation and directed the Supreme Court to the content that its Rules of Procedure must have. The Court construed this as fettering of its discretion and as an unacceptable interference with the exclusive competence that article 163 of the Constitution bestows to the Supreme Court. The disagreement was not about the substance of the provision but rather about the possessor of the competence to regulate the application of the reform. It is submitted that the Court’s approach is absolute and expands the power that article 163 of the Constitution grants to the Supreme Court. It can also be stated that the separation of powers is violated but from the judicial approach vis-à-vis the broad authority that article 61 of the Constitution gives to the legislature to “be exercised in all matters”.

In relation to Referral 1/2020 it can be argued that the legislature had indeed interfered with pending cases before courts by suspending any proceedings for the recovery by the owner of possession of property against a tenant that had failed to comply with the terms of the contract by reason of being affected by the pandemic. This also included the prohibition of issuing judicial orders on such pending matters.

Finally, in relation to Applications 97 et al/2018 the Supreme Court reversed in effect its previous approach in relation to communication data that had permitted for the blanket and indiscriminate collection and storage of such data that could then be accessed by the police after a judicial order was obtained. That approach conflicted, arguably,<sup>3</sup> with the evolving case law of the CJEU in a series of cases.<sup>4</sup>

### III. CONSTITUTIONAL CASES

#### 1. *Referral 1/2020: Legislative Suspension of Pending Judicial Proceedings*

As explained in the preceding sections, the legislature amended the Rent Control Law (Law 3/1983) in 2020 to the effect that it suspended any proceedings for the recovery of possession at any stage until 31 December 2020 on grounds of late or non-payment of rent due. In addition, the law provided that no decision or order for recovery of possession shall be issued by the Court on such grounds and under such procedures until 31 December 2020.

Prior to the promulgation of the said law, the President referred it to the Supreme Court for assessment of its constitutionality. Three arguments were submitted against the constitutionality of the legislation. Firstly, the amendment violated article 26 of the Constitution safeguarding the freedom of contract by intervening in the already established contractual rental relationship which includes a right of ownership. This argument was surprisingly not examined by the Supreme Court.

Secondly, the President argued that the amending law infringed article 30 of the

Constitution that guarantees the right to a fair trial and access to a court because the owner of the property is excluded from accessing courts in a manner that is discriminatory since the restriction in question does not apply to proceedings relating to use of the property for illegal purposes or in a manner that causes nuisance or for damaging the property. The Court held that the right is not absolute and can be thus restricted, provided such restrictions are imposed by law and for the grounds provided for in article 30, as long as the restrictions are not excessive and to the extent of affecting the nucleus of the right. Therefore, it was ruled that the three-month restriction that the amending law introduced was of a temporary nature and did not affect the essence of the right.

Thirdly, it was argued that the automatic suspension of the process of issuing decisions and decrees for evictions, at any stage, without the other party being heard and without a decision of the Court as to whether such a suspension is justified, constitutes an interference with the power of the Courts and a violation of the principle of the separation of powers. The Court focused on this issue and restated the position of the jurisprudence that perceives the separation of powers as being a fundamental principle of Cypriot constitutional law that has a diffused and pervasive presence, and which dictates that the exercise or assumption of power outside the sphere of respective competence of each of the three powers is prohibited. Parliament has the general legislative authority on all matters pursuant to article 61 of the Constitution but subject to the principle of separation of powers. In this case, the Court held, the Law imposes the suspension of any procedure to recover possession under paragraph (a) of paragraph (1) of article 11 of Law 23/1983, regardless of the stage at which the procedure is presently at, thus prohibiting the continuation of even ongoing court proceedings, as well as the issuance in them of court decisions and decrees of recovery of possession. In this way, the Legislature assumes and exercises power outside its sphere of competence and puts the Judiciary under control, intervening, consequently, in its independence and in violation of the principle of separation of powers.

This is a ruling that clearly emphasizes the independence of the judicial function and the entrenchment of judicial proceedings from legislative interference. The Court accepts that Parliament can regulate the access to courts (course of action, remedies, jurisdiction) but at the same time it does not have the constitutional competence to intervene once the field has been occupied by the courts.

## 2. Referral 2/2021: Legislature Dictates Content of the Supreme Court's Rules of Procedure

In this case the separation of powers was again examined by the Supreme Court but in a different context and in a much more contested manner. *Referral 2/2021* concerned an amendment to the Courts of Justice Law (Law 14/1960) to the effect that the Court's Rules of Procedure are to provide specifically for the electronic filling of any document relating to judicial proceedings and that for one year from the issuing of such a Rule of Procedure, the filling of both electronic and hard copies would apply simultaneously.

It was argued by the President's representatives that the preceding provision violated the separation of powers and specifically article 163 of the Constitution. Article 163 (1) states that the Supreme Court shall adopt Rules of Procedure for regulating the practice and procedure of the Court and of any other court established by or under the Constitution. Article 163 (2) specifies that without prejudice to the generality of paragraph 1, the Court may adopt Rules of Procedure for the following purposes:

- (a) for regulating the sittings of the courts and the selection of judges for any purpose;
- (b) for providing the summary determination of any appeal or other proceedings which appear to the High Court or such other court before which such proceedings are pending to be frivolous or vexatious or to have been instituted for the purpose of delaying the course of justice;
- (c) for prescribing forms and fees in respect of proceedings in the courts and regulating the costs of, and incidental to, any such proceedings;
- (d) for prescribing and regulating the composition of the registries of the courts and the powers and duties of officers of the courts;

(e) for prescribing the time within which any requirement of the Rules of Court is to be complied with;

(f) for prescribing the practice and procedure to be followed by the Supreme Council of Judicature in the exercise of its competence with regard to disciplinary matters relating to judicial officers.

Consequently, it can be argued that the Constitution delegates specific powers to the Supreme Court for the purpose of introducing normative measures without the interference of the executive and the legislature. Such competence is nonetheless limited in scope and with reference to paragraph 2 of article 163. In *Referral 2/2021* the amendment under scrutiny did not relate to (a), (b), (d), (e) and (f) of that paragraph. It is also safe to argue that (d) was not also applicable. Therefore, the Supreme Court in a general manner focused on article 163 (1) of the Constitution as providing for a broad, and in effect unlimited, competence of a legislative nature,<sup>5</sup> that aims to guarantee the independence of the judicial function. This must be contrasted with the express authorization that article 61 gives to the legislature to legislate and to "be exercised in all matters".

More specifically, the Court held that the competence of the legislature under article 61 of the Constitution is counterbalanced by the principle of separation of powers. Given the jurisdiction of the Supreme Court, pursuant to Article 163, the exercise of legislative or executive power in that field violates the principle of separation of powers. The Supreme Court made express and exclusive reference to article 163 (1) of the Constitution as granting to it the exclusive power to adopt a procedural regulation, for the purpose of determining the procedure and the individual issues that concern it, with a view to ensure the proper functioning of the courts and the proper administration of justice. Moreover, it was held that the "Supreme Court undoubtedly has the power to determine, inter alia, the manner and type of registration of documents in a court registry, which operates legally in the territory of the Republic of Cyprus, as well as the time for this. This power, if expressed in a specific way, can be subject to judicial review as to the constitutionality

of the relevant regulation, in an appropriate procedure, like any other legislative act."

Consequently, with the provision in the Law the legislature "essentially obliges the Supreme Court to provide in relation to the above procedural issues", thus the House of Representatives determines the regulation by referring to 'electronic registration' and to the time frame, as well as the duration of the specific regulation ('for a period of at least one (1) year'). In conclusion, it must be clarified that the Court had already issued a specific and detailed rule of procedure relating to electronic filing a month prior to the enactment of the law by the House of Representatives; there were indeed certain differences in the two documents.

Overall, the Court construed the intervention by the legislature as fettering judicial discretion and as an unacceptable interference with the exclusive competence that article 163 of the Constitution grants to the Supreme Court. It is submitted that the Court's approach expands the power that article 163 of the Constitution grants to the Supreme Court by selectively focusing on the first and not the second paragraph. The broad reading of a specified competence under the Constitution is coupled with the separation of powers in order to constrain the legislature's wide competence under article 61 of the Constitution. The Court's approach could be construed as excluding the permissibility of any alternative drafting by the legislature, even in the form of authorizing the Court to enact a specific regulation; that would have been redundant since the Court assumes that such competence is already constitutionally provided. Therefore, the Supreme Court is in effect preempting the existence and exercise of any competence of the legislature in such matters, even where the intendance of the judiciary is not in any way affected.

## 3. Applications 97 et al/2018: Retention of Communication Data contrary to EU law

In *Applications 97 et al/2018* the Supreme Court synchronized its case law with that of the CJEU in relation to the storage of communication data by service providers. The cases concerned

certiorari applications by various individuals under criminal investigation who challenged the legality of the judicial orders authorizing access to their communication data.

The Supreme Court had previously permitted for the blanket and indiscriminate collection and storage of such data that could then be accessed by the police after a judicial order was obtained.<sup>6</sup> In the previous decisions, the Court emphasized the existence of sufficient safeguards in the form of judicial scrutiny and subsequent issuing of orders authorizing access to such collected data in the context of serious criminal investigations. The Court placed the emphasis on the effectiveness of crime investigation, the existence of prima facie evidence for criminal conduct and the exercise of judicial control over such access. The Supreme Court did not focus equally on the actual storage of such data, at least in the same way as the CJEU had done in a series of cases.<sup>7</sup> This was the result of a long saga whereby the Republic had implemented<sup>8</sup> secondary EU norms<sup>9</sup> that were subsequently annulled by the CJEU<sup>10</sup> and then amended the Constitution in order to enable storage of such data as a matter now of national constitutional law and for cases where the offences could result in imprisonment for a period over five years.<sup>11</sup>

That approach conflicted, arguably,<sup>12</sup> with the evolving case law of the CJEU. In *Applications 97 et al/2018* the Supreme Court (7-6 decision) relied on the case law of the CJEU and concluded that the Cypriot legislation was universally applicable to all subscribers and registered users of electronic media indiscriminately, throughout the territory of the Republic of Cyprus. As a result, it lacked the explicitly required safeguards that CJEU's decision in *Tele2 Sverige* exhaustively listed. The Supreme Court also emphasized, in effect for the first time, that although there are sufficient safeguards in place for the access to stored data in the Cypriot law, EU law treats data retention and access to them as completely separate and independent matters on their own terms. Legal retention is a prerequisite for legal access and retention was not sufficiently limited in order to enable assessment on the basis of proportionality.

In conclusion, the Supreme Court took an important step in the right direction that the CJEU's binding jurisprudence requires. That has created significant complications for law enforcement agencies and the matter remains unresolved.

#### IV. LOOKING AHEAD

The year 2021 has undoubtedly been an interesting year in terms of the development of Cypriot constitutional law. The crucial and game-changing development that has been long-awaited, is still pending; this refers to the reform of the Cypriot administration of justice that has been underway for years. The proposed reform includes the creation of new courts and procedures with the enactment of relevant constitutional amendments and enabling legislation. At present, the proposals are before the House of Representatives and include the establishment of Supreme Constitutional Court, the maintenance of the Supreme Court and the establishment of a new Court of Appeal. Cypriot judges have carefully voiced their opposition regarding specific provisions of the draft proposals. If the reform takes place, Cypriot constitutional law will be transformed, not necessarily in a positive manner.

#### V. FURTHER READING

N/A

[In this part, please feel free to list up to five recommended readings published in the year 2021. Fewer than five is fine. You may list your own publications if you wish. Citations should conform to OSCOLA. Here are the citation instructions you must follow: [https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012quickreferenceguide.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf). Remember that the entire document cannot exceed 4000 words.]

1 Referral 1/2020, *President v. House of Representatives* ECLI:CY:AD:2021:C419 (5 October 2021); Referral 2/2021, *President v. House of Representatives* ECLI:CY:AD:2021:C459 (11 October 2021).  
2 *Applications 97 et al/2018*, ECLI:CY:AD:2021:D487 (27 October 2021).

3 See Kombos, C., *Cypriot Constitutional Law: Theory, Organization and Praxis* (Nomiki Vivliothiki, 2020), pp. 407-17 (in Greek); Kombos, C., "Data Retention and Protection of Human Rights: Beyond the Call of Duty" (2015) 21 (3) *European Public Law* 411; Kombos, C., and Shaelou, S., "The Cypriot Constitution under the Impact of EU law: An Asymmetrical Formation", in Albi, A. and Bardutzky, S. (eds.) *The Role of National Constitutions in European and Global Governance* (T.M.C. Asser Press/Springer Open, 2019), pp. 1373.

4 Cases C-293/12 and C-594/12, *Digital Rights Ireland*; Cases C-203/15 and C-698/15, *Tele2 Sverige and Watson and Others*; Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net*.  
5 *Athinis v The Republic* (1989) 2 CLR 71.

6 See *Andrea Isaih et al.* (2014) 1 CLR 1445;

7 Cases C-293/12 and C-594/12, *Digital Rights Ireland*; Cases C-203/15 and C-698/15, *Tele2 Sverige and Watson and Others*; Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net*.

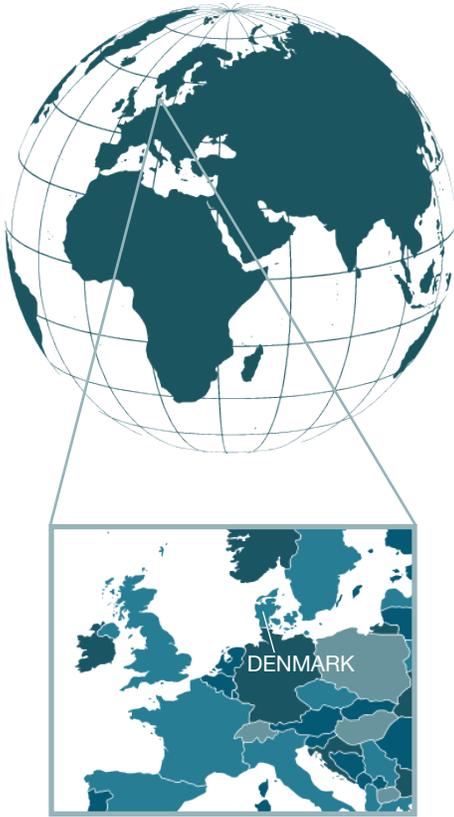
8 Law 183(I)/2007, implementing Directive 2006/24/EC.

9 E.g. Directive 2002/56/EC.

10 *Supra* n. 7.

11 Sixth Amendment to the Constitution (Law 51(I)/2010).

12 *Supra* n. 3.



# Denmark

Mikele Schultz-Knudsen  
Postdoc

Centre for European and Comparative Legal Studies, Faculty of Law, University of Copenhagen

## I. INTRODUCTION

Political court cases have been a core focus in 2021. One former Danish minister was found guilty in an impeachment trial and sentenced to two months in prison. She is the first Danish minister to receive an unconditional prison sentence in an impeachment trial. Another former minister has essentially been charged with high treason, and so has the head of one of Denmark's intelligence agencies. The current Prime Minister has also faced severe criticism during the year, with an ongoing commission investigating the legality of her government's decision to cull all Danish mink. She has further been accused of hiding information from this commission. A fourth politician, the current leader of the Danish People's Party, was originally found guilty of forgery and misuse of EU funds, but the case has had to be restarted due to the judge having liked political posts on Facebook and therefore not being impartial. In a fifth case involving politicians, the Supreme Court had to decide whether an MP's accusations against a Danish female imam were protected by the special protection of MPs' freedom of speech. In Denmark, it is highly unusual for this many leading politicians to be standing trial.

This year, Denmark lost three cases at the European Court of Human Rights, all related to immigration, family reunification, and deportations. Despite this, Denmark has yet again tightened the rules on immigration and on obtaining citizenship. Danish politicians are willingly legislating at the very edge of international human rights when it comes to questions concerning immigrants.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### A. Political cases and commissions

The most significant constitutional event in 2021 was the conclusion of the impeachment trial against former Minister for Immigration and Integration, Inger Støjberg. She was charged with having infringed general principles of administrative law, as well as the requirements in Danish administrative law and in the European Convention of Human Rights (ECHR) for reasoned decisions and for a specific and individual hearing of parties. Concretely, the question was whether she had instructed her administration to separate all married asylum seekers below 18 years of age from their spouses, without allowing any exceptions, thereby causing the administration to breach ECHR art. 8 (the right to family life) by not evaluating whether it was proportional to separate each couple and by not gathering sufficient evidence before making the decisions.

This was the first Danish impeachment trial in 25 years, only the second in the last 100 years, and only the sixth impeachment trial in Danish democratic history. The result was also historical: Støjberg was found guilty and sentenced to two months in prison. This makes her one of only three ministers in Danish legal history that have ever been found guilty in such an impeachment trial. She is also the only minister that has had to serve prison time due to an impeachment trial, since the two earlier convictions against ministers lead to conditional sentences or included the option to pay a fine instead. At the

time of writing, it has not yet been decided whether Støjberg, in accordance with general Danish rules, will be allowed to serve her sentence in her own home by wearing an ankle monitor.

Following the decision of the impeachment trial, a large majority in the Danish Parliament found Støjberg unworthy of her seat in Parliament, leading to her exclusion. She can still run in the next parliamentary elections, although it is a possibility (but not very likely) that a majority will once again find her unworthy after an election.

Despite this historical case, another political case almost managed to steal the attention. As described in last year's report, the current Danish government made the decision to cull all mink on Danish mink farms in 2020. This decision was made to prevent new mutations of Covid-19 from spreading, but it was later revealed that the government had not had the necessary statutory authority to make this decision. The opposition parties have argued that Prime Minister Mette Frederiksen should stand in an impeachment trial for her involvement in these actions, but for now, a commission has been set up to investigate the process leading up to the decision. During autumn, the Prime Minister came under renewed criticism when it was revealed that she and her closest employees had deleted all their text messages, making it impossible for the commission to get access to their communication in the days leading up to the decision. The Prime Minister has explained that for security reasons their phones had been set to automatically delete all text messages, but this is not a setting used by most of her other ministers. The commissions' conclusions are expected in May 2022.

A third political case also blew up towards the end of 2021, ultimately leading to former Minister of Defense, Claus Hjort Frederiksen, as well as the current head of the Danish Defense Intelligence Service (DDIS), Lars Findsen, being charged with having leaked confidential information. In the Danish Criminal code, this crime is categorized under the chapter concerning high treason. The events that ultimately led to this significant

development began in 2020, when the agency tasked with monitoring the intelligence services in Denmark released a harsh criticism of DDIS, accusing it of initiating operational activities in violation of Danish law, including obtaining and passing on a significant amount of information about Danish citizens. This original criticism was described in more detail in my report from last year. As also mentioned there, Danish newspapers had revealed that the case allegedly had to do with a deeply confidential agreement between DDIS and the US National Security Agency (NSA), which allows NSA to access data from Danish internet cables.

Following this criticism, a special commission was created to investigate these allegations. Surprisingly, this commission ended up concluding in December 2021 that DDIS had done nothing wrong. The full conclusions of the commission are confidential, and it is still unclear to the public how the monitoring agency and the commission were able to reach such different conclusions on the matter.<sup>1</sup>

However, in December four employees at DDIS were arrested, charged with leaking highly classified information. On 10 January 2022, it was announced that one of these employees was Lars Findsen, the head of DDIS. The case took a further turn four days later, when former Minister of Defense Claus Hjort Frederiksen announced that he had also been charged with leaking state secrets. If found guilty, this crime can potentially lead to prison for up to 12 years. This constitutional review is written in early 2022, where not much information about this case is yet available. However, based on the current knowledge in the media, it seems the main thing they are accused of, at least when it comes to Claus Hjort Frederiksen, is confirming to the media that the cooperation (mentioned above) between DDIS and NSA exists. While this is a confidential cooperation between Denmark and the US, it seems to be a less serious crime than the term "high treason" would suggest. However, given that both men have been key figures in Danish security and defense, it is still highly significant that they are being prosecuted. This has also led to severe criticism of the cur-

rent Danish government for potentially overreacting, given that the case is potentially damaging Denmark's reputation abroad and the cooperation with intelligence services in allied countries.

## B. Going to the limit of European fundamental rights

Denmark lost three cases at the European Court of Human Rights (ECHR) during 2021, two of them at the Grand Chamber. This is noteworthy, given that Denmark had only lost four cases in the decade leading up to 2021. All three lost cases had to do with immigration policies, which Denmark has continuously, over many years, tightened significantly. Unfortunately, Danish politicians' reactions to these developments highlight an increased willingness to accept certain violations of fundamental rights.

The most significant of these decisions was probably *M.A. v. Denmark* (no. 6697/18), which concerned the Danish three-year waiting period for family reunification for persons benefitting from subsidiary or temporary protection status. This rule meant that newly arrived Syrian refugees had to wait three years before being able to get family members reunified to Denmark. The Court found this to be too long. When implementing the rule, Danish politicians had already been strongly warned by several NGOs that three years would likely be too long. Following the decision, Denmark has changed the rule to a two-year waiting period.

The two other cases, *Abdi v. Denmark* (no. 41643/19) and *Savran v. Denmark* (no. 57467/15), dealt with deportations. In both cases, the Court found based on an assessment of all the facts in each case, that it was disproportionate for Denmark to deport immigrants that had been in Denmark since they were children, despite them having committed crimes. These cases are a sore point for Denmark. Danish politicians have long felt that the European Court of Human Rights stands in the way of deporting criminals from Denmark. In 2018, this led the then Minister of Justice, and current leader of the Conservative Party, Søren Pape Poulsen, to take initiative to the Copenhagen

Declaration during Denmark's chairmanship of the Committee of Ministers in the Council of Europe. In connection with the decision in *Abdi v. Denmark*, Søren Pape Poulsen (now in opposition) stated that the decision was a consequence of the need to go to the limit of the Convention in relation to deportations, arguing that "If Denmark never gets a judgment against us, it means that we are not going close enough to the limit".<sup>2</sup>

It is a worrying tendency in Danish politics that Danish politicians argue for the need to breach the fundamental rights occasionally, purposefully aiming for the very limit of human right standards. However, the current Danish government appears willing to do the same in regard to the European Charter of Fundamental Rights. Denmark has known for years that current Danish legislation breaches EU rules. The European Court of Justice (ECJ) has found, amongst others in a case concerning Sweden (C-203/15), that in light of the European Charter of Fundamental Rights, EU rules preclude national legislation that provides for general and indiscriminate retention of traffic and location data of electronic communication. Danish legislation has been in breach of this, as also already mentioned in my reports from 2019 and 2020. In November 2021, the government proposed a new legislation, which has since been adopted. However, this new legislation is possibly still in breach of EU rules. In the comments to the proposal, the Ministry of Law writes that there is a significant risk that Denmark will lose a case at ECJ (possibly also at ECHR), even with the new legislation. When questioned in a parliamentary committee, the Danish Minister of Justice stated that "the ECJ is on the side of the criminals", because following the EU rules means less surveillance, possibly making it more difficult to investigate crimes. He criticized both the EJC and the ECHR for being "activist", and explained that he disagreed with the "bourgeois" understanding of freedom because in his view government surveillance leads to more freedom for the citizens.<sup>3</sup> In Parliament itself, he further stated that ECJ "has no democratic legitimacy".<sup>4</sup> Thus, both the current Danish government and one of the leading politicians

in the opposition have shown willingness to challenge European fundamental rights as they are interpreted by the European courts.

### C. Stricter policies on citizenship and immigration

Continuing the trend from the last many years, Denmark once again implemented stricter measures in relation to immigration. In 2021, this led to stricter rules on how to acquire Danish citizenship, but also to a number of new policies on immigration that have been accused of violating fundamental rights, especially concerning deportation of immigrants.

As for citizenship, new rules implemented in 2021 mean that a person that has ever received a prison sentence, including conditional sentences, cannot receive Danish citizenship for the rest of their life. This rule has been criticized for being disproportionate, given that a minor crime committed in a person's youth can potentially prevent that person from ever getting the right to vote in national elections, as well as the other benefits that follow from citizenship. Other new rules for obtaining citizenship included requirements on employment and being able to answer questions related to "Danish values" correctly in a test.<sup>5</sup> Importantly, a committee in the Danish Parliament can choose to give dispensations to all of these rules based on an individual assessment of the applicant. While this process makes it possible to avoid the most disproportionate outcomes of the new rules on prior prison sentences, it also runs the risk of leading to discrimination. The chair of the committee, a member of the Danish People's Party, has publicly stated that she generally votes no to applications for dispensation when the applicant is from an "Islamic country", such as Pakistan. A number of experts have described this voting pattern as potentially unconstitutional and a breach of international law. However, given that a majority of the committee disagrees with this voting pattern, it is not known whether it has ever directly influenced the success of any application.

As for other new policies on immigration, the policy receiving the most international atten-

tion has been the Danish decision to revoke residency permits for a number of Syrian refugees, with the Danish authorities claiming that the area around Damascus is now safe enough for refugees to return. These decisions lead to widespread criticism, and even to debates in other EU countries concerning whether Denmark is a safe country to return Syrian refugees to according to the Dublin regulation. Denmark cannot force the refugees back to Syria, due to a lack of diplomatic ties with the Syrian regime, but they can place them in deportation centers and remove their right to work and study in Denmark.

Denmark has also taken steps to export unwanted immigrants to other countries. A majority of the Parliament agreed in December 2021 to rent prison cells in Kosovo for 300 prisoners. Only prisoners that will be expelled from Denmark at the end of their sentence will be sent to these prisons. Similarly, Denmark passed a law that makes it possible to outsource asylum application processing to another country, i.e. for Denmark to send asylum seekers to a center in another country, where their applications would be processed. Potentially, the asylum seekers would also ultimately be given asylum in this other country. The law was passed, but no agreement with another country has yet been finalized, and it is not yet clear which country will be chosen. However, prior to the law being passed, the Danish Minister of Integration visited Rwanda and signed agreements with this country on cooperation in asylum matters. For both of these mentioned initiatives, Denmark will still have a responsibility to ensure that asylum seekers and prisoners are treated in accordance with Danish law and international human right standards, but it can be more difficult to ensure this in asylum centers and prisons far from the Danish border.

## III. CONSTITUTIONAL CASES

### 1. *The Court of Impeachment, 13 December 2021: Former minister sentenced to two months in prison*

The case concerned Inger Støjberg's responsibility for her administration's practice of separating all married asylum seekers from

each other when one spouse was below 18 years of age. The lack of a concrete assessment in each case was seen as a violation of ECHR art. 8 on the right to family life, as well as of general principles in Danish administrative law, as described above. The Court found that the prosecutors had proven that Støjberg had made the decision that all such asylum seekers should be separated without the possibility of exceptions. The defense attorneys had argued that a minister could only be convicted of a serious breach of her duties as minister. The Court rejected this argument, stating that no such requirement for the breach to have been particularly serious existed. The Court was divided on the exact punishment, but the majority argued that due to the societal importance of ministers respecting the law, the starting point for sentencing had to be an unconditional prison sentence in a case like this, where a minister had deliberately broken the law and had ignored significant individual rights, thereby harming individuals.

*2. The Court of Impeachment, 29 June 2021: Whether a minister had lied to Parliament could not influence her sentencing, when Parliament had decided to not charge her for this*

The Parliament had deliberately decided to only charge Støjberg with the crime of having initiated the illegal administration mentioned above. Whether she had also lied to or misinformed the Parliament during this process could have been seen as a separate crime, but Parliament decided not to charge her with this. Instead, on behalf of the Parliament, the prosecutors argued that such lies and misinformation should be seen as an aggravating circumstance when determining the sentencing. The Court rejected this possibility, stating that according to Danish law, a court could not judge a defendant for a crime that was not part of the formal charge. It was therefore not possible to let this influence the sentencing.

*3. Supreme Court, 1 September 2021: Organization banned due to its involvement in a significant amount of serious crimes.*

As described in earlier reports, for the first time since Second World War Denmark has attempted to ban an organization. This

case finally reached the Supreme Court in 2021, which approved the ban. The case concerned the group “Loyal to Familia” (LTF), which has been accused of being a criminal gang. The Supreme Court interpreted the Danish Constitution art. 78, paragraphs 1 and 2. As for the second paragraph, the Court found that an organization could not be banned in accordance with that paragraph simply because it acted through violence. It was also a necessary requirement that such violence, or other forms of crime, had been done with the aim of influencing people of another belief, such as violence committed for political, ideological, or religious aims. The Court found that although LTF had killed people, such violence had not been done for ideological reasons, which meant that LTF could not be banned based on art. 78, paragraph 2. The High Court had reached the opposite conclusion.

Instead, the Supreme Court interpreted art. 78, paragraph 1, to mean that an organization could be banned if it had an illegal purpose, and further concluded that an organization could have an illegal purpose even if the purpose did not fall under art. 78, paragraph 2. The Court also concluded that the real aim of an organization had to be established based on the activities the organization had carried out. In this connection, the Supreme Court found that it had been well known and accepted in LTF that members committed serious crimes in the name of LTF, including murder, and that it had been a regular part of LTF’s activities to use violence. Thus, LTF had carried out activities based on an illegal aim and could therefore be banned.

*4. Supreme Court, 27 May 2021: Statements made by MP were protected by his extended freedom of speech*

A female imam had sent an application for funding to the Parliament. During correspondence between MPs concerning the application, one MP claimed that the imam supported sharia and had defended using whipping as a punishment for criminals. When this became known in the media, he wrote a Facebook post, repeating the same claims. In another Facebook post, he add-

ed the term “islamist” to his accusations against her. The imam charged him in court for libel. However, according to the Danish constitution art. 57, paragraph 2, MPs cannot be held accountable outside of Parliament for statements made in Parliament, unless a majority of the Parliament consents to such an accountability, which they had not done in this case. The Court considered the correspondence between MPs to be part of the parliamentary work and therefore protected by this clause. The Court also found that the first Facebook post was essentially the MP confirming that he stood by his statements made in Parliament, which was therefore also protected. This was not the case for the second Facebook post. However, a majority of the Court found that the MP had enough factual reasons to consider the imam an islamist. In their evaluation of this, the Court lowered the requirements for how solid this factual basis had to be, because the statements were made as part of a public debate on a topic of societal interest, and because the MP had an extended freedom of speech concerning such topics.

*5. Eastern High Court, 22 December 2021: Court case against politician had to be redone after judge had liked Facebook posts*

An MP had been found guilty by a district court of forgery and misuse of EU funds and sentenced to six months in prison. The MP appealed the case, claiming that the judge had been partial. This argument was based on a number of Facebook posts concerning the MP or his political party, which the judge had liked and/or commented on. The High Court stated that a judge is considered partial as soon as a doubt in his impartiality is reasonably justified, even if it cannot be proven that this partiality has influenced the result. The Court found that the posts left the impression that the judge did not have sympathy for the MP and his party. Therefore a reasonable doubt about his impartiality had been raised, which meant that the case had to be redone in the district court by another judge. Following this decision, the MP has been elected as chair of the Danish People’s Party, although he is still awaiting the new trial.

## 6. *Western High Court, 21 October and 7 December 2021*: Danish Covid-19 restrictions were valid

In two decisions from the Western High Court, the Court confirmed that Danish Covid-19 measures that had restricted gatherings of more than 50 (in one case) and 10 (in another case) people were not a breach of the constitutional protections of the freedom of assembly because the legislation had been made with a legitimate purpose of protecting the public health, and because it contained a number of exceptions, e.g. gatherings for a political purpose.

## IV. LOOKING AHEAD

Denmark will have a referendum in June 2022 to decide whether the unique Danish opt-out (obtained in the Maastricht Treaty) from the EU in matters relating to security and defense should be abolished.

A number of political commissions are ongoing. Most significant is the commission investigating the decision on mink, described above, since it is investigating the current government. The commission is expected to conclude in May 2022. Another ongoing commission, the Tibet Commission described in my report from 2018, is also expected to deliver its report in early 2022. The ongoing Tax Commission, also described in my report from 2018, has delivered a minor report during 2021,<sup>6</sup> but its final report is not expected until at least 2023.<sup>7</sup>

There are primarily three ongoing court cases with constitutional importance. One of them is concerned with the possible breach of EU rules due to the Danish rules on retention of traffic and location data, as explained above.

The other is the continuation of the criminal charges against Lars Findsen, Claus Hjort Frederiksen, and others, which was detailed above. During 2022, we will know whether Parliament will agree to remove Claus Hjort Frederiksen's immunity.

The third important court case is challenging the government's ability to administratively

revoke citizenships from people that have acted in a manner considered as seriously harming the vital interests of Denmark (a law primarily targeted at the men and women that joined ISIS in Syria). This court case concerns a woman, living in a prison camp in Syria, who has had her Danish citizenship revoked, causing Denmark to refuse to help her out of the camp. This has also caused her children, still Danish citizens, to remain in the camp, since the mother has refused to let the children leave without her. The High Court's decision on whether the decision to revoke her citizenship is valid is expected in early 2022, but regardless of the result, the case is very likely to be further appealed to the Supreme Court.

1 <https://politiken.dk/indland/art8607212/Et-mysterium-plager-skandalen-i-Forsvarets-Efterretningstjeneste.-Nyt-brev-rummer-m%C3%A5ske-en-del-af-svaret>

2 <https://www.berlingske.dk/danmark/papes-opgaver-med-international-domstol-holdt-ikke-til-somaliers-klage-ny>

3 <https://www.mm.dk/artikel/nej-nick-haekkerup-eu-domstolen-staar-ikke-paa-forbrydernes-side>

4 <https://www.ft.dk/samling/20211/lovforslag/L93/BEH1-21/forhandling.htm>

5 <https://www.uim.dk/nyhedsarkiv/2021/april/bred-af-tale-udelukker-kriminelle-fra-at-faa-dansk-statsborgerskab/>

6 <https://www.justitsministeriet.dk/pressemeddelelse/undersoegelseskommisionen-om-skat-af-giver-delberetning-om-udbyttesagen>

7 <https://kommissionenomskat.dk/nyheder/orientering-nr-18-december-2021.3543.html>



# Dominican Republic

Roberto Medina Reyes  
Professor  
Pontificia Universidad Católica Madre y Maestra

William Cueto Zorrilla  
Law Clerk  
Tribunal Constitucional de la República Dominicana

## I. INTRODUCTION

The 2010 constitutional reform consolidates in the Dominican legal system the essential elements of a model of constitutional democracy. This model seeks on one side, the separation and limitation of political power and, on the other side, the effective protection of the rights of the persons. That is to say, the idea behind this form of political organization is to ensure the development of the democratic system through the protection of a set of liberal, democratic, and social rights.

The Constitution of 2010 is basically structured in two main parts: (a) a declaration of fundamental rights (dogmatic part); and (b) a certain architecture of organs and functions of political power inspired by the principle of separation of powers (organic part). The final purpose of the constituent is to ensure that the actions of individuals and of the organs exercising public powers are aimed at guaranteeing the rights and rules that constitute the preconditions of the democratic system.

To accomplish the above, the Constitution of 2010 incorporates: (a) the principle of constitutional supremacy, providing the Dominican Republic with a rigid constitution given supremacy and an unmodifiable sphere (Article 6); (b) the social and democratic rule of law clause (Article 7); (c) a set of rights of a liberal, democratic and social nature as authentic fundamental rights (Title II); (d) extra-power or constitutional organs that enjoy reinforced autonomy and

that control and limit the actions of the State. For example, one of these organs is the Constitutional Court of the Dominican Republic (Article 184); (e) mechanisms for the control of constitutionality; and (d) a constitutional exception procedure to deal with anomalous situations (Article 262).

The global pandemic of Covid-19 hoarded the social, political, economic, and legal debates of the Dominican Republic in the years of 2020-2021. Therefore, the main constitutional developments in these years are circumscribed to the implementation of the State of Exception and the measures adopted by the State to avoid crowds and contagion of people. Two of the most relevant issues of 2021 were: (a) on the one hand, the constitutional right of exception and the limits to the measures adopted by the President of the Republic; and (b) on the other hand, the mandatory nature of vaccinations. These issues will be discussed in Section II of this report. In addition, other constitutional developments will be analyzed, such as, for example, the designation of four judges to the Constitutional Court by the National Magistracy Council.

In Section III, we will be presenting the main constitutional cases resolved by the Constitutional Court, including two cases on the establishment of virtual mechanisms for the provision of justice services because of the pandemic and the extensions granted by the National Congress to the declaration of the state of emergency. Section IV will analyze

the constitutional reform proposals being debated by the Government and the different sectors of society. And finally, Section V will propose some reading recommendations.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. *Constitutional right of exception and limits to State action.*

The 2010 constitutional reform consecrates a right of “constitutional exception” which is expressly regulated in the constitutional text. This constitutionalizing of emergency situations does not seek to establish a cause of justification that eventually exonerates the public authorities from blame for the measures adopted to defend the constitutional order, but rather seeks to establish a justifying cause that excludes the idea of illegitimacies of such measures and that mean the recognition of the right and duty of the authorities to utilize the exceptional, necessary, appropriate and proportional means to prevent crisis situations that threaten the constitutional order.

The Constitution of 2010 discipline the State of Exception. In fact, according to the article 262 of the Constitution, the State of Exception is “an extraordinary situation that seriously affects the nation’s security, its institutions, and the individual in front of which the ordinary faculties are insufficient. These articles continue stating that “the President of the Republic, with the Congress authority, may declare the states of exception in three modalities: State of Defense, State of Internal Commotion and State of Emergency”.

From the above, it is inferred that the constitutional legitimacy of the state of emergency is subject to the observance of the following parameters: (a) the verification of extraordinary situations; (b) the presence of imminent danger or damage capable of destabilizing the constitutional order; (c) the impossibility of maintaining normality through ordinary means; (d) the transitoriness of the exceptional measures adopted; and, (e) obedience to the powers and limitations established in the Constitution. These parameters condition

the budgets, competencies, instruments, procedures, and legal consequences of the state of emergency, in a way that they are articulated as constitutional limits to the actions of the organs exercising public powers.

The State of Exception is conceived in the Dominican legal system as an authentic constitutional discipline as a constitutional law of exception. For that, the legitimacy of the State of Exception and, therefore, of the actions of the President of the Republic depends to a great extent on the observance of the parameters provided in the constitutional text.

In the Dominican Republic, the State of Exception is divided into three modalities: (a) State of Defense (Article 263); (b) State of Internal Commotion (Article 264); and (c) State of Emergency (Article 265). The declaration of one or another modality has immediate effects on the way in which the authorities affect fundamental rights.

In fact, according to Article 263 of the Constitution, in a State of Defense, the authorities may suspend the rights of individuals, except for those that are considered intangible. These rights are: (a) the right to life; (b) the right to personal integrity; (c) freedom of conscience; (d) protection of the family; (d) the right to a name; (e) the rights of the child; (f) the right to nationality; (g) citizenship rights; (h) the prohibition of slavery and servitude; (i) the principle of legality and non-retroactivity; (j) the right to recognition as a person before the law; and (e) the judicial, procedural and institutional guarantees indispensable for the protection of these rights.

On the other hand, Article 266.6 provides that in a State of Internal Commotion and Emergency it is only possible to suspend the following rights: (a) reduction to imprisonment; (b) deprivation of liberty without cause or without legal formalities; (c) deadlines for submission to judicial authority or for release; (d) transfer from prison or other places; (e) the presentation of detainees; (f) habeas corpus; (g) inviolability of the home and private premises; (h) freedom of transit; (i) freedom of expression; (j) freedom of association and assembly; and (k) inviolability of correspondence.

In any of these cases, the suspension of the fundamental rights is conditioned by the observance of the principles of legality and reasonability and, in addition, must respect the essential content of the suspended right. The total suspension of rights is constitutionally prohibited.

In the years of 2020 and 2021, public and political controversies, academic discussions and constitutional precedents were raised on behalf the constitutional law of exception and the limits to the actions of the State. This was since the President of the Republic decreed a State of Emergency because of the pandemic, adopting measures to suspend the exercise of the rights to freedom of transit and assembly. The National Congress put into practice its power of supervision of the exceptional measures adopted by the President of the Republic and the jurisdictional organs exercised their control function.

One of the relevant decisions issued during the pandemic was Sentence No. 0030-02-2020-SS-EN-00274. In this Sentence, the First Judge of the Superior Administrative Court ordered the Judicial Power Council to immediately lift the suspension of work in the courts, providing for the opening of all judicial offices and guaranteeing the access of users to judicial services, in compliance with the health protocols of the World Health Organization.

### 2. *The Mandatory vaccination*

Another discussion held in 2021 was the mandatory vaccination. The article 42.3 of the Constitution states that “no one may be subjected, without prior consent, to experiments and procedures that do not adjust to internationally recognized scientific and bioethical standards. Nor to medical examinations or procedures, except when life is in danger”. From this article it can be inferred that any medical intervention requires the prior, free, and informed consent of the persons in order to be legally valid. However, this article must be interpreted in the context of the pandemic and in a systematic way with the principles that support the constitutional order. One of these principles is that of social solidarity.

Based on the principle of solidarity, it is possible to justify constitutionally, the imposition of the vaccine as a necessary measure to guarantee, on the one hand, the health of all persons (Article 63.1 of the Constitution) and, on the other hand, the life of the person who resists undergoing the vaccination process (Article 42.3 of the Constitution).

On October 8, 2021, the Ministry of Public Health and Social Assistance issued Resolution No. 000048, by means of which persons are required to present an identity document and vaccination card in order to attend: (a) workplaces with enclosed spaces and of collective use; (b) study centers of all levels, whether public or private; (c) any of the means of transportation for public use, whether urban or interurban; and, (d) restaurants, bars, discotheques, clubs, shopping centers, stores, casinos, gyms, sports centers and any other amusement center.

### *3. Renewal of the Constitutional Court of the Dominican Republic*

In the year 2021, four judges were designated to the Constitutional Court of the Dominican Republic. This court was created by the constitutional reform of 2010 and began operations in January 2012. The essential function of the Constitutional Court is to guarantee constitutional supremacy, the defense of the constitutional order and the protection of fundamental rights.

The constitutional Court is composed of thirteen judges who are appointed by the National Judicial Council. Indeed, according to Article 186 of the Constitution, “the Constitutional Court shall be composed of thirteen members and its decisions shall be adopted with a qualified majority of nine or more of its members”.

The article 187 of the Constitution establishes that “the judges of this court shall be appointed for a single term of nine years. They may not be reelected, except for those who, as replacements have held office for a period of less than five years. The composition of the court shall be gradually renewed every three years”. The decisions of the Constitutional Court are adopted based on a qualified

majority of nine out of thirteen judges. Judges are appointed for a single 9-year term. In 2021, the Constitutional Court issued 527 judgments.

## **III. CONSTITUTIONAL CASES**

### *1. Constitutional procedural law -TC/0526/21, TC/0502/21, TC/0056/21, TC/0113/21 y TC/0508/21*

The 2010 constitutional reform provided the Constitutional Court with a wide range of powers like those of contemporary constitutional jurisdictions. One of these attributions is consecrate in Article 185.3 of the Constitution: the preventive control of international treaties.

In a first phase, the Dominican constitutional jurisprudence, through Sentence TC/0495/15, considered that international treaties were susceptible to be attacked by means of a direct action of unconstitutionality, that is, by means of a concentrated control of constitutionality a posteriori. However, since Sentence TC/0526/21, the previous precedent was abandoned and it was established that international treaties can only be challenged through a priori or preventive control of constitutionality, under the argument that international treaties, according to Article 185.2 of the Constitution, are not acts reserved to be challenged through concentrated control.

This decision is transcendental to understand how the Dominican constitutional justice system works, since it delimits precisely what is the procedural remedy authorized to control the constitutionality of international treaties signed and ratified by the Dominican Republic.

The same way, Sentence TC/0502/21 is of vital importance in terms of constitutional justice, because in that decision the Constitutional Court identified and expanded the acts that can be challenged by means of the direct action of unconstitutionality, specifying that the acts expressly listed in Article 185.1 of the Constitution, regardless of their scope, are subject to concentrated control. This de-

cision changed a long-established precedent in the constitutional jurisprudence that conditioned the admissibility of the direct action of constitutionality to the fact that the effects of the attacked act were of a normative nature or of a general scope.

In the same line, it is worth mentioning Sentence TC/0056/21, since in that decision the Constitutional Court also delimited the object of the direct action of unconstitutionality, by establishing that in the Dominican constitutional system it is not possible to declare the unconstitutionality of the Constitution. This sentence ratified the jurisprudential criterion established in Sentence TC/0352/18, which supported the thesis of the impossibility of declaring the Constitution itself unconstitutional for two main reasons: (a) a formal one, based on the fact that Article 185. 1 of the Constitution does not establish the constitutional text as an act reserved to be attacked by means of a direct action of unconstitutionality; and, (b) a material one, based on the fact that a constituted power, such as the Constitutional Court, is not legitimized to reform the constitutional text, since such attribution corresponds to the constituent body, which, in the Dominican Republic, is the National Revising Assembly, this being an essential guarantee for the validity of the social and democratic Rule of Law, which is based on the pillars of constitutional supremacy and popular sovereignty.

Another decision that has a considerable impact on the Dominican constitutional justice system is Sentence TC/0113/21 since this decision deals with the control of constitutionality of legislative omissions.

As is well known, constitutional infraction can be produced by action or omission of the State. However, the novel and at the same time, controversial component of Sentence TC/0113/21 does not lie in this issue, but rather in the fact that the Constitutional Court exercised the concentrated control of constitutionality over an absolute legislative omission through a constitutional exhortative decision that granted a term of two years to the National Congress to issue the laws reserved in Articles 203, 210 and 272 of the Constitution.

The analyzed sentence contains several dissenting votes, including a dissenting vote of Justice Alba Beard in which she states that in the Dominican constitutional justice system it is only possible to control the constitutionality of relative legislative omissions, since the examination of abstract confrontation of constitutionality presupposes the existence of an infra-constitutional norm that will be examined in the face of the rules, values, and constitutional principles. Therefore, in the total absence of the rule for failure to comply with the general duty to legislate, the constitutional jurisdiction does not have the capacity to control this omission.

On another order, it is worth mentioning Sentence TC/0508/21 for its impact on the system of distribution of competencies of the constitutional bodies and its relevance for the Dominican electoral system.

Prior to the specific study of this judgment, it is appropriate to recall that the Superior Electoral Court is one of the extra-power or constitutional bodies created as of the constitutional reforms of 2010. This court has the competence to judge and resolve contentious electoral conflicts, as well as disputes between the political parties.

One of the competencies that were added to the Superior Electoral Tribunal with the successive regulatory reforms was judging electoral crimes and offenses typified in the Dominican legislation. The Constitutional Court declared that the legal and regulatory provisions that granted criminal jurisdiction to the Superior Electoral Tribunal were not in conformity with the Constitution because it found that such norms violated multiple constitutional provisions, among them, several related to due process guarantees.

Sentence TC/0508/20 has a notorious impact on the system of distribution and delivery of competences of the constitutional organs, since the declaration of unconstitutionality implied the suppression of the criminal competence held by the Superior Electoral Tribunal to judge electoral crimes and offenses. These competencies were transferred to the criminal courts. Likewise, this sentence modifies the Dominican electoral system, in

the sense that it decides who will be the institutional actors that will be arbitrators to hear and judge the electoral infractions that may occur during the electoral process.

## 2. *Constitutional interpretation of fundamental rights - TC/0252/21, TC/0364/21, TC/0479/21 and TC/0239/21*

The constitutional relevance of Sentence C/0252/21 does not lie in the case itself, but in the criterion set by the Constitutional Court in considering that legal persons under public law may be holders of fundamental rights in cases where the Government acts in private law relations like individuals, devoid of its power of *imperium*.

This Sentence represents a step forward, since previously, the State was considered only an obligated subject that was called upon to guarantee the rights of individuals. This judgment incorporates the possibility that the State may also intervene, under certain circumstances, as an active subject to claim the protection of fundamental rights. Although, the express exclusion of the State as holder of fundamental rights when it acts with exorbitant powers could generate discussions about whether the State should be considered as holder of certain fundamental rights - especially those cross-cutting rights such as effective judicial protection and due process.

Sentence TC/0364/21 can be considered as another relevant decision. In this decision, the Constitutional Court considered that the forced transfer of a judge of the Supreme Court of Justice from one judge to another constitutes an arbitrary action that violates the guarantee of being irremovable, which is a fundamental part of judicial independence. Thus, the Constitutional Court not only addressed the principle of irremovability of judges in their positions as a fundamental right, but also as an objective guarantee of the rule of law that seeks to avoid external or internal interference in the exercise of jurisdictional functions, in order to enable judges to act independently when exercising their constitutional and legal powers.

In 2021 the Constitutional Court also consolidated its role as protector of fundamental rights. Proof of the above is Sentence

TC/0479/21, by which it accepted an appeal for constitutional review of an *amparo* judgment filed by Mr. José Selmo Ortega, through which he demanded the granting of a pension for length of service in the State.

The Constitutional Court found in this judgment that Mr. José Selmo Ortega's fundamental rights to social security, health and old age had indeed been violated, for which reason it ordered the Dominican State to pay the necessary contributions to the social security system to enable the claimant to be granted the right to a seniority pension. Mr. Selmo Ortega is a senior citizen and was diagnosed with an illness that made him permanently unable to work.

This decision shows that the Constitutional Court does not conceive of social rights as guiding principles or programmatic norms devoid of legal effects, but rather as authentic fundamental rights that can be claimed through the courts. The Constitutional Court recognizes that social rights are preconditions for the exercise of other fundamental rights, so that they have the same normative structure as other rights of a liberal and democratic nature, since both categories impose negative and positive obligations.

The concept of understanding social rights as authentic fundamental rights can also be seen in Ruling TC/0239/21. In this Ruling, the Constitutional Court considered that the refusal of a private educational center to enroll a minor, based exclusively on a condition of his parents (the existence of a criminal investigation), violated not only the minor's right to education by unjustifiably preventing his access to the educational center, a prerogative that is given greater protection by the principle of the best interests of the child, but also the fundamental rights of equality and human dignity of the minor; since, on the one hand, the requirement imposed for his enrollment exceeded the ordinary requirements required by the educational center for the rest of the children, which implies a discrimination because the difference in treatment is not objectively justified and, on the other hand, also an affectation to his dignity because the child is an object for the criminal prosecution of his parents.

### 3. *Constitutional justice times of pandemic – TC/0286/21 y TC/0441/21*

The pandemic of Covid-19 produces the need for the Dominican State to activate a form of state of emergency to address the economic and health challenges brought about by the pandemic. The declaration of the State of Emergency in the Dominican Republic implied, as in many countries, the suspension of freedom of movement and assembly.

Considering this context, it's convenient to highlight Sentence TC/0286/21, This decision declared several resolutions issued by the Council of the Judiciary unconstitutional. The resolutions challenged in concentrated control of constitutionality had, as an essential axis, the establishment of virtual mechanisms for the provision of the justice services, which included the possibility of holding virtual hearings and the virtual filing of files.

However, the Constitutional Court found, without examining the merits, that these resolutions had been issued by an incompetent body, and therefore, considered that the principle of legality had been violated. The Constitutional Court also identified the National Congress as the competent authority to regulate the virtual hearings because such regulation involves fundamental rights, such as, due process and effective judicial protection. This being so, said court opted to choose a modality of deferred judgment of unconstitutionality due to the harmful effects that a declaration of unconstitutionality with immediate effects could have on the Dominican justice system.

For its part, Sentence TC/0441/21 examined the constitutionality of Articles 21 and 28 of Law No. 21-18, regarding states of exception in the Dominican Republic. Article 21 makes the declaration of a State of Exception conditional upon prior congressional authorization. On the other hand, Article 28 prevents extensions granted by the National Congress from exceeding the term granted in the congressional authorization that gave rise to the declaration of the State of Exception.

The Constitutional Court considered that Article 21 of Law No. 21-18 is compatible with

the Constitution, under the argument that the extraordinary and urgent circumstances that justify the activation of states of exception demand a quick response from the National Congress. Therefore, the approval of an organic law is not required to channel requests for authorization and extensions of states of exception. Likewise, the Constitutional Court understood that Article 28 of Law No. 21-18 does not infringe the constitutional text, since the institutional requirement that prevents the National Congress from authorizing an extension to a State of Exception for a period longer than that established in the original declaration is reasonable and proportional.

## IV. LOOKING AHEAD

The Executive Branch convened a National Dialogue to discuss a proposal for constitutional reform with respect to the organic part of the constitutional text. The proposal seeks to introduce some modifications in the framework of the system of separation and organization of the structures of the powers of the State.

In summary, the purpose of the proposed constitutional reform is to strengthen the system of controls of the powers of the State and the constitutional bodies, to make the State and the Public Administration more efficient and to consolidate the exercise of democracy. To achieve this, the following modifications are proposed:

(a) The recomposition of the National Council of the Magistracy, excluding from its members the Attorney General of the Republic. The composition of the National Council of the Magistracy would be as follows: (a.1) the President of the Republic; (a.2) the President of the Senate; (a.3) a senator or senator chosen by the Senate who belongs to the party or block of parties different from that of the President of the Senate and who holds the representation of the second majority; (a.4) the President of the Chamber of Deputies; (a.5 ) a deputy chosen by the Chamber of Deputies belonging to a party

or block of parties other than the President of the Chamber of Deputies and representing the second majority; (a.6) the President of the Supreme Court of Justice; and, (a.7) a justice of the Supreme Court of Justice.

(b) Reorganization of the operation of the Supreme Court of Justice, the Constitutional Court, and the Superior Electoral Court. Among the proposed modifications are the following:

(b.1) The designation of judges for single nine-year terms and the alternation of the presidency of these high courts every three years.

(b.2) The inclusion of new designations requirements for judges of these high courts, including the obligation that they must not have been registered in a political party or have engaged in political proselytizing activities during the five years prior to their appointment.

(b.3) In the case of the Constitutional Court, it is proposed to maintain the qualified majority of nine votes for the adoption of decisions regarding direct actions of unconstitutionality, preventive control of international treaties, and conflicts of competence. However, it is proposed to refer to the legislator for the determination of the majority required for the adoption of the other competencies; and,

(b.4) It is proposed to delegate to the legislator the regulation of the functioning of the Council of the Judiciary.

(c) Transformation of the Public Prosecutor's Office. It is proposed to subject the heads of the Public Prosecutor's Office to a more rigorous regime of admission, permanence, and supervision, establishing new requirements and forms of designation. In addition, it is proposed to exclude from the competencies of the Attorney General of the Republic the formulation and implementation of the State policy against criminality and the direction of the penitentiary system.

(d) The reorganization of the Administrative Attorney General, who would be

come the Attorney General of the Public Administration.

(e) The restructuring of the electoral organs. New requirements are proposed for the designation of the members of the Central Electoral Board and the establishment of the plenary of the Superior Electoral Tribunal in a total of five members.

(f) Simplification of the popular legislative initiative. The constitutional reform proposes to reduce the current two percent (2%) required for the popular legislative initiative by a minimum of twenty-five thousand (25,000) citizens registered in the voters' registry. Likewise, it is proposed to increase the terms for the observation and enactment of laws.

(g) Finally, the reorganization of the external and internal control bodies. New requirements are proposed for the appointment of the members of the Chamber of Accounts and the extension of the powers of the Comptroller General of the Dominican Republic.

Article 270 of the Constitution establishes that the constitutional reform process takes place within the National Revising Assembly. However, the National Dialogue is being carried out as a previous process of socialization of the proposals with the objective of reaching a consensus with the different social sectors.

## V. FUTURE READING

Hermógenes Acosta de los Santos, *El Tribunal Constitucional Dominicano y los Procedimientos Constitucionales* (Iudex colección, 2020).

Mayra Zuleica Cabral Cabrera, *El control de las políticas públicas sociales por parte de los Tribunales Constitucionales: Una mirada desde el neoconstitucionalismo latinoamericano* (Iudex colección, 2021).

Rafael Díaz Filpo, *Constitución Política. Política Constitucional* (Iudex colección, 2020)

Wilson Gómez Ramírez, *La constitucionalidad del derecho de propiedad y el sistema inmobiliario registral de la República Dominicana* (Iudex colección, 2020).

Eduardo Jorge Prats, *La Constitución de la República Dominicana* (Tirant lo Blanch, 2021).

Eduardo Jorge Prats (coord.), *La organización del poder para la libertad. Homenaje al Mag. Milton Ray Guevara* (Librería Jurídica Internacional, 2021).

Roberto Medina Reyes, *La Administración del Estado social y democrático de Derecho* (Librería Jurídica Internacional, 2020).

Julio José Rojas Báez, *El debido proceso en el bloque de constitucionalidad dominicano* (Editorial Manatí, 2020).



# Ecuador

Roberto Eguiguren Calisto, Chief of Staff, Constitutional Court of Ecuador

Sebastián Abad Jara, Researcher and LL.M Candidate, University of Cambridge<sup>1</sup>

## I. INTRODUCTION

Ecuador faced massive constitutional challenges 2021. The year was marked by the continuous effects of the COVID-19 pandemic, an unprecedented penitentiary crisis in the prison system and a fragile new government in constant confrontation with a divided National Assembly. There were also some positive developments. The year saw the consolidation of the Constitutional Court as one of the country's most stable and independent institutions, issuing transcendental rulings protecting and developing the rights of nature, indigenous communities, women, children, and criminally prosecuted persons.

In the following paragraphs, these developments are presented across two main sections. The first section briefly describes the most important constitutional developments of the year, and it describes the political shifts that marked 2021, with a new market-oriented government battling with the opposition of the National Assembly. The section continues with the tense relationship between the executive power and the Constitutional Court, mainly focusing on the grave humanitarian crisis surrounding Ecuador's prison system and the government's failures to address it.

The second section concisely describes the most important constitutional cases of the year, classified thematically. We begin with the ground-breaking cases that developed the rights of nature included in Ecuador's Constitution and recognized forests, rivers, and animals as individual subjects of rights. Then, we continue with the newest developments in indigenous Peoples' Rights and the relation between extractive industries and

the rights of persons, communities, and nature. Finally, we summarize the most important constitutional cases regarding women's rights, children's rights, criminal defendants, foreign investment, and arbitration.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2021, Ecuador experienced significant political shifts with unavoidable institutional challenges. Presidential and legislative elections took place in early 2021, and the following political transition occurred during an socio-economic crisis that required the incoming administration to adopt immediate measures. These developments, among others, are presented across three topics—first, a description of the political changes in Ecuador in 2021. Second, a review of the relationship between incoming president Guillermo Lasso and the Constitutional Court during 2021. And third, a brief report of the Constitutional Court's major decisions throughout the year.

### *Ecuador's political shifts*

From 2017 until the first semester of 2021, Lenin Moreno governed Ecuador after ten consecutive years of former president Rafael Correa. During the first years of Moreno's government, Ecuador took steps towards re-institutionalization with the renewal of most of the leading control authorities, including Ecuador's higher courts. Nevertheless, Moreno's legacy includes significant crises in the health and sanitary area and several corruption scandals, besides eco-

conomic mismanagement dragged from Correa's period.

That is why one of the critical questions in last year's report was the presidential elections held in 2021. The results favored the right-wing candidate and former banker Guillermo Lasso. His victory in the balloteage against Andrés Arauz represented the end of 14 years of ruling by the same party.<sup>2</sup> Lasso came to power with two central promises. First, to enhance the vaccination process by inoculating nine million people in his first hundred days of government. Second, to start an economic reactivation to overcome the recession caused by the pandemic and previous economic mishandling.

The elected president also made several campaign promises on social aspects, such as raising the minimum wage and eliminating university entrance exams. Moreover, he offered to call for a popular referendum so the people could decide on a number of regulatory, economic, and labor issues<sup>3</sup>, including eliminating the controversial Council for Citizen Participation and Social Control<sup>4</sup>.

President Lasso will govern with limited political power as he faces a fractured National Assembly where he holds a weak minority position. This situation will force the president to at least try to negotiate agreements with the main opposition factions, especially considering that many of his campaign promises require specific constitutional amendments and legislative reforms. It demands the collaboration of a bitterly divided National Assembly and the acquittance of other relevant players, mainly the Constitutional Court. In 2021, Lasso presented four major legislative projects in front of the Legislature and only got one passed—related to economic development and fiscal sustainability after the COVID-19 pandemic—not by a majority vote but by a constitutional provision that mandates the enactment of urgent projects of law in economic matters after the conclusion for a short period given to the National Assembly.

#### *Relationship between the executive power and the Constitutional Court*

The relationship between president Lasso and the Court has not been free of tensions this year. From May 2021 until the end of

the year, the executive power issued seven declarations of a state of emergency in different parts of Ecuador. Two were related to fluctuations of the pandemic, four responded to public safety issues, mainly, the grave penitentiary crisis shocking the country, and one was due to environmental implications of illegal mining in a province.<sup>5</sup>

The penitentiary crisis represents the most significant challenge for the new government. It results from the negligence and forgetfulness through which persons deprived of liberty (PDL) had been treated over the previous decades. Although riots and mutinies had previously occurred in the Ecuadorian penitentiary system, they had dramatically increased in the previous years, and 2021 saw a massive escalation in the levels of violence. Several massacres took hundreds of lives during the year, and much of the violence was broadcast directly through social media, with images and videos of the unspeakable violence offering a grim glimpse of the absolute failure of the government to control its prisons and protect the human rights of PDL.

Even though the scale of the crises requires comprehensive and long-term intervention, Lasso's government response has mainly focused on the continuing issuing of states of emergency. Exercising its power to review the declarations of emergency, through several judgments, the Constitutional Court identified a situation of 'systemic failure' of public policy, characterized by weak institutions that do not have the minimum resources and the absence of a public policy focused on human rights. It reminded the president that, because of their very nature, states of emergency are not supposed to address structural problems that must be treated through the ordinary means recognized in the legal framework.<sup>6</sup> However, the poor enforcement of these judgments shows the limits of the Court's power to force the executive to adopt appropriate measures and the need for a broader political agreement to address the situation between the leading political players, the president, and the National Assembly.

As has been the case since 2019, this year, the Constitutional Court continued to play a role of utmost importance in protecting constitutional rights during the COVID-19

pandemic. After a petition for public information, in judgment 29-21-JI/21, the Court determined that the Ministry of Public Health must hand over all the information regarding Ecuador's vaccination process to the Ombudsperson office. The reasoning considered that this data is essential to track any side effects that a novel shot as the COVID-19 vaccine might have on the population. It also achieves transparency in the inoculation process in Ecuador, so there can be the assurance that the recipients of the vaccines were people who met the prioritization criteria established at the early stages of the pandemic. Moreover, in ruling 4-21-EE/21, the Court addressed a novel issue not discussed before in the country: the constitutionality of imposing restrictions on unvaccinated people before reaching universal accessibility of vaccines. The Court affirmed that compulsory vaccination is intimately related to accessibility for people to vaccines. It concluded that, given that the State had not guaranteed universal access to the vaccination process and the scarcity of vaccines, such restrictions were unreasonable, and they could become a factor of greater inequality, declaring them unconstitutional.

#### *Constitutional Court's main developments*

As evidenced by the reports of the last two years, Ecuador's institutionalism has strengthened after the appointment in 2019 of the nine new judges of the Constitutional Court. Its rulings have contributed to safeguarding democracy and the rule of law and guaranteeing constitutionally protected rights of persons and nature. The latter has proved an immense challenge within a State with structurally significant social and political problems, which the mishandling of the COVID-19 pandemic has accentuated.

In the last two previous reports, we conveyed two topics that would be relevant in 2021. First, a petition presented to the Constitutional Court by a citizen initiative seeking to carry out a partial reform of the Constitution. Second, is the evaluation of the justices from the National Court of Justice carried out by an administrative body known as the Judiciary Council.

The proposal for constitutional reform included three main points: 1) The elimination

of the Citizen Participation Council and the consequent transfer of the power to designate control authorities to the National Assembly. 2) The transformation of the Legislature into a bicameral body. 3) And the separation of the Prosecutor's Office from the Judicial power. The Court allowed the reform with some limitations, and the proposal was submitted to the National Assembly. After two years, the Legislature voted on the petition, but it did not reach the necessary amount of votes to be approved. The proponents argued that this violated the people's right to participation.<sup>7</sup> Such argument was dismissed by the Court, stating that its functions are limited to determining if the National Assembly could carry out the proposed change, not guaranteeing a specific outcome of the legislative debates.<sup>8</sup>

The controversial evaluation of the national justices ended in late 2020 with the early termination of the terms of twenty-three justices. In 2021, the Constitutional Court reviewed the constitutionality of this evaluation in decision 37-19-IN/21. In a country marked by constant attacks on judicial independence, a historic ruling by the Court declared that the early termination of the justices had violated their rights and granted them an appropriate remedy.

One of the most noteworthy developments made by the Constitutional Court in 2021 is the advancement of the constitutionally recognized rights of nature by applying them to declare that a forest, two rivers, and a monkey are individual subjects of rights. Nature rights also proved relevant in addressing the continuing tension between extractive industries and the rights of persons, indigenous communities, and the environment. The Court also progressed in the strengthening of indigenous peoples' rights by adopting decisions that took measures to guarantee that justice is administered under the principle of interculturality.

Concerning women's rights, the Court recognized the obligation of the State to work towards eliminating sexist stereotypes that affect society's perception of women's bodies. Additionally, regarding sexual and reproductive women's rights, the Court decriminalized abortion in cases of rape, allowing any person who has gotten pregnant as a victim of sexual abuse to access free and safe abortion.

Finally, the Court issued two important decisions relating to foreign investment in the country. The first one allowed the reincorporation of Ecuador into the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). The second involved the interpretation of article 422 of the Constitution to verify if it prohibited the State from consenting to international investment arbitration.

### III. CONSTITUTIONAL CASES

#### *Rights of nature: The forest, the two rivers and the monkey*

Although Ecuador was the first country in the world to recognize rights directly to nature in 2008, these constitutional provisions remained unused for more than a decade and were not translated into concrete protection of nature and its elements. The latter changed dramatically in 2021, with the irruption of a series of cases in the jurisprudence of the Court that developed these rights and expanded their scope to protect first ecosystems, then individual forests and rivers, and, finally, animals.

In case 32-17-IN/21, the Constitutional Court declared that two administrative norms that regulated mining activities violated the Constitution since they allowed the modification of the course of a river when a mining project needed a water diversion. The Court concluded that the authorization to modify the course of a river would constitute a limitation of the rights of nature that can only be introduced through legislation and not through administrative actions.

In ruling 22-18-IN/21, the Court declared the unconstitutionality of a norm that allowed certain economic activities in mangrove forests. The Court affirmed that the rights of nature protect a complex community of beings, which contains biotic life and abiotic factors. In the judgment, the Court declared that mangrove forests are entitled to rights as ecosystems, as they are extremely valuable for their environment, they can help attenuate climate change's effects and provide resources for the surrounding communities.

In ruling 1148-19-JP/21, the Court advanced

in the content and scope of the rights of nature. The decision reviewed a case where the Ministry of Environment issued an environmental registry for exploration with mining purposes of a protected forest known as Los Cedros. The Court declared the violation of the rights of the affected communities to water, a healthy environment and prior consultation. Nevertheless, the most interesting part of the judgement was the recognition of the Los Cedros Forest as an individual subject of rights. The Court determined that the rights of the forest encompass the protection of its species, cycles, functions, and natural processes.

This new conception of the rights of nature as a subject of rights was further developed in cases 1185-20-JP/21 and 2167-21-EP/21. The said rulings declared that rivers Aquepi and Monjas have rights as part of nature and are subjects of constitutional protection.

In ruling 1185-20-JP/21, the Court analyzed if the diversion of the flow of the Aquepi river by a municipality for an agricultural project violated the river's rights. The Court established that any decision that interferes in an ecosystem's life cycle, structure, functions, and evolutionary processes must be adopted considering the location and context of the place, as well as protecting the rights of nature that could be affected.

In case 2167-21-EP/22, on the other hand, the Court recognized that the existence, maintenance, and regeneration of life cycles of the Monjas river are entitled to constitutional protection. The Court evidenced a structural problem generated by the lack of planning of local authorities of Ecuador's capital, Quito. The Monjas river was a location for the discharge of sewage and rainwater from large parts of the city, and the use of this ecosystem for such purposes was beyond the river's capacity, causing gradual destruction of animal life and pollution of the water beyond the permitted levels. In this judgment, the Court ordered the restoration of the river, including creating a plan to decontaminate it and stabilize and restore its ecological balance.

Finally, through judgment 253-20-JH/22, the Court reviewed a ruling that denied a habeas corpus presented in favor of a Chorongó monkey called Estrellita. The Court recognized that animals, as part of nature, can also be individual subjects of protection of

the rights of nature. Nonetheless, the Court clarified that the rights to which animals are entitled are not the same as those recognized for human beings. The ruling specified that the rights of animals must be understood based on the principles of interspecies and ecological interpretation. Hence, when analyzing the alleged violation of rights of nature, judges must observe the characteristics, processes, life cycles and other relevant processes of each species within the ecosystem.

### *Indigenous Peoples' Rights*

The year 2021 presented fundamental advances in terms of the rights of indigenous communities. The Court consolidated its application of the principle of interculturality by, among other things, translating every decision affecting indigenous communities to their ancestral languages and communicating them orally to the indigenous authorities in their territory, particularly to the Waotero, Shuar and Kichwa languages. Furthermore, in case 273-19-JP, the Court held, for the first time, an in-situ hearing inside the territory of an indigenous community, Cofán of Sinangoe, located deep inside the Amazon rainforest. These measures, along with the use of expert witnesses, the call for public hearings, and the file of *amici curiae*, represent necessary steps toward establishing an intercultural dialogue between the Court and native communities.

Ruling 112-14-JH/21 represents one of the most complex cases that has come before the Court. It involves a writ of habeas corpus requested in favor of seven indigenous persons of the Waorani nationality. This nationality was isolated in the Amazon jungle until the 20<sup>th</sup> century, when, given the increase of oil and mining activities near their territory, it fractured, with some of its members maintaining voluntary isolation and others gradually integrating into other elements of Ecuador society. The defendants were deprived of their liberty after a confrontation with members of the isolated indigenous communities known as Tagaeri and Taramenani that resulted in the death of several members of the confronted groups.

The Court gave particular attention to the fact that the accused were indigenous persons of recent contact, which made it imperative to

adapt the interpretation of facts and the law to their ancestral traditions and norms, following the principle of interculturality. The Court found that the deprivation of liberty and the denial of the habeas corpus constituted illegal and arbitrary detention since the judges solved the case as an ordinary justice matter without considering the characteristics of the persons involved. The Court set standards for State officials and judges to conduct cases relating to indigenous peoples of recent contact.

### *Relation between extractive industries and rights*

In March, over 80% of the population of the city of Cuenca, the third major city in Ecuador, voted in favor of banning metal mining in the water recharge zones of five rivers. Following the success of the referendum in Cuenca, a group of collectives and members of civil society promoted a similar measure to ban metal mining in the Commonwealth of the Chocó Andino, an area composed of five rural parishes in Quito. After the first proposal failed to get approval from the Constitutional Court in June, a revised application was submitted in September and approved in the early days of January 2022. Therefore, pending the required number of signatures, the popular referendum in Quito can be expected to occur soon.

Aside from popular referendums, the Court has dealt with cases regarding the right to the previous consultation for communities in matters that could affect the environment in which they live. Furthermore, the Court has also protected the collective right of indigenous communities to prior consultation of measures that could affect their rights. In this sense, the Constitutional Court reviewed several cases that were presented by communities alleging the lack of proper consultation before environmentally significant decisions relating to extractive industries.

Through these cases, the Court clarified the differences between the general right to environmental consultation applicable to any population affected by a decision with significant environmental consequences and the specific right to prior consultation applicable to indigenous communities. The Court highlighted that both are non-delegable obligations from the State and that its

purpose is to guarantee inclusive participation, good faith dialogues, and the provision of timely information to communities before any decision is made.

### *Women's rights*

2021 could be defined as one of the most critical years for developing and progressing women's rights in Ecuador. In ruling 751-15-EP/21, the Court analyzed a prohibition that applied to female lawyers regarding visiting their clients inside prisons if they were not dressed 'appropriately'. The Court verified that the restriction obeyed sexist stereotypes that obliged women to change their behavior (including deciding a 'proper' attire) to be 'respected'. The Court concluded that decisions of this nature that impose on women how to get dressed, express themselves, and look like, are a source of discrimination and violence and must be eradicated. The Tribunal ordered the derogation on any internal provision that enacts different treatment to lawyers based on gender.

Furthermore, in judgment 34-19-IN/21, the Court analyzed article 150 of Ecuador's Criminal Code, which prescribed that abortion would not be punished if the woman who performs it has a mental disability. The Court stated that this difference is discriminatory and unjustified. Regardless of the women's mental condition, rape is without consent and provokes similar consequences for the victims. The decision pointed out that prosecuting and depriving women of liberty after being victims of rape is revictimizing. The Court declared that criminalizing all women for getting an abortion after rape is unconstitutional, so it ordered the National Assembly to legislate on the matter. It is a considerable achievement for the Ecuadorian feminist movement in their fight against historic provisions that are obstacles for women to fully enjoy their sexual and reproductive rights and decide over their bodies.

### *Children rights*

Regarding children's rights, the Court made essential advancements. In judgment 456-20-JP/21, the Court reviewed a sanction imposed by a high school on a student who shared a classmate's intimate pictures. The

decision determined that educational institutions must apply principles of restorative justice in any process initiated against students. Thus, all proceedings and sanctions must prioritize inclusive dialogues and non-punitive mechanisms since they could cause worse consequences. Additionally, the Court called upon authorities to take measures to sanction the creation or sharing of explicit images of children and promote restorative procedures when who do it is a child.

Judgment 13-18-CN/21 analyzed the constitutionality of a norm that qualified the consent of minors over the age of 14 and under 18 as irrelevant when they are prosecuted or victims of sexual crimes. The Court concluded that the norm ignores the autonomy of children as subjects of rights and capable of progressively taking decisions over their bodies when they start their sexual lives.

In this sense, the Court emphasizes that judges and prosecutors, assisted by other professionals, must critically assess the situation instead of presuming the irrelevance of children's consent. It includes analyzing the children's maturity, self-governing capacity, intellectual development, and free agency to consent to sexual acts.

### *Criminal law*

In 2021, the Court developed the right of every person to have their conviction integrally reviewed by a different higher tribunals before its definitive, as required by the International Covenant on Civil and Political Rights. This approach was first presented in a dissenting opinion in ruling 1486-14-EP/20. This reasoning gradually gained greater acceptance until it became the majority position in judgment 1989-17-EP/21 and consolidated in ruling 151-15-EP/21. The true magnitude of this development would only be evidenced by the issuance of the ruling in case 1965-18-EP/21.

In judgment 1965-18-EP/21, the Court evidenced that if a person is declared innocent and later convicted at the appellate level, the legal framework does not provide a procedural mechanism that enables defendants access to an integral assessment of the case. The absence of a remedy assures that any conviction decision is confirmed twice, meaning that the criminal law framework was not regulating a procedural mechanism

to exercise a right recognized by international instruments.

### *Foreign investment and arbitration*

In 2009, former president Correa issued a decree withdrawing from the ICSID. This caused a massive impact on international investment since many public and private investors require host States to consent that, in case of any disagreement, the issue would be solved by submitting the case to arbitration procedures carried out by the International Centre for the Settlement of Investment Disputes and conducted under ICSID provisions. In ruling 5-21-TI/21, the Court approved president Lasso's decision to re-enter the ICSID system, which was criticized because of an alleged prohibition of article 422 of the Constitution. People who did not support the re-entrance to the ICSID affirmed that the said constitutional provision proscribes the signature of treaties that submits Ecuador to international arbitration. Due to the doubts about the content and scope of article 422, an interpretation request was presented to the Constitutional Court.

In decision 2-18-IC/22, the Court rejected the petition since it pretends the analysis of a specific case and not the interpretation of the norm in general. Although both decisions leave more questions than certainties about the Court's position on international arbitration and foreign investment, it looks more like a wink towards the matter rather than a complete rejection. This ambiguity is beneficial to the executive power. The vagueness of the Court's decisions, together with the hazy wording of the Constitution, could enable Guillermo Lasso to start signing bilateral investment treaties, which are a crucial point of his economic program.

## **IV. LOOKING AHEAD**

On the political side, next year will continue to be marked by Lasso's weak government and its relation to a fiercely opposed National Assembly. Although the president has announced new bills that respond to his economic agenda, a continued blockade can be expected in the legislative process. On

social aspects, the continuing effects of the COVID-19 pandemic and strict austerity to comply with the International Monetary Fund's lending requirements will likely generate social discontent that can evolve into protests and other expressions of discontent. Under such conditions, Ecuadorian history suggests that the president may try to fulfil its agenda by other means, mainly by executive decrees and direct democracy alternatives, such as popular referendums.

If those alternatives prove unsuccessful, a more powerful constitutional mechanism that the president's inner circle has been discussing could be implemented. A provision found in article 148 of the Ecuadorian Constitution gives broad powers to the president to dissolve the National Assembly due to a severe political crisis, internal commotion, or if he or she considers that the Legislature has repeatedly and unjustifiably obstructed the execution of the National Development Plan. After the activation of this mechanism, both legislative and presidential elections must be called within six months.

The crisis in the prison system will continue to be an enormous challenge to the government and the rest of Ecuador's institutions. Across 2022, the prevention of crude violence and huge losses of life will require massive, coordinated, and continued involvement from the whole State, including a pivotal role assigned to the Constitutional Court as supervisor and enforcer of constitutional guarantees to PDL.

Ecuador's three previous reports highlighted the importance of the current composition of the Constitutional Court in its consolidation as a solid and independent institution. Its term will end in early 2022, as the Court is due for a partial renovation of a third of its members. The renovation will be though for the institution since a fully transparent transition has not happened before. After a new composition is in place, the Court will face the challenge of consolidating its process of institutionalization.

Given these conditions, the Court will likely face politically sensitive decisions, such as approving a possible referendum sponsored by president Lasso, as well as other popular initiatives regarding banning

or limiting extractive industries in environmentally relevant areas. Another delicate issue in 2022 will be the protection of the Court's autonomy. Public servants from the Court filed a lawsuit challenging the constitutionality of a legal provision that includes the Court's staff under the administrative control of the Ministry of Labor. The Court will have to decide if such provision violates its administrative and organic autonomy established in the Constitution.

## V. FURTHER READING

Clara Burbano & Gustavo Prieto, 'The Virtues and Limits of Transformative Constitutionalism - Ecuador's Constitutional Court Decision on Prisons' (Verfassungsblog, March 25th, 2021), <<https://verfassungsblog.de/the-virtues-and-limits-of-transformative-constitutionalism/>> accessed June 12th, 2022.

Silvana Tapia & Kate Bedford, "Specialised (in)security: violence against women, criminal courts, and the gendered presence of the state in Ecuador" (Latin American Law Review, 2021/08/01), Doi:10.29263/lar07.2021.02

Andrés Cervantes, 'Ecuador's Constitutional Landscape Towards COVID-19 - A Year in Review: Overview of Legal and Political Response and Adaptation to COVID-19' (Verfassungsblog, March 29th, 2021), <https://verfassungsblog.de/ecuadors-constitutional-landscape-towards-covid-19/>> accessed June 12th, 2022.

Berros MV. Challenges for the Implementation of the Rights of Nature: Ecuador and Bolivia as the First Instances of an Expanding Movement. Latin American Perspectives. 2021;48(3):192-205. doi:10.1177/0094582X211004898

Andreas Gutmann, 'Monkeys in Their Own Right - The Estrellita Judgement of the Ecuadorian Constitutional Court' (Verfassungsblog, February 22nd, 2022), <https://verfassungsblog.de/monkeys-in-their-own-right/>> accessed June 12th, 2022.

Johanna Fröhlich, More flexibility in favor of constitutional stability? What breaking amendment rules in Ecuador can teach us, International Journal of Constitutional Law, Volume 19, Issue 3, July 2021, Pages 974–996, [https://doi.org/10.1093/icon/](https://doi.org/10.1093/icon/moab076)moab076

1 We are thankful to Fátima Milena Atacushi García from Central University of Ecuador for her invaluable help researching the cases included in this report. The responsibility regarding the content of the text is only ours.

2 <https://www.theguardian.com/world/2021/apr/12/ecuador-election-result-guillermo-lasso-andres-arauz>

3 <https://www.primicias.ec/noticias/politica/lasso-asamblea-bloqueo-consulta-popular/>

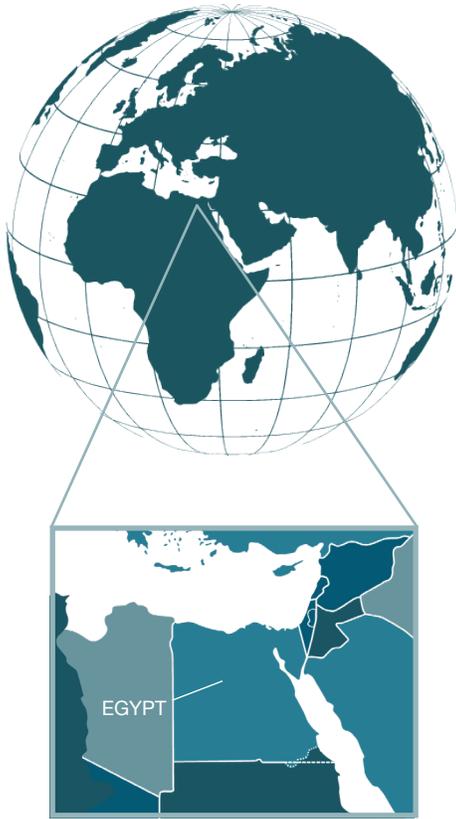
4 <https://www.eluniverso.com/noticias/politica/este-ano-se-realizara-la-consulta-popular-anuncio-el-presidente-guillermo-lasso-nota/>

5 <https://www.corteconstitucional.gob.ec/index.php/boletines-jurisprudenciales/2022-7/bolet%C3%ADn-anual/5814-bolet%C3%ADnanual2022/file.html>

6 Judgements 3-21-EE/21, p. 124.4; 5-21-EE/21, fourth decision provision; 6-21-EE/21, p. 96; 7-21-EE/21, p. 33; 8-21-EE/21, p. 38.

7 <https://www.primicias.ec/noticias/politica/comite-institucionalizacion-respuestas-corte-constitucional/>

8 [http://esacc.corteconstitucional.gob.ec/storage/api/v1/10\\_DWL\\_FL/e2NhcNBlDGE-6J3RyYW1pdGUnLCB1dWlkOidjYThMmMwZS-11Y2JILTRmN2YtYjBIMS03NDExMTU5MTQ5N-2MucGRmJ30=](http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcNBlDGE-6J3RyYW1pdGUnLCB1dWlkOidjYThMmMwZS-11Y2JILTRmN2YtYjBIMS03NDExMTU5MTQ5N-2MucGRmJ30=)



# Egypt

Dr. Eman M. Rashwan  
Lecturer of Public Law/ Visiting Scholar  
Cairo University/ Hamburg Institute of Law & Economics

Ahmad A. Lotief  
Judge  
Egyptian State Council

Eslam M. Saleh  
Judge  
Egyptian State Council

Ahmed Rashwan  
Public Prosecutor  
Egypt Public Prosecution

## I. INTRODUCTION

Among many controversial incidents and debates, this report picks on four significant developments and two crucial rulings delivered by the Supreme Constitutional Court (SCC). After being under on and off emergency statuses for more than 40 years, Egypt witnessed the lift of the latest status that started back in 2017. The hopeless litigation over appointing female judges has finally come to an end through an ad hoc measure by the President, among other victories for gender equality. This equality was also promoted by the SCC striking a law provision that discriminates against men in granting pensions. In another ruling, the Court applied a progressive perspective of the proportionality test to invalidate imprisonment as a criminal sanction for practicing artistic performance with no license. The jurisdiction of SCC was expanded to include decisions delivered against the Egyptian state by foreign entities, organizations, and courts, in a very debatable move by the newly elected Parliament that held its first sessions.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

On 7 January, the House of Representatives was convened to its second legislative session upon the presidential decision no. 5 of the year 2021.<sup>1</sup> The first session was held on 12 January; on an unprecedented occasion, Mrs. Farida Al-Shoubashy was appointed the speaker of the House, in the first session, being the eldest member.<sup>2</sup> It is to be mentioned that Mrs. Al-Shoubashy is the first female to chair, even temporarily, a parliamentary session in Egypt.<sup>3</sup> In the same session Justice Hanafy Gebaly, the former chief of the SCC, was elected as the head of the House. This legislative season witnessed significant legislative activity; among the most compelling issues was the emergency status.

Egypt's modern history with the state of emergency started with enacting the 'State of Emergency Law' no.162 in 1958. The Law enables the President the right to declare the state of emergency across the country or a specific region for a renewable period in cases of threats to national order or security.

The Law was amended a number of times till it reached its current form, the last of them was the amendment law no. 22 issued on 6

May 2020 addressing the timely challenges posed by the COVID-19 pandemic by adding more exceptional measures to be used in a state of emergency.<sup>4</sup>

According to the current form of the Law, a state of emergency substitutes standard procedures of arrest and search of persons, investigation, prosecution, and court systems with exceptional ones.<sup>5 6</sup> It also enables the President to ban public assemblies and restrict private ones; totally or partially suspend work at government bodies, public and the private sector; evacuate pre-determined geographical areas and isolate them from the rest of the land and monitor private communications.

The state of emergency enables harsher punishments and installs a substitute court system of ‘Emergency Courts’ where courts can be formed from judges and military officers - both directly appointed by the President. More importantly, decisions issued by emergency courts cannot be appealed by any legal means except by direct request to the President or a delegate and are not final until either of the two parties ratify them.

On 9 April 2017, the last continuous state of emergency was declared in the aftermath of church bombings across the country.<sup>7 8</sup> It was renewed continuously for a period of three months until, on 25 October 2021, the President declared the termination of the renewal of the state of emergency as the country “became an oasis of security and stability in the region.”<sup>9</sup> Terminating the renewal of the emergency status restores standard criminal procedures and the court system. Still, it does not mean that a new state status can’t be declared again at any time at the will of the President since the Law underlying its legitimacy is still in effect.<sup>10</sup>

Furthermore, and despite the former, some laws that have been issued in the last few years are seen as containing articles normalizing exceptional measures that were previously part of the “State of Emergency Act.”<sup>11</sup> The most notable of these laws are the Anti-terrorism law of 2015 (which was also amended by amendment law no. 149 issued on 11 November 2021<sup>12</sup>), the Law on terrorist entities and terrorism lists of 2015, and the Protest Law of 2013.<sup>13</sup> In addition, a few days after the President’s declaration of the termination of the emergency status, a number of legisla-

tive amendments to existing laws have been introduced and approved by the Parliament. Many have seen these amendments normalize exceptional measures and ensure their permanent application without the need to use the State of Emergency Law, including the Vital Institutions Protection and Preserving the State’s Secrets Laws.<sup>14</sup>

Another major law amendment in 2021 relates to the SCC Law. On 15 August 2021, Law no. 137/2021 was issued by President El Sissi to add two new articles to the SCC Law. The articles expand the Court’s jurisdiction to entail the constitutional review of decisions issued by international organizations and entities and foreign courts against the Egyptian state.<sup>15</sup>

Article 151 of the Egyptian Constitution stipulates that “The President of the Republic represents the state in foreign relations and concludes treaties and ratifies them after the approval of the House of Representatives. They shall acquire the force of Law upon promulgation in accordance with the provisions of the Constitution ... In all cases, no treaty may be concluded which is contrary to the provisions of the Constitution or which leads to a concession of state territories.”<sup>16</sup> Article 93 of the Constitution stipulates that “The state is committed to the agreements, covenants, and international conventions of human rights that Egypt ratified. They have the force of law after publication in accordance with the specified circumstances.”<sup>17</sup> Additionally, previous decisions by the SCC have established and consistently confirmed the principle of “Acts of Sovereignty,” which means that there is a category of executive actions which are not subject to judicial review, e.g., the signing of international treaties. However, in the SCC decision in case no.12/39, the Court differentiated between two phases of international treaties. On the one hand, the Court denied any possibility of judicial review at the stage of drafting, signing, or ratifying an international treaty. On the other hand, the Court admitted its jurisdiction over international treaties after they were ratified and gained the force of Law. The Court explained that in the later phase, the treaty could be subject to judicial review on two levels, procedural and substantive, the former being the review of the treaty’s satisfaction of

procedural requirements, and the latter being the review of the treaty’s consistency with the provisions of the Constitution.<sup>18</sup>

Applying the reasoning of this decision in conjunction with the new amendment means that if the state appealed the enforcement of an international organization or court decision before the SCC, the latter could adjudge the suspension of enforcement of such decision if it found that it doesn’t satisfy procedural requirements according to Egyptian Law or is inconsistent with the Constitutional provisions.<sup>19</sup>

This conclusion goes against articles 26 and 27 of the Vienna Convention on the Law of Treaties. Article 26 stipulates that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 27 stipulates that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...”<sup>20</sup>

Taking all of the above into consideration, till this date, the SCC did not tackle any decision of an international organization or Court. Until then, it is quite vague and unpredictable how this new jurisdiction may play out against Egypt’s international legal responsibilities and the future of the principle of ‘Acts of Sovereignty’ in constitutional litigation.

Finally, on 8 March 2021, the International Women’s Day, the Ministry of Justice announced in a Press Release that the President “directed” the Minister of Justice to “coordinate” with the President of the Supreme Judicial Council - the highest Council supervising general courts - and the State Council President (the administrative judiciary) to appoint women in both judicial bodies. According to the statement, such a “directive” aims at “enforcing the constitutional entitlement” of gender equality.<sup>21</sup> Article 11 of the Constitution stipulates that: “...The state also grants women the right to hold public posts and high management posts in the state, and the appointment in judicial bodies and entities without discrimination...”<sup>22</sup>

Days after the aforementioned “directive,” the State Council announced, on 14 March 2021, a call for applicants to fill judicial positions from female members working in the Administrative Prosecution and the State’s

Lawsuits Authority, whose members have always included females.<sup>23</sup> A full and clear confirmation of such a move forward was made on 2 June 2021 when the President chaired a Supreme Council of Judicial Bodies meeting where the Council decided that women shall start their judicial career in the State Council and the Public Prosecution as of 1 October 2021.<sup>24</sup> Following this decision, the Supreme Judicial Council approved, on 22 August 2021, the Public Prosecutor's request that 11 female judges working in general courts to be seconded as public prosecutors.<sup>25</sup> On 3 October 2021, the President issued Decree No. 446 of 2021 appointing, for the first time in history, 98 female judicial members at the State Council.<sup>26</sup>

It is worth mentioning that according to Article 189 of the Constitution, the Public Prosecution is a Judicial Authority.<sup>27</sup> Of significance, in this regard, is that only 66 female judges were appointed in general courts (among around 16000 judges) in 2007, 2008, and 2015 through exceptional appointment procedures by transmission from Administrative Prosecution and State Lawsuits Authority already-appointed female members and that female law graduates had been deprived their rights of appointment in entry-level jobs for general courts as public prosecutors.<sup>28</sup>

### III. CONSTITUTIONAL CASES

#### 1. *Abdul-Aziz H. Mohammad v. The Head of the Commercials Syndicate and others: The preferential treatment of women in social security laws in Egypt*

One of the few positive discriminations toward females in the Egyptian legal system is that the female widow of a deceased insured male is entitled to a full pension providing few conditions, while the male widow does not disburse a pension in most cases. Accordingly, when the wife of Mr. Abdul-Aziz passed away, he applied for the disbursement of his deceased wife's pension. The Commercials Syndicate refused his request upon Article no. 85 of the Law no. 40 for the year 1972. Therefore, Mr. Abdul-Aziz filed Case no. 7274 of the year 2005 before North Cairo First Instance Court against the Commercials

Syndicate and others demanding the disbursement of his wife's pension. The Court delivered a judicial award on 24 April 2012, approving the plaintiff's request. The Syndicate appealed before Cairo Court of Appeal Civil Circuit no. 151,<sup>29</sup> which canceled the first instance judgment, declared itself not competent, and referred the Case to the Court of Administrative Justice. Accordingly, the Case was referred to the State Council and was recorded as no. 70535 of the judicial year 67. The Court of Administrative Justice questioned the constitutionality of the first two paragraphs of Article no. 85 and invoked violation to articles 11, 53 of the Constitution.<sup>30</sup> It is to be mentioned that the SCC had some precedents concerning the discrimination against males in social security laws.<sup>31</sup>

The Commercials Syndicate was established by Law no. 40 of the year 1972,<sup>32</sup> articles 71 – 92 regulate the pensions and benefits fund. The disputed Article no. 85 regulates the Case of a deceased insured member. According to the Article, the member's parents, female widow, children, and siblings shall be entitled to disburse three-quarters of his pension. The second paragraph of the Article stipulates the share of each of the former without any mention of the male widow of a deceased female member.

The Court rejected the defendant's motion of lack of interest as it found the plaintiff in a legal status disadvantaged by the disputed Article. The Court then found the allegations of unconstitutionality accurate and based its decision on the violation of not only the principle of gender equality, but also to the principle of social solidarity stated in article 8 of the Constitution.<sup>33</sup> The Court found the Article unrestrained by a gender condition and stated that the application of the principle of social solidarity shall not be limited to a specific category or group; consequently, the preferential treatment of females in social security laws and provisions is unconstitutional. The Court, moreover, found the disputed Article violating articles no. 17 and 128 of the Constitution as it absolves the state of its responsibilities of providing a decent life to all citizens without discrimination.

Finally, the Court decided that the disputed Article represents a grave violation of articles no. 4 and 53 of the Constitution that prohibit any sort of discrimination between

citizens on any basis. Hence, the Court delivered its judgment on 5 April 2021 and decided the unconstitutionality of the said Article. In this context, it is to be mentioned that the general tendency of the Egyptian social security legal system is the preferential treatment of females, especially in pension entitlement conditions.<sup>34</sup> The Egyptian legislature adopted the same approach in the new Social Security and Pensions Act issued by Law no. 148 of the year 2019.<sup>35</sup> This discrimination is derived, as we believe, from the Islamic Law, which obliges males with alimony in nearly all cases.

#### 2. *Ashgan Eissa Abdullaziz v. the President of the Republic and others: The Proportionality of Imprisonment in the Sphere of Artistic Freedoms Related Crimes*

On 29 August 2021, the SCC issued a ruling on the proportionality of imprisonment as a criminal penalty for practicing acting, cinema, or music-related professions without a license from the syndicate concerned.<sup>36</sup>

The Case goes back to June 2009 when the plaintiff was referred to a Criminal Court by the Public Prosecution for committing the crime of "practicing acting profession without a license from the Actors Syndicate." In the Case, the Public Prosecution requested the Criminal Court that the plaintiff be punished under Article 5 of Law No. 35 of 1978 on the Establishment of Syndicates of Acting, Cinematic, and Musical Professions, amended by the Law No. 8 of 2003. According to this Article, practicing acting, cinema, or music-related professions without being a registered active member of the syndicate concerned or without being granted a temporary license is punishable by imprisonment of a month minimum and a three-month maximum and/or fine of a 2000 EGP minimum and a 20,000 maximum.

The plaintiff argued before the Criminal Court the constitutionality of the said Article upon the ground that it violated the constitutionally guaranteed Artistic Freedom. Accordingly, the Criminal Court approved the seriousness of the unconstitutionality plea and authorized the plaintiff to file the lawsuit before the SCC; The Case was delivered to the SCC and recorded under Case No. 66 of the Judicial Year No. 31.

It is worth mentioning that the disputed Article was firstly integrated into the said Law by Law No. 103 of 1987.<sup>37</sup> According to the first version of the Article, practicing acting, cinema, or music-related professions without being a registered active member of the syndicate concerned or without being granted a temporary license was punishable by imprisonment and/or fine of a 500 EGP minimum and no maximum. The Article in its original form was struck down by the SCC in Case No. 2 of the Judicial Year No. 15, on 4 January 1997.<sup>38</sup> The Court based its ruling on the ground that not defining a maximum limit for both imprisonment and fine penalties for a crime closely related to Artistic Freedom was clearly beyond the proportionality as a principle that shall be soundly considered whenever the legislator acts with penalization. In January 2003, five years after the said ruling, the President ratified the Law that mostly replicated Article 5 in the form mentioned earlier in this section, that defined a maximum limit for both penalties.<sup>39</sup>

Back to the 2021 ruling of the Case in question, the State's Lawsuits Authority, which represents the government before the SCC, submitted a motion to dismiss the Case upon a plea of *res judicata*. The Court denounced the plea, affirming that the Article replicated was adopted by a different law, and thus, the Court was fully competent to examine its constitutionality.

Finally, the Court, in what seemingly was a more progressive perception of proportionality, ruled that penalizing the practice of artistic professions without a license with imprisonment is an approach that significantly compromised the constitutionally protected Artistic Freedom, under Article 67 of the Constitution, and that artistic professions shall have a form of positive discrimination in the sphere of penalizing the non-compliance with professional syndicates' "license-to-practice" regulations.

## V. LOOKING AHEAD

2022 is the year that will reveal whether the appointment of female judges in all judicial bodies is merely another exceptional *ad hoc* measure just alike other former historical

incidents or is the first step in a complete change in this regard. On another note, as the Municipalities law drafting keeps in process in the Parliament, and accordingly elections keep on hold, one wonders if 2022 will be the year for this constitutional obligation to be finally fulfilled.

## V. FURTHER READING

1. 'تجديت استرسال لي صافيت على فرع' [Introducing the Details of the National Strategy for Human Rights] (AUC - Law & Society Research Unit - Posts | Facebook, 12 September 2021).
2. Eman M Rashwan, 'Religious Identity in the Constitution of Egypt: A Deliberate Ambiguity?' (IACL-IADC Blog, 27 September 2021).
3. '٢٠٢١ ماع في رصملا أرملا داصح' [The Harvest of the Egyptian Women in 2021]' (Women of Egypt - رصم تادي س - Posts | Facebook, 2 January 2022).
4. Eman M Rashwan, 'The Egyptian Supreme Constitutional Court's Interpretation of the Islamic Sharia as a Constitutional Check: Stalling the Radical Islamization of the Egyptian Legal System' (IACL-IADC Blog, 29 June 2021).

- 1 'Official Gazette' (2021) 53, bis, e 5.
- 2 Article 12 of the law no. 1 of the year 2016 'Official Gazette' (2016) 14, bis, b 2.
- 3 Yasmin Fawaz, 'سئل جق الطن... لوالاى هتق باس يف' (In an unprecedented event, the first session of parliament starts under the presidency on Farida Al-Soubashy)' (لاملأ قديرج) (12 January 2021) <<https://almaalnews.com/%d9%81%d9%89-%d8%b3%d8%a7%d8%a8%d9%82%d8%a9-%d9%87%d9%89-%d8%a7%d9%84%d8%a3%d9%88%d9%84%d9%89-%d8%a7%d9%86%d8%b7%d9%84%d8%a7%d9%82-%d8%ac%d9%84%d8%b3%d8%a9-%d8%a7%d9%84%d8%a8%d8%b1%d9%84%d9%85%d8%a7/>> accessed 14 March 2022.
- 4 Eman M Rashwan and Ahmad A. Lotief, 'Egypt', I-CONnect-Clough Center 2019 Global Review of Constitutional Law (Clough Center for the Study of Constitutional Democracy 2020) 97 <<https://papers.ssrn.com/abstract=3736382>> accessed 29 January 2022.
- 5 'Egyptian Emergency Law no.162 of 1958 amended by Law no.22 of 2020' (تاروشنم) <<https://manshurat.org/node/63711>> accessed 25 January 2022.
- 6 Among the most criticized principles of the law was that state of emergency enables authorized personnel to arrest and search persons and private places outside cases of flagrancy and without prior permission from the public prosecution; and detain suspects for exceptionally long periods of time without officially indicting them. This part was however struck down by the Supreme Constitutional Court, see, *Mohamed Ahmed Abdel-Salam vs the Prosecutor General, the Head of the Supreme Judicial Council and the Minister of Interior* [2013] Egyptian Supreme Constitutional Court 17/15.
- 7 For more on the history of the emergency status in Egypt, see 'Egypt and Emergency Law: Important Milestones' *RT Arabic* (26 October 2021) <[https://arabic.rt.com/middle\\_east/1287282-م/اسجبتادحأوتاطحم-ىراوطلانوناقو-رصم/](https://arabic.rt.com/middle_east/1287282-م/اسجبتادحأوتاطحم-ىراوطلانوناقو-رصم/)>
- 8 Yusef Auf, 'The State of Emergency in Egypt: An Exception or Rule?' (*Atlantic Council*, 2 February 2018) <<https://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule/>> accessed 8 December 2021.
- 9 Vivian Yee, 'Egypt's Leader Ends State of Emergency, Says It's No Longer Needed' *The New York Times* (25 October 2021) <<https://www.nytimes.com/2021/10/25/world/middleeast/egypt-sisi-state-emergency.html>> accessed 8 December 2021.
- 10 'What Will Change as Egypt Exits a 4-Year State of Emergency?' *Mada masr* (28 October 2021) <<https://www.madamasr.com/en/2021/10/28/feature/politics/what-will-change-as-egypt-exits-a-4-year-state-of-emergency/>>
- 11 'Egypt Lifted Its State of Emergency: What Now?' *The Tahrir Institute of Middle East Policy* (Egypt, 10 November 2021) <<https://timep.org/explainers/egypt-lifted-its-state-of-emergency-what-now/>>
- 12 'Egypt: Arsenal of Repressive Laws Ensure Continuation of Perpetual State of Emergency' *Association for Freedom of Thought and Expression* (Cairo, Egypt, 26 October 2021) <<https://afteegypt.org/en/advocacy-en/joint-statements-en-2021/10/26/25351-afteegypt.html>>
- 13 Ahmed Abdoudouh, 'After Scrapping Emergency Law Powers in Egypt, Sisi Took Them Back, This Time Permanently' *Independent* <<https://www.independent.co.uk/news/world/middle-east/egypt-sisi-emergency-biden-law-b1950698.html>>
- 14 'بامرال ءحفالكف نوناق م لكحأ ضعب ل يدعت' 2021 [Amending Some Provisions of the Anti-Terrorism Law with Law No. 149 of the Year 2021]' (تاروشنم) (15 November 2021) <<https://manshurat.org/node/74570>> accessed 14 March 2022.
- 15 Hatem Darweesh, 'Egypt - The New Amendments of the Supreme Constitutional Court Law No. 48 of 1979: A Commentary' (*MIDEAST | Law*, 8 September 2021) <<https://mideastlaw.de/en/news/egypt-the-new-amendments-of-the-supreme-constitutional-court-law-no-48-of-1979-a-commentary/>> accessed 13 March 2022.
- 16 The State Information Service, 'The Constitution of the Arab Republic of Egypt, English Version Updated with 2019 Constitutional Amendments' <<https://www.sis.gov.eg/UP/Dustor/Dustor-English002.pdf>> accessed 13 March 2022.
- 17 *ibid.*
- 18 [2018] Egyptian Supreme Constitutional Court 12/39
- 19 'Between Vienna, Sovereignty and enforcement hurdles: How can the SCC use Its New Jurisdiction?' *Manshurat Qanonya (Legal Publications)* (American University in Cairo, 7 September 2021) <[https://manshurat.org/node/73820#\\_ftn6](https://manshurat.org/node/73820#_ftn6)>
- 20 Vienna Convention on the Law of Treaties 1969
- 21 El-Sayed Gamal El-Din, 'Egyptian President Calls for Hiring Women on State Council and Public Prosecution' (*Ahram Online*, 8 March 2021) <<https://english.ahram.org.eg/News/405594.aspx>> accessed 13 March 2022.
- 22 The State Information Service (n 16).
- 23 Egypt's State Council Approves First Ever Appointments of Female Members Per Sisi's Orders' *Ahram Online* (14 March 2021) <<https://english.ahram.org.eg/NewsContentP/1/405991/Egypt/Egypt-States-Council-approves-first-ever-appointment.aspx>> accessed 13 March 2022.
- 24 Sisi Chairs Supreme Judicial Council Meeting, Takes Historic Decisions' *Egyptian Gazette News* (2 June 2021) <<https://egyptian-gazette.com/egypt/sisi-chairs-supreme-judicial-council-meeting-takes-historic-decisions/>> accessed 13 March 2022.
- 25 Haitham AlBoraie, 'ىلع قفاوي ءاضقلل ىلعأل' (تباينلاب لم علل ءيضاق 11 لقونب ماعل ابئانلابلط - The Supreme Judicial Council Approves Public Prosecutor's Request to Second 11 Female Judges' *AlWatan 'The Nation' News Paper* (22 August 2021) <<https://www.elwatannews.com/news/details/5652016>> accessed 13 March 2022.
- 26 'Egypt's Sisi Appoints Female Members of State Lawsuits Authority, Administrative Prosecution at State Council' *Egypt Today News* (4 October 2021) <<https://www.egypttoday.com/Article/1/108508/Egypt-s-Sisi-appoints-female-members-of-State-Lawsuits-Authority>> accessed 13 March 2022.
- 27 The State Information Service (n 16).
- 28 Mohamed N. Leila, 'Gender-Based Discrimination in Egyptian Judicial Appointments: Was the Shift from Gender-Neutral to Gender-Conscious Provisions Inevitable?' [2021] SSRN <<https://ssrn.com/abstract=3889595>> accessed 13 March 2022.
- 29 The appeal no. 2181 of the judicial year 16.
- 30 A court can refer a case if a question of constitutionality is raised, according to article 29/1 of law no 48 of the year 1979.
- 31 'SCC Ruling on Case No. 83 of the Judicial Year No. 22.' On Dec. 14th, 2003, the Court decided the unconstitutionality of the articles 106/2 and 112/4 of the Law No. 79 of 1975 that deprived the male widow of the disbursement of his deceased wife's pension in cases when he deserves another pension or remuneration.<sup>32</sup> Partially amended by the laws no. 155 of the year 1980, and 124 of the year 1982.
- 32 The article reads: "Society is based on social solidarity. The state commits to achieving social justice, providing the means to achieve social solidarity to ensure a decent life for all citizens, in the manner organized by law."
- 33 See for example, articles 104 – 109 of law no. 79 of the year 1975.
- 34 See for example, articles 104 – 109 of law no. 79 of the year 1975.
- 35 Articles 98 – 101 of law, article 259 of the implementing regulation.
- 36 'SCC Ruling on Case No. 66 of the Judicial Year No. 31' (The Official Gazette, Vol 35 bis, 8 September 2021).
- 37 'The Law No. 103 of 1987 on Amending the Law No. 35 of 1978 of the Establishment of Syndicates of Acting, Cinematic, and Musical Professions.' (The Official Gazette, Vol 28 bis, 13 July 1987).
- 38 'SCC Ruling on Case No. 2 of the Judicial Year No. 15' (The Official Gazette, Vol 3, 16 January 1997).
- 39 'The Law No. 8 of 2003 on Amending the Law No. 35 of 1978 of the Establishment of Syndicates of Acting, Cinematic, and Musical Professions.' (The Official Gazette, Vol 4, 13 January 2003).



# El Salvador

Manuel Adrián Merino Menjívar  
Professor of Constitutional Law  
Gerardo Barrios University

## I. INTRODUCTION

2021 was a critical year for Constitutional Democracy in El Salvador. Since the signing of the Peace Agreements in 1991, which ended a 12-year long civil war, the country had not experienced a constitutional crisis like the one that occurred in 2021. On February 28, as a historical event, the political party New Ideas (*Nuevas Ideas*), founded by the current President Nayib Bukele, won 56 out of the 84 seats of the Legislative Assembly, that is the majority required by the Constitution to take —almost— any important decision, as to ratify a constitutional amendment, elect some Public Officials and to remove them as well. On May 1<sup>st</sup>, that Legislative Assembly decided to remove the Justices of the Constitutional Chamber, based, as they argued, on a competence given by the Constitution. But that is not all. In the same session, they also removed the Attorney General. Despite a last effort made by the removed Justices of the Constitutional Chamber, who issued a judgment declaring their removal unconstitutional, the Legislative Assembly appointed 5 new justices, who took office that same day. The Attorney General suffered the same fate.

Then, in September, the *new* Constitutional Chamber took a controversial decision, issuing a ruling in favor of presidential reelection. The thing is, presidential reelection is prohibited by the Constitution. The prohibition of reform of the presidential term limits is an eternity clause (*cláusula pétrea*) established by Article 248 of the Constitution. I will argue in the corresponding section of this paper that that is a case of constitutional

dismemberment. As seen, 2021 in El Salvador was marked by what some scholars call *abusive constitutionalism*.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In the recent political history of El Salvador—which emerged after the signing of the Peace Agreements in 1992—a single political party had never achieved an absolute majority in the Legislative Assembly. This absolute majority, represented by the vote of 56 deputies, allows the Legislative Assembly to: (I) Elect the Attorney General, the Ombudsman and the Public Defender Officer (Article 192 of the Constitution); (II) Elect the Justices of the Supreme Court of Justice, including the 5 Justices of the Constitutional Chamber (Article 186 of the Constitution); (III) Elect the Magistrates of the Supreme Electoral Tribunal (Article 208 of the Constitution); (IV) Elect the Magistrates of the Court of Accounts (Article 131 n. 19°); (V) Ratify international treaties (Article 131 n. 7°); and (VI) Ratify constitutional amendments (Article 248); to mention a few.

In the general elections, to select the members of the Legislative Assembly, on February 28 of 2021, the political party New Ideas won 56 seats.<sup>1</sup> The first session of this completely renewed Legislative Assembly (2021-2024) took place on May 1<sup>st</sup>.<sup>2</sup> In a session that lasted more than 6 hours, between the evening of May 1<sup>st</sup> and the early morning of the following day, a surprising proposal was made by some deputies of the majoritarian party: to remove the Justices of

the Constitutional Chamber.<sup>3</sup> The arguments in which they based their proposal were, in summary, that the Constitutional Chamber issued a series of arbitrary judgments out of the range of its competence, that they violated the separation of powers, and that they put into risk the health of all Salvadorans by ruling against the measures taken by the Government to fight COVID-19.<sup>4</sup>

Did the Legislative Assembly have the power to remove the Justices from the Constitutional Chamber? In a normative sense, the answer is yes. Article 186 of the Constitution grants the Legislative Assembly not only the authority to elect Justices of the Supreme Court (including those of the Constitutional Chamber), but also to remove them, with the vote of 56 deputies. The same Article 186 establishes that the causes for which the Justices can be removed must be previously established by law. This is a case of what constitutional theory have called a constitutional mandate. Constitutional mandates are orders directed by the primary constituent power to the constituted powers—predominantly to the Legislative—for the issuance of acts that make certain constitutional norms fully applicable and thus the rights or situations provided in them become effective in practice.<sup>5</sup>

The law that should regulate the causes for which Justices could be removed from the Supreme Court did not exist at the time the Legislative Assembly decided to remove them, and still does not exist, at the time of writing this work.<sup>6</sup> The argument used by the Legislative Assembly to apply Article 186 of the Constitution, even when there was no regulatory law, was the direct application of the Constitution. This argument does not apply to those cases in which the primary constituent power expressly decided to leave some matters for legislative development. Despite this, it was applied. Later that same day, the Constitutional Chamber issued a judgment declaring their removal unconstitutional, but it was not carried out and the Legislative Assembly appointed 5 new justices, who took office that same day.

After the removal of the Justices of the Constitutional Chamber, a new proposal appeared from the majoritarian party, now

to remove the Attorney General.<sup>7</sup> The main argument was that he was materially linked to a political party in El Salvador, which is prohibited by the Constitution. Unlike the case of the lack of legal regulation for the removal of the Justices of the Constitutional Chamber, the causes to remove the Attorney General were previously regulated by the law. Nonetheless, due process was not followed for the Attorney General to present his defense arguments to the Assembly.

As will be seen in the next section, in September, the *new* Constitutional Chamber took a controversial decision, issuing a judgment in favor of presidential reelection. That, even though presidential reelection is expressly prohibited by the Constitution. The prohibition of reform of the presidential term limits is also an eternity clause established by Article 248 of the Constitution.

These acts carried out by the Legislative Assembly and the Constitutional Chamber have been characterized as a typical case of Abusive Constitutionalism or, as others say, Constitutional Authoritarian-Populism.<sup>8</sup> Abusive Constitutionalism is defined by David Landau as “the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before.”<sup>9</sup> In one way or another, constitutional democracy in El Salvador has been weakened, as one more case of the democratic erosion that has plagued Latin America since the mid-20th century.<sup>10</sup>

### III. CONSTITUTIONAL CASES

#### 1. *Mandamiento judicial de inconstitucionalidad 1-2021: Judicial Review ex officio*

At 8:20 p.m., on May 1<sup>st</sup>, the recently removed Justices of the Constitutional Chamber issued an unprecedented decision in the history of the country: an unconstitutionality ruling *ex officio*. The arguments given by the Constitutional Chamber can be summarized as follows. Article 174 of the Constitution grants the Constitutional Chamber the power to judge in 6 types of cases: *amparo*, *hábeas corpus*, *inconstitucionalidad*, *controversias*

*constitucionales y suspensión, pérdida y rehabilitación de derechos políticos*. But, this case was not referred to an unconstitutionality process (*proceso de inconstitucionalidad*) in the strict sense, because no person filed a lawsuit to start it, it was issued *ex officio*, then the Constitutional Chamber called it *Mandamiento judicial de inconstitucionalidad* (Judicial order of unconstitutionality).<sup>11</sup>

The Constitutional Chamber argued that this practice was not their invention. And said that other Constitutional Courts have done it before in similar cases, when the form and system of government have been put at risk to favor the President of a State. In 1993, in Guatemala, President Jorge Serrano Elías issued certain provisions to suspend certain fundamental rights, dissolve Congress, and dissolve the Supreme Court of Justice and the Constitutional Court. The Constitutional Court issued an *ex officio* ruling declaring those provisions unconstitutional. Despite the fact that the Constitutional Chamber said that “other courts” had carried out similar actions, it limited itself to citing only the case of Guatemala.

In another argument, the Constitutional Chamber said that the Legislative Assembly’s decision to remove them was greatly influenced by the President of the Republic, so there was an imbalance in the balance of power. Finally, the Constitutional Chamber argued that it would be useless to follow a regular unconstitutionality process in which, surely, the Legislative Assembly would ignore the authority of the decision issued.

Once its competence to issue said judgment was justified, the Constitutional Chamber continued its arguments explaining the context in which its decision was being issued. Following Cass Sunstein, it considered that the President and his officials had been carrying out a series of *nudges* to turn public opinion against them and thus undermine their legitimacy. All these actions led the people to “validate” the decision of the Legislative Assembly to remove the Justices from the Constitutional Chamber.

The Constitutional Chamber considered that all this had the purpose of breaking the form

and system of government and monopolizing power in the hands of the President as a “popular triumph”, even knowing that, in reality, he was trying to obtain unlimited power, as has happened in recent Latin American history.

Also, the scenario presented was one in which a presidential system degenerated into a hyper-presidential one. The political party related to the President had a qualified majority in the Legislative Assembly, so it did not represent a real counterweight to his power. From the foregoing, the Constitutional Chamber concluded that the real purpose of the President was to suppress the only real counterweight that remained: The Constitutional Chamber. Thus, when electing new justices related to the President, judicial review would formally continue to exist, but it would be inoperative in practice.

The Constitutional Chamber considered that the decision made by the Legislative Assembly negatively affected the form of government and the political system established in Article 85 of the Constitution, which cannot be altered because it is one of the eternity clauses established in Article 148 of the Constitution. First of all, the government would no longer be, in practice, republican. The system of checks and balances would be non-existent in reality, since the three powers of the State would be in the hands of the Executive Branch, even though this is contrary to the Constitution.

On the other hand, the Chamber said that the democratic character of the government would be affected. Without an effective counter-majoritarian organ that can override legislative or executive decisions, democracy will operate in practice without any insurance for its substantial element. In this sense, only its formal component, the majority, will remain effective, but not the substantial one. Finally, the decision of the Legislative Assembly would also affect the representative character of the government. The magistrates of the Supreme Electoral Tribunal are elected by a qualified majority of the Legislative Assembly. One of the functions of the Constitutional Chamber is to control the constitutionality of the acts issued by said Tribunal. Then, if neither the Electoral Tri-

bunal nor the Constitutional Chamber controls the electoral acts, it may be the case that the right to active or passive suffrage of the people would be affected.

The judgment also considered that fundamental rights, as one of the main elements of the Salvadoran political system (Article 85 of the Constitution), would be affected by not having an independent Constitutional Chamber, whose decisions in defense of the rights of the majority, but also of minorities, could be influenced by the Executive Branch. Finally, after making a much broader theorization than can be summarized here, the Constitutional Chamber declared that the Legislative Decree by which their removal was decided was unconstitutional. Consequently, the decision must be notified and complied with immediately. Unlike Guatemala in 1993, in El Salvador that never happened. The new members of the Constitutional Chamber were sworn in on the night of May 1<sup>st</sup> and took office that same day.<sup>12</sup>

## *2. Pérdida de los derechos de ciudadanía 1-2021: Presidential reelection in El Salvador*

Articles 174 and 182 attribution 7 of the Constitution confer on the Constitutional Chamber the competence to declare the loss of their political rights<sup>13</sup> to persons who “sign acts, proclamations or accession to promote or support the reelection or continuation of the President of the Republic, or use direct means to that purpose”.<sup>14</sup> The case 1-2021 began with a lawsuit filed by a citizen before the Constitutional Chamber in which he demanded the loss of political rights of a person who, being a pre-candidate for deputy for the ruling party of El Salvador, promoted the re-election of the current President of the Republic. The Salvadoran Constitution considers as an eternity clause, that is, that it cannot be reformed by the secondary constituent power, everything related to the alternation in the exercise of the Presidency of the Republic. The protection of this clause by the Constitution reaches such a point that, as a unique case in Latin America, whoever intends to alter it may lose their political rights.

The case 1-2021 was rejected. Nonetheless, the *new* Constitutional Chamber took the

opportunity to establish a new interpretation about the presidential term limits in El Salvador. For the Salvadoran primary constituent power, the prohibition that the president could be reelected immediately and continuously was a fundamental decision. Another series of provisions confirm it. Article 152.1 of the Constitution maintains that a person who has held the presidency for more than six months, consecutive or not, during the immediately preceding period or within the last six months prior to the beginning of the presidential term, cannot be a candidate for President.<sup>15</sup>

Article 88 of the Constitution maintains that the alternation in the exercise of the presidency of the Republic is essential for the maintenance of the form of government and the political system, and that the violation of said norm forces the insurrection of the people. On the other hand, article 75.4 of the Constitution contemplates that the fact of promoting or encouraging presidential reelection is a cause of loss of political rights. Finally, the Constitutional Chamber of the Supreme Court had interpreted in its jurisprudence<sup>16</sup> that the prohibition of immediate presidential reelection covered not only leaving a presidential term in between, but two, since the prohibition includes the nomination as a candidate in the period immediately following the one in which it was exercised the presidency.

Apparently, and from a strictly normative point of view, all the avenues of access to presidential reelection were constitutionally closed. Nonetheless, in case 1-2021, the new members of the Constitutional Chamber reinterpreted the previous criteria to change it completely. In their opinion, article 152.1 of the Constitution what actually prohibits is that whoever has already been president in a first period, and being in a second period, can run for a third period. Consequently, reelection is not prohibited for those who, being in a first term of the presidency, decide to opt for a second term. If it seems confusing, that’s because it is.<sup>17</sup>

I will try to graph it as follows: P is president at time  $t_1$ , therefore, when the Constitution speaks of the “immediately preceding peri-

od”, it refers to time  $t_{-1}$ , that is, when P was not yet president. Hence, P can run for his reelection at time  $t_2$ . Nevertheless, already being in  $t_2$ , since P was president in  $t_1$ , and that would be his “immediate previous term”, he could no longer run for a third term at time  $t_3$ .

The decision also appeals to the sovereignty of the people, who “will have among their range of options the person who at that time holds the presidency, and it is the people who decide whether to place their trust in him again or if they opt for a different option”. The problem with the previous interpretation is that it contradicts what the primary constituent power shielded through an eternity clause and another series of constitutional norms, that is, the clear intention to prohibit consecutive presidential reelection.

This interpretation, by upsetting an eternity clause, undoubtedly generates a momentous constitutional change. The aforementioned change cannot be classified as a constitutional amendment or replacement, because obviously it has not been carried out through a legislative procedure that formally alters the text of the Constitution. Although it is an informal constitutional change, it is not a constitutional mutation either, because although the change has been made via judicial interpretation, it has altered the identity or basic structure of the Constitution.<sup>18</sup>

This missing link between modifying the basic structure of the Constitution without having to replace it with a new one is what Richard Albert has called *constitutional dismemberment*. Constitutional dismemberment implies a profound change that can affect fundamental rights, the structure or the identity of the Constitution. In the Salvadoran case, the said judgment changed the basic structure of the Constitution by modifying an eternity clause, something that would be reserved to the primary constituent power and not to the ordinary power of amendment or to the judges.

In any case, according to Albert, if legal continuity is to be maintained, a change of this magnitude would require approval similar to that required to ratify the Constitution, in

accordance with the principles of reciprocity and symmetry.

This is one more case in Latin America of the modification of the presidential term limits through the interpretation of the constitutional courts (it is added to the cases of Bolivia, Costa Rica, Honduras and Nicaragua). Another case of Constitutional Authoritarian-Populism, Hernández G. would say.<sup>19</sup> These cases invite us to question whether the eternity clauses actually shield certain precommitments of the people or are just colorful toys in the constitutions that do not guarantee their unamendability.

#### IV. LOOKING AHEAD

According to the latest edition of the Democracy Index given by The Economist, El Salvador has been downgraded from an electoral democracy (2020)<sup>20</sup> to a hybrid regime (2021).<sup>21</sup> Undoubtedly, the main events described in the previous sections were decisive in evaluating the state of democracy and the rule of law in El Salvador. The challenge to come for political actors and citizens is to preserve constitutional democracy by restoring the legitimacy of institutions and assert the supremacy of the Constitution.

#### V. FURTHER READING

Joel Colón-Ríos, ‘El poder de una Asamblea Constituyente: reflexiones acerca de la Constitución de 1991 y su artículo 376’ [2021] *Revista Derecho del Estado* [n.º 50] 77-98.

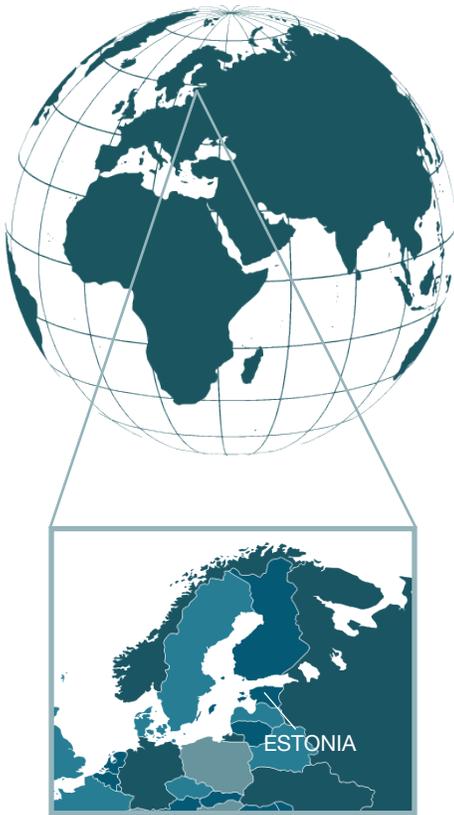
Manuel Adrián Merino Menjivar ‘When Judges Unbound Ulysses: The Case of Presidential Reelection in El Salvador’ (*I-CONNECT*, 9 September 2021) <<http://www.iconnectblog.com/2021/09/when-judges-unbound-ulysses-the-case-of-presidential-reelection-in-el-salvador/>> accessed 21 February 2022.

Marcos Antonio Vela Ávalos, *El proceso de inconstitucionalidad. Configuración salvadoreña* (1<sup>st</sup> edn, Editorial Cuscatleca 2021).

Roberto Gargarella, *El derecho como una conversación entre iguales. Qué hacer para que las democracias se abran —por fin— al diálogo ciudadano* (1<sup>st</sup> edn, Siglo veintiuno editores 2021).

Yaniv Roznai, ‘The Boundaries of Constituent Authority’ [2021] *Connecticut Law Review* [Vol. 52 n.º 5] 1381-1408.

- 1 Tribunal Supremo Electoral, 'Escrutinio final 2021.Resultados de Asamblea Legislativa' (*Tribunal Supremo Electoral*, 12 March 2021) < <https://www.tse.gob.sv/2021/escrutinio-final/asamblea-nacional/> accessed 11 February 2022.
- 2 The complete video of the session can be seen at Asamblea Legislativa, 'Sesión de instalación de la nueva Asamblea Legislativa' (*Asamblea Legislativa*, 1 May 2021) < <https://www.youtube.com/watch?v=79fn0iITlqQ> accessed 11 February 2022.
- 3 María José Saavedra and Nubia Tejada, 'Asamblea Legislativa destituye a magistrados de la Sala de lo Constitucional' (*Diario El Salvador*, 1 May 2021) < <https://diarioelsalvador.com/asamblea-legislativa-destituye-a-magistrados-de-la-sala-de-lo-constitucional/74328/> accessed 11 February 2022.
- 4 Asamblea Legislativa, 'Pieza de correspondencia para la destitución de los magistrados de la Sala de lo Constitucional' (*Asamblea Legislativa*, 1 May 2021) < [https://www.asamblea.gob.sv/sites/default/files/documents/correspondencia/66A70D21-A3DB-4C22-94A0\\_ADF912A8E-BE7.pdf](https://www.asamblea.gob.sv/sites/default/files/documents/correspondencia/66A70D21-A3DB-4C22-94A0_ADF912A8E-BE7.pdf) accessed 11 February 2022.
- 5 José Alfonso da Silva, *Aplicabilidad de las normas constitucionales* (Nuria González Martín tr, IJ UNAM, 2003) 153.
- 6 February 2022.
- 7 Asamblea Legislativa, 'Asamblea Legislativa destituye al Fiscal General de la República por vinculación partidaria' (*Asamblea Legislativa* 8 May 2021) < <https://www.asamblea.gob.sv/node/11225>.
- 8 José Ignacio Hernández G. 'The Mass Removal of Constitutional Judges in El Salvador: A New Case of Constitutional Authoritarian-Populism' (*I-CONNECT*, 14 May 2021) < <http://www.iconnectblog.com/2021/05/the-mass-removal-of-constitutional-judges-in-el-salvador-a-new-case-of-constitutional-authoritarian-populism/> accessed 16 February 2022.
- 9 David Landau, 'Abusive Constitutionalism' [2013] *U.C Davis LR* [Vol. 47] 195.
- 10 Jorge Ernesto Roa Roa, 'Erosión democrática en El Salvador' (*El País*, 7 September 2021) < [https://elpais.com/opinion/2021-09-07/erosion-democratica-en-el-salvador.html?event\\_log=oklogin](https://elpais.com/opinion/2021-09-07/erosion-democratica-en-el-salvador.html?event_log=oklogin)
- 11 Sala de lo Constitucional, *Mandamiento judicial de inconstitucionalidad 1-2021* [1 May 2021] < [https://www.jurisprudencia.gob.sv/pdf/M\\_1-2021.pdf](https://www.jurisprudencia.gob.sv/pdf/M_1-2021.pdf), accessed 17 February 2022.
- 12 Jonathan Laguán, 'Asamblea Legislativa elige a nuevos magistrados de la Sala de lo Constitucional' (*Diario El Salvador*, 1 May 2021) < <https://diarioelsalvador.com/asamblea-legislativa-elige-a-nuevos-magistrados-de-la-sala-de-lo-constitucional/74345/> accessed 17 February 2022.
- 13 These are the right to vote, to form political parties or join those already constituted, and to run for public office. See Article 72 of the Constitution.
- 14 Article 75 ordinal 4th of the Constitution.
- 15 See Marcos Antonio Vela Ávalos 'La reelección presidencial indefinida: el caso de El Salvador' (*IberIConnect*, 9 December 2020) < <https://www.ibericonnect.blog/2020/12/la-reeleccion-presidencial-indefinida-el-caso-de-el-salvador/> accessed 21 February 2022.
- 16 Unconstitutionality ruling 163-2013 [25 June 2014].
- 17 Manuel Adrián Merino Menjívar 'When Judges Unbound Ulysses: The Case of Presidential Re-election in El Salvador' (*I-CONNECT*, 9 September 2021) < <http://www.iconnectblog.com/2021/09/when-judges-unbound-ulysses-the-case-of-presidential-reelection-in-el-salvador/> accessed 21 February 2022.
- 18 José Ignacio Hernández G. has called it *un-constitutional mutation*. See José Ignacio Hernández G. 'La reelección presidencial en El Salvador: otro caso de derecho constitucional autoritario-populista' (*IberIConnect*, 27 September 2021) < <https://www.ibericonnect.blog/2021/09/la-reeleccion-presidencial-en-el-salvador-otro-caso-de-derecho-constitucional-autoritario-populista/> accessed 21 February 2022.
- 19 *ibid*.
- 20 Our World in Data, < <https://ourworldindata.org/grapher/political-regimes> accessed 21 February 2022.
- 21 The Economist 'Democracy Index 2021' (*The Economist*, 9 February 2022) < <https://www.economist.com/graphic-detail/2022/02/09/a-new-low-for-global-democracy> accessed 21 February 2022.



# Estonia

Paloma Krõõt Tupay  
Lecturer in Constitutional Law  
University of Tartu

Katariina Kuum  
Postgraduate  
University of Tartu

Joosep Kuusk  
Undergraduate  
University of Tartu

## I. INTRODUCTION

The year 2021 began with a significant change - the coalition government that had been in power since 2019 with the inclusion of the right-wing populist EKRE party was replaced. Just one day before the parliament was to vote on the realization of a socially and legally controversial referendum on the question of, if the institution of marriage should remain a union between a man and a woman, the Public Prosecutor's Office announced that it suspected high-ranking members of the governing coalition and the prime minister's party to be involved in serious corruption.<sup>1</sup> Since thereupon the prime minister resigned on January 13, the way was cleared for a new coalition formation in which the EKRE party no longer belonged. With the new coalition government, the question of holding the aforementioned referendum also became obsolete, as it did not support its implementation. Nevertheless, the new government did not expect an easy year; due to the Corona pandemic, it often had to engage in crisis management without being able to pursue its own political goals. In addition, the pandemic also gave impetus to the division of society in Estonia.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In matters of constitutional law, 2021 was marked by the ongoing Corona pandemic, local elections, the election of a new president, and some major court decisions.

During the existence of the constitution, there have been repeated efforts to change the election procedure for the president, considered problematic for a variety of reasons. In 2016, presidential elections had proven particularly difficult, when both the Estonian Parliament (Riigikogu) and the Electoral College<sup>2</sup> failed the election by casting blank ballots. Only after the election was referred from the Electoral College back to the parliament did the deputies manage to agree on a new candidate, then Kersti Kaljulaid. Despite political promises to the contrary, the election process has not been improved in the last five years. When only one candidate, Alar Karis, was finally put forward for election in the 2021 presidential election, criticism was voiced that this resembled the sham elections of the communist era. Memories of the 2016 election debacle were awakened, when Alar Karis was not elected by the Riigikogu in the first round and blank ballots were again cast. However, the candidate managed to be elected in the second round. Alar Karis himself has also promised to put forward proposals to reform the presidential election process over the next five years.<sup>3</sup>

With regards to the corona virus, the Estonian 2021 pandemic response measures have often turned out to be issues of political and social antagonism, although compared to many other countries, Estonian restrictions have been mild.

In contrast to the beginning of 2020, and despite further Corona-related restrictions on freedom, the first half of 2021 no longer saw the imposition of a special state of emergency to combat the pandemic. The reason for this can be seen in the fact that the disease and its effects were now better researched medically and were also better known to political decision-makers. Added to this were the new possibilities for vaccination.

However, various voices were critical of the shift in the competence to decide on measures restricting fundamental rights from parliament to the executive, which came hand in hand with the ongoing restrictions.<sup>4</sup> The EKRE party, now in opposition, used the year to position itself as an advocate against the restrictions imposed by the government.<sup>5</sup>

### III. CONSTITUTIONAL CASES

#### 1. First Corona-decisions

As the Corona restrictions are generally subject to administrative appeal, many lawsuits in this area have not yet been decided by the court of last instance. However, the Supreme Court made two important decisions in 2021.

*1.1 RKPJKm 20 November 2021 3-21-2071 and RKPJKm 25 November 2021 3-21-2241: On obligatory vaccination in the Defence Forces*

The cases at hand concern an internal order given by the Commander of the Defence Forces by which the personnel of the Defence Forces were ordered to submit, within two weeks, a certificate of completion or commencement of vaccination against COVID-19, or recovery from the virus. In the two cases at hand, a total of 12 members of the Defence Forces appealed to the SC against this decision. The complainants sought either the annulment of the order, or a temporary injunction prohibiting the De-

fence Forces from terminating the employment relationship with the complainants.

The CRC did not take a final position on the constitutionality of the vaccination obligation and sent both cases back to the lower courts for reconsideration because of the breach of essential procedural requirements. The CRC did, nevertheless, perform a preliminary assessment of the merits of the complaints in one of the cases (3-21-2241) and found that as the purpose of the vaccination requirement for members of the Defence Forces is to secure the defence capability of the state and current knowledge proves the sufficient efficiency of the vaccines, the vaccination requirement at issue is likely necessary. Furthermore, no less restrictive measures to achieve the same objectives are currently in sight. Due to the low prospects on the merits, the court also denied the plaintiffs interim relief.

Particularly noteworthy is the court's preliminary opinion that an obligation to vaccinate in order to ensure the fulfillment of public duties does not necessarily require a legal basis and that an internal administrative regulation or an administrative act can suffice as a legal basis in this respect. The court justifies this with the limited circle of addressees and the special relationship between the addressee of the vaccination obligation and the public authorities.

The chairman of the Administrative Law Chamber of the Supreme Court Ivo Pilving, who is also member of the CRC, has also stated in multiple interviews that in all probability, the obligation to vaccinate workers is not unconstitutional.<sup>6</sup>

*1.2 RKPJKo 23 December 2021 5-21-32: Decision on the right to transfer the parliament to remote sittings*

In the present case, the CRC discussed the constitutionality of holding remote plenary sessions of the Riigikogu, as the parliament had by simple majority decision (with 62 votes to 32), decided on the motion to go on remote work, without the head of the plenary session having opened a more detailed discussion on the question. The request was justified by the fact that “[t]he prevalence of the COVID-19 virus is high in Estonia and the government has

asked all employers to implement teleworking wherever possible. While the vaccination coverage of the parliament's staff and deputies is high, the parliament is setting an example to other institutions and companies.”

A member of the parliamentary opposition appealed the decision to the Supreme Court as he found that it infringed, without a compelling reason, on his right of holding of sittings directly, involving, among other things, political negotiations, debates and the search for compromises both inside and outside the parliament's plenary and its committees.

According to the CRC, the principle of parliamentary democracy and the principle of a free mandate require that important matters of state life be decided under conditions of immediate parliamentary debate and entitle a member of parliament to claim this right. The parliament can therefore not set an example for other collectives - be they in the public, private or not-for-profit sectors - when it comes to teleworking, but must, by virtue of its special constitutional role, be among the last, not the first, to engage in distance work. The CRC stated further that as there were no urgent reasons which would have required transferring the work of the Riigikogu to remote sessions, a substantive discussion of the question in plenary would have been necessary before putting the contested decision to vote. In any event, abuse of the remote sitting format to reduce the opposition's influence in debating important bills must be ruled out.

Hence, the CRC found the decision of the Riigikogu to hold remote plenary sessions unconstitutional. At the same time, the SC also found that a retroactive annulment of the decisions of the Riigikogu taken during the respective period of remote sittings would be disproportionate and undermine legal certainty. Consequently, the judgment did not affect the legality or validity of the laws and decisions adopted during that time.

*2. RKKKo 18 June 2021 1-16-6179 and Judgment of the ECJ of 2 March 2021 C-746/18: The Estonian Communications data saga*

One long awaited ruling of constitutional review in 2021 was the so-called “dog sausage” case. The case got its peculiar nick-

name from the fact that the proceedings centered on a criminal charge of theft of several items of low value, among other things a dog food sausage.

The defense of the accused appealed against the convictions of the first instances and argued that the data protocols from the communications company that were used to place the accused at the place of the offence were not admissible evidence. The Electronic Communications Act (ECA) regulations allowing the use of this data should be dismissed as incompatible with EU law.

The case at hand can be considered a landmark judgment, as the general and indiscriminate retention of all data traffic with the aim of fighting crime foreseen by the ECA had been criticized for years by lawyers, who pointed out that such a rule was in conflict with the settled case law of the ECJ (see e.g. *Joined Cases Tele2 Sverige AB v Post- och telestyrelsen (C-203/15)* and *Secretary of State for the Home Department v. Watson (C-698/15)*, ECJ, Judgment, 21 December 2016).

For the first time in its history, the Estonian state court turned to the ECJ in a criminal case, asking for a preliminary ruling. The ECJ stated that the data retained under ECA infringes the right to privacy and family life and the right to the protection of personal data. The section of the Code of Criminal Procedure, under which the search of communications data did not require authorization by the court, but allowed one by the prosecutor's office to suffice, was also deemed incompatible with EU law, as it is contrary to the requirement of independence.

Following the ECJ's decision,<sup>7</sup> the Criminal Chamber of the Supreme Court ruled that neither the public prosecutor's office nor the court had the right to query communications companies to obtain telephone traffic and location data stored under the ECA as long as, and to the extent that, the respective regulation was not in accordance with EU law. However, the court added by way of an obiter dictum that bearing in mind the importance of the *res judicata* effect for legal certainty and the fact that the incompatibility of national provisions with EU law only required the former to be disapplied, the judgment did

not meet any of the grounds for revision of earlier cases.

### 3. Decisions on the right to stay

#### 3.1 *RKPJKo 16 November 2021 5-21-10 and RKPJKo 28 September 2021 5-21-4: On the right to stay on the basis of a partnership agreement*

The difficulties of registered cohabitation and its association with marriage have been discussed already in the previous reviews.<sup>8</sup> During the year 2021, two key constitutional review cases related to registered cohabitation and the right to stay were brought before the Supreme Court.

Case 5-21-10 touched on the similarities of registered cohabitation between partners of opposite gender and marriage when applying for a residence permit. In the case at hand, the complainant lodged an appeal seeking the annulment of the decision of the Police and Border Guard Board rejecting the application of him/her as registered partner for a long-term residence permit to settle with his/her partner. According to Estonian law, a temporary residence permit may be issued to an alien for the purpose of settling with his or her spouse.

In the framework of constitutional review, the CRC held that in a situation where, under national law, there must be a close economic bond and psychological dependence between foreign life partners and the family must be permanent and real, it is not excessive to require partners to formalize their relationship as a marriage instead of a cohabitation in order to fulfil the condition for entry into the country which the Estonian legislator considers essential. According to the court, a marriage requirement can however be disproportionate if the persons concerned face legal impediments to marry.

Such a legal impediment can be the impossibility of marriage between same-sex partners under Estonian law. The second case at hand, 5-21-4, addressed exactly this situation. The complainant, having entered into a marriage in Denmark and concluded a cohabitation agreement with a person of the same sex in

Estonia, applied for a temporary residence permit to settle with her spouse in Estonia. The residence permit was not granted because the Police and Border Guard Board did not consider the marriage contracted in Denmark to be valid in Estonia. The complainant appealed to have the decision annulled. Contrary to the previous judgment concerning opposite-sex partners, the CRC declared the mentioned provision unconstitutional in so far as it does not allow an alien to be granted a temporary residence permit to settle with a registered partner of the same sex living in Estonia on the basis of a residence permit.

#### 3.2 *RKPJKo 20 April 2021 5-20-10: On the unconstitutionality of the exclusion of the right to appeal to the court in the event of termination of the right to stay*

Another case concerning the right to stay saw the foreign complainants seek their right of appeal against notices issued by the Police and Border Guard Board which prematurely terminated the complainants' stay in Estonia because they had violated COVID-19 related isolation conditions imposed on them. The lower court found that the existing legal lack of the right to judicial remedy in the case at hand infringed on the applicants' fundamental rights and referred the case for constitutional review. The CRC agreed with the referring court and held that the right of everyone to apply to the courts in the event of a violation of his or her rights and freedoms under the Constitution also applies to aliens staying in Estonia.

### 4. Electoral complaints

The increasing popularity of electronic voting throughout the past years<sup>9</sup>, and at the same time, skepticism regarding the legitimacy of e-voting have brought about increased awareness regarding the procedure of e-voting. The following complaints concerned the 2021 local municipality elections.

#### 4.1 *RKPJKo 21 October 2021 5-21-15 and RKPJKo 28 October 2021 5-21-17: Commencement and conducting of e-voting*<sup>10</sup>

In cases 5-21-15 and 5-21-17, a member of the Green Party lodged two complaints

against voting by electronic means. In 5-21-15 he found that the e-voting process of local elections should not commence, due to the electronic voting system not being reliable enough, as the voting software and voter application had not been audited until the date of commencement of the e-voting. In fact, system tests had been conducted prior to the submission of the complaint but the report of these tests had not been approved by the start of electronic voting. However, as the audit of the electronic voting system was approved one day after the start of electronic voting, the Supreme Court (SC) found that there was no reason to suspect that the electronic voting system was not safe or reliable. However, the SC suggested that to ensure trustworthiness and transparency, the analyses and audits regarding the electronic voting system should be made public prior to the commencement of electronic voting. In case 5-21-17, the complainant contested the legitimacy of the organization of electronic voting for the same reason. Additionally, the results of electronic voting were asked to be declared invalid. As in the previous case, the SC found no reason to satisfy the complaint.

#### 4.2 RKPJKo 28 October 2021 5-21-16: E-voting website malfunction

A few days after the commencement of electronic voting in the local elections, the media unveiled an error on the official election website<sup>11</sup>, due to which some of the electoral candidates' names had been automatically translated and thus appeared distorted on the website (but not on the application where the actual voting was done).<sup>12</sup> The error was removed by the end of the day the article was published.

The SC found that the State Electoral Office breached its legal obligations concerning publishing the names of the candidates and the organization of the technical solutions related to electronic voting. Due to the limited effect of the violation – under 10% of candidates were affected and the duration of the violation lasted for 2 days - this did not however constitute such a serious violation that the results of electronic voting should be considered unlawful or declared invalid.

In addition, the violation was mitigated by the fact that in Estonia it is possible to amend the electronically submitted vote by subsequently voting electronically or at the polling station up to and on the election day. The last vote casted shall be counted. In conclusion, the SC found that the effect of the violation was too minimal to constitute a basis for satisfying the complaint.

#### 5. Other significant issues on the protection of fundamental rights

##### 5.1 RKHKo 6 January 2021 3-19-1207: Negligent handling of health data by the state

In this case, the media revealed that due to human failure, the Social Insurance Board's document registry was accessible to the public. After the news became public, access to the document registry's data was restricted. The applicant was a person with intellectual disability, whose rehabilitation plan, which included his personal data (name, age, contact information etc.), had been due to the failure publicly accessible for almost two months.

The SC argued that the Social Insurance Board did indeed breach the applicant's right to the inviolability of his private life, but the applicant was not treated in any way differently due to his disability and therefore not in a way degrading his human dignity. The SC also argued that while the applicant suffered non-patrimonial damage due to his personal data being publicly accessible, there was nevertheless no need to provide monetary compensation to the applicant, since it was not apparent that his data would have been accessed in an unauthorized manner during this time - with the exception of the journalist who acted out of investigative interest.

##### 5.2 RKTkm 21 April 2021 2-20-11920: On court hearings via Skype

In the case at hand the patient had been diagnosed with paranoid schizophrenia and placed under involuntary emergency psychiatric care via implementation of preliminary legal protection. Based on the opinion of a psychiatrist, the county court extended the implementation of preliminary legal protection. Before making the decision, the county

court heard the patient via Skype. The patient appealed the decision of the county court.

The SC found that by hearing the patient via Skype, the statutory requirement of hearing the patient in person before making the decision to extend the implementation of preliminary legal protection had been violated. As at the time of the hearing via Skype no emergency had been proclaimed, a simple referral to the danger arising from the COVID-19 pandemic was not sufficient to permit deviations from the personal hearing requirement. The SC argued that a direct meeting enables to obtain additional information about the person concerned, his or her behavior, medical condition, and the nature of the mental disorder.

## IV. LOOKING AHEAD

In the context of the Corona pandemic, it may prove to be a difficult task for the legislator to create generally applicable regulations of a general-abstract nature, when the actual circumstances (i.a. the mutations of the virus) are constantly and unexpectedly changing. The law faces the challenge of having to fulfill an objective and rightful referee position between the increasingly polarized political camps that demand an immediate solution to the problem. The jurisdiction, again, runs the risk of accusations of politicization.

At present, however, 71% of Estonians trust Estonian courts<sup>13</sup> and according to the "The Justice Scoreboard 2021" Estonia ranks at the top of the European Union member states' courts in terms of efficiency and speed of proceedings.<sup>14</sup> But 2021 also highlighted the limitations that the scarcity of resources imposes on even an effective court system. Among other things, the Supreme Court decided to temporarily suspend its practice of publishing analyses of Estonian case law.<sup>15</sup> The President of the Supreme Court has pointed out that a lack of financial and human resources could set courts back in their development and, as a result, procedural times could become unreasonably long. This, especially in light of the fact that the courts'

workload has increased again due to the lawsuits against the pandemic restrictions.<sup>16</sup> It is worth noting that the Estonian courts did not stop their work at any point during the Corona crisis and used, inter alia, alternative solutions such as written procedures and video hearings to move proceedings forward.<sup>17</sup> A number of final court decisions on the legality of the Corona restrictions are expected for 2022, which will undoubtedly have a direct impact on Estonian constitutional law.

1 See in more detail: Paloma Krõõt Tupay, Linell Raud, Katariina Kuum, '2020 Global Review of Constitutional Law - Country report Estonia' (2021) I-CONnect-Clough Center Global Review of Constitutional Law 2021

2 If the president is not elected in the Riigikogu, the Electoral College, composed of members of the Riigikogu and representatives of the local government councils, elects the president (EC's § 79.7).

3 On the 2021 presidential elections and its background, see in more detail: Helen Wright, ERR News, 'Feature: Estonia's presidential election 2021' (21 August 2021)

<<https://news.err.ee/1608270477/feature-estonia-s-presidential-election-2021>> accessed 24 February 2022

4 See., *i.a.*, *the opinion of the Chancellor of Justice: ERR News, 'Justice chancellor: Riigikogu should debate coronavirus restrictions' (17 September 2021)* <<https://news.err.ee/1608342149/justice-chancellor-riigikogu-should-debate-coronavirus-restrictions>> accessed 24 February 2022.

The institution of the Chancellor of Justice is explained in Estonia's 2019 country report, see: Paloma Krõõt Tupay, Linell Raud, Katariina Kuum, '2019 Global Review of Constitutional Law - Country report Estonia' (2020) I-CONnect-Clough Center Global Review of Constitutional Law 2020

5 See e.g.: Tõnis Saarts, 'Tõnis Saarts: How the national conservatives became liberal democrats' (23 November 2021) <<https://news.err.ee/1608412307/tonis-saarts-how-the-national-conservatives-became-liberal-democrats>> accessed 24 February 2022

6 Herman Kelomees, Rauno Volmar, 'Ivo Pilving: suure tõenäosusega ei ole töötaja vaktsineerimiseks kohustamine põhiseaduse vastane' (25 November 2021) <<https://tv.delfi.ee/artikkel/95229847/ivo-pilving-suure-toenaosusega-ei-ole-tootaja-vaktsineerimiseks-kohustamine-pohiseaduse-vastane>> accessed 24 February 2022

7 Case 176/18 *Prokuratuur [2021] Digital Reports*

8 See: Paloma Krõõt Tupay, Linell Raud, Katariina Kuum, '2019 Global Review of Constitutional Law - Country report Estonia' (2020) I-CONnect-Clough Center Global Review of Constitutional Law 2020

9 ERR News, 'New e-voting record set at 2021 local elections' (16 October 2021) <<https://news.err.ee/1608372258/new-e-voting-record-set-at-2021-local-elections>> accessed 22 February 2022

10 In Estonia, electronic voting (or e-voting) allows people to vote via internet, on the condition that they have a valid proof of identity (ID-card or mobile-ID) and WiFi access. E-voting is allowed throughout the advance voting period, which is Monday-Saturday of the election week. To cast an e-vote, a person must download the voter application and present their proof of identity. After selecting a candidate through the application, the vote is confirmed with a digital signature. In addition, a previous vote can be cancelled via a subsequent e-vote or a vote at a poll station. More information on e-voting: Valimised, 'Introduction to i-voting' <<https://www.valimised.ee/en/internet-voting/more-about-i-voting/introduction-i-voting>> accessed 24 February 2022

11 The official website for local and general elections <<https://www.valimised.ee/en>> accessed 24 February 2022

12 Armas Riives, 'Kes on Hõbe Meikar või Sipelga Hilving? Tõlkerakendus muudab valimiste veebilehel kandidaatide nimesid' (13 October 2021)

<<https://tartu.postimees.ee/7360007/kes-on-hobe-meikar-voi-sipelga-hilving-tolkerakendus-muudab-valimiste-veebilehel-kandidaatide-nimesid>> accessed 22 February 2022

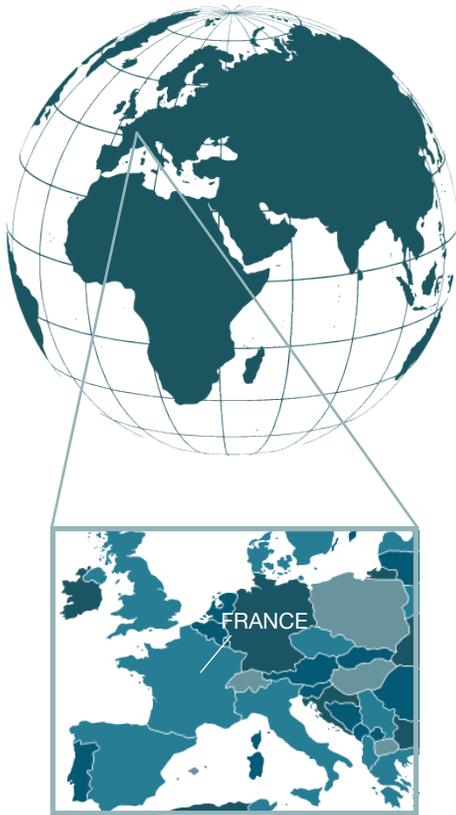
13 The Supreme Court of Estonia, 'Uuring: kohtuid usaldab 71 protsenti eestimaalastest' (30 November 2021) <<https://www.riigikohus.ee/et/uudiste-arhiiv/uuring-kohtuid-usaldab-71-protseinti-eestimaalastest>> accessed 22 February 2022

14 European Commission, 'The 2021 EU Justice Scoreboard' (2021) <[https://ec.europa.eu/info/sites/default/files/eu\\_justice\\_scoreboard\\_2021.pdf](https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf)> accessed 24 February 2022

15 The Supreme Court of Estonia, 'Riigikohus peatab kohtupraktika analüüside avaldamise' (03 December 2021) <<https://www.riigikohus.ee/et/uudiste-arhiiv/riigikohus-peatab-kohtupraktika-analuuside-avaldamise>> accessed 22 February 2022

16 The Supreme Court, 'Villu Kõve: eelarvekärped võivad kohtud arengus tagasi paisata' (20 May 2021) <<https://www.riigikohus.ee/et/uudiste-arhiiv/villu-kove-eelarvekarped-voivad-kohtud-arengus-tagasi-paisata>> accessed 22 February 2022

17 ERR News, 'Kohtud viivad istungid suurematesse saalidesse, aga mitte avalikkuse jaoks veebi' (15 March 2021), <<https://www.err.ee/1608142906/kohtud-viivad-istungid-suurematesse-saalidesse-aga-mitte-avalikkuse-jaoks-veebi>> accessed 23 February 2022



# France

Corinne Luquiens, Member of the Constitutional Council

Nefeli Lefkopoulou, PhD Candidate at Sciences Po Law School

Eirini Tsoumani, PhD Candidate at Sciences Po Law School

Guillaume Tusseau, Professor of Public Law at Sciences Po Law School

## I. INTRODUCTION

As in many other countries, the pandemic dominated French constitutional politics in 2021. This situation prompted a lot of debate regarding how to correctly balance the public health emergency and fundamental freedoms. Imposed decisions or highly recommended policies such as curfews, remote work, vaccination, limitation of movement, or lockdowns resulted in an increasingly tired, divided, and nervous society. A lot of debate also developed regarding the respective roles of the executive and legislative branches. The executive was increasingly empowered to make decisions to promptly face the pandemic's consequences. Such an instrument of secondary legislation as Article 38 ordinances had never been used so extensively under the Fifth Republic. The legislative branch complained that it enjoyed too limited a margin of discussion when the government tabled bills and could not control the government's action in a relevant way. The French democracy seemed to be under pressure. The turnout for the second round in the departmental and regional elections held in June was below 35%. Direct democracy was not able to remedy the apparent disaffection for traditional modes of political participation. The second attempt at a citizen-initiated referendum failed as the Constitutional Council considered that one of the provisions of the proposed bill unduly limited the Prime Minister's power (Decision 2021-2 RIP). Following the recommendations of the Citizens' Climate Convention, President Macron tried to have the Constitution amended but to no avail. The amendment would have modified Article 1 of the Constitution and provided that France "guar-

antees the preservation of the environment and biological diversity and fights against climate change." President Macron declared his intention to have this amendment put to a referendum after its adoption by the two houses of Parliament. However, Deputies and Senators did not agree on the wording of the amendment. The latter especially rejected the term "guarantees" and favored a less constraining terminology. Because of this veto, the project was abandoned. At the end of the year, Parliament adopted an organic act on public finances. It reformed and updated what is sometimes presented as the French "economic constitution."

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The pandemic and the public health state of emergency regime that was created to deal with it had an impact on the Constitutional Council's activity. Significant rulings contributed to the development of an increasingly rich jurisprudence. In Decisions 2020-872 QPC of January 15<sup>th</sup> and 2021-911/919 QPC of June 4<sup>th</sup>, the Constitutional Council declared that resorting to audio-visual means of communication without the agreement of all the parties, for any penal matter (with the sole exception of criminal trials), was unconstitutional. Although it was consistent with the constitutional objective of protecting public health and ensuring that justice would be rendered without interruption, the Constitutional Council judged that such a measure, because it was not framed by any legal conditions, put the right of the defense in jeopardy, given how important it was that

someone charged with an offense be physically present before a judge.

In Decision 2020-878/879 QPC of January 29th, the Constitutional Council also invalidated provisions allowing the remanding of someone in custody for an additional time of three to six months without the intervention of a judge. Considering the difficulty for justice to work in such a period, the Council admitted that this measure, which was meant to prevent the release of someone before judgment, aimed at the general interest of the protection of public order and the tracking down of offenders. Nevertheless, it considered that it was a direct violation of Article 66 of the Constitution, which holds that the Judicial Authority is the guardian of individual freedom.

An act organizing the exit from the public health state of emergency, which maintained the Prime Minister's extraordinary powers to fight the pandemic wherever the virus was actively circulating, was referred to the Constitutional Council. Among its provisions was the obligation to produce a "health pass" proving either vaccination or previous contamination, or non-contamination, by way of a viral screening test, to have access to leisure activities where a large number of people gathered. In Decision 2021819 DC of May 31st, the Constitutional Council deferred to the legislator's assessment of public health risks. It did not appear inadequate, provided political, labor union, or worship activities were not considered leisure activities. Concerning the collection and detention of health data for research purposes, the Constitutional Council, as far as the provisions of the law followed the objective of protecting public health and imposed sufficient guarantees, declared them to conform to the Constitution, subject to the reservation that the data should be completely anonymous.

In another decision, Decision 2021-824 of August 5th, the Constitutional Council had to review a new law on managing public health. It broadened the cases in which the Prime Minister may make access to certain places, establishments, services, or events – like shopping centers, commercial dining or drinking places, fairs, and long-distance transport – conditional on the presentation of a "health pass." These measures infringed on freedom of movement and might restrict

the freedom of assembly and the right of collective expression of ideas and opinions. However, the Constitutional Council took into account that the legislator had pursued the objective of protecting health which has a constitutional value. It also noticed that these provisions were only to be imposed for a limited period, in places where a large number of people might gather, thus presenting a risk of transmission of the virus. Moreover, different guarantees were provided regarding access to health or social services. Finally, the regulatory measures taken on this basis were under a judge's supervision, and only to be taken in the interest of public health. The Constitutional Council concluded that these provisions achieved an acceptable balance between the relevant constitutional requirements. Nevertheless, it struck down a provision holding that the failure to present a "health pass" allowed for the termination of fixed-term or assignment contracts – but not of open-ended contracts – since it infringed the principle of equality. It also declared unconstitutional another provision creating a confinement measure, applicable as of right, to persons testing positive for COVID-19. It considered that the objective pursued was not such as to justify a custodial measure, which constitutes a deprivation of liberty, without an individual decision based on an assessment by the administrative or judicial authority.

In a last decision, Decision 2021-828 DC of November 9th, the Constitutional Council, in line with its former decision, deferred to the legislator's assessment of public health risks. It consequently admitted the extension of measures to be taken under either the State of Emergency Act or the Act Organizing the Exit from the State of Emergency. However, it struck down a provision allowing headteachers to access the medical data of their pupils to prepare vaccination campaigns and organize courses on how to prevent the propagation of the virus. It declared these provisions contrary to the constitutional right to private life.

Another major ruling was Decision 2021-817 DC regarding the "Act for a Global Security Preserving Liberties." This text, which had been tabled by a backbencher, addressed a wide array of topics. They ranged from the

extension of the powers of local police forces to the use of cameras by policemen, the shooting, transmitting, and using of images and videos, the use of drones, the regulation of the private security sector, or security on the roads, and in public transports. Although it met the requests of police forces, it was strongly criticized by human rights associations, activists, and journalists. Deputies, Senators, and the Prime Minister referred it to the Council.

The less controversial provisions passed muster. This was for example the case of the extended possibility for visual inspection, luggage search, and security frisk during public sports, recreational, or cultural events. Provided these practices, for which consent is required, are not discriminatory, equality, freedom of movement, and private life are protected enough. Additional disciplinary sanctions made available to private security firms, as well as the requirement that foreigners working in this sector hold a residence permit for a minimum of 5 years were similarly regarded as constitutionally permissible. The Council did not object to the newly created possibility of public road surveillance by private security agents, provided these missions are authorized by a State authority, are specifically related to the prevention of acts of terrorism aiming at the buildings they are in charge of, do not permit searches and pat downs, and are limited to the immediate surroundings of the places where they operate. The constitutional right to private life is not endangered by the suppression of the need for a specific authorization for private security agents to carry out pat downs, provided this possibility is open to specifically trained agents and in case of grave threats to public security. The possibility for them to detect drones and forward information to the State's services is not unconstitutional either. Several provisions were related to extended practices of video protection and image capturing (individual cameras used by policemen, private video surveillance, etc.). After examining who the agents empowered to implement these techniques were and what qualification and training they had, the precise circumstances under which they could be used, the conditions of transmission, viewing, and detention of the images, the information of the public, the

aims of the recordings, the Council generally considered that they struck a proportionate balance between the constitutional objective of the protection of public order and investigations to identify offenders on the one hand, and private life on the other hand.

On the contrary, the Constitutional Council quashed the experimental extension of local police authorities' powers. This measure did not sufficiently ensure their professional qualification, nor their supervision by the judicial authority. The Council also considered that the provisions regarding the use of cameras located on drones for judicial and administrative police ends were defective. "Given their mobility and the height at which they can move, these devices are capable of capturing images of a very large number of people anywhere and without their presence being detected, and of monitoring their movements within a large perimeter. Therefore, the implementation of such surveillance systems must be accompanied by specific guarantees to safeguard the right to private life." These guarantees appeared to be insufficient: drones could be used for too many purposes; the legislator had not defined any maximum time limit for their use; the number of drones simultaneously used was not limited. Such was also the fate of the provisions regarding the use of onboard cameras, the conditions of which were too lax. The most controversial provision of the bill was Article 52, which was the only one the Prime Minister had referred to the Council. Pursuant to that text, "Provocation that obviously aims at affecting the physical or mental integrity, or at identifying a member of the national police, of the national gendarmerie or of the municipal police, when these agents act within the framework of a police operation, or a customs officer, when she is in operation, is punishable by five years of imprisonment and a fine of 75,000 euros." Previous drafts of this provision had been criticized for threatening freedom of expression and freedom of the press. Refraining from discussing this issue from this angle, the Council considered that several terms could be interpreted in multiple ways. Therefore, the legislator had not defined the offense precisely enough, thus violating the principle of the legality of crimes and punishment.

A new Act relating to criminal liability and national security was adopted at the end of 2021 to comply with the Council's decision. It was immediately referred to the Council and partially declared unconstitutional (Decision 2021-834 DC).

### III. CONSTITUTIONAL CASES

1. Decision 2021-940 QPC of 15 October 2021 - Air France, Obligation for air transportation companies to provide return transportation to passengers refused entry into France

In a referral to the Constitutional Council, the applicant company criticized the provisions of the Code of Entry and Residence of Foreigners and the Right of Asylum requiring air transport companies to return foreign nationals whose access to the French territory was denied. According to the applicant, these provisions would amount to delegating powers of general administrative police, which are inherent in the exercise of public force, to a private entity that does not enjoy such powers, in violation of Article 12 of the Declaration of the Rights of Man and the Citizen. The applicant company also claimed these provisions violated Article 66 of the Constitution by requiring companies, during this return transportation, to hold the persons who refuse to comply with this measure against their will. Moreover, these provisions would make the transportation companies liable, while the very non-compliance with this obligation would only be attributable to the passenger's behavior. As such, they violated Article 9 of the Declaration of the Rights of Man and the Citizen.

The disputed provisions of the Code of Entry and Residence of Foreigners and the Right of Asylum seek to ensure the transposition of an EU directive by providing for the air or maritime transportation company to return foreign nationals whose entry onto the territory of Member States was refused to a third State. The Constitutional Council found that these provisions are limited to provide the necessary consequences of the unconditional and precise provisions of the directive of June 28, 2001. Consequently, the Council is only competent to control the compliance of the disputed domestic legis-

lative provisions with rights and freedoms that are guaranteed by the Constitution in that they call into question a rule or principle that, not having found equivalent protection in European Union law, is inherent in France's constitutional identity. Firstly, the right to security, the principle of individual responsibility, and equality before public burden sharing, which are protected by the European Union law, do not constitute rules or principles that are inherent in French constitutional identity. It is therefore not up to the Constitutional Council to rule on these objections, but to the European Court of Justice. Secondly, it follows from Article 12 of the Declaration of the Rights of Man and the Citizen that delegating to private entities general administrative police powers which are inherent in the use of "public force" necessary for the guaranteeing of rights is prohibited. This requirement constitutes a principle that is inherent in the constitutional identity of France. The decision to implement the return of a person who was not granted entry into French national territory is the exclusive competence of the authorities controlling the borders. However, pursuant to the disputed provisions, the airline companies are only required to be responsible for these persons and to ensure their transportation. Therefore, the disputed provisions have neither the purpose nor the effect of making these companies responsible for the monitoring of these persons who must be returned or for exerting any constraint on these persons. Such measures remain within the competence of the police authorities. They do not deprive the captain of the right to disembark a person who presents a danger to the safety, health, hygiene, or the orderly operation of the aircraft either. The Council thus declared the provisions conformed with the Constitution.

2. Decisions 2020-886 QPC March 4th, 2021; 2021-894 QPC April 9th, 2021; 2021-895/901/902/903 QPC April 9th, 2021; 2021-920 QPC June 18th, 2021 – The right to remain silent at different stages of criminal proceedings

The Constitutional Council, being referred different provisions of the Code of Penal Procedure by the Criminal Chamber of the Court of Cassation, was led to specify the

scope of the right to remain silent at different stages of criminal proceedings. In Decision 2020-886 QPC of March 4th, 2021, the Constitutional Council considered that, by not providing that the indicted person who is brought before the judge of liberty and custody must be informed of her right to remain silent, the contested provisions violated the Constitution. The already adopted measures were not annulled, however. Until a derogating legislation is adopted, the judge of liberty and custody must inform the indicted person before her of her right to remain silent. For similar reasons, the Council struck down the provisions of Article 199 of the Code of Penal Procedure for not providing that a person who has been indicted must be informed of her right to remain silent before the trial court in Decision 2021-895/901/902/903 QPC of April 9th, 2021. Furthermore, in Decision 2021-894 QPC of April 9th, 2021, the Constitutional Council quashed certain provisions relating to delinquent youth for not providing that the minor must be informed of her right to remain silent when she is heard by the Judicial Youth Protection Services. Finally, in Decision 2021-920 QPC of June 18th, 2021, the Council declared provisions of Article 148-2 of the Code of Penal Procedure unconstitutional for not providing that the indicted person must be informed of her right to remain silent before the court examining an application for release from judicial control or for release from custody. It results that in each of these situations, the indicted person must systematically be informed that what she says is likely to be taken into consideration later in the proceedings.

3. Decisions 2020-851/852 QPC of July 3rd, 2020 and 2020-878/879 QPC of January 29th, 2021 – Pre-trial detention in the context of public health emergency

In Decision 2020-851/852 QPC, the Constitutional Council validated the constitutionality of the provisions enabling the Government to adapt the duration of pre-trial detention to prevent the spread of COVID-19. The Councilors considered that since the contested provisions did not exclude judicial intervention during the extended period of pre-trial detention that would have come to an end during the pe-

riod of a declared public health emergency, they did not violate the requirements of Article 66 of the Constitution which, in cases of deprivation of liberty, imposed that a judge step in as soon as possible. On the other hand, in Decision 2020-878/879 QPC, the Council found that the provisions automatically extending pre-trial detention duration without providing for any systematic intervention of the judge during the first period of the declared public health emergency are unconstitutional. Furthermore, it held that the pursued objective cannot justify the withdrawal of the judicial assessment of the extension of the duration of the custody. Regarding the effects of the ruling, the Council declared the unconstitutionality of the provisions *ex nunc*, considering that the annulment of already adopted measures would be incompatible with the constitutional objectives of safeguarding public order and tracking down offenders, and would thus have patently excessive consequences.

4. Decision 2020-874/875/876/877 QPC of January 21st, 2021 – Right to maintain family bonds during pre-trial detention

The Council held that determining the place of pre-trial detention without necessarily taking into account the place of residence of the family of the indicted person did not violate the latter's right to lead a normal family life as it is inherently limited by her status as a detainee.

5. Decision 2021-818 DC of May 21st, 2021 – Law on the heritage protection of regional languages and their promotion

The Constitutional Council handed down its ruling regarding the financial support provided by municipalities for the schooling of children taking regional language courses. The Council found the contested provisions constitutional, as the use of another language than French is not imposed on a public or private legal person in the exercise of a public service mission. In the same vein, it decided that the provision authorizing non-French diacritical marks in the civil status registry violated Article 2 of the Constitution because they granted individuals a right to use a language different from the national one in their relations with the public administration.

## IV. LOOKING AHEAD

In 2022, presidential and legislative elections will be held. The Constitutional Council will be involved in the organization and supervision of the vote, the announcement of the results, and the possible ensuing litigation. In the meantime, three new members will be appointed to the Council. As three women with a well-established legal background are leaving, there is much wonder as to the new equilibria (both in terms of gender and professional qualification) resulting from the new appointments. The latter will be made by the current President of the Republic, the current President of the National Assembly, and the current President of the Senate. The first two may not be re-elected in the spring. That is why one may also wonder to what extent the coming appointments may be read from a strategic point of view according to which the three presidents would try to make sure that the orientations of the Council do not change in the event that the majority in both Houses of Parliament do.

## V. FURTHER READING

Martin Collet, *Finances publiques*, 6<sup>th</sup> ed. (Lextenso, 2021)

Jean-François Kerléo, *La déontologie politique* (Lextenso, 2021)

Guillaume Tusseau, *Contentieux constitutionnel comparé. Une introduction critique au droit processuel constitutionnel* (Lextenso, 2021)

Guillaume Tusseau, *Droit constitutionnel et institutions politiques*, 6<sup>th</sup> ed. (Le Seuil, 2021)

Elisabeth Zoller, Wanda Mastor, *Droit constitutionnel*, 3rd ed. (Presses universitaires de France, 2021)



# Georgia

Malkhaz Nakashidze  
Professor, Jean Monnet Chair  
Batumi Shota Rustaveli State University

## I. INTRODUCTION

This report provides a brief introduction to the Georgian constitutional system including local elections, EU-mediated agreement reached between political parties on April 19, 2021 on overcoming the political crisis in the country after the parliamentary elections, abolition of the State Inspector Service, appointment of judges in the Supreme Court, the Constitutional Court, appointment of members in the High Council of Justice, amendments to the legislation on the courts and main challenges of the judiciary. The report also discusses restrictions imposed by the COVID-19 pandemic on the government's policy against the spread of the virus and vaccination of the population in Georgia, as well as cases considered by the Georgian Constitutional Court on the powers delegated to the government during the pandemic, curfew, and restrictions on individual rights. It provides an overview of other landmark judgments of the Georgian Constitutional Court in 2021. The final section examines developments expected in 2022 related to court vacancies, Constitutional Court cases, and other related issues.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. The Political Crisis and the “Charles Michel Agreement” between Political Parties

The political crisis created after the 2020 parliamentary elections continued in 2021 as well. In February, Prime Minister Giorgi Gakharia resigned after refusing to launch a special operation to arrest the chairman of

the National Movement, the largest opposition party. Irakli Gharibashvili, who was appointed Prime Minister in 2013, became the Prime Minister for the second time. After Gharibashvili's appointment, the chairman of the opposition party was arrested, who was finally released after paying 40,000 GEL bail by the European Union. Former President Mikheil Saakashvili also returned to Georgia in October this year. Georgian authorities have launched several criminal cases against him, although Saakashvili has linked him to political persecution. He was arrested upon his return and the opposition is holding protests in the coming months to secure his release.

Through the mediation of European Council President Charles Michel in 2021, the government and the opposition worked together to defuse the political crisis. On April 19, 2021, the so-called the “Charles Michel Agreement,” was signed according to which the opposition would enter parliament, start electoral and judicial reform, and resolve issues perceived as a politicized judiciary. The agreement provided for the calling of early parliamentary elections in 2022 if the Georgian Dream party received less than 43% of the proportional vote in the October 2021 local elections. The document was signed by “Georgian Dream” and part of the opposition parties. However, three months after the signing, on July 28, 2021, the “Georgian Dream” withdrew from Michel's agreement. The main opposition party, the National Movement, signed Michel's document only after that, and the party later entered parliament. The agreement does not fulfill all of the opposition expectations, but it is a compromise outcome, and it provides an agenda for Georgia's fur-

ther relations with the EU and for progress in the field of rule of law and democracy.<sup>1</sup>

## 2. The COVID-19 Pandemic

In 2021, 13,800 people died as a result of the coronavirus in Georgia, and the number of confirmed cases increased to 934,741. Georgia was the seventh most populous country in the world in terms of mortality. In 2021, more than 10,000 people died due to COVID-19. Vaccination against COVID-19 in Georgia started only in March 2021 and by the end of the year, 1,148,962 people were vaccinated in two doses, which is 40 percent of the population. From December 1, 2021, the so-called Green passport for citizens vaccinated with two doses. The government, however, acted inconsistently during the pandemic and made populist decisions. For example, on June 24, the government abolished unpaid fines for violating co-regulations, which could be seen as a threat to the rule of law.

## 2. Changes in the General Courts

On December 30, the Parliament of Georgia adopted amendments to the General Courts imposing sanctions on judges due to unbalanced, disproportionate or politically biased views. Also, the number of votes required for the imposition of disciplinary sanctions on judges is reduced from 2/3 of the Board to a simple majority. In addition, the ban on being elected a member of the High Council of Justice twice was lifted, in order to avoid the concentration of power in the council. The adoption of the law was criticized by observers from the very beginning.<sup>2</sup> As well as by diplomatic missions that support judicial reform in Georgia.<sup>3</sup> Also at the end of 2021, after the early resignation of two members of the High Council of Justice, the Conference of Judges elected two new members of the Council. The decision was made in a quick and non-transparent way, which was criticized, including by the European Union, for violating Georgia's obligations under the EU-Georgia Association Agreement. In addition, the Georgian parliament on December 1 appointed four judges to the Supreme Court for life. The EU also noted that the appointments of judges were contrary to the aims

of the judicial reform set out in the April 19, Agreement. Earlier, Georgian Dream supported 6 judges of the Supreme Court. The President of the European Council has stated that EU assistance depends on judicial reform.<sup>4</sup> The government even refused the EU support because government announced that the country was experiencing economic growth and began to reduce its foreign debt. In fact, the Georgian government did not fulfill the preconditions signed in agreement with the EU. The Georgian government somehow got ahead of the EU and made a statement that would have been less damaging to it in the run-up to the elections.<sup>5</sup>

## 3. Appointment of a Judge of the Constitutional Court

The President of Georgia, Salome Zurbishvili, appointed Giorgi Tevdorashvili as a judge of the Constitutional Court on July 13, with the quota of the President. Tevdorashvili was replaced by Tamaz Tsabutashvili, who was the last judge among the judges appointed for the previous 10 years. Giorgi Tevdorashvili is an associate professor at the Faculty of Law, and he was a candidate for a judge of the Supreme Court in 2019, although he was not elected a judge. Prior to the appointment of the judge, the Presidential Administration posted a statement on its website on June 29 and called on interested candidates to submit the papers by July 7.

## 4. Local Elections

On October 2, 2021, local self-government election was held in Georgia. The election was held by a mixed electoral system. In the proportional system, the ruling Georgian Dream party won 46.74 percent, followed by the National Movement with 30.67 percent, the former Prime Minister Gakharia's party "For Georgia" with 7.808 percent, and the Lelo party with 2.713 percent. As a result of the elections, the majority of Georgian city councils were formed by the Georgian Dream. Currently there are already 6 opposition Sakrebulo in Georgia where the opposition has a chance to form a majority. In only one city, Tsalenjikha, was the candidate of the opposition, the National Movement,

elected as a mayor. The opposition is talking about election falsification and is calling for early parliamentary elections, but government says that elections will not be held in the country until 2024.

## 5. Abolition of the State Inspector Service

On December 24, 2021, it became known that the ruling party had drafted a bill that would abolish the service of the State Inspector and create two new state bodies. The majority of the Georgian Dream started discussing the bill in an expedited manner. The initiative was preceded by an investigation by the Inspector's Office into possible inhumane treatment of former Georgian President Mikheil Saakashvili during his transfer to a prison medical facility, and a violation of the Personal Data Protection Law over the publication of his videos and photos. Eventually this service was abolished, the inspector submitted a constitutional claim to the Constitutional Court, and we will consider this development in the 2022 report.

## III. CONSTITUTIONAL CASES

### 1. Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v. Parliament and Government of Georgia (№1/1505,1515,1516,1529, 11 February 2021) - Restrictive Regulations of COVID-19

The case involved several constitutional claims, and the subject of dispute was the constitutionality of norms of the Law of Georgia on Public Health and the resolution of the Government of Georgia on the Approval of the Rules of Isolation and Quarantine. The plaintiffs point out that the quarantine and isolation of a person, given the form and intensity of the interference with the right, interferes with a person's physical liberty, in particular his detention. According to the disputed norms, the restriction of the right takes place by the executive without prior and subsequent judicial control. According to the respondent, the delegation of powers to the executive serves to give it a better opportunity to act operatively. The court largely dismissed the claim, noting that quarantine and isolation meant only the separation of

a person, not the interference with his freedom of conduct, and that he was not subject to any kind of control by the state. The court explained that delegating authority to the government to protect the health of the population during an epidemic is justified by the need to make timely and effective decisions against the threats posed by the pandemic. Judge Giorgi Kverenchkhiladze had a different opinion on the case, arguing that the executive branch was given indefinite legislative powers not to enforce the law, but to give the government the power to create a new legal framework, which is unconstitutional.

## 2. Mikheil Samnidze v. Government of Georgia (№1/5/1499, December 16, 2021) - Curfew

The subject of the dispute in the case was the constitutionality of the norms of the resolution of the Government of Georgia “On the approval of the measures to be taken to prevent the spread of the new coronavirus in Georgia.” According to the disputed norm, “during the state of emergency, the movement of persons from 21:00 to 06:00 is prohibited, both on foot and by vehicle. The plaintiff considered that the disputed norm restricted the right of free movement of persons. Interference with Article 14 of the Constitution is allowed only on the basis of law, and in case of emergency by a presidential decree and in this case the government was not authorized, this restriction was established. According to the government, the fight against the pandemic requires an immediate response by selecting and applying a variety of measures, and the restriction imposed by the disputed norm is fully in line with the Constitution. The Constitutional Court clarified that the basis for the transfer of the authority to introduce curfew during a state of emergency is the Law of Georgia on the State of Emergency and the transfer of the authority to declare a curfew for the government was a temporary measure and it could not affect the long-term prospects of the country’s social, economic, cultural, legal or political development. According to the Court, the measure by its nature does not have an intense impact on the scope of a person’s free action, the admissibility decision of which must be made directly by the legislator.

## 3. Constitutional Submission of the Tetrtskaro District Court (№3 / 2/1478, December 28, 2021) - Oath of the Accused and Judge Clarifying Question

The subject of the dispute in the case was the constitutionality of the norms of the Criminal Procedure Code of Georgia. The author of the submission considered that the norm of the Criminal Procedure Code of Georgia, according to which a person acquires the status and rights and responsibilities of a witness after being warned and sworn in criminal liability, should be declared unconstitutional. The submission also requested a review of the constitutionality of the Code’s proposal, according to which a judge is empowered, only in exceptional cases, to ensure a fair trial, and only with the consent of the parties, to ask a clarifying question. The Constitutional Court held that the accused did not have the constitutional right to give false testimony and the legal system, which provided for the possibility for the accused to testify only on the condition of telling the truth, did not restrict the rights guaranteed by the Constitution of Georgia. The court also clarified that the questioning by a judge is an action aimed at a thorough investigation of the case, to establish the truth, which does not violate the constitutional requirements of equality and adversarial parties and/or the impartiality of the court. Based on the above-mentioned argument, the Constitutional Court held that the restriction of the right of a judge to question during the proceedings was of an arbitrary nature and was contrary to the Constitution of Georgia.

## 4. Public Defender of Georgia v. Parliament of Georgia (№1/3/1441, July 5, 2021) - Accessibility of Defendant/Convicted Person to the Public Defender’s Hotline

The subject matter of the dispute was the constitutionality of the norms of the Detention Code. The plaintiff requested a review of the constitutionality of the norm, according to which the accused/convicted person in the form of a disciplinary sanction is restricted from connecting to the Public Defender’s hotline and is not allowed to use the Public Defender’s hotline in solitary confinement. According to the respondent, the hotline

may indeed be an instant and effective mechanism in terms of preventing alleged torture and ill-treatment, their timely detection and investigation. However, this should be considered not in relation to the Public Defender, but in relation to the investigative body, in particular, the State Inspector. The Public Defender does not have the above-mentioned investigative authority directly by law. The Court held that the disputed norms do not meet the positive obligations imposed by the absolute nature of the prohibition of ill-treatment under the Constitution. The court declared the disputed norms unconstitutional due to incompatibility with the obligations of prevention of torture and ill-treatment established by the Constitution.

## 5. Koba Todua v. Parliament of Georgia (№2/2/1428, 15 July 2021) - Consideration of the Solicitation in the Court without Oral Hearing

The subject matter of the case was the constitutionality of the norms of the Criminal Procedure Code of Georgia. According to the disputed norm, the admissibility and substantiation of a motion for revision of a judgment due to newly discovered circumstances is examined by the Court of Appeals without an oral hearing. According to the second disputed norm, the Court of Cassation considers the cassation appeal of the Court of Appeals without an oral hearing. According to the plaintiff, the disputed norms exclude the possibility of holding an oral hearing, thus depriving him of the right to fully substantiate the motion and, on the other hand, restricting the court. At the substantive hearing, the respondent partially accepted the constitutional claim. In the position of the respondent, judges should have discretionary power to decide for themselves whether to hold an oral hearing, and this will also ensure the artificial overload of the courts. The Constitutional Court declared the disputed norms unconstitutional.

## 6. Giorgi Tsertsvadze v. Parliament of Georgia (№1/4/1330, 23 September 2021) - Transfer the Case to another Body for Investigation

The subject matter of the case was the constitutionality of the words of the Criminal

Procedure Code of Georgia: “The Chief Prosecutor of Georgia or a person authorized by him has the right to withdraw a case from one investigative body and transfer it to another investigative body for investigation.” According to the plaintiff, paragraph 2 of Article 9 of the Constitution of Georgia includes the positive obligation of the state to conduct an effective and independent investigation. The disputed norms do not guarantee the institutional independence of the investigative body. According to the respondent, on the basis of the disputed norm, this decision is made by a reasoned decision, which explains the grounds for such action and the purpose of the disputed regulation is not to overly limit the powers of the prosecutor and promote the efficiency and independence of the investigation. Among other arguments, the Court pointed out that the impugned norm, due to the lack of necessary guarantees to ensure the effectiveness of the investigation, does not meet the requirements of a positive obligation under Article 9 of the Constitution of Georgia and should be declared unconstitutional.

#### 7. Elga Maisuradze, Irma Ginturi and Leri Todadze v. Parliament of Georgia (№1/6/1320, 28 December 2021) - Status of a Singleton Parent

The subject of the case was the constitutionality of the norms of the Civil Code of Georgia in relation to the first paragraph of Article 11 of the Constitution of Georgia, where it is defined that all persons are equal before the law and discrimination is prohibited. According to the disputed norm, “a single mother is a person who has a child under the age of 18 born out of wedlock, if the childbirth certificate does not include a record of the child’s father, as well as a person who has an adopted child under the age of 18 and who was not in a registered marriage at the time of adoption.” The norm of the same content is in Part 3 of the same article, with the difference that the record of the childbirth certificate does not include a record of the baby’s mother. According to the plaintiffs, the preconditions for obtaining the status of a single parent established by the disputed norms do not meet the real needs of the relevant persons and unjustifiably restrict the plaintiffs’ right to equality

protected by the Constitution of Georgia. According to the representative of the defendant, the purpose of the disputed norms is to define the category of persons who are both de facto and legally single parents and the improvement of their legal status is entrusted only to the state. The Constitutional Court declared the disputed norm unconstitutional and pointed out that there is no rational basis for the difference of treatment established between substantially equal persons on the basis of the disputed norm and it contradicts the first paragraph of Article 11 of the Constitution of Georgia.

#### 8. Tamaz Mechiauri v. Parliament of Georgia (№3/1/1298,1313, 23 April 2021) - Declaration of No Confidence to the Mayor of Municipality

The subject matter of the dispute was the constitutionality of the norms of the Local Self-Government Code. According to the constitutional claim, the plaintiff Tamaz Mechiauri was elected mayor of Tianeti. According to the plaintiff, based on the disputed norms, the Tianeti Municipality Council (where there is another party in the majority) had the opportunity, without any justification, to express no confidence in the mayor directly elected by the people. In his view, the dismissal should be related to the abuse of his mandate, non-fulfillment of his obligations, violation of the law, and he should be subject to justification. According to the respondent, the mayor is a political official and therefore he may be subject to dismissal, including for political expediency. The Constitutional Court did not recognize the disputed norm as unconstitutional and in its decision indicated that the right of the Sakrebulo to terminate the directly elected mayor when it is necessary for the effective functioning and development of self-government is not unconstitutional.

#### 9. Giorgi Beruashvili v. Parliament of Georgia (№2/1/1289, 15 July 2021) - Anti-social Action

The subject matter of the case was the constitutionality of the words of the Criminal Code of Georgia “or other anti-social action”. According to the Criminal Code, it is a criminal offense to incite a minor to

beg or engage in other anti-social activities. According to the plaintiff, the words used in the disputed norm are to obscure the juvenile to the anti-social action and, in the presence of identical circumstances, provide an opportunity to explain it in different ways, including contradictory content. The impugned norm fails to meet the constitutional requirements for the quality of the law. According to the position of the respondent party, the legitimate aim of the disputed norm is to protect the interests of minors and third parties, to prevent the involvement of minors in anti-social actions. The court partially upheld the claim and declared the disputed norm unconstitutional. The Court pointed out that the existence of conflicting case-law clearly indicates the uncertainty of the named normative content of the disputed norm and declared it unconstitutional.

#### 10. Ana Pirtskhalashvili v. Parliament of Georgia and the Georgian Energy and Water Regulatory Commission (№1/2/1248, 5 July 2021) - Utility Bills

The subject of the dispute was constitutionality of the norms of the Law of Georgia on Electricity and Natural Gas and the decision of the National Regulatory Commission on “The implementation of electricity supply, water supply and cleaning in Tbilisi through a unified integrated and coordinated system”. According to the provisions of the disputed law, the administrator terminates the provision of his/her services to the customer before the payment of the debt in case of non-payment or incomplete payment of the fee reflected in the service fee/fee payment receipt. According to the plaintiff, the disputed norms violate his right to dignity. The respondent pointed out that the necessity of introducing the disputed norms was conditioned by the difficult factual reality; there was no mechanism for forcing the service fee collection in Tbilisi, and the population did not pay the fee voluntarily. The court partially upheld the constitutional claim and pointed out that the disputed regulations did not meet the criterion of necessity and, therefore, contradicted the consumer rights guarantees established by the Constitution of Georgia.

#### IV. LOOKING AHEAD

In 2022, the implementation of judicial reform, decision-making in the High Council of Justice, selection of judges will be relevant for Georgia. The reform of the State Inspector's Service should be completed in 2022, and the Constitutional Court of Georgia should make a decision on this issue. In addition, it is important this year to end the crisis in the local self-government councils, where the ruling party failed to win a majority. Several local councils are also scheduled to elect members by the majoritarian system. The Constitutional Court must also rule on several cases of human rights.

#### V. FURTHER READING

Malkhaz Nakashidze, "Restriction of the Right to Liberty in the Covid-19 Pandemic: European Standards and Georgian Legislation" - was published in a book: Konstantin Korkelia (Ed.), "Human Rights Protection and the COVID-19 Pandemic", Tbilisi, 2021

Malkhaz Nakashidze, "Public Discussions on the Constitutional Amendments to the Constitution of the Autonomous Republic of Adjara and the Right to Public Participation", published in book by the Caucasus International University, dedicated to 100 years anniversary of the First Constitution of Georgia, 2021

Malkhaz Nakashidze, "The Association Agreement and the Implementation of Domestic Reforms Towards Strengthening the Rule of Law, in Georgia, Moldova, and Ukraine" *International Comparative Jurisprudence*, Vol 7, No 1 (2021) p. 51-74

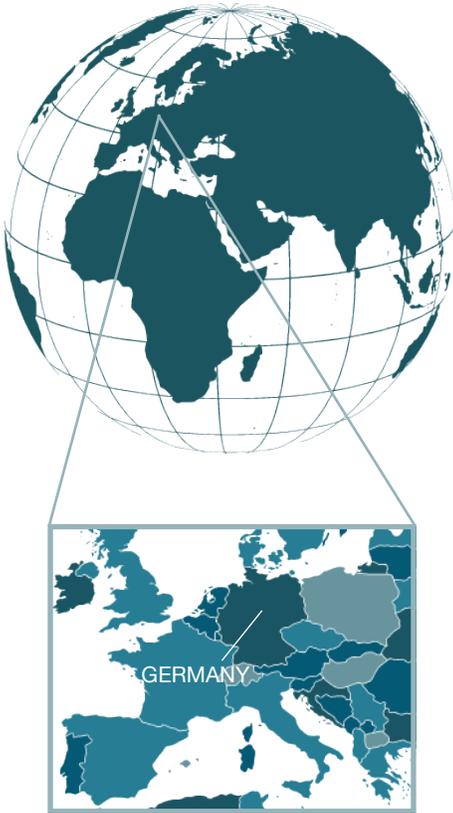
1 Malkhaz Nakashidze, "European Union Mediation of Georgia's Political Crisis after the 2020 Parliamentary Elections", *Presidential Power Blog*, Posted on 17/05/2021. <<https://bit.ly/3GyfnrD>> accessed February 20, 2022

2 Coalition Responds to Accelerated Discussion of Amendments to Organic Law on Common Courts 28 December 2021. <<https://bit.ly/3HG-MXx0>> accessed February 20, 2022

3 Ambassador Degnan's Remarks to Media at Parliament, <<https://bit.ly/3scDQ25>> accessed February 20, 2022.

4 President Michel visits Georgia 19 July 2021, Charles MICHEL, President of the European Council, visits Batumi, on 19 July 2021, <<https://bit.ly/3p0Rhjv>> accessed February 20, 2022

5 Malkhaz Nakashidze, "EU Macro-Financial Assistance: Has Georgia Fulfilled the Agreed Preconditions?" Blog published at the Jean Monnet Chair website, September 6, 2021 <<https://bit.ly/3Bx-U74u>> accessed February 20, 2022



# Germany

Stefan Martini

Dr.

Walther Schücking Institute for International Law / Kiel University

Paulina Starski

Prof. Dr.

Chair of German and Comparative Public Law, European as well as International Law, University of Freiburg<sup>1</sup>

## INTRODUCTION

Germany's past constitutional year was marked by four distinct while at the same time rather disconnected developments and events: COVID-19, general elections, the end of the PSPP saga, and a Court anniversary. In the first instance, German public *and* legal life was, again, as in 2020, heavily affected by the ebb and flow of the COVID-19 pandemic (see III.1).

Secondly, the general election in September 2021 delivered a new government. Christian Democrat Merkel, who chose not to run for a fifth term, was succeeded by Social Democrat Olaf Scholz as chancellor, spearheading a three-party coalition government, completed by the Greens and the Liberals. The trio joined in an unprecedented combination, at least on the German federal level. Even before the war in Ukraine transformed its priorities, the so-called 'traffic light' coalition promised a major shift in German politics in its nonbinding coalition agreement come<sup>2</sup>, vowing to invest heavily in climate protection, raise the minimum wage, and introduce a progressive legal agenda on sociopolitical issues.

Thirdly, not only the Federal Constitutional Court (FCC), but also the EU institutions wrapped up the infamous PSPP proceedings in which the FCC held in 2020 regarding the European Central Bank's Public Sector Purchase Programme (PSPP), *inter alia*, that the Federal Government and the *Bund-*

*estag* had failed to take steps to ensure that the ECB conducts the necessary proportionality assessment before the purchase of public sector securities on the secondary market, ultimately alleging EU institutions including the Court of Justice of the European Union (CJEU) of acting *ultra vires*. The complainants in the case unsuccessfully petitioned for an execution order before the FCC,<sup>3</sup> bringing a highly unusual proceeding before the Court. Although dismissing the case as going beyond the scope of the original proceeding, the FCC – taking into account a certain margin of discretion – found the German parliament's and government's reactions to the PSPP judgment not insufficient. Moreover, the European Commission closed infringement proceedings against Germany at the end of 2021, contenting herself with the government's assurance to use all means at its disposal to prevent a similar judgment from happening again.

The fourth German constitutional highlight of 2021 falls into the housekeeping category: The FCC celebrated its 70<sup>th</sup> anniversary. As in-person festivities were muted by the pandemic, the Court continued to modernize its external communication and attempted to reach out to the general public in new, especially digital ways.<sup>4</sup> Nonetheless, hearings remain non-televised.<sup>5</sup>

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS: LITIGATING THE FUTURE NOW, INTERTEMPORAL RIGHTS IN THE CLIMATE PROTECTION CASE FCC, ORDER OF THE FIRST SENATE OF 24 MARCH 2021 – 1 BVR 2656/18 ET AL.

In December 2019 the German legislature adopted the Federal Climate Change Act (*Bundes-Klimaschutzgesetz* – KSG) thereby reacting to demands and pressure from the climate movement and aiming to fulfill international obligations to reduce greenhouse gas emissions under the Paris Agreement. The KSG set, for the first time, legally binding climate targets and sectoral annual emission amounts providing for a gradual reduction of greenhouse gas emissions by at least 55% relative to 1990 levels until 2030.

In its – also from a comparative perspective on climate change litigation – seminal decision of March 24, 2021,<sup>6</sup> the FCC found – addressing constitutional complaints by a number of climate activists – the KSG to be partially unconstitutional, insofar as it lacked sufficient specifications for emission reductions from 2031 onwards (§ 3(1) 2<sup>nd</sup> sent. and § 4(1) 3<sup>rd</sup> sent. KSG in conjunction with Annex 2).<sup>7</sup> The FCC derived, first, a positive obligation incumbent on the state to take climate action in accordance with the Paris target and the objective to achieve climate neutrality emerging from Art. 20a BL (protection of natural foundations). Thereby the Court attributed an international and justiciable dimension to Art. 20a BL. Considering scientific uncertainties, the Court identified, second, a special legislative duty of care – particularly with respect to future generations – when decisions are made concerning the consumption of Germany's remaining CO<sup>2</sup> budget as estimated by the IPCC and the German Advisory Council on the Environment. Third, the Court re-conceptualized fundamental rights enshrined in the BL as so-called 'intertemporal guarantees of freedom'. In this understanding, fundamental rights protect particularly younger generations against threats to the future enjoyment of their freedoms. The legisla-

tive failure to establish how emissions will be reduced after 2030 combined with an irreversible 'offload' of significant parts of the emission reduction burden onto periods after 2030 has – the rationale of the FCC goes – detrimental effects on the freedoms of younger generations.

In detail: In its reasoning, the FCC first declared the complaints admissible regarding a possible non-fulfillment of the State's positive duty to protect life and physical integrity (Art. 2(2) 1<sup>st</sup> sent. BL) as well as property against arising risks of climate change (Art. 14(1) BL). Ruling out that an inadmissible *actio popularis* would be given in the case at hand, the FCC stressed that admissibility would not require that the complainants are 'especially affected' by climate change in a manner which distinguishes them from the whole of society.<sup>8</sup> It sufficed that their fundamental rights are affected individually. This finding is of particular importance and potentially paves the way towards a more extensive judicial review in comparable cases.

In the merits, the FCC was, however, unable to find that the state failed to fulfill its positive obligations in the present case (a violation of a positive duty would require the implementation of manifestly inadequate measures of protection): The gradual reduction of greenhouse gas emissions that the legislature opted for would not be inadequate considering the wide discretion that the Constitution grants to the legislative.

Beyond the State's positive duties to protect, the FCC also found the complaints admissible regarding a possible violation of the complainants' fundamental rights (*status negativus* dimension of fundamental rights) – which is the truly revolutionary point of the decision: By shifting the burden of a significant part of emission reductions to periods *post* 2030, the KSG would engender a curtailing effect on the enjoyment of practically all fundamental rights. Considering the intertemporal dimension of fundamental rights under the BL the FCC was able to establish a present violation of these rights in the merits, even though the tangible detrimental effects occur only in the future.

To arrive at this conclusion the FCC made one crucial conceptual step: According to the Court, the contested provisions of the KSG issue an 'advance interference-like effect' ('*eingriffsähnliche Vorwirkung*') on the complainants' freedoms, subjecting them to significant restrictions of their fundamental rights after 2030 in order to drastically reduce greenhouse gas emissions.

For this 'advance interference-like effect' to be justified under constitutional law it must not only be compatible with the State's obligation to take climate action arising from Art. 20a BL but also meet proportionality standards. While climate change is a phenomenon of a global dimension, Art. 20a BL obliges the state to take climate action supra- and internationally. Still, although the remaining CO<sup>2</sup> budget of Germany would most certainly be largely used up by the year 2030, the FCC regarded the challenged provisions of the KSG to be compatible with the State's obligation arising from Art. 20a BL in the present case given the uncertainties involved in the calculation of the budget. Yet, the relevant provisions of the KSG constitute – according to the FCC – a disproportionate violation of the complainants' freedoms. The Court specified that serious curtailments of fundamental rights could in the future be deemed proportionate in order to combat aggravated climate change effects, posing a serious threat to future freedoms of the complainants – which must be prevented through timely climate action. For such timely climate action to be taken, the FCC obliged the legislator to enact provisions that specify *now* on how it plans to reduce greenhouse gas emissions for periods *post* 2030, in particular by setting annual emission amounts and implementing further emission reduction measures.<sup>9</sup>

This FCC decision constitutes the most significant piece of climate change jurisprudence in Germany. With its novel and progressive legal findings and re-conceptualizations – especially the identification of an 'advance interference-like effect' and the re-construction of fundamental rights as 'intertemporal guarantees of freedom' – the FCC is paving the way for meaningful

further jurisprudence on climate action.<sup>10</sup> It might inspire human rights-based climate change litigation of courts in other jurisdictions should they employ a comparative methodology in their adjudicative process.

### III. CONSTITUTIONAL CASES

1. *Pandemic Discretion Granted: FCC Orders of 19 November 2021 – 1 BvR 781 et al. (curfews and contact restrictions), and 1 BvR 971/21 (school closures), a.k.a. Federal Pandemic Emergency Brake I and II*

Starting from around April 2021, public life in Germany was, again, suspended extensively. Reacting to a spike in infections and hospitalizations, the ascendance of the SARS-CoV-2 delta variant, when the vaccination campaign was about to pick up speed, the German *Bundestag* introduced nightly curfews and severe contact restrictions for a period of about two months, as part of an overall strategy to combat infections, protect the well-being of citizens, and prevent the overburdening of health facilities. As one of the few major COVID-19 cases before the FCC, the decision to reject a batch of constitutional complaints<sup>11</sup> sparked medium-level controversy because of the width of discretion accorded to the legislative branch.<sup>12</sup>

The case reached the Court fast and directly because the constitutional complaints had to be directed against the federal provisions of law themselves, by fiat of which the mentioned containment measures came into effect immediately in localities, in which certain infection thresholds were surpassed. Before, federal law only provided the legal basis, on which the *Länder*, the subfederal political units, acted when introducing their own containment measures. Consequently, although the *Länder* tried to coordinate themselves, measures could differ across the country, and legal proceedings could (more easily) be filed at local administrative courts.

The Court recognized that the contact restrictions interfered with the right to family life (Art. 6(1) Basic Law (BL)) and the right to free development of one's personality

(Art. 2(1) BL), acknowledging the right to socialize with close persons and to be protected from loneliness. The restrictions, the FCC held, were justified and proportionate, though. They followed a legitimate purpose, protecting life and health of citizens (Art. 2(2) sent. 1 BL). The Court also accorded the legislative branch a certain margin of appreciation when factual assessment is tentative, as was the case with the dangers of the coronavirus at the time the measures were adopted. The FCC accepted the assessment of the legislative branch who itself deferred to the assessment of the national health institute and prevailing expert opinion. The deference shown by the Court materialized also at the other stages of the proportionality analysis, which the Court defended by referring to the seriousness of the danger and the considerable weight of constitutional interests involved, as well as by pointing to factual uncertainties. As the measures were temporary, sensitive to local circumstance, and subject to exceptions, the FCC came to the conclusion that the legislator struck a sufficiently sound balance between the affected interests.

The nightly curfew as the other measure under scrutiny was also held constitutional by the FCC. The indirect psychological coercive force of the curfew to refrain from physical movement especially interfered with the right to liberty (Art. 2(2) sent. 2 BL in conjunction with Art. 104(1) BL). Contrary to the explicit wording of the BL, the Court affirmed that the right can be restricted not only "pursuant to a law" (Art. 2(2) BL) by implementing authorities, but also *by* a law and thus the legislative branch directly (as is provided for for other fundamental rights in the BL). Although declaring that curfews are only permissive under exceptional circumstances and although the curfew supported the spread of infections only indirectly, the Court confirmed the proportionality of this specific curfew, again by pointing to certain exemptions and deferring to legislative assessments.

On the same day as the Federal Emergency Brake I case, the FCC rejected constitutional complaints against temporary COVID-19-induced prohibition of in-person school

teaching as well (Federal Pandemic Emergency Brake II).<sup>13</sup> In this decision, the Court recognized, for the first time, a constitutional right to school education combining Art. 2(1) BL with Art. 7(1) BL (state supervision of the school system). Nonetheless, the FCC upheld the law and somewhat begrudgingly reasoned that school temporary school closures as part of a comprehensive concept were proportionate to curb infections while at the same time criticizing that data on alternative measures in schools had not been collected earlier and stressing that the state has to ensure (digital) distance learning when adopting school closures.

2. *Triage Not Without Act of Parliament: FCC, Order of the First Senate of 16 December 2021 – 1 BvR 1541/20*

Persons with disabilities, especially those with certain types of impairment or pre-existing conditions living in nursing homes or other care institutions or relying on third parties for daily assistance face an increased risk of contracting COVID-19 and developing severe symptoms. During the pandemic, doctors' potential triage decisions were merely governed by medical chamber recommendations. Persons with disabilities, fearing discriminatory choices by doctors, filed a constitutional complaint, urging the legislator to take action, based on the fundamental right and principle of non-discrimination enshrined in Art. 3(3) sent. 2 BL. This provision imposes, *inter alia*, a duty of protection upon the legislator to prevent situations in which persons with disabilities would become subject to exclusionary measures or situations of structural inequality.

The FCC found<sup>14</sup> that there are sufficient indications of a risk that persons with disabilities could be disadvantaged in the event of pandemic-related shortages and limitations to intensive care resources. In light of the reduced likelihood of survival due to their disability they might be denied necessary treatment. Whilst statutes aiming at protecting the rights of persons with disabilities and ensuring their participation in society have been adopted, the legislative has nevertheless failed to meet constitutional commands of the BL which is to be read – in particular – in consideration of

the Convention on the Rights of Persons with Disabilities. In that regard the decision of the FCC is another manifestation of the cordiality of the German constitutional order towards international law.

The FCC obliged the legislator to adopt a binding framework of protection for persons with disabilities and described several ways to alleviate the risk of disadvantaging persons with disabilities in situations of limited care resources, assigning wide discretion to the legislative. The latter must ensure, however, that these safeguards do not impose an additional burden on health-care institutions, eventually subverting the objective of enhancing the protection of life and physical integrity of patients with disabilities. The particularities of clinical healthcare and the final responsibility of the medical personnel have to be taken into account. These parameters determine and limit the legislator's options to establish criteria for allocation decisions, procedural requirements or stipulations for special training for the medical staff.

### 3. No interim relief against German Participation in new EU borrowings program: FCC, Order of the Second Senate of 15 April 2021 – 2 BvR 547/21

Adding another brick to a mounting EU jurisprudence edifice, the FCC rejected the application for interim relief against the Act Ratifying the latest EU Own Resources Decision. The EU Council had authorized the EU Commission to borrow money on behalf of the EU under the recovery instrument 'Next Generation EU'. The constitutional complaint against the German implementation Act and the principal proceedings are, however, not completed and, according to the FCC, 'neither inadmissible from the outset nor clearly unfounded'.<sup>15</sup> The applicants demonstrated that the EU decision's ratification could possibly interfere with the constitutional identity of the BL enshrined in Art. 79(3) BL and that it might exceed the constitutionally permissible EU integration agenda (*Integrationsprogramm*).

The ratification could possibly infringe the *Bundestag's* overall budgetary powers as

protected under the principle of democracy manifesting in Art. 38(1) sent. 2, Art. 20(1) and (2) and Art. 79(3) BL. According to the FCC, the applicants have sufficiently substantiated that the rules on liability under the Own Resources Decision allow the Commission to call on Member States to provide further financing, which could increase Germany's liability for EU debt stemming from decisions of other states, and could therefore deprive the *Bundestag* of its prerogative to decide on budgetary matters forming an element of its 'overall budgetary responsibility'.

However, upon a summary assessment focusing solely on the aspect of 'identity control' (and not '*ultra vires* control' which was also raised by the complainants) the FCC found the requirements for interim relief not to be met, as it is not highly likely that it will establish a violation of Art. 79(3) BL in the principal proceedings. Since the outcome of the principal proceedings remains open the FCC engaged – as it is typical for preliminary proceedings – in a balancing of consequences putting the summary assessment aside: The consequences that would arise if the preliminary injunction was not issued although the Act was to be found unconstitutional are less severe than the consequences arising if the injunction were to be granted and the Act turned out to be constitutional. The mere authorization of the Commission does not create direct liabilities for Germany or its federal budget. Liability would only arise if the Commission failed to generate necessary liquidity to comply with the EU's financial obligations and therefore chose to have recourse to the Member States. Even then, the liability would only apply *pro rata* to the estimated budget revenue of each Member State, being hence limited in scope and time. Within the academic discourse the Court's decision has been perceived as limiting the significance of '*ultra vires* control' within the procedural setting of constitutional complaints.<sup>16</sup> In any case, the FCC decision – at first sight appearing cordial towards the EU legal order – is a further element in calibrating and managing potential conflicts between the FCC and the CJEU.

### 4. Foreign lower-ranking government officials do not enjoy functional immunity before German Criminal Courts: Federal Court of Justice (FCJ), Judgment of 28 January 2021 – 3 StR 564/19

Considering the backlash against the International Criminal Court and various contestations of its legitimacy perceivable nowadays, the prosecution of foreign war criminals before national courts under the principle of universal jurisdiction has recently gained considerable significance – particularly in Europe. A recent judgment of the Federal Court of Justice (FCJ) aligns with this development by tackling the aspect of functional immunity – immunity *ratione materiae* – thereby echoing the idea of the complementarity of the system of international criminal law in the wider sense.

The relevant judgment dealt with a former Afghan army officer accused of several war crimes committed in Afghanistan in 2013 and 2014. Upon appeal and contrary to the previous instance the FCJ qualified the acts in question as torture under § 8(1) no. 3 of the Code of Crimes against International Law (CCAIL – *Völkerstrafgesetzbuch*). Analyzing customary international law, the FCJ confirmed that a state is in principle not subject to foreign jurisdiction regarding acts falling into its sphere of sovereignty. In the constellation at hand involving the individual criminal liability of lower-ranking officials (not enjoying immunity *ratione personae*) for war crimes, functional immunity would, however, not bar criminal prosecution before foreign national courts. The Court based its findings on a wide range of national and international case law, the work of the International Law Commission (ILC) and scholarship. Although Germany and other states in the Sixth Committee of the UN General Assembly in 2017 rejected a draft on curtailing functional immunity submitted by the ILC Special Rapporteur,<sup>17</sup> the FCJ deemed the German rejection to be based on methodological rather than on substantive considerations. Furthermore, the Court refused to submit the legal questions to the FCC as obliged under Art. 100(2) BL in cases of any serious doubt concerning the existence or scope of a rule of customary

international law. This appears as a surprise considering the intense discussions on the limits of functional immunity within the ILC. The Court's words veil the progressive (and very much welcome) dimension of its decision, whilst the Court's line of argument and analysis of the state of customary international law raises quite a few methodological questions. Overall, the FCJ seems to be led by practical considerations and eager to prevent procedural delays.<sup>18</sup> Its judgment is significant particularly in its long-term effects: First, the FCJ strengthens the criminal liability of war criminals putting aside obstacles to the global fight against impunity. It is hence to be expected that German courts will become important fora for enforcing international criminal law. Second, the Court's ruling constitutes state practice. Therefore, it is apt to facilitate a further evolution of international customary law and an erosion of state immunity of state officials in criminal proceedings.

Michaela Hailbronner, 'Combatting malfunction or optimizing democracy? Lessons from Germany for a comparative political process theory' (2021) 19 *I-CON* 495.

Florian Meinel, 'Das Bundesverfassungsgericht in der Ära der Großen Koalition: Zur Rechtsprechung seit dem Lissabon-Urteil' (2021) 60 *Der Staat* 43.

Niels Petersen, Konstantin Chatziathanasiou, 'Empirical research in comparative constitutional law: The cool kid on the block or all smoke and mirrors?' (2021) 19 *I-CON* 1810.

Alec Stone Sweet and Giacinto della Cananea, 'A Conversation with Dieter Grimm' (2021) 22 *German Law Journal* 1541.

#### IV. LOOKING AHEAD

Apart from still unforeseeable ripple effects of the war in Ukraine, some constitutional controversies are already on the horizon: e.g., it is still an open question whether and how the BL allows to bypass strict constitutional fiscal rules to boost the fitness of German military with extra heaps of money.<sup>19</sup> While the *Bundestag* still has to decide on the specificities of a legal duty to get inoculated with a COVID-19 vaccine, the FCC will already judge on the constitutionality of the sectoral vaccination duty in health and care facilities, in place since March 2022.<sup>20</sup> Furthermore, the FCC will clear the constitutionality of the CETA agreement between the EU and Canada off its docket (2 BvR 1368/16 et al.).<sup>21</sup>

#### V. FURTHER READING

Michael Grünberger, Anna Katharina Mangold, Nora Markard, Mehrdad Payandeh and Emanuel Towfigh, *Diversität in Rechtswissenschaft und Rechtspraxis* (Nomos 2021).

1 Special thanks go to Berthold Becker, Johannes Vöhler and Sebastian Pfeifer for their considerable input.

2 See unofficial English translation here: <https://portal.ieu-monitoring.com/editorial/dare-more-progress-agreement-of-germanys-new-coalition-now-online>.

3 Order of 29 April 2021, 2 BvR 1651 and 2006/15.

4 Annual Report 2021, p. 26 et seq. For the short-lived FCC's Instagram account see Silvia Steininger, 'Swipe up for the German Federal Constitutional Court on Instagram', *Verfassungsblog*, 19 August 2021.

5 This is stipulated by § 17a of the Act on the Federal Constitutional Court, thus not a matter for the Court, but for Parliament, see for an English translation of the Act here: [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?\\_\\_blob=publication-file&v=1](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publication-file&v=1).

6 For further analysis Ingo Wolfgang Sarlet and Wolfgang Kahl, 'Constitution and Climate Change: The Cases of Germany and Brazil' in Javier Cremades and Cristina Hermida (eds), *Encyclopedia of Contemporary Constitutionalism* (2022) 1, 4 et seq.

7 Find the English translation of the Order here: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324\\_1bvr265618en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html); press release: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>. The summary presented here follows the English translation of the Order.

8 Contrary to CJEU, Judgment of 25 March 2021, C-565/19 P, EU:C:2021:252.

9 The *Bundestag* followed suit and enacted changes to the unconstitutional Act by Act of 18 August 2021 (Federal Law Gazette I 3905).

10 See, however, the unsuccessful challenge of subfederal climate legislation in FCC, Order of 18 January 2022, 1 BvR 1565/21.

11 See the translated press release here: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-101.html>.

12 See for a damning analysis of the emergency break decision, but also the preliminary injunction order Oliver Lepsius, 'Der Rechtsstaat wird umgebaut' *Frankfurter Allgemeine Zeitung*, 10 December 2021; 'Einstweiliger Grundrechtsschutz nach Maßgabe des Gesetzes' (2021) 60 *Der Staat* 609.

13 See the English press release: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-100.html>.

14 See the English press release: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-109.html>.

15 English version of the Order forming the basis of this analysis available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/04/rs20210415\\_2bvr054721en.html;jsessionid=2FE38B339C7D8CC837011D1FEF4D6A8B.1\\_cid506](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/04/rs20210415_2bvr054721en.html;jsessionid=2FE38B339C7D8CC837011D1FEF4D6A8B.1_cid506). See also the English press release: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-029.html>.

16 See e.g. Christian Walter and Philipp Nedelcu, 'Die Relativierung der ultra-vires-Kontrolle im Eilrechtsschutz: Eine verfassungsprozessuale Analyse der Entscheidung in Sachen "Next Generation EU"', *Verfassungsblog*, 23 April 2021.

17 See discussions on Art. 7 ILC Draft Articles on Immunity of State Officials from Foreign Criminal

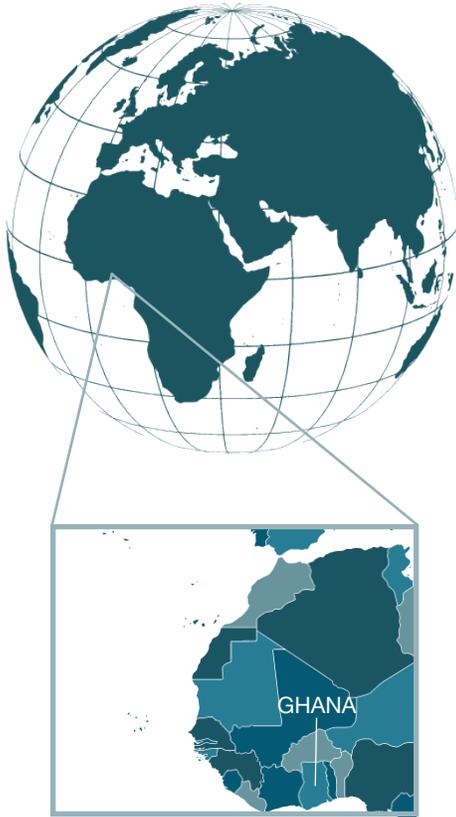
Jurisdiction, UN Doc. A/72/10, 175, 177; Dire Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?' (2019) 32 *Leiden Journal of International Law* 169, 187.

18 See also Tom Syring, 'Introductory Note' (2021) *ILM* 1.

19 See, for a first evaluation, Hanno Kube, 'Optionen und Perspektiven eines Bundeswehr-Sondervermögens', *Verfassungsblog*, 28 February 2022.

20 By Order of 10 February 2022, 1 BvR 2649/21, the FCC denied interim relief, see <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-012.html>. Also, another vaccination mandate reached the Court, regarding measles in child care facilities.

21 'Organstreit' proceedings already dismissed by Judgment of 2 March 2021, 2 BvE 4/16.



# Ghana

Dr. Maame A.S. Mensa-Bonsu  
LSE

## I. INTRODUCTION

There was not a dull moment, constitutionally speaking, for Ghana in 2021. The most striking thread running through the major developments of 2021 is the clarity with which they demonstrated the link between the constitution and politics. Many of the incidents were in the first instance political and, perhaps in older democracies would add nothing new to the small-c constitution of the jurisdiction. But for Ghana, these political firsts have become important illustrations and thinking points of the workings and in some instances weaknesses of the 1992 Constitution. The year began on a historic note: the country got its the first ever hung Parliament. Then, by the end of the first quarter #Fixthecountry had provided another first: a social media-initiated protest movement focused on economic, governance, and rights related issues. The country also saw its second presidential election petition with, amusingly, the same parties as the first one in 2013; only this time the roles were reversed. For all the sensationalism with which the case was followed and reported, it provided no exceptional insights into the workings of the 1992 Constitution. In the end, it was just a constitutional enforcement that hinged on basic addition. Its relevance constitutionally is not in what it contained, but rather in what it revealed about the public's perception of the Supreme Court's role in our constitution's functioning and sustainability. The normally sombre, purely statutory event of the presentation of the government's budget took a theatric turn that made it of interest to constitutional law scholars. The legacy of 2021 is a mixed bag. The actual outcomes

were often sub optimal or concerning. But in terms of process, interdepartmental relations, and public scrutiny, 2021 has added much to Ghana's constitution and constitutionalism journey.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

This year, it was Parliament's turn to be at the forefront of constitutional developments. January 7<sup>th</sup> saw the swearing in of a Parliament in which there was no clear majority side. 137 MPs each of the country's main parties: the New Patriotic Party (NPP) currently in government and the New Democratic Congress currently in opposition have 137 MPs. The last of Parliament's 275 seats was won by an independent candidate. Independents are rare in Ghana's parliament. Indeed, even the smaller parties have had increasingly less participation in Parliament as the Fourth Republic has unfolded. From six in 1996, the number of small party MPs dropped to one in 2012. That last MP from a small party lost his seat in the 2016 elections. The presence of an Independent MP in a Parliament that has no small parties participating is comforting. Though in truth, it is less meaningful that it appears. The lone MP was a leading member of the NPP who went independent when he lost the primaries amid allegations of vote-rigging. He has, unsurprisingly, but disappointingly caucused with the NPP and thus created a majority of them. In a non-parliamentary government, a majority is not strictly speaking required for government to function. It should be able to get through legislation on the basis of its

merit. Especially as in this case, only one member of the minority need agree to break the deadlock. At their swearing-in, there was great excitement about the make-up of the House. In some quarters, the excitement was a nervous kind which seemed to be rooted more in the unfamiliarity of the phenomenon than in any clearly articulated problem envisaged. For other scholars, myself included, the excitement was of a positive sort. The possibility of the opposition being actually able to impede government action and finally giving some tangibility to the constitution's clear but poorly structured intention that parliament should be the principal check on executive authority. Though that the experience was far below what we anticipated, it was nevertheless the most vibrant our opposition has ever been.

The first business of the new Parliament brought this term's first new turn in our democratic processes. Parliament elected its Speaker. Per the 1992 Constitution, it is Parliament which must elect its leader. Historically, however, the Speaker has been chosen by the president and imposed on the House through the majority. This eighth Parliament with its lack of a clear majority is the first to have independently chosen its speaker. The event was marred by the embarrassing debacle of a scuffle among the MPs. But after the dust settled, yet another constitutional first was realized- Ghana's first ever Speaker of Parliament to not share a party with the president.

The vetting of government nominees to ministerial positions which had till now been a mere formality for the first time took on an air of seriousness. The opposition members of the committee rejected 3 nominees thereby requiring a vote by the full house on their nomination. For the first time, the outcome of this full house vote was not a foregone conclusion. Though all three were eventually approved to the disappointment of many, there were two victories of that episode. Firstly, that the approval was achieved by the majority having to win over the twenty minority MPs who voted with them. This is the first time a parliamentary minority has had even leverage to be taken seriously by the majority. The democratic growth evinced by

this development was completely eclipsed by public anger and disappointment in the result that persons rejected for very valid reasons – including lying under oath about personal assets, and incompetence- are now in office as ministers. But the constitutionalist victory in the invigoration of the minority as a valuable presence in Parliament is not negligible. The second victory is found in the backlash that the opposition faced when it caved and approved these nominees. So angry were the party's supporters that several explanations, statements, and even an acceptance of responsibility for failure by the Minority Leader. With our history of unaccountable and highhanded governance, it is most heartening to see the political process grow to create accountability loops between the people and their elected officers and to understand the value of a parliamentary opposition.

A further interesting development in Parliament was the rejection of the government's 2022 budget on account of the new e-levy tax proposed therein. This is only the second time in Ghana's history that a government's budget has been rejected. Until now, it was accepted with heavy resignation that the government's spending habits and choices were beyond the control of the polity. Public reaction to the tax was overwhelmingly negative and thus compelled the minority's decision to reject it. Indeed, when it showed signs of softening towards the tax after the initial rejection, the public reaction, including from non-supporters, suggested the electoral cost of changing position would be too high. The opposition has since stood its ground in opposition to the tax and for the first time- under this Constitution at least, government is being forced to pay more than cursory attention to public response to its projected spending. 2021 has brought a welcome new turn to the inter and intra institutional workings of the arms of state.

An important landmark of 2021 is the momentum the #Fixthecountry movement has garnered over the course of the year. Began by Cambridge PhD student and lawyer Oliver Barker-Vormawor, the movement started as a hashtag that went viral. In May, the group held its first event- a protest march. The state's disproportionate

and very worrying response coalesced the public sympathies the group enjoyed into a fully-fledged movement #Fixthecountry. After several efforts to get the protest outlawed by the courts, the government's response to the court finally granting the movement permission to protest was to have armored cars pull into the Independence Square where the march was scheduled to start on the morning of the protest. Rather than quell it, these acts have persuaded more young people that the democratically elected government is not in fact democratically minded. The online campaign expanded to include traditional media events. By the close of the year, the group had made the radical jump from seeking better governance to calling for a vote of no confidence in the 1992 Constitution. It is unclear exactly what the group envisions will be the next step should their call receive overwhelming endorsement. Are they asking for a referendum? A coup d'etat? A constitutional review? Greater clarity on this would have made assessing the movement's impact and likely direction easier to achieve, and, at least for the older generations with memories of life under a dictator, easier to endorse.

The legal world was shaken in August when Justice Samuel Marful Sau succumbed to COVID-19. A well-respected judge, Marful Sau JSC will be missed. Justice Appau turned seventy in August. He is thus currently serving out the year of post retirement service within which superior court judges must complete all matters they are involved in prior to proceeding on retirement. No mention of new appointees has been made thus far. It is unclear whether the president intends to make any new appointments.

A final, noteworthy and truly shameful development of 2021 worth reflecting on is the disgraceful Ghanaian family values bill (LGBTQIA Bill). This bill was introduced not only to criminalize homosexual activity in Ghana; it went to the shocking levels of criminalizing assisting a person convicted under the bill and offering 'mercy' mitigations where the convict recanted and requested rehabilitation. Further the court could order that the 'victim' of the

homosexual encounter be compensated by the ‘culprit’ of the act. The only good thing about this episode is the response of civil society groups to the bill. They rose to the occasion and undertook vigorous education and advocacy campaigns to prevent the bill from passing. One cannot fully appreciate the credit it is to CSOs- in particular the Centre for Democratic Development- that they countered this bill so strongly until one is aware of the Salem-style response instigated by religious groups; where a whisper against the bill led to an accusation of the critic being themselves ‘one of them’ (i.e. a homosexual.)

Egged on by several influential megachurches, the House initially proved intransigent. The Speaker of Parliament announced that it was a priority for him that the bill should pass within the year. The bill has not. Disappointingly, it is not because of the House has come to understand the error of its ways. Rather, a media campaign drawing attention to how it criminalized non-vaginal heterosexual relations that resulted in the bill being colloquially referred to as the ‘antiblowjob bill’ caused a deflation in the feverish ardor of support the bill had commanded within Parliament and the religious demographics of the populace. The bill has not been completely shelved. But Parliament has announced an intention to review and pass it clause by clause. The year ended with no further activity in that quarter. But it may yet be premature to breathe in relief that this plan to abuse and oppress a portion of the populace that is just as human and just as much citizens as any other.

### III. CONSTITUTIONAL CASES

#### 1. Mahama Vrs Electoral Commission and Another (J1 5 of 2021) [2021] GHASC 12 (04 March 2021)- Presidential Election Petition

The plaintiff was the opposition NDC party’s candidate in the 2020 presidential elections. He brought the petition to challenge, not the conduct of the election, or even the figures given by the Electoral Commission, but rather the conversion into percentages of those figures and the declaration that the

incumbent president had crossed the constitutional threshold for victory. The petition was unsuccessful. The Electoral Commission admitted that the Commissioner had erred in her announcement of the results but maintained that the error was not computational. The Commissioner had read out the total number of votes cast in place of the total number of valid votes cast. This error was rectified by a press statement on the following day. There was therefore no reason, according to the Electoral Commission to rerun the election.

So much attention was focused on the implications and chances of success for the opposition that little attention was paid to the most constitutionally important ruling of the court. The ruling was in response to a preliminary objection raised by the Attorney-General that by the nature of the articulated grievance, the petition was not an election petition properly so called since it did not challenge any of the processes involved in its conduct” voting, counting of ballots, collation of results or the announcement thereof. Since, according to the respondent, the challenge was to the errors on the face of the declaration and the subsequent corrections, the petition was not about the elections and therefore could not be pursued by petition to the supreme court. The court rejected that argument. It held, correctly, that the petition sought to reverse the declaration of the 1<sup>st</sup> Respondent as winner of the elections and was therefore an election petition within the meaning of article 64(1). This holding is important for the scope of the power to appeal an electoral result.

At the close of the petitioner’s case, the Electoral Commission chose not to call any witnesses but to depend on its documentary evidence. Counsel for the petitioner vehemently opposed this and even sought leave to reopen their case and subpoena the Chairperson of the Electoral Commission. When the court refused the application, the petitioner sought a review of the ruling. This also failed. Strangely, the decision not to force the EC chair to testify was criticized by several commentators as being anti transparency. There is no force in these objections. It is and has

always been the way of the Common Law tradition to let a party conduct and construct their case according to their whims or chosen strategy. Absolutely nothing could have been gained from a departure of the rule in this case. There are accountability mechanisms in the constitution for probing the affairs of a public body. It is to such mechanisms that those who seek transparency should turn. The court dealt quickly with the substantive issues and before the quarter ended, had concluded the case.

The immediate and unceasing public calls for the unhappy opposition to ‘go to court’ at their refusal to accept the results and the lack of tense notes and public worry in the anticipation that greeted the result were heartening signs of public confidence in the Supreme Court’s performance of its constitutional role in such high stakes disputes and indicates a marked strengthening in the democratic model of the 1992 Constitution since the 2013 election petition.

#### 2. *Tyron Iras Marhgyu) v Board of Governors Achimota Senior High School & The Attorney-General (2021) JELR 107192 (HC) - freedom to manifest religion*

The plaintiff suing per his next friend challenged Achimota school’s refusal to enroll him after he had accepted their offer of admission solely on the grounds of his dreadlocks which he wears as a manifestation of his Rastafarian religion. The school’s defense against the discrimination charge was that the haircut was not required specifically of him; but was a school rule enforced on every pupil and for the purpose of instilling discipline. Being generally applicable and for a purpose intimately connected with the purposes of the school, they could not be held to have discriminated against the plaintiff. This underwhelming defense was rightly rejected by the High Court. Justice Gifty Agyei Addo held that the school had not demonstrated the connection between the rule and the stated purpose and could see no reason why the plaintiff’s right to manifest his religion within its constitutional limits should be taken away on those grounds.

## IV. LOOKING AHEAD

The e-levy saga continues in 2022, we wait to see how that parliamentary impasse will be resolved. The President is not required to replace the two former Supreme Court judges, and, he has not, as at the end of the year, shown any inclination to. Nevertheless, with two more retirements anticipated in 2022, it is unlikely that the president will be able to avoid making any new appointments in 2022. With thirteen justices and the Chief Justice making up the Supreme Court at the moment, the court is swamped. It will not be able to stay afloat of the workload when the impending retirements happen unless the president exercises his prerogative to nominate new justices. What will become of the #Fixthecountry movement? Will it be able to sustain the moment that OccupyGhana and other momentarily promising protest movements were unable to retain, and, critically, will that trigger constitutional reform? The door is not yet closed on the Ghanaian Family Values bill episode is far from over, though it is unclear how it will end. The controversies looming ahead in 2022 evoke dread rather than excitement. But we continue to hope that Ghana will come out the better for it.

## V. FURTHER READING

Maame A. S. Mensa-Bonsu, 'Why Electoral Reforms are Urgently Needed in Ghana' (2021), 29(2) *African Journal of International and Comparative Law*, (185

Samuel Marfo, Halidu Musah, & Festus Owiredu-Amankwah, 'Perspectives on state funding of political parties and the consolidation of constitutional democracy in Ghana, Africa.' (2021) 15(3) *African Journal of Political Science and International Relations* 120

Peter A Atupare, 'A fundamental law of reason and the constitutional law of elections in Africa.' (2021) 8(1) *Journal of Comparative Law in Africa* 1

Christopher Appiah-Thompson. 'The politics of judicial review of elections in Gha-

na: Implications for judicial reforms and emerging electoral jurisprudence.' (2021) 13(2) *Africa Review* 251

Maame A.S. Mensa-Bonsu, 'Forging Forward Introspectively as Ghana's Constitution Turns Thirty', IACL-AIDC Blog (11 October 2021) <https://blog-iacl-aidc.org/spotlight-on-africa/2021/10/11/forging-forward-introspectively-as-ghanas-constitution-turns-thirty>.



# Greece

Dr. Alkmene Fotiadou  
Research Associate  
Centre for European Constitutional Law, Athens, Greece

## I. INTRODUCTION

Throughout 2021, constitutional dialogue focused on the measures taken to tackle the COVID-19 pandemic. The second phase of the pandemic posed different issues than the first one, as lockdown measures were gradually replaced by measures stemming from the availability of vaccines. Mandatory vaccination for health workers and other high-risk and age groups posed issues of respect for human dignity and equality, that had to be addressed through the application of proportionality. The use of vaccination certificates raises issues of privacy and data protection. 2021 was therefore another yet pandemic-dominated year, instead of what it was expected to be - a reflection and celebration of the bicentennial of the Greek Revolution of 1821 and the birth of the Modern Greek State, marked by the enactment of the first Greek Constitutions. The revolutionary Constitutions of 1821 are part of the Greek national identity and constitutional culture. Their enactment is the founding moment of the Greek state. Drafted in the midst of revolution, but also of strong conflicts, the first constitutional documents are part of a collective identity. Their study reveals the impact of this revolutionary constitutionalism memory on the modern Greek constitutional identity.<sup>1</sup>

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Constitutional dialogue in 2021 continued to be fixated on COVID-19 measures. Tackling the pandemic involved the limitation of numerous constitutional rights. The use of

fast-track lawmaking by the executive continued. It must be noted that the ever-changing demands of the unfolding crisis response created the need for quick decision making. Art. 44 of the Greek Constitution stipulates that under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts are submitted to Parliament for ratification within forty days of their issuance or within forty days from the convocation of a parliamentary session. In case, such acts are not submitted to Parliament within the above time-limits or are not ratified by Parliament within three months of their submission, they henceforth cease to be in force. Although criticized for evading Parliamentary deliberation and even fostering lack of transparency, acts of legislative content have proved useful during crises. Much like the need for expediency throughout the financial crisis, the pandemic paradigm ascertains the importance of fast-track lawmaking tools being readily available to the executive. Of equal importance is the existence of a safety valve, which in the Greek constitution is the subsequent ratification by the Parliament.

Proportionality remained the main focus of constitutional controversies. As expected, the availability of vaccines brought forth new constitutional questions involving mandatory vaccinations and vaccination certificates. What has become apparent is that the pandemic, even more acutely than the financial crisis, provides a testing ground for the resilience of constitutional rights and the methods available for evaluating their limitation. It is noteworthy that in Greece the principle of proportionality was firstly derived by way of

interpretation from the rule of law principle and was later on constitutionally entrenched in 2001. Never before had, however, proportionality been in the everyday vocabulary of citizens. This is an important novel aspect of proportionality that appears to be gradually becoming more than part of the judicial culture – it becomes part of the way citizens collectively perceive the protective scope of rights. It appears that along with the severe restrictions on constitutional rights and liberties during the pandemic, awareness for a pressing need for justification of measures has set in motion a process through which the culture of justification travels beyond the realm of law-making and judicial reasoning and is embraced by the citizens.

Another constitutional concept that came into play and is being elaborated toward new directions is solidarity. According to art. 25 para 4 of the Greek Constitution, the State has the right to claim of all citizens to fulfil the duty of social and national solidarity.<sup>2</sup> The traditional interpretation of the concept has been that solidarity provides the doctrinal basis for obligations prescribed by the Constitution, such as the obligation of citizens to contribute without distinction to public charges in proportion to their means (art. 4 para 5 of the Greek Constitution). During the pandemic the notion of solidarity was used to justify the restrictions on rights, in the sense that citizens are expected to demonstrate solidarity by doing their fair share for preventing the spread of COVID 19. This is an interesting interpretation, which poses the question whether solidarity could be used outside the pandemic context to justify limitations imposed on rights. If this proves to be the case, it could add a novel mechanism for restricting rights to proportionality and the general interest.

Pandemic - related topics such as mandatory vaccination and issues of freedom of expression triggered by the legislative attempt to regulate fake news dominated in constitutional debates. This overshadowed the celebration of a very important historical event, that is, the bicentennial of the Greek revolution and the birth of the modern Greek state through the enactment of its first constitution. The revolutionary Constitutions of 1821 are an element of the Greek constitutional and national identity. Reflecting on

their promulgation and the process of their enactment is important for understanding the turbulent history of Greek constitutionalism. Lastly two important rights issues will most probably beget case law and discussions in the future: The amendment of article 191 of the Penal Code on dissemination of false information triggered a heated debate. The central issue concerned the penalization of fake news, which according to the provision are false news capable of causing concern or fear to the public or undermining public confidence in the national economy, the country's defense capacity, or public health. The provision also provides that in case the transaction was performed repeatedly through the press or online, the perpetrator is punished with imprisonment of at least six months and a fine. The publisher or owner of a media outlet responsible would also face prison and financial penalties. The issue of public health was an addition directly related to fake news about the pandemic and the vaccines. The scope of the provision being quite wide, along with the vagueness of what kind of information can undermine public health posed issues of free speech violation. More so since responsibility also covers the publishers and owners of media.

A much-debated constitutional controversy was triggered by a law passed by the Greek government, which aimed at stationing University police on university campuses. Maintaining law and order in the campuses must be balanced against both academic freedom and the 'self-governing' legal status of the universities, as enshrined in the Greek Constitution. The question is whether the Constitution allows the permanent stationing of a police body in campuses, which is not part of the University personnel, nor does answer to the university authorities but is part of the police force. It must be noted that legislation has recently abolished 'university asylum', a constitutional notion derived from the interpretation of academic freedom following the restoration of democracy, which did not allow police to enter University campuses without permission from university authorities except in the case crimes against life were being committed. This allows police intervention when necessary. The new

law has been impugned before the Council of the State, which will review its constitutionality.<sup>3</sup>

Another major issue of human rights is posed by complaints regarding "pushback" operations in the Aegean Region by the Hellenic Coast Guard filed before the European Court of Human Rights. In a letter addressed to the Minister for Citizens' Protection, the Minister of Migration and Asylum, and the Minister of Shipping and Island Policy of Greece, the Council of Europe Commissioner for Human Rights, urged the Greek authorities to put an end to pushback operations at both the land and sea borders with Turkey, and to ensure that independent and effective investigations are carried out into all allegations of pushbacks and of ill-treatment by members of security forces in the context of such operations.<sup>4</sup> Following the ECtHR communication, Greece is obliged to respond and a Chamber of the court is expected to decide on the cases in the summer of 2022.

### III. CONSTITUTIONAL CASES

1. *Decision 133/2021 of the Council of State (Suspension Committee of the Plenary Session): mandatory vaccination of the Fire Service's Special Disaster Management Unit employees.*

Decision 133/2021 of the Council of State, rejected the request for suspension filed by the Fire Service's Special Disaster Management Unit employees against the decision of the Chief of the Fire Service mandating their vaccination. The impugned decision provided for the mandatory transfer of employees to other jobs in case they refused to be vaccinated. According to the Suspension Committee of the Council, this decision was imposed by overriding reasons of public interest, that is, the need to safeguard the smooth and uninterrupted operation of the Special Units of the Fire Brigade, in charge of dealing with disasters. According to the Court, not only is it necessary that this operation is continuous, but in view of the special and crucial nature of disaster management, the full availability of the service personnel must be ensured. This operation can be seriously disrupted in the event that its members become infected

with coronavirus. These compelling reasons of public interest balanced against the reasons put forward by the applicants do not allow granting a suspension. The principle of proportionality was not manifestly violated in view of the nature of the special units' personnel duties, and in particular the special conditions under which they perform these duties (emergency and particularly difficult disaster situations and the need for increased mobility of rescue units), which require the highest possible protection of health from the COVID-19 infection risk, due also the necessity of teamwork. In addition, in numerous cases the special units are required to rescue persons having direct physical contact with them. In view of the above, mandatory vaccination as a pre-condition for the exercise of the special units' personnel duties cannot be considered to be manifestly inappropriate or disproportionate to serve the above-mentioned purposes of public interest. The argument that the principle of equality was violated by the decision was also rejected. The applicants had claimed that the principle of equality was violated based on the fact that COVID-19 is transmitted by both vaccinated and non-vaccinated persons. The Court rejected the claim because of the consequences that non-vaccination might have for the proper functioning of the public service in question.

Due to the special weight of the decisions concerning the protection of public health, regarding the special units' staff and also the medical staff, the Head of the Council of State, made use for the first time of article 25 of law 4786/2021, which gave him the right to announce the result of closed-door conferences of the Court.

## *2. Decisions 250-252 / 2021 Council of State (Committee of Suspensions of the Plenary Session): mandatory vaccination of health workers*

Decisions 250-252 / 2021 of the Committee of Suspensions of the Plenary Session, rejected the applications that requested the annulment of the suspension of non-vaccinated medical, nursing and other personnel of the health structures. It was held that the applications for annulment were manifestly ill-founded and did not justify granting a suspension, on the grounds that vaccination

is required to protect public health from the spread of coronavirus to patients who are particularly vulnerable, and to ensure the proper functioning of hospitals, which would be disturbed in case members of the nursing staff were infected. The Court stressed that the mandatory vaccination imposed on this group is justified in the context of the constitutional obligation to demonstrate social solidarity. Medical and nursing staff due to their increased responsibility for the protection of patients' health have a special duty to demonstrate solidarity. Furthermore, vaccination is a key tool for handling the emergence the COVID-19 pandemic according to valid scientific data, supported by the vast majority of competent scientific bodies in Greece and internationally, whereas according to such data, serious side effects of vaccination are extremely rare. The Court also found that suspension of work without payment of full remuneration is constitutionally tolerable. Furthermore, the Court also held that the obligation to vaccinate only medical, paramedical, nursing and other personnel in hospitals does not violate the principle of equality in relation to other categories of workers and that the prescribed procedure for monitoring and controlling compliance with the vaccination obligation does not violate the legislation on personal data protection. The ruling on the constitutionality of compulsory vaccination measures was based, as stated in the rationale of the decision, on the fact that vaccination protects public health and the lives of citizens, which constitute supreme goals. As a consequence, the significance of the court's decision means by implication that any similar appeal by citizens or trade unions against mandatory vaccination in the future will most probably fail, as a strong judicial precedent appears to have been set, placing compulsory vaccinations within the constitutional framework. The underlying question is whether the ruling implies a hierarchy of constitutional rights. Another important aspect of the decision is that the suspension from work of those who do not want to be vaccinated without pay is constitutionally acceptable.<sup>5</sup> The ruling, could thus for extending compulsory shots for other population groups determined by age and vulnerability criteria.

## *3. Council of the State Decision 622/2021(1<sup>st</sup> Chamber): state responsibility for damage caused by vaccination*

The state bears responsibility in the event of a direct damage to a person's health resulting from of a constitutionally allowed vaccination, carried out in accordance with the legislation enacted having taken into consideration substantiated scientific, medical and epidemiological data. In other words, state responsibility arises directly from article 4 par. 5 in combination with article 25 par. 4 of the Constitution in cases of damage caused by vaccination carried out for the purpose of protecting public health and individual health. Vaccination must also entail the possibility of exemption on an individual basis for special reasons when contraindicated and the damage must not result from an illegal act or omission (such as the administration of a defective or unsuitable preparation, or defects in the vaccination process). The state is thus responsible for reasonable compensation of the victim, which includes the restoration of both material and moral damages. This is because, in these cases, the damage caused by the vaccination constitutes an excessive sacrifice for the victim to bear (damage to health and insult to personality), for the benefit of society as a whole. The applicant's daughter became severely ill and subsequently died, after vaccination with the MMR II vaccine (trivalent measles, mumps and rubella vaccine) from panencephalitis, a very rare (1: 1,000,000 doses of vaccine) side effect of this vaccine. The case is important understood in conjunction with mandatory vaccinations. The state demands citizens to be vaccinated to serve the common good and to fulfill their constitutional obligation to display solidarity. In the case, however, of the rare complications of safe vaccines, the burden that the citizen is requested to bear becomes disproportionate and the state must compensate this excessive sacrifice.

## *4. Decision 1362/2021 of the Council of State (Plenary Session): exemption from religious education in schools.*

The Plenary Session of the Council of State with decision 1362/2021 found unconstitutional the ministerial decisions of the Depu-

ty Minister of Education for the exemption of the students of the secondary education from the lesson of religious education for the school year 2020-2021. According to the ruling, the impugned acts (which are enforceable) are void because they lacked legislative authorization and were thus in violation, thus, of article 43 par. 2 of the Greek Constitution. Although of the finding of unconstitutionality relies of a procedural issue, the underlying question, which is to be revisited by the Court, is the scope of freedom of conscience and religious freedom. It is the content of the statement that parents have to submit to schools for the children to be exempted from the lesson, due to the fact that religious education in Greek schools consists in indoctrination in the Greek Orthodox Religion. The question, therefore, is whether parents will have to state the reasons for requesting the exemption revealing this way their religious and philosophical beliefs. This case is an addition to the case law involving the interpretation of article 16 of the Greek Constitution, which states that the state is responsible for the “development of religious conscience” in conjunction with the concept of a dominant religion.

#### *5. Council of the State (4<sup>th</sup> Chamber) Decision 1751/2021: the slaughter animals without anesthesia is not permitted*

According to the ruling, the legislator failed to strike the right balance between the obligation to protect animals and the obligation to respect the religious freedom of Muslims and Jews living in Greece, when regulating the religious slaughter of animals. The Court took into consideration the case law of the Court of Justice of the EU and the European Court of Human Rights and stated that the Regulation under review (1099/2009) does make the necessary harmonization between animal welfare and freedom of religion, but only sets the framework for the balancing between them, recognizing a wide margin of appreciation to the Member States, under, however, European supervision. In interpreting the provisions of the Charter of Fundamental Rights of the European Union, the evolution of values and perceptions in the Member States

should be considered. Animal welfare must therefore be taken into account in order to regulate religious slaughter. Member States may, inter alia, impose an obligation to give anesthesia before the slaughter of animals, which also applies in the case of religious slaughter. Religious freedom is violated only when the ban on religious slaughter results in the inability of believers to obtain meat from animals slaughtered according to the requirements of their religion in a country. The Greek legislature failed to strike the right balance between the obligation to protect animals under Article 13 TFEU and the obligation to respect Article 13 of the Greek Constitution and Article 10 of the Charter of Fundamental Rights of the European Union enshrining the religious freedom of religious Muslims and Jews living in Greece. The legislator erred in considering that article 4 par. 4 of the Regulation imposed an obligation to allow religious slaughter of animals without prior anesthesia, despite the fact that article 2 para 2 of law 1197/1981 prohibits the killing of mammals in slaughterhouses without prior anesthesia, reflecting modern beliefs in line with how European Union law perceives the treatment of animals during slaughter. This decision was received with enthusiasm by animal rights supporters. It could create though issues of religious freedom and integration.

## IV. LOOKING AHEAD

Predictions for the future are becoming more difficult each year. We live in an age where unexpected crises trigger constitutional reactions more and more often. 2022 will probably be an election year. Furthermore, due to the diffuse, decentralized, ex post system of constitutional review, constitutional controversies that marked 2021 will undergo constitutional review in 2022. The pandemic case-law will continue to unfold, while the Council of State is expected to rule on the constitutionality of establishing a University police body. The three interlocking crises that Greece has been facing, that is, the financial crisis, the pandemic and the migration crisis will continue to beget constitutional and human rights issues.

## V. FURTHER READING

George Karavokyris, ‘The Coronavirus Crisis-Law in Greece: A (Constitutional) Matter of Life and Death’ (VerfBlog, 14 April 2021), <https://verfassungsblog.de/the-coronavirus-crisis-law-in-greece-a-constitutional-matter-of-life-and-death/>

X. Contiades and A. Fotiadou, ‘Facing the Financial Crisis: The Greek Constitutional Experience’ (e-politeia, 1/22) <https://www.epoliteia.gr/wp-content/uploads/2022/01/28-39.pdf>

1 X. Contiades, *The adventurous history of the revolutionary Constitutions of 1821 - The founding moment of the Greek state* (in Greek), (Kastaniotis, 2021)

2 [https://www.constituteproject.org/constitution/Greece\\_2008?lang=en](https://www.constituteproject.org/constitution/Greece_2008?lang=en)

3 Eirini Fasia, *'Police-Governed' Universities: The New Greek Law on Higher Education*, (VerfBlog, 15 February 2021) <https://verfassungsblog.de/police-governed-universities/>

4 <https://www.coe.int/en/web/commissioner/-/greek-authorities-should-investigate-allegations-of-pushbacks-and-ill-treatment-of-migrants-ensure-an-enabling-environment-for-ngos-and-improve-recept>

5 <https://www.ekathimerini.com/news/1173100/cos-mandatory-vaccination-is-constitutional/>



# Honduras

Rafael Jerez

MD Anderson Research Fellow 2021-2022

Institute of Transnational Law of the University of Texas at Austin

## I. INTRODUCTION

Like in every other country, the COVID-19 pandemic prolonged its effects in Honduras during 2021. However, the main event of the year was the general election celebrated in November.<sup>1</sup> The outcome of the election would have considerable consequences in the country's future, considering it represented the end of Juan Orlando Hernandez's tenure in the presidency after being reelected in a controversial 2017 election despite constitutional prohibitions regarding term limits. With newly created electoral bodies, the enactment of new electoral legislation occurred one day before the beginning of the general election process, opening the door for constitutional claims concerning some of its provisions.

Parallel to the electoral context, three of the most pressing debates that occurred in 2021 were the constitutional reforms that, on the one hand, prohibited abortion and, on the other, established a voting threshold higher than that already contemplated in the Constitution for the reform procedures. The new amendment threshold was also set for future amendments regarding the existing ban on same-sex marriage. Finally, the debate on the constitutionality of the Employment and Economic Development Zones (ZEDE), a figure included in the constitutional order since 2013, continues to generate controversy.

Considering this is the first report about Honduras in the *Global Review*, it is imperative to start the next section with an introductory context of its constitutional system.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. Honduran Constitutional System

The Honduran Constitution was enacted in January 1982 replacing the 1965 Constitution and has endured for forty years. The Constitution created the Judiciary Power with the competency to administer justice on behalf of the State. In terms of constitutional justice procedures, among its provisions, the Constitution recognized certain guarantees to procure the effectiveness of the fundamental rights and the defense of the constitutional order. One such guarantee is *Hábeas Corpus* or *Exhibición Personal* (Article 182), against illegal imprisonments or detentions that violated a person's liberty, and when a person suffers torments, torture, restriction, coercion (among others) that are unnecessary for its personal safety or to maintain the order of the prison in the case of legal imprisonment and detention. Article 183 recognized the *Amparo* guarantee to maintain or reestablish the exercise of rights and guarantees recognized in the Constitution and international treaties ratified by Honduras. This article also declares that in individual cases that a law, resolution, or act of an authority does not oblige and does not apply to the citizen that presents the claim because it contravenes or diminishes rights recognized by the Constitution. Articles 184 and 185 regulate the Unconstitutionality Guarantee (*Garantía de Inconstitucionalidad*), and Article 186 the *Revisión* Guarantee as an exception to *res judicata* in criminal and civil issues. Article 319 assigned the acknowledgment and resolution of the guar-

antees of Unconstitutionality and *Amparo* to the Supreme Court of Justice. Alongside the 1982 Constitution, the *Amparo* Law enacted in 1936 was still applicable and designated the acknowledgement of the guarantees of *Amparo* and *Hábeas Corpus* to different jurisdictions depending on the authority that committed the violation.

After a constitutional amendment approved by the National Congress in 2000 concerning the organization of the Judiciary Power, in 2004 Congress enacted the Law of Constitutional Justice, in replacement of the *Amparo* Law. The Law of Constitutional Justice regulates the constitutional guarantees of *Hábeas Corpus*, *Hábeas Data*, *Amparo*, *Inconstitucionalidad*, *Revisión*, and conflicts that arise between the Powers of the State, and between these and the National Electoral Council (CNE). In January 2013, Congress ratified an amendment that included the *Hábeas Data* guarantee in the Constitution, the latter recognized every person's right to access, update or suppress information about themselves and their properties hosted in public or private registries and other databases. The amendment incorporated the recognition of the Constitutional Chamber of the Supreme Court in Article 316 as one of its different Chambers along with its competencies to receive claims regarding the Guarantees of *Hábeas Corpus*, *Hábeas Data*, *Amparo*, *Inconstitucionalidad*, *Revisión*, and conflicts that arise between the different State Branches, including the CNE. The article established that the decisions in the Constitutional Chamber had to be taken unanimously by its five judges, in case there is no unanimity in the Chamber, the claim would rise to be decided by 15 judges that make up the Supreme Court of Justice, excluding the five that make up the Chamber.<sup>2</sup>

## 2. Constitutional amendments

On January 21, 2021, the National Congress approved two constitutional reforms on abortion and same-sex marriage. The first of these two reforms included Article 67 of the Constitution. Originally this provision protected the unborn, who are considered born for the purposes that favor

them according to the law. Life is protected since the moment of conception. The reform prohibits and declares illegal any practice carried out by the mother or a third party that interrupts the life of the unborn. Additionally, Congress included a new reform threshold of three-fourths of the 128 votes to reform article 67 and contradictorily stated that the provisions of this article will not lose force when they are supposedly repealed or reformed by another constitutional provision. The reform declared null and void any future constitutional provision that contradicts the prohibition.

The amendment also comprised of the reform of Article 112 relative to marriage regulations. In the original 1982 constitutional text, Article 112 recognized the right to marriage between men and women, equality of spouses towards the law, and recognized common law marriage between persons legally capable of contracting marriage. In 2004, Congress passed an amendment to this Article, clarifying that the legal recognition to marriage applied only to men and women who had this condition naturally. The reform included a ban on marriage and common law marriage between persons of the same sex and added that same-sex marriage and common law marriage that are valid according to a foreign legal system are not valid in Honduras. The 2021 amendment reinforced the prohibition by adding the same amendment threshold requirement as in Article 67, a three-fourths vote of the Congress members, and the declaration of nullity and invalidation of future provisions that contravene the prohibition.

The National Congress based both amendments on Article 1 of the International Covenant on Civil and Political Rights (ICCPR) regarding the right to self-determination of nations to establish their political conditions and seek their economic, social, and cultural development, Article 4.1 of the American Convention on Human Rights (ACHR), and the obligation to adopt measurements in harmony with "social and cultural values and principles"<sup>3</sup>. It is important to mention that, according to Article 373 of the Constitution, amendments to its text require two-thirds of the votes of Congress. The Legislative Power

is made up of 128 Congress members. Therefore, a constitutional amendment requires 86 votes. However, Article 374 establishes a catalog of unamendable provisions, one of them being Article 373 regarding amendment procedures and voting conditions. The Constitution only requires a three-fourths voting threshold for the approval of international treaties and conventions signed by the Executive Power, and for impeachment of the President of the Republic (Articles 20 and 234). The following section describes the claims filed against the amendments towards the Constitutional Chamber.

## III. CONSTITUTIONAL CASES

### 1. *Abortion and same-sex marriage amendment: Unconstitutionality challenge*

According to Honduran legislation, the Unconstitutionality Guarantee contains two modalities: a) against the substance of a constitutional amendment when it contravenes the Constitution, or b) against the form of approval when the process did not comply with the legislative procedure provided for in the Constitution (Article 75 of the Law of Constitutional Justice). The Guarantee of Unconstitutionality can be partial if it challenges specific provisions of law, or total if it challenges the entire law (Article 89 of the Law of Constitutional Justice).

The Constitutional Chamber received two Guarantee of Unconstitutionality claims against the amendment described in the II section regarding abortion and same-sex marriage. One of them was endorsed by 20 social organizations and their leadership.<sup>4</sup> They focused on the unconstitutionality of the constitutional amendment of Article 67 and against Article 196, paragraph 1, of the Penal Code.<sup>5</sup> The plaintiffs built their reasoning on six main reasonings conveyed by the Constitutional Chamber in past decisions. One of these reasonings is that the Constitution is the minimum base of protection of human beings and their dignity, it is not exhausted in its text, it transcends it. Also, the Constitutional Chamber can declare the unconstitutionality of norms that contravene human rights treaties in force in Honduras, and judges other

than the Constitutional Chamber can decide the non-application of laws in matters of their competence without ruling on their constitutional validity, among others.

The organizations filed eight arguments of unconstitutionality. The first argument is the violation of the right to life recognized in the Constitution (Article 65), international conventions ratified by Honduras (ACHR and the ICCPR) and the rulings of the Inter-American Court of Human Rights. The second argument related to the right to health protected in Article 145 of the Constitution, in the Convention on the Elimination of All Forms of Discrimination against Women, and the ACHR. The third argument comprehended the violation of the right to human dignity and the development of a dignified life protected by Article 59 of the Constitution and international conventions (Universal Declaration of Human Rights and ICCPR). The violation of the principle of equality and non-discrimination was the fourth argument, considering that the amendment was directed exclusively to adult women and minors, the consequences it could produce determined by socio-cultural inequalities between men and women, and the vulnerabilities that suffer women that recur to unsafe abortions due to their economic conditions. The fifth argument was the violation of the principle of progressive guarantee of human rights contained in Articles 63 and 64 of the Constitution and Article 2.1 of the International Covenant on Economic, Social, and Cultural Rights.

The claim included three additional arguments of unconstitutionality. Among these was the violation of the principle of national sovereignty, considering that the amendment established a new threshold to reform Article 67 in the future, in contravention of Articles 373 and 374 that already described voting thresholds and enumerated the unamendable provisions of the Constitution. Another argument was the violation of the principle of progressivity of Article 64, which prohibits the application of legislation and other norms if they diminish or restrict constitutional rights and guarantees.

Indyra María Mendoza Aguilar, coordinator of the Lesbian Network (*Red Lesbica*) “*Cat-*

*trachas*” filed the second Unconstitutionality Guarantee claim.<sup>6</sup> This challenge included two procedural arguments of unconstitutionality and three arguments addressing the substance of the amendments of Articles 67 and 112 of the Constitution. The arguments comprehended the non-compliance with the constitutional requirements of Article 214 regarding the procedure required for the debate of legislative proposals, and the alleged non-compliance with the 86 votes threshold required to approve the reforms. The claims against the merits of the amendments focused on the alteration of Articles 373 and 374 that regulate the process and conditions for constitutional amendments. The last argument of unconstitutionality of this challenge emphasized the diminishing and restriction of human dignity and the fundamental rights to equality, non-discrimination, and personal freedom of LGBTQ persons guaranteed in Articles 60 and 69 of the Constitution and 24 and 1.1 of the ACHR. This last argument also used the Constitutionality Block doctrine recognized by the Constitutional Chamber upon which international treaties and standards of interpretation of human rights are binding sources in the administration of justice.

Both challenges were admitted for judicial review by the Constitutional Chamber and are still pending a decision.

## 2. *The National Autonomous University of Honduras and the “ZEDE”: Unconstitutionality challenge*

In 2011, Congress amended Article 329 of the Constitution to create the Special Regions of Development (*RED*), with the purpose of “accelerating the adoption of technologies that enable the production and provision of services with high added value”.<sup>7</sup> The *RED* were capable of attracting local and foreign investments, had a legal personality, a system of public administration, legislation, and the ability to subscribe to treaties related to commerce, among other characteristics. This amendment also stated that the *RED* were subject to the National Government regarding sovereignty, national defense, foreign affairs, electoral matters, and the national identification

system. In October 2012, the Supreme Court declared the unconstitutionality of the amendment that created the *RED*.<sup>8</sup> The Court recognized the unamendable character of the constitutional provisions regarding the territory. The regulations developed in the Constitutional Statute of the *RED* violated the Constitution because it absorbed competencies that belong to the three State Powers, and the differential treatment concerning the exercise of constitutional rights of citizens once they entered the territories of the *RED* contravened the right of freedom of movement recognized in Article 80 of the Constitution. The latter had to be analyzed harmonically, the *RED* violated the territory as a key element of the structure of the State, the National Congress did not have the faculty to enact legislation that injured the sovereignty and the Republic.

Later, in January 2013, the National Congress approved an amendment to Articles 294, 303, and 329 of the Constitution, creating the *ZEDE*. The new provisions gave Congress the competency to create these Zones with a two-thirds vote and after citizens authorize it through a referendum in certain cases.<sup>9</sup> Once created, the *ZEDE* had a legal personality, and they would be subject to a special tax regime and an exclusive judicial system. However, the amendment expressed that these Zones would be subject to the national legal system concerning sovereignty, national defense, foreign affairs, electoral regulations, and identification system. Article 294 refers to the division of the national territory in departments and municipalities, and it is an unamendable provision, but the amendment added a paragraph that includes the *ZEDE* to the territorial design of the State. In June 2013, Congress enacted the Organic Law of the *ZEDE*, expanding the basis of the new constitutional provisions.

The Constitutional Chamber of the Supreme Court sustained the constitutionality of the *ZEDE* in a unanimous vote in 2014, after receiving an Unconstitutionality Guarantee claim against the amendments of Articles 294, 303, and 329 of the Constitution and the Organic Law of the *ZEDE*. The claimant’s arguments focused on the violation of the national territorial integrity, infringement

of the exclusive competence of the National Congress to enact taxes, violation of the aerial and territorial sovereignty of the State in enabling the entrance of ships and planes to the ZEDE. Other arguments addressed the contravention of the unamendable provision regarding the form of government and the nondelegable character of the faculties of the three Powers of the State. The Constitutional Chamber concluded that the amendment and the special legislation subject to judicial review expressly recognized that the *ZEDE* had to oversee the respect of constitutional provisions regarding the integrity of the national territory. The *ZEDE* does not violate the national taxing system because it was Congress, as a constituted power, that delegated this faculty.<sup>10</sup> There was no violation of the national sovereignty because Congress, as a constituted power that derives its authority from the constituent power, had the legitimacy to exercise sovereignty and enact the reviewed figure. Lastly, the Chamber resorted to the *ZEDE* Organic Law's provisions concerning compliance with the national legal system in matters such as sovereignty, justice administration, territory, among others, and therefore with the constitutional form of government.<sup>11</sup>

Six years after this decision, the *ZEDE* came back to the public agenda debate during May 2021 when Congress approved additional regulations, paving the way for more controversy and opposition to the figure. The United Nations Office in Honduras issued a public statement urging the Honduran authorities to “check the compliance of the *ZEDE* with the constitutional and legal framework and the State's international obligations to respect and guarantee human rights.”<sup>12</sup> Amid the ongoing debate, in July 2021, the National Autonomous University of Honduras (UNAH) filed an Unconstitutional Guarantee claim against the substance of Article 34 of the Organic Law of the *ZEDE*.<sup>13</sup> This provision enabled the *ZEDE* to establish educative policies for their territories. According to the UNAH, this violated Article 160 of the Constitution that recognizes the latter as the exclusive authority of superior education in the country, along with international treaties on the matter. The University argued that the challenged provision contravened Article 151 of the Constitu-

tion that recognizes education as an essential function of the State to preserve and promote culture. The third argument of unconstitutionality contended that the amendments that created the *ZEDE* did not modify Articles 151 and 160 of the Constitution referring to the authority of UNAH over national education. In October 2021, the Constitutional Chamber admitted the challenge for review, and it is still pending a final decision.

It is worth mentioning that on June 14, 2021, the Supreme Court approved the creation of the Special Jurisdiction of the *ZEDE* that “will be a part of the structure of the Judiciary Power, with exclusive jurisdiction over the Zones.”<sup>14</sup>

### 3. *Electoral v. Constitutional Justice: Unconstitutionality challenges*

Honduras held primary and general elections in March and November 2021. Nevertheless, two years before, in 2019, Congress created new electoral bodies through a constitutional amendment, the National Electoral Council (CNE) and the Electoral Justice Tribunal (TJE), replacing the Electoral Supreme Tribunal (TSE) that existed between 2004-2019. For the first time in the democratic history of the country, there was a specialized electoral judicial body. Under the former institutional design, the TSE received electoral claims, and its decisions could only be challenged through an *Amparo* presented towards Constitutional Chamber of the Supreme Court. According to the constitutional amendment, the TJE became the supreme judicial authority in electoral matters; however, the amendment included an exception that opened the door for the Constitutional Chamber and its constitutional competencies.

The new institutional design required secondary legislation, considering that the Political Organizations and Electoral Law complied with the former TSE structure. Congress approved the new Electoral Law on May 26, 2021, one day before the CNE announced the beginning of the pre-electoral stage leading to the general election in November. Once the law was enforceable to the ongoing electoral process, a group of political parties filed an Unconstitutional Guarantee claim against Articles 42, 44, and 46 of the new Electoral

Law.<sup>15</sup> These provisions addressed the integration of members of the polling stations and the Municipal and Departmental Electoral Councils. In the repealed electoral legislation, every political party had a representative in these bodies. The new regulations established that each of the three types of bodies have five members, and it is mandatory that 3 of these belong to the most voted parties in the primary election.<sup>16</sup> For the 2021 general election, 14 political parties had an official registration towards CNE, this meant that only the 3 most voted parties in the March 2021 primary elections would have representation in all the electoral bodies, the rest of the parties would have representation on a rotation basis, in order of seniority. Further information about the arguments used by the political parties has not been made public. The Constitutional Chamber admitted the claim in August 2021, and it is still pending a resolution. In parallel, the electoral process continued its course, and the new authorities of the Executive and Legislative Powers took their offices in January 2022.

## IV. LOOKING AHEAD

The year 2022 will be the last one of the tenures of the current Supreme Court judges (2016-2023) before the election of a new cohort for the period of 2023-2030. Therefore, 2022 acquires importance concerning the resolution of relevant constitutional cases still pending a final decision, as described in this report.

Xiomara Castro, leader of the opposition and the first woman ever to be elected president was sworn in on January 27, 2022. A couple of days before Castro's inauguration, with a new distribution of forces between political parties in the National Congress for the legislature of 2022-2026, the election of the Directive Council of Congress led to a constitutional crisis that resulted in the election of two parallel Directive Councils of Congress in January 2022. Both parties to the conflict resorted to the Supreme Court for constitutionality control of the procedures following both elections.

During the ongoing conflict, one of the sessions led by the Directive Council (supported by Castro) elected a new Solicitor

General and Deputy Solicitor General and approved legislation. The Office of the High Commissioner for Human Rights in Honduras expressed its concern over the confirmation procedure of both high officials and its compliance with the Constitution.<sup>17</sup> Whether there will be constitutional repercussions from the confirmation procedure and legislation passed before the parties reached an agreement remains to be seen.

## V. FURTHER READING

Dennis Hercules, 'Las Zonas de Empleo y Desarrollo (ZEDE): Observaciones sobre la nueva figura de división territorial de Honduras' (*El Milenio*, 1 November 2020) <<https://elmileniohn.com/las-zonas-de-empleo-y-desarrollo-economico-zede-observaciones-sobre-la-nueva-figura-de-division-territorial-de-honduras/>>

Rafael Jerez & Juan Carlos Aguilar, 'The unconstitutionality of a constitutional reform: the case of Honduras', (*ConstitutionNet*, 31 March 2021) <<https://constitutionnet.org/news/unconstitutionality-constitutional-reform-case-honduras>>

Rafael Jerez, 'Los Avances y retrocesos en la nueva Ley Electoral de Honduras' (2021) 66 ENVÍO <[https://drive.google.com/file/d/1SZwQXoRrgZWvobjbNY-q2ia\\_5W6QzNArSg/view](https://drive.google.com/file/d/1SZwQXoRrgZWvobjbNY-q2ia_5W6QzNArSg/view)>

1 Xiomara Castro, from the opposition party *Libertad y Refundación (Libre)*, won the presidency, the first woman ever elected for this office in the democratic history of the country. Her victory ended with twelve consecutive years of tenure of the National Party (*Partido Nacional*), after the Coup of 2009 against former President Manuel Zelaya, her husband.

2 The Law of Constitutional Justice created the Constitutional Chamber, nevertheless, the constitutional amendment of 2013 incorporated the Chamber and its competencies in the constitutional text. The unanimous vote requirement applies to the other Chambers of the Court as well. According to article 16 of the bylaws of the Supreme Court, its 15 judges are distributed in four Chambers: The Constitutional Chamber (five judges), the Civil Chamber (three judges), the Penal Chamber (three judges), and the Labor-Administrative Litigation Chamber (three judges).

3 *Decreto Legislativo No. 192-2020 2021 Considerando 7.*

4 *Recurso de Inconstitucionalidad en contra del decreto No. 130-2017 del Código Penal, Artículo 196 párrafo 1, y en contra del artículo 1 del decreto 192-2020 que reforma el artículo 67 de la Constitución de la República* (April, 2021).

5 The Penal Code was published in the official report of the State in May 2019, and it entered into force in 2021. Article 196 of the Penal Code prohibits abortion and punishes it with imprisonment between 3-10 years depending on the degree of the consent of the mother, the use of violence, and intimidation. The provision includes fines against physicians that cooperate with the procedure.

6 *Recurso de Inconstitucionalidad en contra del decreto 192-2020 contentivo de la reforma a los artículos 67 y 112 de la Constitución de la República* (February, 2021).

7 *Decreto Legislativo No. 4-2011 2011 Artículo 329.*

8 *Certificación de la sentencia del Recurso de Inconstitucionalidad 769 =11* (October 17, 2012).

9 The referendum requisite does not apply when the ZEDE covers territories with low population density where the number of permanent habitants per square kilometer is inferior to the average in rural zones. This requirement must be certified by the National Institute of Statistics (INE).

10 Article 206 of the Constitution expresses that the faculties of Congress are non-subject to delegation.

11 Short after the Supreme Court issued the RED decision in October 2012, the National Congress removed the four judges of the Constitutional Chamber that had voted against the RED, only the one who voted in favor remained in office. When the Constitutional Chamber issued the ZEDE decision in 2014, new judges integrated the Chamber and the five votes agreed on the constitutionality of the figure.

12 María Elena Calix, 'Las ZEDE podrían suponer serios riesgos para la garantía de los derechos humanos por parte del Estado de Honduras' (Naciones Unidas Honduras, 1 June 2021) <<https://presencia.unah.edu.hn/noticias/sala-constitucional-admite-recurso-contra-las-zede-interpuesto-por-la-unah/>> accessed 1 February 2022.

13 Yuri Vargas, 'Conozca los detalles del recurso de inconstitucionalidad contra las ZEDE, interpuesto por la UNAH' (*Presencia Universitaria*, 21 de julio de 2021) <https://presencia.unah.edu.hn/>

noticias/conozca-los-detalles-del-recurso-de-inconstitucionalidad-contra-las-zede-interpuesto-por-la-unahconozca-los-detalles-del-recurso-de-institucionalidad-contra-las-zedes-interpuesto-por-la-unah/ accessed 16 October 2022.

14 *Acuerdo No. CSJ-01-2021 Establecimiento de la Jurisdicción Especial de las Zonas de Empleo y Desarrollo Económico (ZEDE).*

15 Braian Maldonado, 'Admiten recurso de inconstitucionalidad contra nueva Ley Electoral; CSJ lo resolvería la próxima semana' (*TuNota*, 24 de agosto de 2021) <<https://www.tunota.com/honduras-hoy/articulo/recurso-inconstitucionalidad-nueva-ley-electoral-corte-suprema-justicia-elecciones-honduras-2021>> accessed 17 October 2022

16 In every election, there are ballots to elect representatives for presidential, legislative, and municipal levels.

17 *Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, 'OACNUDH expresa su preocupación por la elección del Procurador y Subprocurador de la República'* (Twitter, 4 February 2022) <[https://twitter.com/OACNUDH/status/1489708355597877251?s=20&t=Dz9YjYjEY-0lqpF2bB\\_tFkw](https://twitter.com/OACNUDH/status/1489708355597877251?s=20&t=Dz9YjYjEY-0lqpF2bB_tFkw)> accessed 20 February 2022



# Hungary

Fruzsina Gárdos-Orosz  
Senior research fellow  
Institute for Legal Studies Center for Social Sciences  
Associate professor  
ELTE Eötvös Loránd University Faculty of Law

Zoltán Pozsár-Szentmiklós  
Associate professor  
ELTE Eötvös Loránd University Faculty of Law

Bernadette Somody  
Assistant professor  
ELTE Eötvös Loránd University Faculty of Law

## I. INTRODUCTION

By 2022, Hungary has seen five waves of the global Covid-19 pandemic, with nearly 1,900,000 confirmed cases resulting in more than 46,000 deaths.<sup>1</sup> In 2021, mortality rates per capita were among the highest in the world in Hungary.

After the World Health Organisation declared Covid-19 a pandemic and the outbreak of the epidemic, on 11 March 2020, based on the Fundamental Law of Hungary,<sup>2</sup> the Government declared the state of danger. With this declaration, a special legal order came into force across Hungary. General rules of state operation were suspended, and the Government was given the authority to issue special, emergency decrees and introduce extensive extraordinary measures, including restricting the fundamental rights of people.

In Hungary, the Government is the general organ of executive power; it exercises all functions and powers that are not expressly conferred by the Fundamental Law on another organ. The Government is responsible before the Parliament in this parliamentary system, where it has enjoyed a two-thirds majority since 2010. The Government, as the head of the executive branch, could originally mostly issue Government decrees in delegated competence matters. In recent years, the Constitutional Court and other high state

offices, such as the ombudsperson responsible for the signalisation of human rights matters, were held by people elected by the governing majority. Therefore, in 2021, due to the above circumstances, the Government parties in Parliament ruled the country without effective control institutions.

We will first provide basic information on the introduction of the special legal order related to the pandemic, called a state of danger, and then will discuss the constitutional review and the protection of human rights by the Constitutional Court in the state of danger. We will conclude with some remarks on the effectiveness of this protection.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The *lex specialis*, the state of danger, the special, centralized, and limited legal order have become *lex generalis* in recent times. There were already three different special legal orders in force in Hungary (prolonged by Government decrees) in force in 2021 (a state of danger under the Fundamental Law; a health emergency under the Act on Public Health; and an emergency based on mass migration under the Act on asylum) and any of these can be prolonged following the assessment of the two-thirds government majority.

Furthermore, the Parliament has adopted the Ninth Amendment to the Fundamental Law, entering into force in 2023, according to which the Government rules by decree in all special legal orders. In the special legal order, according to the official justification of Article 54 para (1) of the Fundamental Law, fundamental rights can be suspended or restricted more than prescribed in Art. 1. proportionality close. The special legal order is a deviation from the application of ordinary law. This deviation takes two forms: one is a different approach to human rights limitations, while the other is a different approach to the separation of powers, a rearrangement of the competence of state organizations.

Critical views appeared already in April 2020 that a takeover of power took place in Hungary,<sup>3</sup> and the Government has achieved unlimited power. It is quite clear from a constitutional law point of view that, according to Article 53 of the Fundamental Law, the possibility to declare a state of danger in case of a pandemic was not included in the text. As the pandemic is not an industrial catastrophe or a natural disaster, as the text of the Fundamental Law requires, it was rather a vague understanding of this provision to apply that to the situation. The health crisis was regulated in the act on health care (Act CLIV of 1997 on health care) and the catastrophe act also offered further possibilities to act in such a situation with certainly less government competence than in a special legal order.

As to the protection of fundamental rights in the special legal order, Article 54 of the Fundamental Law declares that, apart from certain rights, such as the right to a fair trial or human dignity, the application of the rights can be suspended or can be restricted beyond the general standards of rights restriction, with the proportionality test incorporated into Article I (3) of the Fundamental Law. The operation of the Constitutional Court, however, cannot be restricted. The Fundamental Law also remains in force.

By 2016, all Constitutional Court judges were elected for 12 years, instead of the former nine-year term, and all of them have been supported if not elected by the ruling majority. In recent years, in controversial po-

litical issues, the Court usually makes decisions favourable to Government policies, as we described in our former reports.

Apart from the fundamental question of the constitutionality of the declaration of the special legal order, which, unfortunately, in the absence of a petition, was not reviewed by the Constitutional Court, the problematic cases that reached the Court were quite different. In sum, the accessibility of the Constitutional Court did not change in this period, and its operation was also intact. The workload and the decided cases show no difference between the year 2021 and the previous years, which means that the everyday operation was stable. It is even more interesting in this light that the constitutionality of several measures and the overall constitutional assessment of the constitutionality of the declaration and the application of the state of danger and its framework were never discussed.

The role of the Constitutional Court in this particular legal order is the same as in previous years. Although some important decisions were made in constitutional complaint procedures, almost no petitions were raised in general matters of the exercise of public power in emergency situations. Moreover, in almost all important constitutional complaint procedures that were decided on the merits (only a few related to the volume of questions of fundamental rights were raised during the pandemic) a so-called constitutional requirement was born together with the rejection of the petition. The constitutional requirement is a soft tool to influence the legislator, the Government, or the judiciary to decide fundamental rights matters in line with the constitutional standards and in these cases, the legislative act, the Government Decree or the judicial decision is not annulled. Furthermore, the Constitutional Court does not have the competence to formulate its activity in a way to be a quasi-counsellor to the legislator and the judiciary during the times of pandemic in fundamental rights matters.

Concerning our hopes that in extraordinary times the extraordinary responsibility that the state of danger as a special legal order means in a constitutional democracy will be reflected upon scrutiny failed to come true. Even if some of the cases that reached the Constitutional Court are important ones in

the overall assessment, no significant decisions have been made. We could not get any closer to understanding the scope of the limitations of the rights in the state of danger or limiting the separation of powers.

In the next subchapter, we will discuss the most important cases of 2021 in detail.

### III. CONSTITUTIONAL CASES

#### *Constitutional complaints – lacking clarification of fundamental rights standards in the special legal order*

In Decision 3537/2021 (XII. 22.), the Constitutional Court found the emergency decree requiring health workers to be vaccinated against Covid-19 constitutional. Under the regulation, vaccination could only be exempted for health reasons. In the absence of vaccination, the employment of health workers was terminated with immediate effect and without severance pay. The Court argued that the right to health self-determination affected by compulsory vaccination is derived from the right to human dignity, the limitation of which is subject to the general proportionality test under the Fundamental Law, even in a special legal order. Thus, the Constitutional Court avoided interpreting the provision of the Fundamental Law on the limitation of fundamental rights in a special legal order. Although the vaccination was required by an emergency decree, the Constitutional Court assessed the constitutionality of the restriction of the health worker's rights based on the general proportionality test.

#### *Freedom of information*

A case decided on the merits in 2021 was initiated by a member of the Parliament in the form of a constitutional complaint on January 21, 2021, against the 521/2020. (XI. 25.) Government Decree on access to public data. According to this decree, public data could be withheld for 40 days in case it might hinder the operation of the state authority. The Constitutional Court rejected the constitutional complaint but formulated a so-called constitutional requirement stating that the rules on privacy in Art. VI. para (3) of the Fundamental Law require that when the decree is applied, the state organizations must

explain the pandemic-related reasons for their hindrance in providing the public information. [Decision 15/2021. (V. 13.) AB].

### *Freedom of assembly*

During the summer of 2021, Decision 23/2021 (VII. 22.) presented a summation of the different approaches of the judges. Government Decree 484/2020. (XI. 10.) Para 4. (1) was claimed to be unconstitutional because it prohibits assembly when the rules of obligatory distance and masque wearing are met. According to the petition, this limitation is disproportionate to the aim pursued and is discriminatory as well, because other types of events, such as sporting and religious ones, could be held.

In this case too, the Constitutional Court declared a so-called constitutional requirement and did not annul the law, stating that, according to Article VII. (1) of the Fundamental Law and according to Article 54(1) on the possibility of restricting fundamental rights in special legal orders, the ban on assemblies must be temporal and reviewed regularly. The suspension of the exercise of the right must be restricted in scope as well in the case of restriction beyond article I (3), the standard proportionality test. The Constitutional Court rejected the provision because it found that at the time of the judicial decision the complete ban on demonstrations could be justified.

The decision was contested by five dissenting opinions and five concurring opinions. One of the judges argued that the constitutional requirement, in this case, was not an acceptable legal consequence, as the Constitutional Court does not have the competence to advise on interpretation to the legislator. Agreeing with this criticism, we would add that it is generally problematic when the CC uses soft law instruments instead of being the arbitrator of the concrete matter at hand. However, the major debate was not the soft law v. hard law debate and the interpretation competence, but rather the test to be applied in times of Covid-19 for the restriction of fundamental rights.

The majority opinion suggested that the same proportionality tests should be applied in times of Covid-19 as well. Arguments were raised, however, against this

approach by saying that the necessity of introducing one or the other measure falls outside the scope of constitutional review in such times. Although it is possible to check if there is any connection between the implemented rule, the goal of protection to be achieved, and the temporality of the measure, it is not possible to decide in the short run if there is a constitutional necessity to implement that rule.

### *Right to property*

The Constitutional Court in Decision 8/2021. (III. 2.) refused the constitutional complaint of the municipality of Göd as well. In its complaint, the municipality of Göd contested the constitutionality of the Government Decree that established a “special economic area” within the industrial territory of the city, thereby assigning the administration of that territory (including tax levy) to the county council. The Constitutional Court formulated a so-called constitutional requirement again, meaning that the National Assembly is obliged to offer due financial compensation for the tasks assigned to the municipalities.

According to the Constitutional Court, this reorganization of the property is necessary and proportionate in such a situation. The property right is not unlimited; the statutory limitation is possible if it conforms to the Fundamental Law. The Court emphasized that the Government is authorized to take prompt and effective measures in a state of danger. Preparation is not always possible. The measures were not discriminatory between the legal subjects in an equal position, and the measure was not retroactive.

### *The Autonomy of universities*

One of the autonomies targeted by governmental measures is that of universities. As we discussed in the reports of 2017 and 2018, the Amendment of the National Tertiary Education Act introduced new conditions for the operation of universities accredited outside the European Economic Area in Hungary which were applicable also to the existing higher education institutions, including the Central European University (CEU). By 2018, the CEU was forced to give up part of its activities in

Budapest. The case was brought before the Constitutional Court by the CEU and by one-fourth of the MPs. The Court, however, seemed to be reluctant to decide on it and postponed the decision, using procedural tools. Later in 2018, the Court suspended its procedure until the decision in the infringement procedure against Hungary before the Court of Justice of the European Union (CJEU),<sup>4</sup> even though the suspension requirements were questionable. The Constitutional Court’s proceedings continued after the CJEU ruled on 6 October 2020, but the case was ended without a decision on the merits. The relevant provisions of the National Tertiary Education Act were amended in 2021 to implement the CJEU’s ruling. In light of the latter and the passage of time, the Court declared that the original submissions no longer needed to be adjudicated.<sup>5</sup> Eventually, as we had suspected its intentions before, the Court avoided the political conflict with the Government.

In 2019, the Government started to reorganise tertiary education into funds. The maintenance of several universities was transferred to funds newly established by the state. In the new model, the state continues to finance the universities but in a contractual framework and not from the central budget. The members of the new foundation board of trustees were appointed by the government. The funds are granted broader competences while the senates, the representative bodies of university autonomy, have less significant powers in comparison to public universities.

The maintenance of the University of Theatre and Film Arts was reorganised in 2020. In protest against the restriction of the university’s autonomy, both the leaders and the senate of the university resigned, students occupied the building, and the student self-government body challenged more decisions of the fund before the court. In one of these cases, the judge referred to the Constitutional Court a regulation that gives the maintainer the right to make decisions (the adoption of the budget, annual report, organisational and operational regulations, asset management plans, decisions on the establishment or the acquisition of shares in a business organisation,

and calls for applications for the post of the rector), which in public universities are granted to the Senate. The Constitutional Court found the maintainer's rights to be in line with the autonomy of the university, provided that the university's senate has consultative rights. As the Court formulated in the constitutional requirement, the maintainer must provide sufficient time for the exercise of the right of the senate of the higher education institution to express its opinion and the opportunity to formulate a substantive proposal, which it must take into account in a traceable manner in its decision-making.<sup>6</sup>

In the other case, the judge initiated the annulment of an emergency decree provision, which gave the maintainer the power to determine that the conditions for the lawful fulfilment of study obligations are not met or cannot be ensured. The involvement of the Senate in the decision was neither required by the regulation nor laid down as a constitutional requirement by the Court. It was merely referred to in the reasoning that it must be examined by the ordinary court in its proceedings. However, the rule was not found to be unconstitutional.<sup>7</sup>

#### *Interpretation of the Fundamental Law on the applicability of the European Law*

As mentioned in the previous part, in 2021 the Constitutional Court interpreted the provisions of the Fundamental Law in an abstract way concerning the applicability of EU Law. The case is related to Decision C-808/18. of the European Court of Justice (ECJ) which declared the violation of EU Law in the case of the Hungarian regulation and practice related to the access of asylum-seekers to effective protection (as there is a fence installed at the Hungarian-Serbian border and asylum seekers have to wait for the decision in their case in the so-called 'transition zone,' which can be considered *de facto* detention) and fair trial (as the Hungarian law allows the immediate expulsion of foreign citizens who do not have a legal basis for their stay in Hungary; moreover, they have no access to effective legal remedy against the expulsion). The Hungarian Government turned to the Constitutional

Court, claiming the abstract interpretation of the provisions of the Fundamental Law, taking into consideration that applying the ECJ decision could lead to the 'alteration of the population of the country' as expulsions may not be realized in the future.

In its Decision 32/2021. (XII. 20.) CC the Constitutional Court interpreted Article E) of the Fundamental Law (FL), which formulates the constitutional basis of the membership of Hungary in the European Union. According to its former interpretation [Decision 22/2016. (XII. 5) CC], the Court is entitled to examine the joint exercise of powers by the EU organs/ other EU members and Hungary from the perspective of the protection of fundamental rights, the control of sovereignty and the control of constitutional identity. In this case, the HCC concluded that as a result of the inefficiency of the readmission agreements in the case of those persons who are subject to expulsion, the alteration of the population of the country may lead to the limitation of self-identity and the right to self-determination (as fundamental rights) of those living in Hungary. Furthermore, in the Court's view, until the organs of the EU create proper conditions for the joint exercise of competences, based on the principle of reserved sovereignty, Hungary is entitled to exercise certain EU competences (except the exclusive competences) on its own. The Constitutional Court also declared in abstract terms that the 'inalienable right of Hungary to determine its territorial unity, population, the form of government and state structure' [mentioned in Article E) paragraph (2) of the FL, as limits of the joint exercise competences within the EU] is part of Hungary's constitutional identity.

In this case, the Court interpreted, to some extent for the second time, the concept of constitutional identity. It is a positive element of the decision that it has not questioned directly the validity of the ECJ decision and the primacy of the EU Law. However, it is problematic that this theoretically underdeveloped concept [together with the 'fundamental right's control' and 'sovereignty control'] was used by the Court in line with the interests of the Government to counter the decisions of the EU organs in a politically sensitive case.

## V. LOOKING AHEAD

The central issue in the months leading up to the 2022 parliamentary elections was the opposition's room for manoeuvre in the transformation of the constitutional system in the lack of a qualified majority. An indication of the position of the Constitutional Court in this public debate is that its President turned to the President of the Republic, the Prime Minister and the Speaker of the National Assembly in an open letter for support. However, the topic of constitution-making was dropped from the agenda as the governing parties reached a two-thirds majority in parliament for the fourth time. The Government is seeking ways to maintain a special legal order. In May the Parliament adopted the tenth amendment to the Fundamental Law about a further situation justifying the declaration of a state of emergency. On the same day, the Government declared a state of danger based on the newly introduced constitutional ground, i.e. the war in a neighbouring country.

## V. FURTHER READING

Tímea Drinóczi, 'Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis' *MTA Law Working Papers*, 2020/13.

Sára Hungler, Lilla Rácz and Fruzsina Gárdos-Orosz, 'LAC19 Country Report: Hungary' in Jeff King et al (eds), *Lex Atlas: Covid 19* (OUP 2022) <https://lexatlas-c19.org/> [forthcoming]

Fruzsina Gárdos-Orosz, Kinga Zakariás (eds), *The main lines of the jurisprudence of the Hungarian Constitutional Court. 30 case studies from the 30 years of the Constitutional Court (1990 to 2020)* (Nomos 2022)

Zoltán Sente, *The Constitutional System of Hungary* (Kluwer International 2021)

Zoltán Sente and Fruzsina Gárdos-Orosz, 'Using emergency powers in Hungary: against the pandemic and/or democracy?' in Konrad Lachmayer and Matthias Kettleman (eds), *Pandemocracy* (Hart 2021)

1 Government of Hungary, 'Igazolt COVID-19 fertőzöttek száma megyénként' [*Covid-19 Cases - Number of confirmed Covid-19 cases by county*] (1 May 2022).

2 The Fundamental Law of Hungary (Fundamental Law), art 53 s 1.

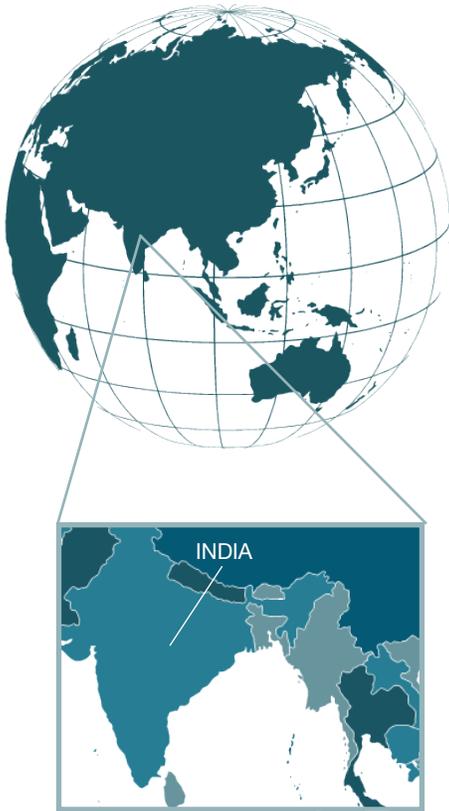
3 Csaba György – Nyasha Weinberg, 'Emergency Powers in a Hybrid Regime. The Case of Hungary' *Theory and Practice of Legislation* [2020] 329-353; Tímea Drinóczi, 'Hungarian Abuse of Emergency Regimes, also in the light of the COVID-19 Crisis', *MTA Law Working Papers* 2020/13; István Balázs – István Hoffman: Közigazgatás koronavírus idején, A közigazgatási jog rezilienciája [*Administrative law in times of corona virus – the resilience of the administrative law*] *MTA Law Working Papers* 2020/21.

4 Case C-66/18 *Commission v. Hungary* [2020] ECR, Decision 3199/2018. (VI. 21.) CC and Decision 3200/2018. (VI. 21.) CC

5 Decision 3318/2021. (VII. 23.) CC and Decision 3319/2021. (VII. 23.) CC

6 Decision 21/2021. (VI. 22.) CC

7 Decision 28/2021. (XI. 5.) CC



# India

Swapnil Tripathi  
Doctoral Student (DPhil), University of Oxford

## I. INTRODUCTION

In 2021, India grappled with the deadly second wave of the Covid-19 pandemic which caused significant loss of life. This rampant loss of life prompted the Supreme Court to intervene *suo motu* and oversee the government's approach towards the pandemic, particularly ensuring that swift action was being taken. The Court monitored the government's action to ensure that essential services and medical supplies were delivered in a fair manner, oxygen was supplied to critically affected states, ex-gratia compensation was given to family of patients who died from covid etc. Most importantly, the Court was instrumental in ensuring that the vaccines are provided for free to every citizen.

In April, Justice N.V. Ramanna was appointed as the new Chief Justice of India. During his tenure, three women Judges have been sworn in the Supreme Court, one of whom shall serve as a Chief Justice of India (Justice BV Nagarathna), both a first in India's history.<sup>1</sup> The gender representation was reflected in the judgments as well, as the Court batted for shedding gendered stereotypes in the judiciary and army, through its judgments.

In July, an investigative report revealed that the Pegasus spyware (owned by the Israeli company NSO) was used to spy over 300 cell phone numbers in India, including that of Union Ministers, Opposition leaders, journalists etc.<sup>2</sup> The Supreme Court agreed to hear a petition seeking a court-monitored probe into the scandal and the government's role in it. The Court also heard numerous petitions challenging the use of draconian

legislations to arrest individuals, who spoke critically of the government. The year 2021, was one of hits and misses. While the Court took steps towards higher scrutiny of government action, censuring discrimination on grounds of sex and disability, it failed to solve the perennial problem of judicial vacancies and failed to hear key constitutional law cases.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

India witnessed an exponential surge in Covid-19 cases in April. By April 12, India had the second-most Covid-19 cases worldwide and was experiencing significant loss of life. The surge took a severe toll on the medical infrastructure as well. The rampant loss of life prompted the Constitutional Courts to question the government's preparedness and its response to the second wave. Within two weeks of the wave, the Court acting under its *suo motu* jurisdiction decided to conduct regular hearings over (a) central government's policy on distribution of oxygen and other necessary drugs, (b) steps to prevent hoarding or necessary drugs, (c) vaccinations and (d) ensuring ways to enhance the medical infrastructure of the country.<sup>3</sup> The Court justified these hearings as part of its dialogic jurisdiction wherein stakeholders could raise constitutional grievances regarding the management of the pandemic.<sup>4</sup>

During these hearings, the Court reprimanded the central government for failing to supply the required oxygen to the government of Delhi. In May, it was brought to the Court's

notice that as per the central government's policy, vaccinations for individuals between the age group of 18-44 years was to be procured by the concerned states and private hospitals. This policy effectively created a monopoly for vaccine manufacturers, who could charge exorbitant prices for the vaccines, given the high demand amongst states. As per the Constitution, 'health' as a subject fall under the legislative competence for both the Union and state governments. The Court urged the Union government to change its policy and act as the sole buyer of vaccines and thereafter, share it with the states.<sup>5</sup>

The Court also questioned the government's policy wherein free vaccines were administered to the persons above 45 years of age, whereas individuals in the 18-44 age group had to undergo paid vaccination. The Court observed that this policy was prima facie arbitrary and urged the Court to review its vaccination policy.<sup>6</sup> The Court observed that such a policy would result in individuals from an economically privileged section getting vaccinated before others. It also cautioned the government against over reliance on digital registrations and appointments for vaccines, considering the digital divide in India, particularly between rural and urban areas. The Court also highlighted that the platform for booking vaccines was inaccessible for persons with visual disabilities and urged the government to fix the glitch. The Court's observations prompted the government to amend its policy and on 7 June, it was announced that the Union government will procure vaccinations for the state government as well, and that free vaccination will be provided to the age group of 18-44 years.<sup>7</sup>

In July, based on a newspaper report the Court took *suo motu* cognizance of the Uttar Pradesh state government's decision to allow an annual religious pilgrimage wherein over 2-3 crore people would visit pilgrimage spots in the state.<sup>8</sup> The Court urged the state government to reconsider its decision, given the possibility of a third wave of the pandemic in India. The Court observed that the health of citizens is a fundamental right under Article 21 and religious sentiments are subservient to it. A day later, the state government revoked the permission for the pilgrimage. In

October, the Court directed the Union government to pay an ex-gratia assistance of Rs. 50,000 to the next of kin of the deceased who died due to Covid-19. The Court specifically observed that the assistance shall not be denied merely because the death certificate did not list Covid-19 as the cause of death. It observed that any death occurring within 30 days from the date of testing positive for the virus or from the date of being clinically determined as a Covid-19 case, shall be considered as a death due to Covid-19.

As the second wave abated, the Supreme Court was asked to constitute a Special Investigative body to investigate the Pegasus spyware scandal. An investigative report revealed that the Pegasus spyware was used to carry out surveillance on over 300 Indian citizens, which included Union Ministers, Opposition leaders, journalists etc. These allegations were denied by the Union government.<sup>9</sup> The Court ordered the constitution of an independent expert committee to investigate the allegations. The Court observed, that as per the Constitution, every citizen has the right to a reasonable expectation of privacy and the threat of surveillance violates this right.<sup>10</sup> It particularly focused on the freedom of press and argued that the threat of surveillance casted a chilling effect on this right and also affected the protection of journalist sources, which is concomitant to the right.<sup>11</sup>

The Court called out the government for its failure to provide any clarity on the facts involved.<sup>12</sup> It specifically rejected the defence of national security, a ground urged repeatedly by the government before the Courts to avoid judicial review. The Court admitted that in matters concerning national security the power of judicial review is limited, however it cautioned that this ground cannot be used repeatedly as a free pass.<sup>13</sup> It held that to claim this defence the government must prove the facts which show that divulgence of certain information will affect national security. Finding a prima facie case made out against the government, the Court ordered the constitution of an Expert Committee to investigate the allegations made in the petition. The Court rejected the government's alternative of constituting a Committee of Experts by itself, which would submit its report before the Court, on

the ground that such an action would violate the principle of bias i.e., justice must not only be done but also seen to be done.<sup>14</sup>

### III. CONSTITUTIONAL CASES

#### 1. Vikash Kumar v. Union Public Services Commission & Ors.: *Reasonable Accommodation & Shedding Stereotypes against Disabled*

The Supreme Court, in February 2021, granted relief to an applicant suffering from a writer's cramp who was denied a scribe in the civil service examination.<sup>15</sup> The candidate's request was denied by the Union Public Services Commission on the ground that in accordance with the Rights of Persons with Disabilities Act, 2016 scribes are provided only to blind candidates or candidates with benchmark disability i.e., 40% or more.

The Court ordered the constitution of a medical board to evaluate the condition of the appellant. The Board observed that the candidate is a person with disability under the Act, with a disability of 6%. The Court reiterated the Act's commitment to the policy of reasonable accommodation wherein the state and private parties are obligated to make necessary and appropriate modifications to ensure persons with disabilities enjoy and exercise rights equally with others. It observed that as per the Act, the provisions concerning benchmark disability are attracted in limited special circumstances only. Denying the rights under the Act on the technical threshold of benchmark disability would be against the text and intention of the Act.<sup>16</sup>

Importantly, the Court recognized the intersectionality arising from multiple disabilities and consequence thereof.<sup>17</sup> It held that in such cases customization was needed and measures should be designed on a case-to-case basis, in consultation with the concerned disabled person. The Court also directed the Union Ministry of Social Justice and Empowerment to ensure that guidelines regulating the grant of scribes to persons with disability are framed.

The judgment is also pathbreaking because the Court rejected the arguments of stereo-

types i.e., disabled persons are incompetent and incapable of success sans access to assistance, which were argued by the Respondents.

### 2. *Municipal Corporation of Greater Mumbai v. Ankita Singh: Suo Moto jurisdiction of Quasi-Judicial Bodies*

The Supreme Court, in October 2021, held that the National Green Tribunal (the primary body responsible for hearing environmental law disputes) has powers to exercise *suo motu* jurisdiction.<sup>18</sup> The key issue before the Court was whether a quasi-judicial body like the Tribunal should have *suo motu* jurisdiction much like a Constitutional Court.

The Court held that mere failure of the Parliament to stipulate an express provision granting such powers, does not divest the NGT of *suo motu* jurisdiction. It adopted a purposive approach and observed that the NGT is a sui generis institution and hence, has a special role in fostering public interest in the environmental domain.<sup>19</sup> Relying on the Law Commission Reports, it observed that NGT was expected to deal with complex issues of environment and also reduce the burden of the Constitutional Courts which previously heard these cases.<sup>20</sup> Hence, it should have similar powers. The Court liberally interpreted the National Green Tribunal Act, 2010 and observed that by employing the phrase ‘secure ends of justice’, the legislature intended a wider jurisdiction for the body.

The Court however clarified that NGT’s exercise of *suo motu* is distinct from Constitutional Courts, as the former cannot travel beyond its environmental domain while the Constitutional Courts can enter any issue of constitutional importance.

### 3. *Dr. Jaishree Laxmanrao Patil v. Chief Minister and Ors.: Quotas for Socially and Educationally Backward*

A Five Judge Constitution Bench of the Supreme Court partially struck down the Maharashtra Socially Educationally Backward Act, 2018 which granted 16% reservation/quotas to the Maratha community in jobs and education in the state.<sup>21</sup> The Act took the

existing reservation in the state to 68%.

The Court observed that the Act violated Article 14 and 16 of the Constitution. Article 14 guarantees the Right to Equality and Article 16 guarantees equality in public employment. Article 16 also allows the state to make special provisions for classes that are inadequately represented in the services under the state. Special provisions have traditionally included quotas in appointments, relaxation of qualifying marks etc. The Court held that reservation granted under the Act was violative of these articles as the Marathas were adequately represented in the state.<sup>22</sup>

The Court also held that the Act violated the dictum in *Indira Sawhney v. Union of India*, wherein it was held that reservation in any post cannot exceed 50% of the total vacancies.<sup>23</sup> The said ceiling can only be breached in exceptional circumstances. As per the Court, no such special circumstances were present which justified the reservation in favor of the Marathas. Reiterating the judgment in *Indira Sawhney*, the Court upheld its validity and rejected the plea for referring it to a larger bench for reconsideration.

### 4. *Aparna Bhatt & Ors. v. State of Madhya Pradesh: Gender Sensitization in sexual offences against women*

The Supreme Court laid down guidelines for judicial orders granting bail in sexual offences against women.<sup>24</sup> The Court was hearing a challenge to an order by the Madhya Pradesh High Court wherein the accused (charged with sexual harassment) was granted bail subject to the victim tying a rakhi thread on him. Tying the rakhi is a tradition followed in India wherein a sister ties a thread on her brother, who in turn promises to protect her from evil.

Recognizing the deep-rooted discrimination and subordination faced by women in India, the court held that severe acts like such sexual harassment cannot be remedied by way of an apology, rendering community service, tying a rakhi or presenting a gift of the victim. The Court quashed the order and held that it effectively transforms a molester into a brother, through a judicial mandate.<sup>25</sup> This in effect, dilutes and erodes the offence of sexual harassment.

The Court cautioned the Judges against judicial stereotyping i.e., an act of ascribing specific attributes, characteristics, or roles to an individual solely because of her/his membership in a particular social group. Importantly, the Court passed orders mandating a module on gender sensitization as part of the foundational training of every Judge. Similarly, it directed the Bar Council of India to devise a course on gender sensitization which should be mandatorily taught in law schools.

### 5. *Kush Kalra v. Union of India: Sex Discrimination and the Army*

The Supreme Court passed interim orders allowing women to appear for the National Defence Academy examinations.<sup>26</sup> There are three modes of entry in the Army i.e., through National Defence Academy, Indian Military Academy and Officers’ Training Academy. The latter two allow women to appear for their examinations, the National Defence Academy does not.

The petitioner approached the Court against this exclusion and argued that it amounts to discrimination on the sole basis of sex and a violation of the fundamental rights of equality and the right to practice any profession. The Court provisionally allowed women candidates to appear for the NDA examinations, but their result would be subject to the final adjudication in the case.

The Court relied on a judgment delivered last year wherein it held that Permanent Commission should be granted to women in the army.<sup>27</sup> The Court had observed that absolute exclusion of women from command assignments in the army was discriminatory and violative of the principles of equality.

### 6. *Vinod Dua v. Union of India: Criticism of the government does not amount to Sedition*

The Supreme Court quashed a criminal complaint against journalist Vinod Dua for his critical remarks against the government for its handling of the Covid crisis.<sup>28</sup> Amongst other things, the journalist had made claims that the government’s medical infrastructure during the Covid crisis was poor as it lacked enough testing facilities and personal protective kits. He was charged with the offences

of causing public nuisance,<sup>29</sup> printing defamatory material,<sup>30</sup> causing public mischief<sup>31</sup> and sedition.<sup>32</sup>

The Court quashed the complaint. It observed that the offence of sedition is committed only when an individual incites people to commit violence against the government and its functionaries or s/he intends to create public disorder. It held that the journalist's statements were an expression of strong disapproval of actions of the government and not a call for violence.

In another case, the Supreme Court quashed the charges of sedition against two news channels.<sup>33</sup> The Court termed such criminal complaints as an attempt to muzzle media's freedom and observed, that the Court needs to define limits of sedition law specifically considering the rights of electronic and print media to communicate news which might be critical of the government.

#### 7. Union of India v. Rajendra Shah and Ors.: Constitutional Amendment struck down for lack of state ratification

The Supreme Court in July 2021 held unconstitutional (in part) the Constitution (97<sup>th</sup> Amendment) Act 2011 which added Part IXB to the Constitution dealing with co-operative societies.<sup>34</sup> The Amendment added provisions regarding multi-state co-operative societies and also restricted the state legislature's ability to regulate co-operative societies.

Schedule VII of the Constitution contains three lists which delineate the subject matter on which the Parliament and state governments can make laws respectively. As per Article 368(2) the Constitution, any amendment that seeks to make changes to any of the Lists in the Seventh Schedule, must obtain ratification of one-half of the state legislatures in addition to being passed in the two houses of the parliament by a majority of the total membership of that house present and voting.

The Court struck down the amendment stating that co-operative societies is a state subject as per Entry 32 in List II and hence, the Amendment mandatorily required the rati-

fication of one half of the state legislature. The Court observed that exclusive legislative power of the states in matters of the State List forms part of the basic structure of the Indian Constitution and should not be tampered with.<sup>35</sup>

There was a split in the Bench regarding multi-state cooperative societies. The majority of two Judges applied the doctrine of severability and upheld the provisions dealing with multi-state cooperative societies, while Justice Joseph (dissenting) struck down the entire amendment.

#### 8. Rajeev Suri v. Delhi Development Authority & Ors.,

The Supreme Court rejected a challenge to the Union government's Central Vista Project under which significant government structures including the Parliament will be renovated at a cost of Rs. 20,000 crores.<sup>36</sup> The proposed Project was challenged for allegedly violating the Right to Life and Clean Environment enshrined under Article 21 of the Constitution. It was argued that the government violated the procedure listed in Master Plan of Delhi 2021 for conversion of land use. Court rejected the challenge and held that the project has the necessary environment clearances and the proper procedure on conversion of land use was followed.

Justice Khanna dissented and observed that the proper procedure on conversion of land use was not followed. He observed that there had been no disclosure for public participation, and no prior approval of the Heritage Conservation Committee was taken as required under the Master Plan.

### IV. LOOKING AHEAD

The Supreme Court shall continue hearing petitions concerning the limits of sedition and admission of women into the National Defence Academy. However, much like the last year, it continues to keep judicial determination of important issues like the challenge to the government's decision to demonetize notes of Rs. 500 and Rs. 1000, amendments to India's citizenship law, electoral funding through electoral bonds etc. on

the backburner. In fact, there are a total of 587 cases pending before the Constitution Benches of the Supreme Court and it needs a mechanism to resolve them.

Another perennial challenge facing the Court is judicial vacancies. The present strength of High Courts is 687 Judges as against the sanctioned 1098.<sup>37</sup> Appointment of Judges is a collaborative process between the Collegium (consisting of the Chief Justice of India and four senior-most Judges) and the Executive.

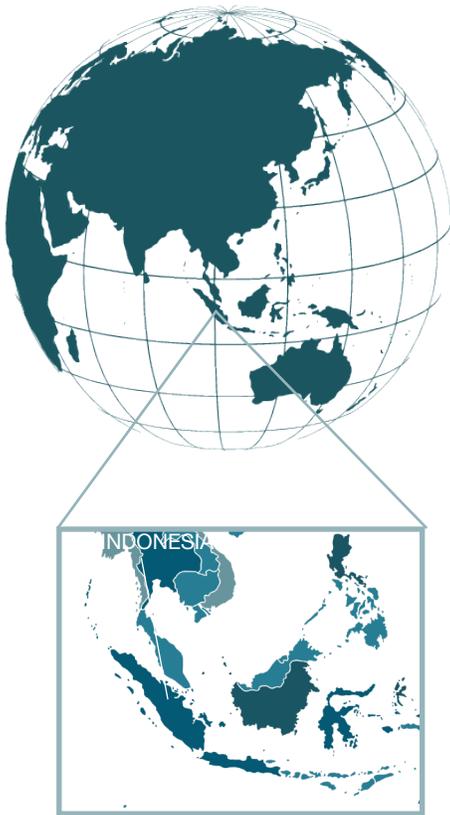
### V. FURTHER READING

R.F. Nariman, 'Discordant Notes, Volume 1: The Voice of Dissent in the Last Court of Last Resort', Penguin 2021

Tripurdaman Singh and Adeel Hussain, 'Nehru: The Debates that Defined India', Fourth Estate India 2021

Swapnil Tripathi, *The Supreme Court's judgment granting suo motu powers to the NGT*, Indian Constitutional Law and Philosophy (2 November 2021), available at <https://indconlawphil.wordpress.com/2021/11/02/guest-post-the-supreme-courts-judgment-granting-suo-motu-powers-to-the-ngt%EF%BF%BC/>

- 1 Tribune News Service, *Nine, including three women, sworn in as SC judges*, (31 August 2020) available at <https://www.tribuneindia.com/news/nation/nine-including-three-women-sworn-in-as-sc-judges-304566#:~:text=Justice%20BV%20Nagarathna%2C%20Justice%20Hima,in%20New%20Delhi%20on%20Tuesday.>
- 2 Express Web Desk, *A timeline of the Pegasus snooping scandal*, (27 October 2021), available at <https://indianexpress.com/article/india/a-timeline-of-the-pegasus-snooping-scandal/>
- 3 In Re: Distribution of Essential Supplies and Services during Pandemic, *Suo Motu W.P. (C) 3 of 2021*, Order dated 27 April 2021.
- 4 Id, order dated 31 May 2021.
- 5 Id.
- 6 Id.
- 7 LiveLaw News Network, *Centre Will Procure Vaccines For States; Free Vaccination For 18-44 Years, Says PM Modi*, (7 June 2021), available at <https://www.livelaw.in/top-stories/centre-to-procure-vaccines-for-states-free-vaccines-for-18-44-years-says-pm-modi-175355>
- 8 In Re : Alarming Newspaper Report Regarding Kanwar Yatra in State of UP, *Suo Motu Writ Petition(c) No. 5/2021*.
- 9 Simon Sharwood, *India IT minister denies illegal use of NSO Pegasus spyware*, (20 July 2021) available at [https://www.theregister.com/2021/07/20/ashwini\\_vaishnaw\\_bns\\_pegasus\\_denial/](https://www.theregister.com/2021/07/20/ashwini_vaishnaw_bns_pegasus_denial/)
- 10 Manohar Lal Sharma v. Union of India, *Writ Petition (Crl.) 314 of 2021* at par. 39.
- 11 Id at par. 40.
- 12 Id at par. 46.
- 13 Id at par. 49.
- 14 Id at par. 57.
- 15 Vikash Kumar v. Union Public Services Commission & Ors., (2021) 5 SCC 370.
- 16 Id at par. 41.
- 17 Id at par. 48.
- 18 Municipal Corporation of Greater Mumbai v. Ankita Singh, 2021 SCC OnLine SC 897.
- 19 Id at par. 30.
- 20 Id at par. 24.
- 21 Dr. Jaishree Laxmanrao Patil v. Chief Minister and Ors. 2021 SCC OnLine SC 362.
- 22 Id at par. 294
- 23 Indra Sawhney v. Union of India, 1992 Suppl. (3) SCC 217.
- 24 *Aparna Bhatt & Ors. v. State of Madhya Pradesh*, 2021 SCC OnLine SC 230.
- 25 Id at par. 33.
- 26 Kush Kalra v. Union of India, *Writ Petition (Civil) 1416 of 2020*.
- 27 Secretary, Ministry of Defence v. Babita Puniya & Ors., C.A. 9367 of 2011.
- 28 Vinod Dua v. Union of India, *Writ Petition (Crl) .154 of 2020*
- 29 Section 268, Indian Penal Code, 1860.
- 30 Section 501, Indian Penal Code, 1860.
- 31 Section 505, Indian Penal Code, 1860.
- 32 Section 124-A, Indian Penal Code, 1860.
- 33 M/s Shreya Broadcasting Private Limited and Another v. State of Andhra Pradesh, *W.P. (Crl) 217/2021* (dated 31 May 2021).
- 34 Union of India v. Rajendra Shah and Ors., 2021 SCC OnLine SC 474.
- 35 Id at par. 58.
- 36 Rajeev Suri v. Delhi Development Authority & Ors, *Transfer Petition (C) No. 229 of 2020*.
- 37 Legal Correspondent The Hindu, *Supreme Court effort to fill High Court vacancies continues into 2022*, (2 February 2022) available at <https://www.thehindu.com/news/national/supreme-court-effort-to-fill-high-court-vacancies-continues-into-2022/article38366752.ece>



# Indonesia

Stefanus Hendrianto,  
Lecturer  
Pontifical Gregorian University

Fritz Edward Siregar  
Lecturer  
Indonesia Jentera School of Law

## I. INTRODUCTION

This report aims to briefly overview Indonesian constitutional politics from March 2022 to February 2021. This report will highlight several important issues; first, it will continue to review Indonesian constitutional politics in the context of Jokowi administration policy in handling the COVID 19 pandemic. Second, it provides a brief overview of President Jokowi's attempt to cement his legacy by relocating the Indonesian capital to a new place. Third, it will address some blind spots perspective and legislative burden of inertia, especially in the anti-corruption issues. Finally, it will review how the Indonesian Constitutional Court deals with some major cases in light of the amendment of the Constitutional Court Law in 2020, which extended the term of appointment from five to fifteen years.

In our report last year, we reported a trend of how the Constitutional Court frequently dismissed cases on the ground of standing and abandoned its own precedent on loose standing. In sum, we predicted that the Court, under the chairmanship of Anwar Usman, would make strong deference to the Executive and Legislative through the application of strict standing. Nevertheless, there are several trends in the Court that prove our prediction incorrect. First, there is a trend in which Chief Justice Anwar Usman is on the minority in some important cases. This trend shows that Chief Justice Usman has not intellectually and socially commanded the Court. Second, the Court began to employ more weak-form reviews, such as the suspension order. This trend signifies that, at

the very least, the Court majority has tried to be a little more responsive to several issues of democratic blockages in the country.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major constitutional development in Indonesia is the relocation of the capital. As one of his reelection pledges, President Jokowi announced the plan to relocate Indonesia's Capital from Jakarta to a new place in the island of Kalimantan. Jokowi formally proposed the Capital relocation in his speech in Parliament to commemorate the 74th anniversary of Indonesian independence. On Monday, August 26, 2019, Jokowi announced that the new capital will be located between North Penajam Paser and Kutai Kartanegara in East Kalimantan. Unfortunately, due to the coronavirus outbreak, the relocation of the capital was "halted" briefly. But the Jokowi administration did not wait too long and kept pushing for the relocation of the capital.

On January 18, 2022, the Indonesian parliament approved a bill that set Indonesia's new capital city to Nusantara. The new State Capital Law provides a legal framework for Jokowi's ambitious proposal, and it stipulates how the development of the capital will be funded and governed. Nevertheless, the new State Capital Law is problematic from the legal constitutional point of view for various reasons. First, the content of the law itself is not about the relocation of capital from the old Capital Jakarta to a new capital

Nusantara, but is merely a declaration that Nusantara will be a new capital of Indonesia. Secondly, the transitional clause of the State Capital Law states that the capital remains in Jakarta until the declaration of the relocation of the capital by the Presidential Decree. In other words, the law authorizes the President to issue Presidential Decree to relocate the Capital. So basically, the Capital's relocation will merely be based on a Presidential Decree instead of a statute. Third, the State Capital Law never explicitly revoked Law No. 10 of 1964, which declared that Jakarta is the Capital of Indonesia. One could argue with the principle "a later law repeals an earlier law" (*lex posterior derogat legi priori*), a maxim in the civil law system that refers to a legal rule arising after a conflicting previous legal rule. Nevertheless, Law No. 10 of 1964 has a historical significance, which cannot be negated easily by a legal maxim. Soekarno, the first president of Indonesia and the most prominent figure of Indonesian founding fathers, signed Law No. 10 of 1964 on the Declaration of Jakarta as the Indonesian Capital. In the Law, Soekarno explained that the main reason for him to declare Jakarta as the Capital is that it is the city where the Declaration of Independence was announced on August 17, 1945. Moreover, Soekarno explained that Jakarta is the center of all revolutionary activities and the revolutionary movement. Soekarno's statement in the Law signified that the declaration of Jakarta as the Capital of the nation is part of an unwritten constitutional norm. Based on the idea, the status of Jakarta as a Capital is part of the unwritten constitution; therefore, such legal norms may be revised only by way of constitutional revision instead of Presidential Decree.

Another issue with the new capital is the budget allocation. Lawmakers have agreed to partially finance the relocation with state funds, dividing the cost over ten years. The Government estimated the project would cost around 500 trillion rupiah (\$35 billion). Initially, the Minister of Finance Sri Mulyani wanted to use the budget for the Economic Recovery in the Post Covid-19 pandemic of 178.3 trillion rupiahs to accelerate the capital relocation. Nevertheless, after receiving much criticism, the Government-backed down and agreed not to use the budget for

the Economic Recovery for the relocation of capital, but it remains to be seen whether the Government will make an illegal budget maneuver to make relocation of the capital work.

As the Jokowi administration was contemplating using the economic recovery budget in the post-Covid 19 pandemic, the administration had to deal with another blow concerning the Covid-19 emergency regulation. The Constitutional Court, with a 6-3 decision, declared that the Law on the National Finance and Financial System Stability Policy for Handling Corona Virus Disease 2019 (COVID-19) is only valid as long as the President hasn't officially announced that the status of the Covid-19 pandemic has come to an end in Indonesia. Furthermore, the Court declared that the Covid emergency status could only last for two years since the promulgation of the Law. If the Covid-19 pandemic has not ended by the third year, the allocation of the budget for handling the Covid-19 pandemic must be approved by the People Representative Council (DPR) and consider the opinions of the Regional Representative Council (DPD). Previously, under the Emergency law, the National State Budget during the Covid-19 response period can be carried out by Presidential Regulation without any approval of the DPR and DPD. The Court decision in the Covid Emergency case is a personal blow to Jokowi and a sign that the Court is moving differently from what the administration intended. In 2020, the Government enacted the amendment of the Constitutional Court Law, which increased the term of Justices from 5 years to 15 years and retirement age from 67 to 70. Many political activists suspected that the amendment is a "bribe" to sitting judges, who in return may offer favorable decision to the President in most likely anticipated contentious litigation against President Jokowi's ambitious project like the Omnibus Law of Job Creation. But instead of issuing a decision in favor of Jokowi, the Court issued a suspended order on the Omnibus Law Creation and declared the Law "conditionally unconstitutional". The new Law that guarantees tenure stability for the judges for 15 years, perhaps, has created unintended consequences, in which some Constitutional Court Justices become bolder in coun-

tering the policy of the Jokowi administration. Moreover, several split decisions in the Court, in which Chief Justice Anwar is in the minority, indicate that some justices are trying to be more responsive to democratic blind spots and legislative burdens of inertia in Indonesia.

### III. CONSTITUTIONAL CASES

#### 1. The *Agus Rahardjo* case (Constitutional Court Decision No. 79/PUU-XVII/2019)

The case involved the constitutionality of Law Number 19 of 2019 on the Second Amendment to Law on the Corruption Eradication Commission. The principal petitioner, Agus Rahardjo, is a former commissioner of the Corruption Eradication Commission (KPK); he argued that the formation of Law 19 of 2019 is procedurally flawed. The argument is based on several pieces of evidence, such as the plenary session in the Parliament was not in the quorum, and the legislators used fictitious bill's academic draft and did not match with the actual bill. The petitioner also requested an injunction that will halt the implementation of the Law. The petitioner referred to the *Hamzah & Riyanto* case,<sup>1</sup> in which the Court issued an injunction to postpone the criminal investigations of the Commissioners.

The Court ruled that there is no sufficient evidence to support's the petitioner allegation about the procedural flaw in the enactment process of the law. While the Court acknowledged that it has authority to issue an injunction, it rejected the claimants' petition to issue an injunction to halt the law's implementation. Finally, the Court rejected the claimants' petition in its entirety.

Justice Wahidudin Adams issued a dissenting opinion, in which he argued that the Court should have granted the request for a formal review due to the apparent violation of the Constitution in the legislative process. Moreover, Adams also referred to the fact that President Jokowi never formally signed the Law, and the President never gave an official explanation on why he did not sign the Law. Therefore, in Adams' view, the best option is to cancel the Law and return to the previous Law before the amendment.

## 2. The Islamic University of Indonesia Case (Constitutional Court Decision No. 70/PUU-XVII/2019)

This is the second case that challenged the constitutionality of Law Number 19 of 2019 on the Second Amendment to the Law on the Corruption Eradication Commission. The petitioners are academics from the Islamic University of Indonesia, chiefly led by their President, Fathul Wahid. The petitioners challenged several provisions in the Law such as article 12B (1), which states that to conduct wiretapping, the Commissioners must obtain written permission from the Supervisory Board. The petitioners also challenged Article 47 (1), which states that the investigator can conduct a search and seizure with written approval from the Supervisory Board (*Dewan Pengawas*) in the investigation process.

The Court held that article 12B (1) is unconstitutional. The Court opined that the Supervisory Board is inherently part of the Corruption Eradication Commission, meaning there is no hierarchical structure between the Commissioners and Supervisory Board. Moreover, the Court ruled that the written permission from the Supervisory Board not only signified an intervention to law enforcement process, but it is also an encroachment to the authority of law enforcement agencies. Concerning the search and seizure, the Court held that the provision is conditionally unconstitutional, as it must be construed that the Commission only needs to “notify to the Supervisory Board.” In other words, the Commission does not need to obtain a permit from the Supervisory Board any longer, but merely a notification of their search and seizure plan.

## 3. The Minerba Law Case (Constitutional Court Decision No. 64/PUU-XVIII/2020)

The case involved the constitutionality of Law Number 3 of 2020 concerning Amendments to Law on the Mining of Mineral and Coal (*Undang – Undang Pertambangan Mineral and Batura – Minerba*). The 2009 Minerba Law classified three types of mining permits/licenses: (a) Mining Business Permit (*Izin Usaha Pertambangan* or IUP), (b) Community Mining Permit (*Izin Pertam-*

*bangsan Rakyat* or IPR), (c) Special Mining Business Permit (*Izin Usaha Pertambangan Khusus* or IUPK). The 2020 Amendment of the Minerba Law incorporates new types of mining permits such as IUPK for the continuity of Contract of Work or Coal Contract of Work (IUPK for Continuity of Operations of Contract/Agreement). Accordingly, article 169A of the 2020 Law, “assures” the extension of Contracts of Work (CoW) and Coal Contracts of Work (CCoW) in the form of IUPK for Continuity of Operation of Contract/Agreement. Furthermore, the provision provides that if the CoW and CCoW have never been extended, the extension will be given twice where each extension will be given for a maximum period of 10 years; and if the CoW and CCoW have been extended once, the second extension will be given with a maximum period of 10 years.

The claimants challenged the constitutionality of article 169A. They posited that the law had given too much authority to the Minister of Energy and Mineral Resources to provide an extension of CoW and CCoW in the form of IUPK without the involvement of the Regional Governments as directly impacted parties by the mining concession. The claimants argued that the provision is contrary to article 18A (2) of the Constitution, which provides that “the relations between the central government and regional authorities in finances, public services, and the use of natural and other resources shall be regulated and administered with justice and equity according to law.”

The Court dismissed the claimants’ argument and referred to article 75 (3) of the 2020 Law, which provides that State-Owned Enterprises (BUMN) and the Regional Owned Enterprises (BUMD) must be given priority in obtaining Special Mining Business Permit (IUPK). The Court opined that the philosophy behind the priority to State and Regional Owned Enterprises embodies the constitutional mandate for the State to control natural resources. Nevertheless, the Court considers that the provision of Article 169A, which “assures” extension of IUPK to private enterprises, problematic because it may block the opportunity for the State and Regional Owned Enterprises to obtain Special Mining Business Permits. Therefore, the Court declared the provision conditionally

unconstitutional, and it shall be construed as “can be given the extension,” instead of “to be given assurance of the extension.”

## 4. The Omnibus Law Case (Constitutional Court Decision No. 91/PUU-XVIII/2020)

This case involved a challenge to the Omnibus Law of Job Creation, 1187 pages of legislation, which amended 78 laws and repealed one Law. The Omnibus Law of Job Creation is President Jokowi’s ambitious project, and many predicted that the Government was all out in defending this Law, including “bribing” the Constitutional Court Justices through the extension of their tenure and retirement age.

In a 5-4 decision, the Court issued a suspension order that the Law and its implementing regulations will remain in effect in the next two years, unless the Government successfully revisits and amends the procedural flaws in the Law; otherwise, the Law will be deemed unconstitutional. The Court majority ruled that the Omnibus Law is “conditionally unconstitutional” because of its procedural flaws, and, therefore, the Government must ensure that issues of procedural flaws in the Omnibus Law can be addressed within the next two years. Concerning the procedural flaws, the Court majority focused on several issues, such as the lack of clarity on the nature of the Law, whether it is a new law or a law that intended to amend previous laws. The Court also highlighted the secrecy around the bill’s academic draft (*naskah akademik*), and the minimal public participation in discussing the bill. In addition, the Court also ordered the legislature to establish a guideline on how to prepare omnibus law legislation.

The Court majority ruled that it will not review the substance of the Law, but rather will defer to the legislature to undertake such a review based on the public criticism or objection from the claimants in the Court proceedings. Moreover, the majority opined that the Court could understand the “regulatory obesity” of the Omnibus Law and especially the primary motivation of the Government to use omnibus legislation to accelerate foreign direct investment and expand labor opportunities in the country.

Chief Justice Anwar Usman and former Chief Justice Arief Hidayat issued a dis-

senting opinion. They argued that the Court must uphold the Omnibus legislation because it is necessary to attract investment by simplifying bureaucracy and guaranteeing legal protection for the investor. In the meantime, Justice Mahanan Sitompul and Justice Daniel Yusmic issued a separate dissenting opinion, in which they argued that there is no reason for the Court's majority to invalidate the Omnibus Law on the procedural ground because the Parliament had discussed the Omnibus Bill publicly, and the Parliament had invited public participation to discuss the bill.

#### 5. The Covid Emergency case (Constitutional Court Decision 37/PUU-XVIII/2020)

The background of this case is the issuance of Government Regulation in lieu of Law of the Republic of Indonesia No. 1 of 2020 on the National Finance and Financial System Stability Policy for Handling Corona Virus Disease 2019 (COVID-19) Pandemic and/or in Order to Face Threats that Endanger the National Economy and/or Financial System Stability ("the Emergency Regulation No. 1 of 2020"). President Jokowi issued the emergency Decree on March 31, 2020. On May 16, 2020, the Parliament (DPR) ratified Emergency Regulation No. 1 of 2020 into a statute (Law No. 2 of 2020).

The claimants challenged several provisions in the Law; first, the claimants challenged article 27 (1), which states that all the budget spending for the economic recovery during Covid-19 shall not be counted as "state losses" (*kerugian negara*). Second, the claimants challenged article 27 (3), which exempts government officials from any administrative liability. Finally, the claimants challenged Article 28 of the Law, which cancelled many financial regulatory procedures and oversight in the country during the Covid-19 emergency. For instance, the emergency regulation allows the President to prepare the State Budget without the People Representative Council (DPR). The claimants argued that as there is no time limit to the Covid-19 emergency, all those financial regulations will be suspended indefinitely. First, concerning the term "state losses," the Court declared the provision is conditionally unconstitutional, and it shall be con-

strued that all the budget spending will not be counted as "state losses" as long as it was carried with a good faith and according to the statutory regulation. Second, the Court ruled that the emergency law is related to Covid 19 and concerning all other issues of the national economy and financial stability. Therefore, all governmental decisions outside the Covid-19 issue and all administrative action based on the emergency law shall be subjected to administrative accountability before the administrative court. If the administrative liability was stripped, it will open the potential abuse of power and legal uncertainty. In the end, the Court held that the provision is conditionally unconstitutional, and it must be construed that the exemption from administrative liability only applied to the administrative action and decisions related to Covid-19 and as long as it was carried out with good faith and according to the statutory regulations.

Finally, the Court concurred with claimants that without the emergency's time limit, all the financial regulation and oversight will be suspended indefinitely. The Court ruled that it must set the deadline for the emergency regulation and so that there will be certainty on the period of emergency and the suspension of regulations. The Court declared that the emergency regulations will only last until the President declares the end of the pandemic, and it can only last for two years since the promulgation of the Law. If the Covid-19 pandemic has not ended by the third year, the allocation of the budget for handling the Covid-19 pandemic must obtain the approval of the People Representative Council (DPR) and consider the opinions of the Regional Representative Council (DPD). Previously, under the Emergency law, the National State Budget during the COVID-19 response period can be carried out by Presidential Regulation without any approval of the DPR and DPD. Chief Justice Anwar Usman filed a dissenting opinion, joined by Justice Arief Hidayat and Justice Daniel Yusmic. Basically, the dissenters believed that the review of the emergency law has no legal basis and must be rejected entirely. One of their arguments is that there are two types of emergencies in the Constitution. First, article 12 of the Constitution provides that President may declare

a state emergency. The dissenters argued that this provision is related to emergencies in war or related to national security. This type of emergency then requires a time limit. Secondly, article 22 of the Constitution provides that "should exigencies compel, the President shall have the right to establish government regulations in lieu of laws." The dissenters posited that the second type of emergency does not require a time limit. The dissenters further argued that the Covid-19 emergency is based on Article 22 instead of article 12, and therefore, it doesn't require a time limit. Indeed, the dissenters provided an interesting argument about the different types of emergencies in the Constitution. But unfortunately, they did not provide extensive analysis on the differences between these two types of emergencies. Moreover, the majority did not address their argument either.

#### 6. The Political Party Verification II Case (Constitutional Court Decision No. 55/PUU-XVIII/2020)

This case concerns the constitutionality of article 173 (1) of the General Election Law, which provides that "political parties that can participate in the General Election are political parties that have been verified and certified by the General Election Commission." The claimant is the Indonesian Transformation Movement Party (*Partai Gerakan Perubahan Indonesia - Partai Garuda*). After being certified and verified by the General Election Commission, the claimant became a participant in the 2019 General Election. Nevertheless, the petitioner did not pass the parliamentary threshold in the 2019 General Election. The claimant then demanded that the Court declare that political parties verified in the 2019 Election do not undergo a new verification and certification process in the next general election.

The Court partially accepted the claimant's argument. It declared the provision conditionally unconstitutional, and it must be construed that political parties that had passed the verification in the 2019 General Election and met the Parliamentary Threshold in the 2019 Election would only be verified administratively without factual verification. Political parties that do not meet the requirement of the Parliamentary Threshold or political

parties that only have representatives in the Regional Parliament must be verified both administratively and factually like a new political party.

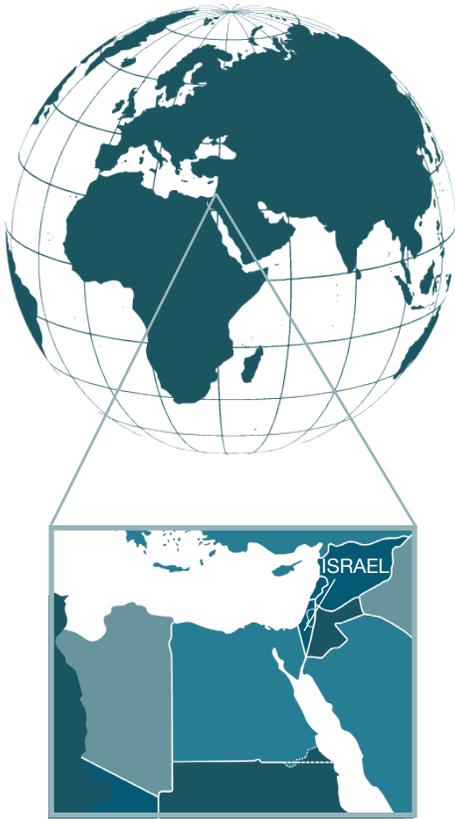
Justice Saldi Isra filed a dissenting opinion, joined by Justice Suhartoyo and Justice Enny Nurbaningsih. The dissenters argued that all political parties must be treated equally; all forms of privilege that cause unfairness in the election process must be eliminated. The claimant requested that political parties that have been verified and certified in one election period be given special privilege; such an argument is contrary to the Constitution that requires all constitutional stakeholders to be treated equally, including political parties in their participation in the general election.

1. The Constitutional Court Decision No.133/PUU-VII/2009 (hereinafter *Hamzah & Riyanto* case).

#### IV. LOOKING AHEAD

One of the significant constitutional issues waiting ahead is the idea of the postponement of the 2024 election. Recently, Deputy House Speaker Muhaimin Iskandar, had put forth a proposal to postpone the 2024 general elections for one to two years to maintain the momentum of economic recovery. While the proposal itself lacks constitutional and legal basis, it remains to be seen whether the Indonesian politicians would remain faithful to the Constitution or merely advance their political interests.

As President Jokowi is already in his second and final five-year term, he will struggle to maintain his legacy. His new ambitious project of capital relocation has been challenged at the Constitutional Court. Currently, few petitions have been filed to challenge the constitutionality of the Law on New State Capital. So, in the end, the Court will decide on whether the relocation of capital is constitutional.



# Israel

Salim Joubran  
Former Justice and Deputy President  
Supreme Court of Israel

Yaniv Roznai  
Associate Professor  
Harry Radzyner Law School, Reichman University (IDC Herzliya)

Amir Cahane  
Researcher  
Israel Democracy Institute

Gal Maor  
Student  
Harry Radzyner Law School, Reichman University (IDC Herzliya)

Yael Sirkis  
Student  
Harry Radzyner Law School, Reichman University (IDC Herzliya)

## I. INTRODUCTION

2021 marked an important year for constitutional developments in Israel. This report reviews the main developments in constitutional politics and constitutional jurisprudence, and mainly: the establishment of a new rotating government ending four rounds of elections in two years; a series of decisions by the Supreme Court concerning judicial review of basic laws and the scope and possible limits of the Knesset's constituent power; and a series of decisions by the Supreme Court concerning various measures dealing with the COVID-19 pandemic.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

2021 was a year of important developments in constitutional politics and jurisprudence. When it comes to politics, in March 2021, elections to the 24<sup>th</sup> Knesset were held. This was the fourth election in two years.

After meeting and consulting the leaders of all political parties, President Reuven Rivlin charged Benjamin Netanyahu with the task of forming the government. However, Netanyahu failed to form a new government and the mandate was then given to MK Yair Lapid, the head of Yesh Atid party. In May, Lapid conducted negotiations to form a new government and eventually secured the support of the following parties: blue-white, Labor, Israel Beiteinu (Israel Our Home), Tikva Hadasha (New Hope), Meretz, Yamina (besides one MK who refused to back the decision) Ra'am. President Rivlin was then informed that he could form a new rotating government. On June 13, the thirty-sixth government of Israel was sworn. Naftali Bennett, the leader of Yamina – with only six mandates, became the prime minister until 2023, with Lapid as alternate prime minister, intended to replace Bennett as prime minister until 2025. This was permissible due to the major constitutional reform that occurred in 2020 which included the possibility of 'rotating government' into Basic-Law: The Government.<sup>1</sup>

When it comes to constitutional jurisprudence, the court has dealt with various petitions against measures employed in the context of COVID-19, such as surveillance measures or restrictions on entering and exiting Israel. Furthermore, we focused on three major cases decided by extended benches of the High Court of Justice (HCJ) concerning the authority of the court to review constitutional norms and the possible application of the ‘unconstitutional constitutional amendments doctrine’ or abuse of constituent power doctrine: Amendment No. 8 to the Basic Law: The Government, which established the ‘rotating government’ model; Temporary Amendments to Basic Law: State Economy concerning the state budget; and Basic Law: Israel – The Nation State of the Jewish People. We elaborate on these, and more cases below.

### III. CONSTITUTIONAL CASES

#### 1. *HCJ 5555/18 Hasson v. the Knesset (July 8, 2021): Unconstitutional Constitutional Changes – Petitions against Basic Law: Israel as the Nation State of the Jewish People*

Basic-Law: Israel as the Nation State of the Jewish People was enacted in July 2018. After the enactment of this basic law, 15 petitions have been filed to the HCJ asking that the Basic Law: Israel as the Nation State of the Jewish People be declared null. On July 8, 2021, an extended bench of 11 judges rejected the petitions. In this 201-page decision, ten judges (each of whom wrote a separate opinion) were in majority opinion and a single judge - Justice Kar’*a*, who is the only Arab judge in the court, was in a minority opinion, and the only judge who held that several of the basic law’s provisions should be declared unconstitutional and invalid.

The main opinion was written by President Hayut. The court made a distinction between two questions: the scope of the Knesset’s constituent power – whether it is limited or not, and – if it is limited – the authority of the court to substantively review a basic law. According to President Hayut, as the constitution-making process is still ongoing, the time has not arrived to adopt a compre-

hensive doctrine of “unconstitutional constitutional amendments”. The question of the adoption of such a doctrine should be decided upon the completion of the enterprise of the basic laws into a complete constitution.

However, the absence of such a comprehensive doctrine does not necessarily mean that the powers of the Constituent Assembly in Israel are unlimited. On the contrary. The Court declared that the constituent power of the Knesset is limited: The Knesset cannot deny in a basic law the very existence of Israel as a Jewish and democratic state. If a basic law denies the basic features of the State of Israel as a Jewish and democratic state – then the Knesset has exceeded its constituent power. Following this decision, the idea of a limited constituent power, which has been mentioned in several decisions over the years,<sup>2</sup> is now established. But the limitations on the Knesset’s constituent power are restricted to the very core character of Israel as a Jewish and Democratic.

On the second issue, the court leaves open and undecided the question whether it is at all empowered to invalidate a basic law. The Court does not decide upon its competence to review basic laws, because it held that there is no real need to decide upon it in this specific case. According to the court, even if it assumed that the court is empowered to review the content of basic laws, Basic Law: The Nation State does not negate the Jewish and democratic features of the state in a manner that justifies judicial interference. The basic law does not undermine the democratic character because all the principles that are missing from the basic law (such as equality or democracy), exist anyway in the Israeli legal system, and are binding. The Court held that the basic law neither prioritizes the Jewish identity of Israel over the principle of democracy; it does not detract from the status of equality in the legal system, and it does not deny personal rights to those who belong to minority groups. The court reaches these conclusions through a harmonious interpretation, according to which the Basic Law must be read together with the other Basic Laws and constitutional principles. Accordingly, the court assumes that the Knesset intended to protect equality and to preserve the democratic values of the state.<sup>3</sup>

#### 2. *HCJ 5969/20 Stav Shafir v. The Knesset (May 23, 2021): Misuse of Basic Laws*

On May 23, 2021, the Israeli HCJ delivered an important decision, given by a 6-3 majority of an extended bench, setting and defining the limits for the use of Basic Laws – laws of a constitutional ranking – for the purpose of solving temporary political and coalition problems. The case dealt with a political compromise concerning the budget. In May 2020, a Likud and Blue-White rotating government was formed. According to the Basic Law, it had to pass a state budget 100 days later, and if not – the Knesset would have to be dissolved. Defense Minister (and the alternate Prime Minister) Benny Gantz demanded that Prime Minister Netanyahu fulfill his commitment in the coalition agreement, and that a biennial budget be passed for the years 2020-2021, thus ensuring the rotation between them, that was supposed to take place in November 2021. However, Prime Minister Netanyahu demanded a one-year budget for 2020. The political tangle did not come to a solution, and a day before the dissolution of the Knesset, on August 24<sup>th</sup>, 2020, a compromise was adopted and anchored by constitutional amendments, according to which the provisions of the basic law will be temporarily amended so that the deadline for passing the budget law for 2020 would be extended until December 2020. It also stated that an amount of 11 billion NIS will be added to finance expenses, for the continuing budget that applied in 2020, at the discretion of the government. These amendments were challenged before the HCJ.

The six majority judges, led by President Hayut, ruled that the Knesset had misused its power to change the Basic Laws to solve political problems. It was held that by using temporary constitutional provisions, the Knesset (in its constituent capacity) denied the Knesset’s oversight capacity (in its capacity as the legislature), on setting priorities and allocations of public funds for narrow coalition needs of the time. Basic Law: The State Economy establishes a mechanism designed to incentivize the Knesset to pass a budget law, and as long as a budget law is not passed, then the government

can continue to operate under a ‘continuation budget’, subject to various temporal, amount, and purposes limitations. Through these temporary and particular amendments, the Knesset in fact ‘bypassed’ the permanent constitutional arrangement and misused its constituent authority to change the Basic Laws.

The importance of this judgment is that the court set out a detailed test for disqualifying amendments to the Basic Laws that are in fact a misuse of the title ‘Basic Law’. According to President Hayut, at the first stage, the court should examine whether the Basic Law or its amendments carry the characteristics of a constitutional norm. This is the ‘identification stage’. In this context, the court suggests three tests that may assist the court in this identification: first, stability – whether the arrangement is of a temporary nature or whether we are facing a stable, forward-looking permanent arrangement; second, generality – whether it is a norm with general applicability or a norm that has personal characteristics; third, constitutional fabric – whether the arrangement is consistent with the nature of those issues that have been regulated in the basic laws. This is not a closed list of tests.

In the second stage, to the extent that the petitioner has been able to demonstrate that the characteristic of the arrangement does not comply with one of the abovementioned tests, the burden then shifts to the government to point to a justification for including the arrangement in a Basic Law. Applying these tests to the amendment under discussion, the majority found that it is of a temporary nature, institutionally personal as it was tailored to apply to a specific set circumstances, and also is not suitable to be anchored at a constitutional level, all without a justification. It is thus an extreme misuse of constituent authority. Instead of invalidation, as the funds were already allocated, the court issued a notice of invalidation if this occurs again in the future.<sup>4</sup>

3. *HCJ 2905/20 The Movement for Quality Government in Israel v Knesset: Misuse of Basic Laws; Petitions Regarding the Basic Law: Government, Amendment No. 8 and the*

*Temporary Order (the Alternation of Government) (12.07.2021): Misuse of Basic Laws*

A nine-judge panel of the HCJ rejected petitions against the 2020 amendment to Basic Law: The Government, that anchored the establishment of a rotating government with the position of alternate prime minister. The amendment was designed as part of the unity coalition agreement between Likud leader Benjamin Netanyahu and Blue-White’s Benny Gantz in 2020. It created the alternate Prime Minister’s office, which was supposed to have been held by Gantz for 18 months and then be transferred to Netanyahu as part of a power-sharing deal. This form of government has been maintained by the current government to anchor a similar rotational agreement between Yamina chair Naftali Bennett and Yesh Atid leader Yair Lapid.

The Majority held that this amendment does not amount to the denial of the basic characteristics of the state as a Jewish and Democratic, and thus does not warrant judicial intervention. Moreover, it is not considered a misuse of basic laws.

However, Justice Hanan Melcer wrote a minority opinion. According to Justice Melcer, a provision of the amendment according to which it is entered into place immediately with the 23<sup>rd</sup> Knesset should be repealed. He held that such a dramatic amendment of a basic law amounts to “changing the rules of the game while it is still being played”, and thereby constitutes a misuse of constituent power. Such amendments should only apply prospectively, from future Knessets or Governments.

4. *HCJ 6732/20 Association for Civil Rights in Israel v. Knesset (1.3.2021): Judicial Review of law authorizing security service to use surveillance measures for COVID-19 contact tracing.*

In this petition, the court upheld the constitutionality of The Law to Authorize the ISA to Assist in the National Effort to Contain the Spread of the Novel Coronavirus and to Promote Use of Civilian Technology to Locate Individuals who were in Close Contact with Patients (Temporary Provisions) 5780-2020,

SH 2816, 166 (Isr.) (hereinafter: the “Authorization Law”).

Under the Authorization Law, Israel Security Agency (Shin Bet, or ISA) was authorized to process and share with the Ministry of Health the location and identity data of COVID-19 carriers, in an effort to contain the spread of the pandemic. Pursuant to the Authorization Law the government may declare a three-week period in which the ISA may assist the Ministry of Health in epidemiological investigations if no other appropriate alternative is available. The law further designates a ministerial team to assess and recommend the government whether the use of ISA for this purpose is necessary, and that authorization declarations thereunder are subject to the approval of the Knesset’s Foreign Affairs and Defense Committee.<sup>5</sup> The Authorization Law was set to expire within six months of its enactment; however, its effective period was automatically extended by nearly six more months, triggered by the dissolution of the Knesset.<sup>6</sup>

The petitioners argued that the Authorization Law disproportionately violates the right to privacy while its benefits are limited, while stressing the change of circumstances since its enactment, in particular the Israeli rollout of COVID-19 vaccinations and the establishment of a high volume effective epidemiological investigations unit. The majority opinion upheld the Authorization Law, relying on its declaration mechanism, under which the government is required to address proportionality considerations, such the extent of the current threat posed by the virus and available alternative to the reliance on ISA surveillance measures.

However, the court did acknowledge that the automatic extension of the Authorization Law which nearly doubled its effective period impacts the manner in its operations will be assessed by the court. The decision-making process under which the government re-examined whether to extend the declaration under the Authorization Law lacked clear and measurable criteria in establishing the level of the threat posed by the virus, the existence of alternatives to the ISA measures and of their overall efficacy. Accordingly,

the court ruled that any further reliance on Surveillance measures under the Authorization Law shall be subject to objective criteria to be presented by the government to the Knesset's Foreign Affairs and Defense Committee and limited to targeted cases in which the patient cannot or refuses to cooperate with her epidemiological investigators.

#### [5. HCJ 8196/21 Association for Civil Rights in Israel v. Government \(2.12.2021\): Review of emergency regulations authorizing security service to use surveillance measures for Omicron related contact tracing](#)

This petition challenged the emergency regulations authorizing the ISA to engage in location tracking of carriers of the Omicron variant, issued within days following initial reports of the new variant.<sup>7</sup>

The omicron emergency regulations, set to expire within five days of their promulgation, were limited to carriers of the new variant and to persons that, according to lab tests, may be carriers of the omicron variant, rather than to all carriers of COVID-19.

The petitioners argued that, according to existing ISA coronavirus location case law, the ISA cannot authorize the location-tracking measures through emergency regulations but, rather, must do so through a parliamentary review procedure – either by limited review by the secret services subcommittee of a government resolution or by a full deliberative parliamentary statutory legislation process. The court rejected these arguments, ruling that in the current circumstances of a short expiration term and narrow scope of the regulations, and given the uncertainty surrounding the threat of the new variant, emergency regulations can be in effect for a five-day period while statutory legislation is promoted.

#### [6. HCJ 11013/05 Dahan v. Minister of the Interior \(1.3.2021\): Recognition in reform and conservative conversion regarding the Law of Return 5710-1950](#)

The central issue of this petition was regarding the validity of the reform and conservative conversion process when done in Israel in relation to the Law of Return. The court

ruled that the meaning of the term “Jewish” as it appears in the Law of Return, applies to Jews who during their lawful stay in Israel went through a conversion process according to the customs of the reform or conservative communities. This ruling was given 15 years after the original petition, after the court emphasized its reluctance to do so in this complex and politically charged question, following the legislator's lack of participation in this subject, despite different promises to settle it.<sup>8</sup>

The Dahan case brought closure to a historic process which showcases the expanding perspective of the court's understanding as to who is considered Jewish. An earlier definition of “Jewish” given by the court appeared in the Rufeisen and Shalit cases which had adopted a secular and national understanding of the term instead of a religious one. Similarly, the Dahan case expressed a further expansion of the court's perspective on the Right of Return – in addition to the recognition of non-orthodox conversions done outside of Israel or orthodox conversions from within, whether through the Rabbinate or privately-recognized non-orthodox conversions from within Israel as well.

It is important to mention that regarding conflicts in questions of state and religion, the HCJ abstains from intervening, and therefore this broader definition of “Jewish” recognized in the Dahan case strictly applies to civil matters, the Right of Return, and the population registrar. As such, concerning legal matters settled according to the Rabbinate's recognition of Judaism, for instance matters of marriage and divorce, the only conversion process recognized by the Rabbinate is the state conversion in Israel, or one which was carried out by a Rabbinate approved Orthodox Rabbi outside of Israel.

#### [7. HCJ 8010/16 Barzon v. State of Israel \(12.7.21\): Gender segregation in universities](#)

The court ruled that in order to increase the integration of the ultra-Orthodox population in higher education, the Council for Higher Education was allowed to authorize study programs with gender segregation. Additionally, the court determined that the prohibition of segregation in public spaces

on campuses must be enforced. However, the decision regarding gender segregation of students in the ultra-Orthodox study programs, was not unanimous.

Justices Melcer, Hendel and Elron supported separate study programs for the ultra-Orthodox public, explaining that even if there is a violation of equality, the violation is justified given its purpose of integrating the ultra-Orthodox population into academia, and therefore is a proportionate infringement. On the other hand, Justices Vogelmann and Baron held that the opinion of the majority perpetuates an abusive and discriminatory stance towards women, since it constitutes institutional acceptance of discrimination. Justice Baron added that a “separate but equal” policy is discriminatory and degrading, and that the segregated ultra-Orthodox education program perpetuates gender gaps and the public perception of women as inferior in general.

#### [8. HCJ 1107/21 Shemesh v. Prime Minister \(17.3.21\): Restrictions on entering and exiting Israel due to COVID-19 and nearby the election date of the 24<sup>th</sup> Knesset](#)

This petition was submitted against the government's decision to restrict entry and exit from Israel due to COVID-19 by limiting the number of people who enter Israel every day.

The HCJ unanimously ruled that the current cap of 3,000 returning citizens per day and the current restrictions that obligate unvaccinated or non-recovered citizens to apply to the Exceptions Committee for permission to leave Israel, are unconstitutional.

The court held that the current limitation disproportionately violates civil rights due to its sweeping and extended nature and since the regulations were not imposed based on concrete data and information, and the threat of the coronavirus is not expected to disappear in the foreseeable future. Moreover, the court ruled that the regulations violate the basic constitutional right to enter and exit Israel, and other rights at the core of the democratic fabric of life, especially due to the proximity to the 24<sup>th</sup> Knesset's elections.

President Hayut stated that this conclusion is magnified by the fact that Israel is the only

democratic country in the world where citizens have been so sweepingly limited in entering their country.

9. *H CJ 781/15 Arad-Pinkas v. Committee for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements (Agreement Approval & Status of the New-born Child) Law, 5756-1996 (11.7.2021)*: Increasing access to surrogacy process in Israel

In this petition, the court unanimously ruled that the definitions in the present regulations of surrogacy that exclude single men and couples from the same sex, will be cancelled within six months.

This ruling was held after the court unanimously stated on February 2020 that the regulations of surrogacy are unconstitutional since they disproportionately violate the right to parenthood and the right to equality of the groups written above. The court decided to invalidate the definitions in the regulations (operational remedy), since the legislature violated its order to amend the regulations within 12 months. President Hayut held that a lack of political feasibility does not justify a violation of fundamental rights.

#### IV. LOOKING AHEAD

The big questions for the coming year concern constitutional reforms and the stability of the government. The Minister of Justice, Gideon Sa'ar, has been promoting various important constitutional reforms. One such reform is Basic-Law: Legislation, that aims to regulate the legislative process, the manner by which basic laws are enacted and amended, and the relationship between the judiciary and legislature. Another reform is the enactment of Basic Law: Rights in the Criminal Process, which aims to protect basic rights in criminal proceedings such as the right to a fair trial. Another expected report in an amendment to Basis Law: The Government that would limit the term for Prime Ministers. As this government rests on a slim majority in the Knesset (61 MKS out of 120, before April 6, 2020 – when one Coalition-member retired from the coalition), its stability is uncertain.

#### V. FURTHER READING

Alon Harel, 'Basic Law: Israel as the Nation State of the Jewish People' 49(2) *Nationalities Papers* (March 2021) 262-269.

Einat Albin, Ittai Bar-Siman-Tov, Aeyal Gross, Tamar Hostovsky Brandes, 'Israel: Legal Response to Covid-19' *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press, 2021), [https://www.researchgate.net/profile/Ittai-Bar-Siman-Tov/publication/351108840\\_Israel\\_Legal\\_Response\\_to\\_Covid-19/links/6087e275881fa114b42e0a82/Israel-Legal-Response-to-Covid-19.pdf](https://www.researchgate.net/profile/Ittai-Bar-Siman-Tov/publication/351108840_Israel_Legal_Response_to_Covid-19/links/6087e275881fa114b42e0a82/Israel-Legal-Response-to-Covid-19.pdf)

Jan Feldman, 'Public Purposes at Cross-Purposes: Can Segregation Lead to Integration? What We Can Learn from Israel' 26(2) *Israel Studies* (2021) 29-56.

Nicole Maor and David Ellenson, "'Who is a Convert?'"—The Law of Return and the Legality of Reform and Conservative Conversions in Israel' (2022) 27(2) *Israel Studies* 24-40.

1 See Yaniv Roznai & Nadiv Mordechai 'Israel' in Luis Roberto Barroso & Richard Albert eds., *The 2020 International Review of Constitutional Reform* (the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2021) 158-161.

2 On this, see Suzie Navot & Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21(3) *European Journal of Law Reform* 403.

3 See also Rivka Weill, 'A Covert Constitutional Revolution? Is Basic Law: Israel--the Nation-State of the Jewish People Democratic?' *Balkinization* (December 19, 2021), <https://balkin.blogspot.com/2021/12/a-covert-constitutional-revolution-is.html>

4 See Yaniv Roznai & Matan Gutman, 'Saving the Constitution from Politics: The Israeli High Court of Justice and the Misuse of Constituent Power Doctrine' *VerfBlog* (30.5.2021), <https://verfassungsblog.de/saving-the-constitution-from-politics/>

5 See also Amir Cahane, 'Israel's SIGINT Oversight Ecosystem: COVID-19 Secret Location Tracking as a Test Case' (2021) 19 *U. N. H. Law Review* 451.

6 Section 38 of Basic Law: the Knesset.

7 This builds on Amir Cahane, 'The Collapsed Bridge Loan: Israel's Shin Bet Location Tracking of Omicron Carriers', *Lawfare* (2021) <https://www.lawfareblog.com/collapsed-bridge-loan-israels-shin-bet-location-tracking-omicron-carriers>

8 See e.g. Gidon Sapir, 'How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid - The Israeli Controversy over Who Is a Jew as an Illustration' (2006) 39 *Vanderbilt Journal of Transnational Law* 1233.



# Italy

Pietro Faraguna  
Associate Professor of Constitutional Law  
University of Trieste

Michele Massa  
Associate Professor of Public Law  
Catholic University of the Sacred Heart, Milano

Davide Paris  
Assistant Professor of Constitutional Law  
University of Foggia

coordinated by Daria de Pretis  
Vice President of the Constitutional Court of Italy

## I. INTRODUCTION

The year 2021 has been characterized as – for now – the “peak” in the judicial pandemic curve of COVID-19 related constitutional controversies before the Italian Constitutional Court (hereafter ItCC). In this report, we will summarize these crucial developments (Part II), involving a wide range of legal sectors. However, the ItCC activity in 2021 has not been limited to adjudicating emergency legislation. On the contrary, the Court reiterated its central role also outside the circle of emergency legislation in protecting fundamental rights, issuing a number of topical decisions across different sectors of the legal order (Part III).

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2021, pandemic-related issues were debated in several legal disputes, but – due to the rules on access to the ItCC<sup>1</sup> – constitutional rulings were rendered only in some cases<sup>2</sup>, only a few of which allowed the ItCC to address questions substantially connected to the management of this unprecedented emergency.

Firstly, a broad legislative power was affirmed for the State to manage the pandemic.

According to the ItCC, on core issues such as lockdown regime, therapeutic protocols, vaccinations etc., the centralized legislative competence on «international preventive healthcare» (Article 117, para. 2, letter q, It. Const.) pre-empts all territorial attributions, which may expand only in the room specifically left for them by the relevant pieces of national legislation<sup>3</sup>. A broad reading of other national powers was adopted also with regard to social and economic setbacks of the pandemic: e.g., as emergency national legislation had already extended the duration of administrative authorizations particularly in urban planning, this has been considered a fundamental principle (of land-use planning, Article 117, para. 3, It. Const.) which prevents Regions from conceding further extensions, notwithstanding the alleged special problems of local construction business<sup>4</sup>.

Secondly, the ItCC apparently endorsed the legal framework crafted for the pandemic, although such framework was mostly made up by decree-laws (issued by the Government and converted into law by the Parliament within 60 days) and administrative acts (mainly issued by the President of the Council of ministers, or single Ministers), not ordinary laws passed by the Parliament. A first challenge came from two MPs, protesting that the Government had basically appropriated the powers vested by the Constitution in the leg-

islative assembly. The complaints were easily dismissed, also because the Parliament had been involved effectively in the conversion of decree-laws<sup>5</sup>. A second challenge came from a justice of the peace, in proceedings concerning a violation of the prohibition to leave home during the first wave of the pandemic, established in a decree of the President of the Council of ministers. Taking position in a lively debate, the ItCC held that such administrative acts amounted to merely executive enforcement of the relevant decrees-law, which had already disciplined the lockdown regime with sufficient precision<sup>6</sup>. Only an early decree-law (n. 6 of 2020) was lacking in this respect, but it had been rapidly amended. Last and assuredly not least, the ItCC gradually pushed the legislator towards more calibrated and narrowly tailored measures, whenever they infringed on constitutional rights and principles.

Moratoriums on evictions and foreclosures were challenged twice with the question of whether a fair balance had been struck between the rights of owners and creditors, and their «fundamental duties» of «economic and social solidarity»<sup>7</sup>. The ItCC reiterated that such measures must be temporary and exceptional, and clarified that – although the pandemic affords extraordinary discretion to the legislator – they should not be prolonged indiscriminately, but instead be tapered gradually and with reasonable differentiations according to the relevant factors, eventually calling into action the solidarity (not of owners and creditors only, but) of society at large, with different provision aimed at securing housing rights. Consequently, the extensions were in part quashed, and in part blocked from further continuation.

Furthermore, suspensions to the statute of limitations came twice before the ItCC. At a first stage, these suspensions were linked to the postponement of all judicial proceedings, enforced directly by law: this passed muster in the ItCC as a well-defined statutory application of a general principle enshrined in the Criminal code (Article 159, I para.)<sup>8</sup>. In a second phase, further suspensions were made conditional on the decisions, entrusted to the presidents of each criminal court, to postpone proceedings: but this prerequisite was not deemed determined, accessible and foreseeable enough, to be compatible with the prin-

ciple of strict legality<sup>9</sup> – which, in Italian constitutional law, encompasses criminal liability also in its temporal dimension, as the well-known *Taricco* saga made abundantly clear<sup>10</sup>.

### III. CONSTITUTIONAL CASES

#### 1. *Judgment No. 32 of 2021: Same sex-parents and adoption in special cases*

In this case, the Court decided on the constitutionality of legislative provisions impeding a child, born via heterologous medically assisted procreation undertaken by a same-sex couple, to be granted the status of child recognized also by the intentional mother. In the case at hand, conditions for “adoption in special cases” were not fulfilled even though the competent court had established that such recognition would be in the interests of the child. The Court acknowledged serious shortcomings in the legal system with regards to protecting the best interests of the child under circumstances such as the ones of the cases from which the constitutional question originated. However, it ruled the question inadmissible on the basis that it is primarily for the legislator to take action to provide systemic protection to children’s rights thereby avoiding inconsistencies in the legal system that would arise from fragmented intervention by the Court.

#### 2. *Judgment No. 33 of 2021: Recognition of same sex parenthood as acknowledged in a foreign country*

In this case, the Court stated that, in the balancing between the need to discourage the practice of surrogate motherhood and the need to ensure minors’ rights, the possibility of the “adoption in special cases” (see below) by the intentional parent is not an adequate remedy to protect the interest of the child. Adoption in special cases has been held as a legal arrangement that was designed to regulate exceptional situations, where there is also the need to preserve the legal link between the minor and his family of origin, need that is entirely missing in the medically assisted procreation.

The Court firmly reiterated that the prohibition on surrogate pregnancy pursues the objective of protecting the dignity of women. However, the Court observed that the main perspective to be adopted in the case at hand was the protection of the “best interests” of the child. This includes the child interest to “to obtain legal recognition of the ties which already exist in respect of both of them, without prejudice to the possible establishment of a legal relationship with the surrogate mother”. Within this framework, the Court also considered the child interest in obtaining recognition for the legal duties of both partners towards his or her by virtue of their parental responsibility. However, the Court considered that the legislator is entitled to strike a balance between these interests and the legitimate aim of discouraging recourse to surrogate pregnancy. It also stressed that the European Court of Human Rights does not require States to give effect within their legal orders to foreign birth certificates presented by a couple (hetero- or homosexual) who have had recourse to surrogate pregnancy abroad. As a consequence, the Court ruled the question inadmissible. However, the Court once again reiterated its appeal to the legislator for urgent legislation to ensure due protection of the child’s best interests, including recognition of the legal relationship with the non-biological parent. The Court underlined that recourse to “adoption under special circumstances” offers the only available legal option nowadays, but that the standard of protection is not entirely consistent with constitutional and supranational principles. E.g. this form of adoption is conditional upon the consent of the “biological” parent, which may potentially be denied in the event of a break-up of the couple, with unilateral consequences possibly detrimental to the best interest of the child.

#### 3. *Judgment no. 59 of 2021: Protection of workers against their dismissal*

The Court ruled on the constitutionality of one of the key provisions of the “workers’ charter” stating that, in case of a dismissal of a worker enacted on allegedly “good grounds”, the competent Court – where these good grounds are not acknowledged – must order the reinstatement of the dismissed worker. This regulation was allegedly found

to be discriminatory against the case of dismissals justified on “business grounds”. In these cases, no legal remedy of compulsory reinstatement is provided. While the ItCC found that it is for the legislator to decide whether to rule out reinstatement as a remedy for dismissal, once it has chosen to provide protection in that form, the legislator might not treat identical situations differently. This was the case in the contested case, and therefore the Court declared the provision unconstitutional as far as it provided that, in the given circumstances, a court “may” rather than “shall” order reinstatement.

#### 4. Judgment no. 41 of 2021: Role of honorary judges and temporal effects of the decisions of the ItCC

In this case, the Court decided on the constitutionality of two pieces of legislation (Articles 62 to 72 of Decree-Law No. 69 of 21 June 2013) insofar as they provide that a certain category of honorary (i.e.d non-professional) judges are to be permanent auxiliary members of Court of appeal panels. In the view of the referring Court, this circumstance violated Articles 102 and 106 of the Constitution limiting the role of honorary judges to the exercise of judicial functions vested in single-member (lower) courts as opposed to multi-member courts (also of appeals).

From a substantive point of view, the decision of the Court illustrated widely the history of this segment of legislation, illustrating how a temporary provision was turned into a permanent regulation. The Court found that the challenged provisions had gone too far in expanding functions exercised by honorary judges.

The decision is possibly even more crucial because of the innovative procedural aspects. In fact, the ItCC, taking into account the devastating impact that the decision of unconstitutionality would have on the administration of justice in light of the key contribution of auxiliary judges in tackling backlogs at appeal level, limited the temporary effects of its decision. In short, the Court decided to postpone these effects starting from 31 October 2025 (when a comprehensive reform of the regulation of honorary judges should come into effect), thus allowing enough time for the legislator to legislate accordingly.

#### 5. Judgment No. 84 of 2021: Right to remain silent

In this case, the Court decided that Article 187-quinquiesdecies of Legislative Decree no. 58 of 24 February 1998 was unconstitutional. The decision followed a reference for a preliminary ruling submitted by the ItCC itself (order no. 117 of 2019) to the Court of Justice, which decided on the case in February 2021 (case C-481/19). In its decision, the ItCC, thus adhering to the point of view of the European Court, ruled that the right to remain silent also applies to administrative investigations carried out by supervisory authorities, such as the one involved in the case at hand. Therefore, a natural person (as opposed to “legal persons”) may not be penalised if he or she has refused to answer questions put by those authorities at a hearing or in writing, which could have revealed their liability for an administrative offence punishable with punitive measures, or even their criminal liability.

However, the Court stated that the right to remain silent does not justify obstructive behaviors that may cause undue delays in exercise of supervisory activities, such as refusal to attend a hearing, or delaying tactics aimed at postponing the hearing itself, or refusal to hand over data, documents or records existing prior to the authority’s request.

#### 6. Judgment No. 137 of 2021: Social benefits for convicts of terrorism and organized crime

In this case, the Court reviewed the constitutionality of a 2012 provision revoking social welfare benefits (such as unemployment benefit, income support, etc.) to offenders convicted of organized crime and terrorism offences. The referring court did not question the revocation of social benefits to those convicts as such. It rather challenged the provision only as far as it applies to offenders serving their sentence outside prison, in particular to those who benefit of house arrest. In this specific case, the convict is neither in the prison’s care, nor can enjoy social benefits. Thus, absent other incomes, he or she might lack the means to survive.

In the Court’s view, the challenged provision establishes an “unworthiness regime” with

respect to social benefits for those convicted of particularly serious crimes. However, according to Art. 38, para. 1 of the Constitution, the Republic is under a solidarity duty requiring to provide all citizens in need and unable to work with the minimum means to lead a decent life. Since the social benefits mentioned in the challenged provision are expression of this duty, their revocation to offenders serving their sentence outside prison entails the risk of depriving them of the means for a decent survival. Although it is true that such convicts have gravely violated the foundations of social coexistence, it is also part of the same social coexistence – so the Court – that the means to survive are guaranteed to them.

#### 7. Judgment No. 150 of 2021: Jail for libel aggravated by the use of the press (Part II)

The criminal code and law No. 47 of 1948 on the press punish defamation with both a pecuniary fine and imprisonment for one to six years, when this crime is committed through the press and consists of attributing a specific fact to the victim. In Order 132/2020 the ItCC held that the mandatory application of imprisonment in such cases was incompatible with the freedom of expression, as protected both by the Italian Constitution and by the ECHR, for their chilling effect. However, on that occasion, the Court did not invalidate the contested provisions. While making clear their incompatibility with the Constitution, it postponed its final decision for one year to give the legislature time to pass new legislation<sup>11</sup>. Since in the following year no legislative amendment was passed, the Court held unconstitutional the mandatory application of imprisonment in the abovementioned circumstances. However, the ItCC did not go as far as to consider punishing defamation with imprisonment as such unconstitutional. In the Court’s view, imprisonment might be justified in exceptional circumstances such as hate speech and mass disinformation through the press, internet and social media. While freedom of expression is the cornerstone of democracy, those involved in such activities – be they journalists or not – do not act as “democracy’s watchdogs” but rather undermine it through lies and jeopardize the freedom of elections. Thus, it will be for the

ordinary judge to consider on a case-by-case basis whether the exceptional circumstances justifying the sanction of imprisonment exist or not. The present decision, however, does not rule out the need of a comprehensive reform by the legislature, which is not prevented from giving up completely the penalty of imprisonment.

This judgment embodies the second application of the new technique of declaring the law's incompatibility with the Constitution while postponing the final decision to allow the legislature to take action (for its first application see Order No. 207 of 2018 and Judgment No. 242 of 2019). So far, however, in both cases the legislature has turned a deaf ear to the ItCC's appeals to redress the ascertained unconstitutionality. Thus the Court was obliged to correct the unconstitutionality itself after having uselessly awaited for the legislature's action.

#### 8. Judgment No. 157 of 2021: legal aid for non-EU nationals

The case that led to judgment No. 157 of 2021 concerned the denial of legal aid to two Indian nationals in a civil proceeding. Non-EU nationals can have access to legal aid, which is granted to the needy by Art. 24, para. 3 of the Constitution, only if they prove that they have no foreign income. In the case at stake, however, the Indian Embassy and Consulate in Italy never replied to the applicants' request to certify their lack of foreign income, so that their application for legal aid was denied. When they filed an appeal against the denial, the court referred the matter to the ItCC, bringing to the latter's attention the following inconsistency: While in criminal proceedings non-EU nationals can replace the certification of the consular authority with a self-declaration when the consular authority does not process their request, the same possibility does not exist in civil and administrative proceedings.

The ItCC held that the current regulation violates the rights to an effective remedy and to defense before a court enshrined in Art. 24 of the Constitution because it charges the applicant with the inefficiency of the consular authority. So, it held the challenged provision unconstitutional insofar as

it does not allow non-EU nationals to overcome the inertia of the consular authority by means of a self-declaration. Following the Court's judgment non-EU nationals are now requested only to prove that they have acted in good faith and with due diligence to obtain the requested documentation.

#### 9. Orders Nos. 216 and 217 of 2021: two preliminary references to the Court of Justice concerning the European Arrest Warrant

In recent years, the number of preliminary references to the Court of Justice of the EU (CJEU) by the ItCC has significantly increased, especially following Judgment No. 269 of 2017, which marked a turning point in the interaction between the two courts<sup>12</sup>.

In 2021, the ItCC referred to the CJEU two requests for preliminary rulings, both concerning the European Arrest Warrant (EAW). In both Orders, the ItCC firmly stated that it is for the CJEU, and not for domestic authorities, to define exceptions to the duty to surrender an individual other than those expressly envisaged in the Framework Decision on the EAW.

Order No. 216 deals with the possibility to refuse surrendering an individual who suffers from a chronic health disease when surrendering might have severe consequences for him or her, even though the Framework Decision does not provide for an exception in such circumstances. By raising a preliminary reference, the ItCC also suggests the CJEU the answer to its own question. In the ItCC's view, the CJEU should extend to this specific case its jurisprudence that requires the requesting judicial authority to interact with the receiving judicial authority to secure that the individual's fundamental rights are not violated in case of surrender.

Order No. 217 concerns the possibility to not surrender a non-EU national for the purpose of executing a custodial sentence or detention order, when the individual has established deep personal and family ties in the country of residence, so that the surrender might amount to a violation of his or her right to private and family life.

The Framework Decision enables the Member States to provide for such an ex-

ception. However, the Italian legislation implementing the Framework Decision only provides such an exception for Italian and EU nationals but not for non-EU nationals. In the ItCC's view, before examining whether this is permitted under domestic constitutional law, it is necessary to make clear whether this is permitted under EU law. Therefore, the ItCC referred the matter to the CJEU asking whether the Framework Decision prevents domestic legislation from excluding at all the refusal to surrender a non-EU national, even when he or she has solid family and personal ties in the country. Should the answer be in the affirmative, the CJEU is further requested to define the criteria to assess whether the family and personal ties are so deep as to justify the refusal. Unlike Order No. 216, in this case, the ItCC does not clearly suggest the CJEU a specific answer but confines itself to showing the novelty of its question and to raise some observations on the right to private and family life.

## IV. LOOKING AHEAD

In 2022, the ItCC will be called to decide on many issues. Some of them will still relate to the COVID-19 emergency regulation. However, the guidelines emerging from the case law reported above seem to track a very clear course in the Court's jurisprudence, and it is hard to believe that the Court will deviate its navigation.

The Court will be dealing with the admissibility of eight popular referenda. In fact, the Court is given the authority to decide on the admissibility of a referendum, based on limits imposed by the Constitution and fine-tuned in a complex stream of case law. Among these, five requests for popular referenda have been filed in matter of organization of the judiciary, one concerns the removal of a wide range of legal impediments to candidacies in electoral legislation, one concerns end of life choices and the last one regards cannabis and other drugs regulation. Moreover, old questions will be on the Court's table again, such as the regulation of the father's and mother's surname transmission to their children in family law.

## V. FURTHER READING

Marta Cartabia and Nicola Lupo, 'The Constitution of Italy: A Contextual Analysis' (Bloomsbury 2022)

Giacomo Delledonne and Carlo Padula, 'The Impact of the Pandemic Crisis on the Relations between the State and the Regions in Italy', in Ewoud Hondius and Marta Santos et al (eds), *Coronavirus and the Law in Europe* (Intersentia 2021), p. 301

Stefano Civitarese Matteucci, Alessandra Pioggia, Giorgio Repetto, Diletta Tega, Nicol Pignataro, Mirush Celepija, 'Italy: Legal Response to Covid-19', in Jeff King and Octávio L.M. Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (OUP 2021). doi: 10.1093/law-occ19/e11.013.11

Michele Massa, 'A General and Constitutional Outline of Italy's Efforts against COVID-19', in Ewoud Hondius and Marta Santos et al (eds), *Coronavirus and the Law in Europe* (Intersentia 2021), p. 25

Giorgio Repetto, 'Changing me softly? Actors, tools and techniques of international human rights compliance in Italy' in Rainer Grote, Mariela Morales Antoniazzi and Davide Paris (eds), *Research Handbook on Compliance in International Human Rights Law* (Edward Elgar 2021), p. 121

1 See the 2016 report by Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Šimon Drugda (eds.), *The I-CONNECT- Clough Center 2016 Global Review of Constitutional Law*, 2017, p 109. See also Vittoria Barsotti and Paolo G. Carozza et al, *Italian Constitutional Justice in Global Context* (OUP 2015), p 52.

2 Corte costituzionale, ordinanza 19 novembre-11 dicembre 2020, n. 269, sentenza 15 aprile-11 maggio 2021, n. 96 (on remote hearings in civil and criminal proceedings); ordinanza 28 gennaio-11 febbraio 2021, n. 19 (on the management by presidents of tribunals of the organization of justices of the peace); sentenza 24 marzo-27 maggio 2021, n. 108 (on the selection of Municipalities hit hard by the first pandemic wave as recipients of extraordinary resources).

3 Corte costituzionale, sentenza 24 febbraio – 12 marzo 2021, n. 37 (available in English). The case is noteworthy also because, before the final judgment, the ItCC unusually stayed the enforcement of the challenged regional law (issued by Valle d'Aosta/Vallée d'Aoste, an autonomous Region with its own special statute): Corte costituzionale, ordinanza 14 gennaio 2021, n. 4.

4 Corte costituzionale, sentenza 30 novembre – 21 dicembre 2021, n. 245.

5 Ordinanze 10 marzo-13 aprile 2021, nn. 66-67. A different group of complaints – concerning the of a Covid-19 vaccine certification to participate in parliamentary business – was dismissed with ordinanze 15-23 dicembre 2021, nn. 255-256, and with a further order announced on 19 January 2022 (press release available in English).

6 Corte costituzionale, sentenza 23 settembre-22 ottobre 2021, n. 198 (press release available in English).

7 Corte costituzionale, sentenza 9-22 giugno 2021, n. 128; 19 ottobre-11 novembre 2021, n. 213 (press release available in English).

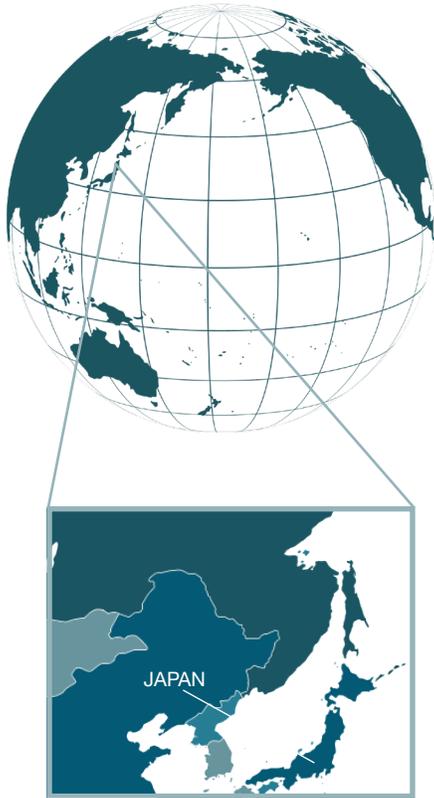
8 Corte costituzionale, sentenza 18 novembre-23 dicembre 2020, n. 278.

9 Corte costituzionale, sentenza 25 maggio-6 luglio 2021, n. 140.

10 See the 2016 and 2018 reports by Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Šimon Drugda (eds.), *The I-CONNECT- Clough Center 2016 Global Review of Constitutional Law*, 2017, p 110, and in *The I-CONNECT- Clough Center 2018 Global Review of Constitutional Law*, 2019, p 169.

11 See the 2020 report by Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Šimon Drugda (eds.), *The I-CONNECT-Clough Center 2020 Global Review of Constitutional Law*, 2021, p 159.

12 See the 2017 report by Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Pietro Faraguna, Šimon Drugda (eds.), *The I-CONNECT-Clough Center 2018 Global Review of Constitutional Law*, 2017, p 160.



# Japan

Masahiko Kinoshita  
Professor  
Kobe University

Mayu Terada  
Professor  
Hitotsubashi University  
Visiting Scientist, RIKEN

## I. INTRODUCTION

In 2021, Japan experienced a further change of prime minister as in 2020. Yoshihide Suga, who replaced Shinzo Abe as prime minister in September 2020, had a successful performance in terms of policies such as promoting vaccination against Covid-19 and establishing a new digital agency. However, public resentment was widespread against Suga's stance of pushing for the Tokyo Olympics to be held in August 2021 without sufficient explanation while the fifth wave of Covid-19 was hitting Japan. Opinion polls conducted by major media, including NHK and the Asahi Shimbun, showed that approval ratings for the Suga Cabinet had fallen significantly to below 30%. A general election for the House of Representatives was scheduled for late 2020. Within the Liberal Democratic Party (LDP), the view that the party would not be able to win the election with Suga as the prime minister became more and more prevalent. As Suga's power of leading within the LDP declined, he was finally pressured to withdraw from running in the LDP leadership election scheduled for September 2020. In the LDP leadership election, Fumio Kishida, who had lost to Suga in the previous year's election, won the election and became prime minister. In the general election for the House of Representatives in October 2021, held immediately after Kishida formed his new Cabinet, the LDP and Komeito, which were in a coalition government, won a majority of seats (293/465), although they lost a few seats. The largest opposition party, the Constitutional Democratic Party of Japan (CDP), also de-

creased its seats (96/465). The party that made a major leap forward in this election was the Nippon Ishin no Kai (NIK), which grew out of a regional party in Osaka. Before the election, the NIK held only 11 seats, but in this election, it won 41 seats. The NIK's policy is close to the LDP's on several issues, including constitutional amendments. The LDP, Komeito, the NIK, and the Democratic Party of Japan (DPJ) are positive toward constitutional amendments, and together they are referred to as "pro-amendments parties". The Constitution of Japan requires a two-thirds majority in each of the two houses of the Diet in order to hold a referendum on constitutional amendments. In the October 2021 general election, the pro-amendments parties won a total of 346 seats in the House of Representatives. Kishida, however, is not as enthusiastic about constitutional amendments as Abe, and momentum for constitutional amendments has not grown.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. The Politics of Constitutional Amendments

The concept of constitutional amendments per se is neither conservative nor liberal. Some amendments are intended to make the Constitution more conservative, while others are intended to make it more liberal. In Japan, however, constitutional amendments have been a conservative concept. Conservatives have argued for amending the liberal

1946 Constitution, which replaced the conservative Meiji Constitution. From a theoretical perspective, one could envision amendments to the 1946 Constitution so as to make it even more liberal. However, liberals have been reluctant to envisage liberal amendments on the ground that the discussion of constitutional amendments could serve as a catalyst for conservative amendments.

The political trend regarding constitutional amendments are closely related to the internal politics of the Liberal Democratic Party (LDP). LDP has been in power for most of the time since its formation in 1955. Only twice has the LDP been out of administration, and both times were of short duration. However, Although the LDP holds dominant power in Japanese politics, its inner structure is not necessarily centrally controlled. There are various factions within the LDP, and these factions have a wide range of policies. For example, the *Seiwakai* is strongly conservative and nationalistic oriented and has been active in constitutional amendments. The *Kochikai*, on the other hand, has a liberal orientation and has been reluctant to amend the Constitution. It may not be an exaggeration to say that the difference in political stances between the *Seiwakai* and the *Kochikai* is as significant as the difference between the Republican Party and the Democratic Party in the United States. Who represents the LDP as the president of LDP is determined by the LDP's internal leadership election. Those eligible to vote in the leadership election are LDP-affiliated Diet members and LDP party members. Although the votes of Diet members are heavily weighted, the ballots of LDP party members cannot be ignored. Therefore, who becomes an LDP president is in flux, and no single faction may continue to dominate the office. Shinzo Abe, who had expressed a strong desire to amend the Constitution, is from the *Seiwakai*, while Fumio Kishida, who became prime minister in 2021, is from the *Kochikai*. In this sense, the transition of power from Abe to Kishida via Suga had an impact similar to that of the transition of power from the Republican Party to the Democratic Party. In the 2021 general election for the House of Representatives, which the LDP campaigned for under Kishida, constitutional amendments were

one of the campaign promises. However, this was more in the aspect of a superficial appeal to members of the *Seiwakai* and their supporters, and Kishida does not seem to have the same enthusiasm for constitutional amendments as Abe once did.

What should be recalled here is the fact that the Abe administration, which showed a strong desire to amend the Constitution, lasted for eight years, from 2012 to 2020, but as a result, constitutional amendments were not realized. The Constitution states that a referendum on constitutional amendments requires a two-thirds majority of all members of the House of Representatives and the House of Councillors. Certainly, two-thirds is a high bar. However, during the Abe administration, the LDP won a series of major elections, and even if the LDP alone did not achieve a two-thirds majority, it was not impossible that the “pro-amendments parties” could manage to put the amendment to a referendum if they combined their votes. In fact, in enacting the new national security legislation in 2015, which changed the interpretation of Article 9 of the Constitution, the LDP pushed through the legislation despite strong objections from the opposition parties. However, there are circumstances in which it is not possible to simply rely on the number of seats in the Diet to proceed with the constitutional amendments process.<sup>1</sup> In Japan, if the ruling parties pass a bill while the opposition parties strongly disagree, the support rate of the ruling parties and the administration would drop significantly. In fact, this was the case with the new national security legislation in 2015. However, a drop in the support rate is not a significant problem unless there is an election in the immediate future. In the case of the Abe administration, in particular, the drops in support rate were only temporary. With regard to constitutional amendments, however, the process does not end with the vote of Diet members; a referendum is also required. If a constitutional amendment proposal that is strongly opposed by the opposition parties is submitted to a referendum, the decline in the support rate for the ruling parties may affect the approval or disapproval of the referendum. A rejection of the referendum would be a serious blow to the ruling parties beyond

the constitutional amendment issue. Therefore, even the Abe administration could not lightly proceed with constitutional amendments without the consent of the opposition parties, unlike in the case of the ordinary legislative process.

## 2, Digital Agency

The Suga administration had set the digitization of the entire Japan as one of its major agendas. Bills concerning digital reform were submitted to the Diet by the Suga Cabinet and passed into law on 12 May 2021. This established a new administrative agency, the Digital Agency, which directly belongs to the Cabinet. Previously, policies related to digitization were formulated by individual ministries. However, the disparate planning by individual ministries has been criticized for lacking uniformity and speed. Therefore, the Digital Agency was established to take charge of all digitization policies and to unify and expedite the digitization process. However, unlike administrative commissions such as the Fair Trade Commission and the Personal Information Protection Commission, there is little independence of the Digital Agency from the Cabinet. It has been pointed out that the Digital Agency should have been established as an administrative commission with independence, like the Fair Trade Commission, since this would have strengthened the powers of the Cabinet.

## III. CONSTITUTIONAL CASES

In 2021, the Supreme Court issued two grand bench decisions on constitutional issues: the *Same Surname System Case II* and the *Confucian Temple Case*.<sup>2</sup> The former conclusion is constitutional; the latter is unconstitutional. Both cases deal with difficult matters, but the decisional framework follows previous precedents. In this meaning, in 2021, no major changes were made in the framework of constitutional cases.

### 1. Same Surname System Case II

Article 750 of the Japanese Civil Code provides that “[a] husband and wife shall adopt

the surname of the husband or wife in accordance with that which is decided at the time of marriage”. Under this article, one of the husband and wife must change his/her surname at marriage. Historically, married couples in Japan had separate surnames, but the Civil Code enacted in 1898 adopted a system whereby all members of a family were required to have the same surname. After World War II, although the rules of the family stipulated by the Civil Code were drastically changed, the system in which married couples were to share one surname survived. A couple cannot legally marry while both continue to use their original surnames. The Civil Code does not require women to necessarily change their maiden surnames. It is left to the couples to decide which of their surnames will be used as the couples’ surnames. However, 96% of married couples have chosen their husband’s surnames. In other words, under the same surname system, women are virtually forced to change their surnames. A change of surname carries the risk that for research and business, the pre-marital and post-marital accomplishments may no longer be perceived as belonging to the same person. Because of the present situation in which such risks are unilaterally imposed on women, the same surname system has become a symbol of gender inequality. In 1996, the Legislative Council of the Ministry of Justice reported to the Minister of Justice that the optional separate surname system should be introduced, whereby married couples could choose to have the same or separate surnames. However, the optional separate surname system has not been implemented to date due to strong opposition from conservative members of the LDP, who argue that giving married couples separate surnames would lead to a breakdown of family unity.

The Grand Bench of the Supreme Court ruled on the constitutionality of the surname system in 2015 (the *Same Surname System Case I*).<sup>3</sup> There is an argument against the same surname system, claiming that it violates Article 14 of the Constitution. Article 14 guarantees equality under the law by stating that “[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations

because of race, creed, sex, social status or family origin”. However, in the *Same Surname System Case I*, the Supreme Court held that Article 750 of the Civil Code did not itself discriminate between men and women because it left the choice of a surname to the agreement of the couple, and therefore the system itself did not discriminate between the sexes. The Supreme Court’s logic was that Article 14 prohibits only formal discriminatory treatment by the law, but the surname system is neutral in the choice of surname; in other words, 96% of women were forced to change their surnames because of social pressure, not because of the law.

The Supreme Court, however, ruled that the same surname system would be an issue under Article 24 (2). Article 24 (2) provides that “[w]ith regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes”. Article 24 was based on a draft by Beate Sirota Gordon, a 22-year-old American woman who was one of the officials of the Allied Forces occupying Japan. Sirota had lived in Japan in childhood and was passionate about eliminating the discrimination against women that had taken root in Japan.<sup>4</sup> However, Article 24 has not received much attention, even among constitutional scholars. It was considered that the elimination of gender discrimination could be achieved through Article 14 and that Article 24 did not have any unique significance. In contrast, the Supreme Court recognized the unique significance of Article 24, which is not included in Article 14. The Supreme Court held that the “essential equality of the sexes” in Article 24(2) does not require only equal formal treatment of the sexes but rather requires the Diet to realize substantive equality that can eliminate the influence of discriminatory consciousness and customs that remain in society. This interpretation is important because it acknowledges that even if formally neutral to both sexes, a treatment that results in substantive inequality could be a constitutional issue. However, the Supreme Court, after recognizing the room for discretion by the Diet on how to achieve substantive

equality, concluded that the same surname system was not unconstitutional, pointing the fact that outside of official registration, a married couple could effectively continue to use their pre-marital surname.

The plaintiffs in *Same Surname System Case II* argued that *Same Surname System Case I* should be overturned on the grounds that since 2015, women increasingly entered the workforce and the need to maintain their maiden names had grown, and that the percentage in favor of an optional separate surname system had increased. However, on 23 June 2021, the Supreme Court ruled that the same surname system did not violate Article 24, even if post-2015 circumstances were taken into account. Nevertheless, the Supreme Court had urged the Diet to discuss the issue further, stating that not violating Article 24 does not mean that the same surname system is reasonable as a legislative policy. Note that four of the 15 judges in all wrote opinions stating that the same surname system was unconstitutional.

The Constitution provides for a system of national review at the time of the general election of the House of Representatives, whereby the people vote on whether or not newly appointed Supreme Court judges should be removed from office. The national review was conducted in the October 2021 general election. No judges were removed from office as a result. However, although the difference was only about 1%, more votes were cast to remove the judges who ruled that the same surname system was constitutional in the *Same Surname System Case II* than those who ruled that it was unconstitutional.

## 2. Confucian Temple Case

After the Meiji Restoration of 1868, the *State Shinto* religion was formed based on the indigenous *Shinto* religion in Japan, which affirmed the idea of the emperor as the offspring of a deity (*Amaterasu*) and justified the sovereignty of the emperor based on this idea. The government treated the *State Shinto* as having de facto state religion status and severely persecuted religions that could be in conflict with *State Shinto*. In order to prevent such detriments created by the com-

bination of state and religion, the 1946 Constitution introduced clauses aimed at separating state and religion. Those clauses are the latter part of Article 20 (1) (prohibition of the state granting privileges to religious organizations), Article 20 (3) (prohibition of religious activities by the state), and Article 89 (prohibition of financial assistance to religious institutions by the state), collectively referred to as the separation clauses.

The Supreme Court's doctrines on the separation clauses have been compromising. The Supreme Court has held that the separation clauses do not require absolute separation of state and religion, but rather make state actions unconstitutional only when they exceed "reasonable limits" on the degree of connection with religion. This approach permits the state to have a connection with religion within reasonable limits, and it is unclear in what cases the reasonable limits are "exceeded". However, the Supreme Court has twice ruled that local government actions were unconstitutional based on the separation clauses.<sup>5</sup> The *Confucian Temple Case* was the third time it had ruled that a local government act was unconstitutional.

The subject of controversy, in this case, was the Confucian Temple built in Matsuyama Park, owned by Naha City in Okinawa. The Okinawa Islands are located in the southwestern part of Japan and have long been in relationships with China. The Kume area of Naha City is home to a group of clans called the Thirty-six Clans of Kume, who are thought to have migrated from China between 600 and 300 years ago. The clans had built a temple worshipping Confucius, the founder of Confucianism, in the Kume area since the 17th century, but the temple was burned down in the battles of World War II. The temple was later rebuilt outside the Kume area, but the *Kume Souseikai*, an organization formed by the Thirty-six Clans of Kume, lobbied Naha City to help relocate the temple to the Kume area where it originally stood. In 2011, Naha City granted the *Kume Souseikai* permission to relocate the Confucian Temple building on Matsuyama Park. In addition, Naha City exempted all fees for the use of the park. The amount of the exemption was as much as 5.76 million

yen per year. A resident of Naha City filed a lawsuit claiming that Naha City's exemption of land use fees for the Confucian Temple was invalid because it violated the separation clauses of the Constitution.

The issue of lease fee exemptions for religious institutions on public land is not exactly new. This issue was also in dispute in the *Surachibuto Shrine Case* in 2010, in which the Supreme Court stated, "[W]hen judging whether or not the condition where national or public land is offered for the use as the site of a religious facility without compensation is ... beyond the limit that is deemed to be reasonable ..., it is appropriate to construe that judgment should be made comprehensively in light of the socially accepted ideas, while taking into consideration various factors, including the nature of the religious facility in question, the circumstances where the land in question has been offered for the use as the site of the relevant facility without compensation, the manner of offering without compensation, and the public's evaluation of such practice". That is, whether or not the use of public lands for religious facilities without compensation exceeds reasonable limits depends on a comprehensive judgment focusing on four factors: (1) the nature of the religious facility, (2) the circumstances where the land has been offered for the use, (3) the manner of offering without compensation, and (4) the public's evaluation of such practice. The Supreme Court followed the same framework in the *Confucian Temple Case*.

First, with regard to the nature of the Confucian Temple, the Supreme Court held that the degree of religiosity of the Confucian Temple was not minor, noting that in addition to its similarity in appearance to *Shinto* shrines and Buddhist temples, it is also a place where rituals of religious significance are held to worship Confucius as a spirit, rather than Confucius as a philosopher. Second, regarding the circumstances where the free use of the park for the Confucian Temple was granted, the Supreme Court stated that since the building itself was newly constructed and was not treated as a cultural heritage, the free lease of the land could not be affirmed on the grounds of the temple's historical value. Furthermore, concerning the

manner of free use, the Supreme Court noted that the high exemption facilitated religious activities by the *Kume Souseikai* conducting religious rituals at the Confucian Temple. Finally, as to the evaluation of the public, the Supreme Court, based on the situations mentioned above, stated that the exemption from land use fees could be evaluated by the public that Naha City offered a special benefit to a specific religion and assisted it. In conclusion, the Supreme Court held that the free lease of public land to the Confucian Temple by Naha City exceeded reasonable limits and constituted "religious activities" prohibited by Article 20 (3) of the Constitution.

The first thing that should be noted about the *Confucian Temple Case* is that the Supreme Court avoided making a decision on the religious nature of Confucianism. Naha City and the *Kume Souseikai* had denied the religious nature of Confucianism. The Supreme Court did not decide whether Confucianism itself is a religion, but rather affirmed the religious nature of the Confucius Temple on the basis of the fact that religious rituals are practiced worshipping Confucius as a spirit. Second, in the *Soratibuto Shrine Case*, the free lease of public land was found to violate Articles 20(1) and 89, while in this *Confucian Temple Case*, it was found to violate Article 20(3). Although it is unclear what the difference is between these articles, Article 20 (1) and Article 89, by their wording, can only be applied in cases where benefits are provided to "religious organizations". In the *Confucian Temple Case*, it was not clear whether the *Kume Souseikai* could be said to be a religious organization. Therefore, the Supreme Court used Article 20(3), which can be applied even if the target of the benefit is not a religious organization. In the *Confucian Temple Case*, the Supreme Court implied that the framework of judgment would not change under Article 20(1), Article 20(3), or Article 89. If so, just Article 20(3), which has the widest scope of application, is sufficient as a separate clause, and the question arises as to where the unique significance of Article 20(1) and Article 89 lies. Third, although the Supreme Court held that the full exemption of park fees was unconstitutional, it did not rule the lease of the land itself was unconstitutional. After this ruling, Naha

City continued to lease the land for the Confucius Temple after changing the lease from no charge to a paid one. Although the constitutionality of the continued lease of the land with compensation was also disputed in the lawsuit, the Naha District Court ruled in a 23 March 2022 decision that the continued lease of the land with compensation was not unconstitutional.<sup>6</sup>

#### IV. LOOKING AHEAD

On 10 July 2022, a regular election for the House of Councillors was held. Two days before the election, an incident occurred that shook the world. Former Prime Minister Shinzo Abe, who was giving a speech in support of an LDP candidate, was shot and killed. In the election, the LDP won an increase in seats, partly out of sympathy for the slain Abe. In the House of Councillors, the total number of seats held by the pro-amendment parties exceeded two-thirds (177/248). However, the movement toward constitutional amendments has not gained momentum. Rather, the LDP faction *Seiwakai*, which had been positive toward constitutional amendments, has been subjected to strong public criticism. The man who killed Abe was one whose family had been destroyed as a result of his mother's large donations to the *Unification Church*, a religious sect. The man possessed a deep grudge against the *Unification Church*. The man learned that Abe had sent a video message to the *Unification Church* ceremony and decided to assassinate him. After the incident, the media reported various other cases of families that had been disrupted by large donations to the *Unification Church*, as well as the close relationship between the *Unification Church* and the conservative faction of the LDP, mainly *Seiwakai*, which led to strong criticism. In an attempt to accommodate the LDP conservatives, Kishida gave Abe a state funeral, but it also aroused public opposition. The Kishida cabinet's approval rating dropped to the level at which Suga had stepped down a year earlier. It is unclear how long the Kishida cabinet will last, but the strong negative sentiment toward the conservative factions of the LDP indicates that the debate on consti-

tutional amendments is unlikely to get going in earnest any time soon.

#### V. FURTHER READING

Ejima Akiko, 'How to Compare Constitutional Amendments in the World: Some Reflections from an Empirical Perspective' (2021) 11 *Yonsei L.J.* 39

Shigenori Matsui, 'Judicial Review of Restrictions on Constitutional Rights in Japan' in Po Jen Yap (ed), *Proportionality in Asia* (CUP 2020)

Koichi Nakano, 'The Politics of Unconstitutional Constitutional Amendment in Japan: The Case of the Pacifist Article 9' in Rehan Abeyratne and Ngoc Son Bui (ed), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021)

1 Masato Shimizu, Kenpo Seiji [Constitutional Politics] (Chikuma Shobo 2022) 12.

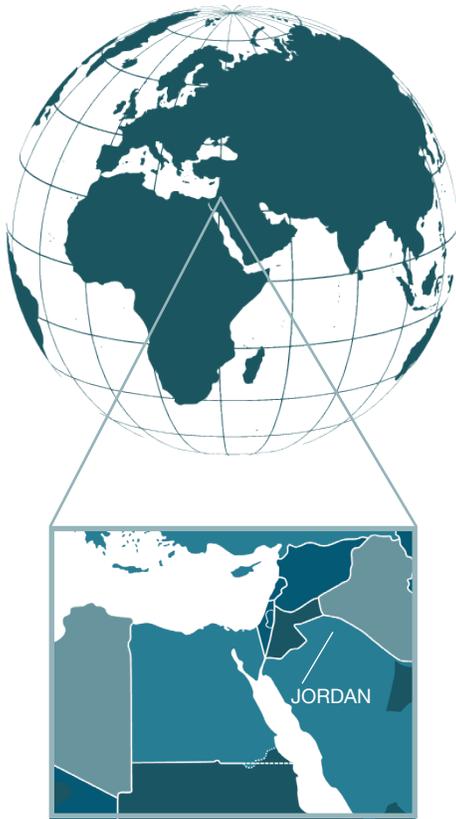
2 Supreme Court, Grand Bench, 23 June 2021, 1488 *Hanrei Times* 94 (Same Surname System Case II); Supreme Court, Grand Bench, 24 February 2021, 75 (2) *Minshu* 29 (Confucius Temple Case).

3 Supreme Court, Grand Bench, 16 December 2015, 69 (8) *Minshu* 2586 (Same Surname System Case I), available in English at [https://www.courts.go.jp/app/hanrei\\_en/detail?id=1435](https://www.courts.go.jp/app/hanrei_en/detail?id=1435).

4 See, Beate Sirota Gordon, *The Only Woman in the Room* (University of Chicago Press 2014).

5 Supreme Court, Grand Bench, 2 April 1997, 51(4) *Minshu* 1673 (Ehime Tamagushi Case), available in English at [https://www.courts.go.jp/app/hanrei\\_en/detail?id=312](https://www.courts.go.jp/app/hanrei_en/detail?id=312); Supreme Court, Grand Bench, 20 January 2010, 64(1) *Keishu* 1 (Sorachibuto Shrine Case), available in English at [https://www.courts.go.jp/app/hanrei\\_en/detail?id=1048](https://www.courts.go.jp/app/hanrei_en/detail?id=1048).

6 Naha District Court, 23 March 2022.



# Jordan

Dr. Laith Nasrawin  
Rapporteur of the Royal Subcommittee for Constitutional Amendments  
Professor of Constitutional Law  
School of Law – University of Jordan

## I. INTRODUCTION

In June 2021, The King of Jordan entrusted the Royal Committee to Modernize the Political System to materialize the political reform and uphold Jordanians' right to enhance democratic participation and empower youth and women. The mandate of the committee was to put forward new draft election and political parties' laws; look into the necessary constitutional amendments connected to the two laws and the mechanisms of parliamentary work. The committee was also asked to provide recommendations on developing legislation regulating local administration, expanding participation in decision-making, and creating a political and legislative environment conducive to the active engagement of youth and women in public life.

A former Prime Minister, Samir Rifai, was selected to chair the committee along with 92 members who represented diverse political, ideological, and sectoral backgrounds, and 10 seats were reserved for youth activists under the age of thirty-five. I was honored to be a member of the committee, and to be later elected as the Rapporteur of the Sub-Committee for Constitutional Amendments.

The committee submitted its final report to the King in early October, which included draft laws for elections and political parties, and 22 constitutional amendments related to the two proposed laws: advancing parliamentary work and ways to empower youth and women.

The King expressed his satisfaction of the recommendations, affirming that they will be pivotal in implementing tangible advancement in platform-based partisan parliamentary work, calling on political parties to develop their tools to win over voters and

to meet their aspirations in the parliament. The King also reassured members of the committee that the final recommendations will be adopted by the government without intervention, and that they would be submitted unchanged to the Parliament. Law-makers started with approving the constitutional amendments by the end of 2021, before moving to the draft election law and political party law early this year.

On a different level, an important decision was issued by the Constitutional Court of Jordan which clearly determined the legal status of international conventions signed and ratified by the State.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

There was a lukewarm public reception of the royal decree appointing the committee and with its final report. A majority of Jordanians suffer from a poor economic environment, which was worsened by the repercussion of the corona virus pandemic. Rates of unemployment and poverty have reached unprecedented levels. Furthermore, the last 20 years of holding parliamentary elections have only delivered weak parliaments that have failed to perform their oversight duty over king-appointed governments.

Moreover, there were calls against amending the constitution, which was last revised in 2016 and that it would be the fourth amendments to its provisions since 2011, which contravenes its classification as a rigid written constitution. However, it is relevant to mention that in 2021, Jordan has completed its first centennial, so it makes sense to enter the new

century with modern tools and laws that are compatible with the era's requirements. Modernization and development are characteristics of active states, and Jordanians have always been at the forefront of those seeking progress and reform. So it is important that the State, embarking on its second centennial, continues the process of development to guarantee Jordanians' right to engage in a parliamentary and political life that enhances their democracy and way of life, and contributes to fulfilling their aspirations.

The mandate of the Royal Committee was different to those previously established. It was assigned with the duty to come up with a legislative framework to set the grounds for effective partisan life capable of persuading voters with its platforms, leading to a parliament built on platform-based blocs, and establishing for an advanced phase in the way the executive branch exercises its responsibilities, in accordance with the Jordanian Constitution.

The methodology adopted by the committee was to study current laws and situations, to examine successful experience and best practices in the Arab world and the world at large, to listen to citizens and their recommendations. The Committee defined its goal as specified in the King's letter to the Chairman, and aimed at crafting consensus-building bills that ensure a gradual transition toward achieving all future goals of equitable representation of citizens throughout the country and paving the way towards the implementation of parliamentary government.

In order to facilitate the work mechanism, the committee was divided into sub-committees. A committee for political parties was formed, as was another for elections, and another for local government, empowerment of women, empowerment of youth, and constitutional amendments.

The sub-committee for constitutional amendments started by defining its mandate: to review constitutional text relating to the work of parliament and to make necessary constitutional changes that go with the new proposed laws for election and political parties. It also defined its work to include constitutionalizing the recommendations tabled by the youth and women subcommittees.

## 1- Constitutional amendments related to the modernization of parliamentary work

The sub-committee for constitutional amendments noticed that the constitutional rules in application are old, and are not compatible with the dramatic increase in the number of serving MPs. As such, number of MPs for the submission of a vote of no confidence was increased from 10 members to a fixed percentage of 25% of total number of MPs.

Also, the subcommittee suggested amending Article 72 of the Constitution, making the resignation of any lawmaker effective from the date of handing over the letter of resignation to the Speaker of the House of Representatives. This proposal was meant to remove any obstacles hindering lawmakers' participation in government, following the proposal of prohibiting members of Parliament from being appointed as ministers, as well as to enhance the stability of parliamentary work. Should any member of Parliament from the ruling party decide to join the government, he can resign with an immediate effect and shift position to the executive authority.

The subcommittee also suggested amending article 74/2 of the Constitution which forces the government to resign following the dissolution of Parliament, proposing instead that there should be no resignation of the government that recommend the dissolution of the elected chamber, in the event that the dissolution is within the last four months of the parliament's term.

The justification for this proposal was that dissolving the House of Representatives during this period is meant to hold new parliamentary elections, which does not necessitate the resignation of the government. The new appointed government after the dissolution of Parliament would be obliged to resign following the outcome of the parliamentary election to allow the political party with the majority of elected seats to form the government.

The subcommittee also proposed amending Article 88 of the Constitution related to refilling vacant seats in the House of Senate, noting that there should be no need to notify the government in case one seat in the Senate is declared vacant, since the King is granted the sole power in the Constitution to appoint senators without the need of any governmental recommendation.

Also, the rules relating to the holding of joint sessions of the elected House and the Senate for legislative purposes were amended, allowing the formation of a joint committee from both chambers to discuss controversial items of any draft law and agree on a final structure, before referring recommendations to the two houses.

This proposal was made to ensure that the work of the joint session in the legislative process goes smoothly, and that lawmakers do not spend much time debating the points of disagreement in any draft law. They would instead depend on the outcome of the joint committee to decide on how to proceed with the draft law.

As far as the financial function of members of Parliament is concerned, the subcommittee proposed the unification of the financial reference under one legal umbrella through providing Parliament with one annual draft law for the general budget that includes the budgets of government units at least one month before the end of the fiscal year.

This amendment aimed at granting the government the authority to monitor the revenues and expenditures of independent commissions, and at developing the mechanisms of parliamentary action by saving time and effort of lawmakers and senators in deliberating the draft law of the general budget.

Furthermore, a time limit for discussing the Audit Bureau annual reports by the two chambers of Parliament was set up in the revision of the Constitution. A new clause was recommended to be inserted to the effect of requiring the Senate and the Lower House to discuss Audit Bureau reports during the session in which they are presented in, or the next ordinary session maximum.

## 2- Constitutional amendments related to the Law of Election and Political Parties

With respect to constitutional amendments relating to the law of election, the Subcommittee for constitutional amendments proposed lowering the age of candidacy for Parliament from 30 to 25 years of age, substituting unpaid leave for resignation for those running for election, increasing the presence of women and youth within party organizational structures, and ensuring their inclusion in the first ranks of party lists nom-

inated for elections. This is in the hope of creating an inductive environment for youth, who account for roughly 70% of the State of Jordan. Political parties were also given more freedom to operate, including inside universities.

The Constitution was also revised to the effect of allowing the new electoral system to include (41) seats elected through a national list consisting only of political parties' candidates.

This amendment aims at implementing the new election law suggested by the royal committee, which entailed a mixed electoral system made up of two levels of representation: national general districts and local districts. Under this system Jordan is divided into (18) local electoral districts and one national general district; (41) seats, out of a total of (138) seats, would be allocated for the general district.

The national electoral lists would be exclusive to political parties that would need to pass a threshold of (2.5%) of the total number of voters in the national general district under a closed list system. The share of political parties in Lower House seats would increase proportionally in the following elections; thus, ideally, delivering parliamentary governments in around (10) years' time.

However, and as a response to the recommendations of the subcommittee for political parties, the Constitution was revised in favor of assigning to the Independent Election Commission the jurisdiction to decide on the setting up of political parties, and to monitor their internal affairs. At present, this mandate is given to the Ministry of Political and Parliamentary Affairs, and this arrangement goes against the principles of parliamentary government, in which the winning political party of a general election forms a government.

### 3- Constitutional amendments related to empowerment of women and youth

The subcommittee for the empowerment of women submitted recommendations for adding the word "sex" to article (6) of the Constitution which reads as "Jordanians shall be equal before the law with no discrimination between them in rights and duties even if they differ in race, language or religion".

The proposal was rejected on the ground that

laws relating to the rules of distributing inheritance amongst men and women which gives men double the shares might be found unconstitutional. Also, the text in the Jordanian Nationality Law which only allows Jordanian men to pass the nationality to their sons and daughters when married to non-Jordanians would also be challenged for being unconstitutional based on the proposed addition to article (6).

Instead, the title of Chapter (2) of the Constitution which reads "Rights and Duties of Jordanians" was revised to become "Rights and Duties of male and female Jordanians". A new paragraph to article (6) of the constitution was also added to include "The state guarantees the empowerment and support of women to play an active role in building society, in a way that guarantees their right to equal opportunities on the basis of justice and equity and protects them from all forms of violence and discrimination".

Another paragraph to article (6) was proposed to empower youth, which reads "The state guarantees, within the limits of its capabilities, empowering young people to contribute to political, economic, social and cultural life, developing their capabilities, supporting their creativity and innovations, spreading a culture of tolerance and promoting the values of citizenship and the rule of law".

### 4- Parliament reject two major amendments

The constitutional amendments with the draft laws on election and political parties were tabled before Parliament last November. According to the Constitution, Parliament has the upper hand in approving, amending or repealing the outcomes of the Royal Committee, and only two constitutional amendments were rejected by Parliament. The first amendment relates to the proposal by the royal committee to impose full restriction on MPs' financial interests of not signing any sort of contracts with government bodies and companied owned or controlled by government.

Lawmakers rejected that recommendation, approving instead the text which prohibits members of both chambers of parliament, while in office, from concluding any contract, lease, sale, barter, or any other type of contract with the government, public insti-

tutions or government-owned or controlled companies.

However, they excluded cases in which a senator or a deputy, prior to membership, is a shareholder or partner with ownership of no less than (5%), in addition to leases of land and property signed before membership.

The second constitutional recommendation rejected by Parliament was related to reducing the scope of parliamentary immunity for members of Parliament. It was suggested that MPs and senators would only be immune from being detained during the duration of the Parliament's session but not from facing trial. The rationale of this proposal was that the criminal proceedings laws in Jordan do not anymore require that the defendant appears before court and to attend all hearings of the trial.

Both chambers of Parliament rejected that proposal, voting in favor of preserving article (86) as it currently stand which provides that no Senator or Deputy may be detained or tried during the currency of the sessions of Parliament unless the House to which he belongs decides by an absolute majority that there is sufficient reason for his detention or trial or unless he was arrested flagrante delicto. In the event of his arrest in this manner, the House to which he belongs shall be notified immediately.

### 5- Constitutional Amendments added by the Government

The government implemented the instructions of the King of not intervening in the outcomes of the royal committee with respect to the constitutional amendments. However, it added to the (22) amendments tabled by the committee (8) new constitutional proposals, the most important of which, is to establish a National Security and Foreign Policy Council to be headed by the King.

Parliament rejected the proposal as made by the government on the ground that the King's chairmanship of the new council goes against the principles in article (30) of the Constitution which defines his constitutional position as the head of the State, and grants him immunity from every liability and responsibility. That constitutional proposal was revised by Parliament to the effect that the council was renamed to "The National Security Council"

and was assigned the functions of overseeing security, defence and foreign policy matters. The new council will be led by the Prime Minister, but meet at the request of the king, convene in his presence and its decisions would be enforceable only after the king signs off on them.

The council will be staffed by the PM, Ministers of Defence, Foreign Affairs and Interior, the head of the army, intelligence and public security directorate, as well as two members chosen by the king. In effect, this means all members of the council will be selected by the monarch, as the king appoints all of the above ministers and security officials to their positions.

The government also proposed extending the list of appointees made by the sole decision of the King to include the chief justice, head of the Sharia court, the general mufti, the head of the Royal Hashemite Court and advisers.

This amendment reflects the intention of applying the system of parliamentary government, which require defining the relationship between the king and the elected prime minister. All matters relating to the security and foreign affairs will be assigned to the king, and these important positions are highly related to the national security due to their major duties statutory assigned to them. Hence, they should be kept away from any political party's influence from different parties coming to office.

### III. CONSTITUTIONAL CASES

The establishment of the Constitutional Court was a part of the amendments made to the Jordanian Constitution in 2011, with the aim of establishing an independent judicial body with the specific task to settle disputes related to the unconstitutionality of laws and regulations in force, in addition to its additional competence, namely interpretation of the provisions of the constitution.

A constitutional question was raised as to whether members of Parliament can enact a national law that contravenes the rules of an international convention approved by the State. According to the Constitution, treaties and agreements which entail any expenditures to the Treasury of the State or affect the

public or private rights of Jordanians shall not be valid unless approved by the Parliament; and in no case shall the secret terms in a treaty or agreement be contrary to the overt terms.

In its interpretative decision, the Constitutional Court interpreted article (33/2) of the Constitution regarding the place of international treaties in the Jordanian legal system. The Court defined the treaty and the agreement as one of the acts of sovereignty that states conclude among themselves, and that Parliament may not issue any law that conflicts with a provision of a treaty or an agreement that was ratified by Jordanian accordance with the Constitution.

The importance of this interpretative decision stems from the fact that it has brought an end to the legal debate in Jordan about the status of the international treaty in the Jordanian legal system. The Constitution did not include any provision that defined the status of an international treaty as regards its hierarchy compared to national laws. The judicial decisions issued by the Court of Cassation have always been influential as it is the highest court in the Jordanian judicial system. Its jurisprudence established that international treaties are superior to national laws in Jordan.

In the Case No. 4677/2014, the Court of Cassation ruled that "The provision contained in an international agreement is the first priority to apply from the domestic laws, since the agreement is superior to the law".

Also, in the case No. 3726 of 2014, the Court of Cassation ruled that "Judicial jurisprudence has established that the agreements are of a higher order than the law and that they are more likely to be applied in the event that their provisions conflict with the provisions of the domestic law".

In the case No. 1486/2011, the court ruled that "The judiciary and jurisprudence have settled that the provisions of the agreement are one of the rules of international law, as they are the highest order and the first in application of the rules of domestic law".

But the problem with relying on the decisions of the Court of Cassation, to determine the status of international treaty in the Jordanian legal system, was that these judicial precedents are merely indicative and a secondary source of law in Jordan. Also, the Court of

Cassation has the right to revoke any of its previous jurisprudence. The Law on the Formation of Ordinary Courts stipulates that the Court of Cassation shall convene by at least five judges in its regular session if one of its bodies decides to revoke a principle established in a previous judgment.

Therefore, once the interpretative decision was issued by the Constitutional Court regarding the supremacy of the international treaty ratified by Parliament on national law, there became a constant and binding constitutional principle that can be relied on to the effect that the ratified international treaty is higher than national law, and that ordinary laws may not contradict an international treaty that has been approved by the Parliament.

### IV. LOOKING AHEAD

At the time of writing this report, Parliament has already approved the constitutional amendments that have been ratified by the King. The constitutional reforms are intended to revitalize the country's stagnant political life, to restore public trust in the state and defuse anger over successive governments' failure to deliver on pledges of prosperity and curbing corruption.

The ultimate aim of the revision process is to pave the way for a prime minister to be chosen by the assembly's largest single party, rather than one handpicked by the monarch. For this, it is the responsibility of political parties in Jordan to make the best out of this historical opportunity. They are invited to restructure themselves and to work together as a coalition, so that their members can stand for the next general election and to compete over the (41) parliamentary seats reserved for political parties.

Any political party or a coalition which can win a decent number of seats in the next Parliament will be invited to form the government, which will move Jordan a step closer to the complete implementation of the parliamentary government.



# Kazakhstan

Rustam B. Atadjanov  
Assistant Professor of Public and International Law  
KIMEP University School of Law

## I. INTRODUCTION

During 2021, Kazakhstan continued following its long-established course of strengthening or reinforcing the existing state system and the influence of the ruling elite, first of all, the authority of the first president (“El-basy”) of the state thereby consolidating the so-called current “diarchy” between the first president and the incumbent. No substantial change or radical improvement in the domestic reform implementation could be observed. That included the constitutional developments as well. Furthermore, the Kazakhstani authorities appeared to have learned the algorithm of reaction to the waves of the COVID-19 pandemic which hit the country hard for several times since the beginning of the year.

Three things that stood out in terms of constitutional discussions in 2021 were the review of the attempts to more strictly regulate and restrain the legal profession and the work of legal consultants on the side of state system, issues related to the jurisdiction of a jury trial in Kazakhstan, and – impermissibly briefly – the necessity to expand citizens’ access to constitutional control. The Constitutional Council went on with its usual practice of issuing rare decisions and symbolic annual addresses to the Kazakhstani Parliament.

The present report describes the developments in the country relevant from the constitutional legal perspective as well as the work carried out by the Constitutional Council of Kazakhstan during 2021. It further provides an overview of the Council’s normative resolutions and other documents dealing

with issues of constitutional significance. Similar to the last year’s contribution to the Global Review on Kazakhstan, the report proposes that the existing flexible constitutional system in the country basically continued to carry out the work expected from it by the ruling elites, with the issued decisions confirming this status-quo, and that no big changes or true constitutional reforms are currently foreseen.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Again, not much happened in the country during 2021 in terms of constitutional developments. There was no new constitutional legislation adopted and no major amendments to the Constitution itself were introduced. As before, the only mechanism of constitutional control in Kazakhstan, i.e., the Constitutional Council, issued certain normative resolutions. The constitutional provision authorizing institutional subjects (the President and the courts) to address the Council was invoked twice to consider matters involving constitutionality review. What follows is a description of some occurrences, which to different degrees were, relevant from the point of view of constitutional law in Kazakhstan.

While no state of emergency was introduced in Kazakhstan in 2021<sup>1</sup>, quarantine measures were sustained from time to time throughout the year, although the practice of imposing criminal sanctions was not widely applied. What raised questions, though, was the unclear nature of the legal status of the official

acts adopted or issued on the side of the chief sanitary physicians in response to several waves of the coronavirus pandemic.<sup>2</sup> These documents<sup>3</sup> were declared to be binding on all subjects of law on the entire territory of the Republic and apparently were held to be prevailing even over the legislative acts. That allegedly violated the hierarchy of legal sources established in the legislation of Kazakhstan, in accordance with article 4 of the Constitution as well as the Law of the Republic of Kazakhstan “On Legal Acts”<sup>4</sup> especially in the absence of any state of emergency in the country during the reported period. Moreover, those acts are not normative in nature while imposing the restriction of the citizens’ rights upon an unlimited number of subjects of law is allowed under the Constitution only through adopting laws. However, the main constitutional authority, namely, the Constitutional Council, has never pronounced on this key matter directly affecting the interests of individuals and business entities, nor was it asked to provide its authoritative interpretation of the issue.

Another development was the adoption by the Parliament on 8 April 2021 of the Law “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Issues of Advocacy and Legal Assistance”. Before signing it into law, President Tokayev requested the Constitutional Council to check the adopted Law for its compliance with the Constitution (see further below). According to lawyers and experts’ prevailing opinion in the country, this legislative act was problematic due to the following reasons: it provided for introduction of strict regulation of the legal profession by the state apparatus and its associated public entities, allowed for expansion of opportunities for unfair competition by major representatives of the legal services market, imposed a specific digital product, i.e., an information system developed according to an opaque scheme with unclear funding, and intended as a non-alternative, paid and mandatory system for persons providing legal services and legal assistance, and it also established mandatory payments with a specific minimum amount required to work as a legal consultant, thus creating a paid access to the profession and requirement of payment for the right to work.<sup>5</sup>

As the description in the next section will demonstrate, the Constitutional Council did not find the Law violating any constitutional provision and hence it was corresponding to the Constitution of Kazakhstan. Subsequently, the adopted legislative act was signed by the President into Law on 9 June 2021.

One more change in the domestic legislation of Kazakhstan that pertains to constitutional provisions and their implementation is the introduction of several amendments into the acting Law of the republic of Kazakhstan “On International Treaties”. The modifying Law was signed by the President on 13 March 2021 and entered into force on 26 March 2021.<sup>6</sup> It contained the following relevant modification: “Article 20-1. Correlation between ratified acting international treaties of the Republic of Kazakhstan and the laws of the Republic of Kazakhstan. International treaties of the Republic of Kazakhstan, that are ratified by the Republic of Kazakhstan and are valid, have priority over its laws and are applied directly, except when it follows from the international treaty that its application requires the issuance [adoption. *RBA*] of a law.” It appears that the question of relationship between international legal obligations of Kazakhstan and its domestic law has been perceived by the authorities as an important one (which it is), and it also appears that by introducing this clarification into the law on treaties they attempted to explain in more detail the paragraph 3 of article 4 of the Constitution which states that international treaties ratified by the Republic take precedence over its laws.<sup>7</sup>

### III. CONSTITUTIONAL CASES

The Constitutional Council of the Republic of Kazakhstan issued only two normative resolutions and gave one annual address to the Kazakhstani Parliament covering the year. The Council has been approached and requested by two authorized institutions, namely, the Head of the State and a judicial subject, i.e., a court, on the matter of reviewing the constitutionality of the legislation being adopted or already in force, as described right below.

#### 1. *Normative Resolution #1 of 4 June 2021: Review of the Constitutionality of the Law “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Issues of Advocacy and Legal Assistance”*

In issuing its first normative document in 2021<sup>8</sup>, the Council was acting upon the request from the President of Kazakhstan, Kassym-Jomart Tokayev, who is authorized to do so by para. 2, article 72 of the Constitution. Doubts about the constitutionality of the Law had been caused by a wide discussion in the Kazakhstani society, including the professional legal community, entrepreneurs, human rights activists and parliamentarians. The discussion was accompanied by pickets and rallies, and was characterized by a growth of social tension among the public.<sup>9</sup> The President in his request did not specify which exact provisions of the Law needed to be analyzed; hence the entire legislative act’s text was expected to be reviewed. The Law provided for the introduction of modifications into three codes and six laws of Kazakhstan: on criminal and civil procedure, notary activities, non-commercial organizations, executive proceedings as well as advocacy and legal assistance. Citing various international and domestic legal sources and also certain legal principles, the Council declared the Law as constitutional. It found that the novelties introduced by the Law (such as the establishment of one unified informative system of juridical assistance, creation of a so-called Republican Collegium of Legal Consultants, expansion of the rights of the advocates, and others) do not violate the constitutional requirements.

This normative resolution of the Council raises a number of issues well summarized in the analysis by leading lawyers in the country. According to their review, first, the principle of legal certainty was violated in the Resolution: the Council argues that in response to the right of everyone to receive qualified legal assistance, the state is obliged to do something unclear and of an unspecified nature for creating unclear conditions for undisclosed persons (“the necessary measures of a regulatory, legal, organizational and other nature in order to create appropriate conditions, both to guarantee the specified right of the individual, and

to ensure the effectiveness of the activities of persons called upon to provide qualified legal assistance”).<sup>10</sup> In other words, in its very first arguments, the Constitutional Council actually maintains that since the state is obliged to do something in the field of legal assistance, whatever it does in this area is constitutional – which is undoubtedly against basic constitutional principles. Second, the Council argues that the legislative regulation of the activities of legal consultants is constitutional because legal consultants are somewhat similar to advocates (while ignoring the fundamental differences between them) and that the regulation of the activities of legal consultants makes the organization of their activities similar to the organization of advocates.<sup>11</sup> Such a judgment is a fallacy of analogy: there are fundamental differences between legal consultants and advocates, and those differences are not considered properly by the Council. There are also other key issues raised by the experts (stepping beyond the authority of the Council in taking such a decision, certain Council members not recusing themselves despite the conflicts of interest, etc.).<sup>12</sup> In total, as it appears, this Resolution is rather problematic especially compared to multiple other resolutions and decisions of the Constitutional Council issued in the past where it realized its authority in much better accordance with its constitutional mandate. As a result, the bill in question went into its final adoption stage, was signed into Law and subsequently entered into force.

*2. Normative Resolution #2 of 24 November 2021: On verification of the constitutionality of a provision of the Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Improving Criminal and Criminal Procedural Legislation, and Strengthening the Protection of Individual Rights” dealing with jury trial*

In this case, the Constitutional Council considered, in an open session, the petition of the Specialized Inter-District Court for Criminal Cases of the Akmola Region on the recognition of one norm, namely, subparagraph 2, article 2 of the Law of the Republic of Kazakhstan of 27 December 2019 “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakh-

stan on Improving Criminal and Criminal Procedural Legislation, and Strengthening the Protection of Individual Rights” as unconstitutional. It followed from the court’s submission that it was dealing with a criminal case against Mr. N. Ivanov, who had been accused of committing an especially grave crime and whose petition to consider his case in a jury trial had been rejected, on the grounds that the jury trial’s jurisdiction with respect to the crime he committed (a drug-related criminal offence) had not yet become validated in the law and would be activated only on a specific date, i.e., 1 January 2023, in accordance with a specific Law to that effect.<sup>13</sup> The defendant claimed that such a provision in the said Law violated his constitutional rights and freedoms of the individual and citizen, in particular, the right to be tried by a jury trial in accordance with part 2, article 75 of the Constitution. The Council response was that the legal provision in question was corresponding to the Constitution. It cited the Law of the Republic of Kazakhstan “On Legal Acts” noting that it stipulated that legislative acts are put into effect upon the expiration of ten calendar days after the day of their first official publication, *unless* other terms are indicated in the acts themselves or in the acts regarding their entry into force. The Council maintained that the three-year period established by the Law, i.e., 2019-2022, according to its developers, was necessary to prepare the law appliers, especially the judicial system, as well as participants in criminal proceedings for proper work in anticipation of an expected increase in the number of criminal cases to be considered by the courts with the participation of jurors. Hence, the disputed provision of the Law does not violate the relevant provision of the Constitution such as articles 13 (everyone’s right to judicial protection), 62 (procedure for the adoption of legislative and other normative acts) and 75 (criminal proceedings with a jury trial).

*3. Annual Address of 21 June 2021: Status of Constitutional Legality in Kazakhstan*

This act of the Council was addressed to the Parliament of the Republic of Kazakhstan, in accordance with para. 6 of article 53 of the Constitution. Again, full of solemn proclama-

tions, anniversary mentions and, even more importantly, exaggerating the role of the first president of the state, this Address represented another one of many acts endorsing the current policies of the state and ruling elite. If anything, this, one more time, demonstrated the Council’s reluctance to objectively assess the situation with constitutional legality, law and practice in Kazakhstan. Just as before, the text of the Address is abundant in generalizing statements and platitudes similar to this one: “... The Republic of Kazakhstan is developing along an evolutionary path based on a well-defined strategy of the state, constitutional and legal policy and fundamental principles of the country’s activities ...”. It represents a listing of constant successes of the State during the reported period in various spheres of life of the society and State, from political life to State programs to policy concepts to the country’s international role and actions, and so on.

There are some aspects of public and constitutional life in Kazakhstan mentioned in the Address that deserve to be noted here. Several points stand out in this regard. Firstly, the Council noted that in January 2021, despite the complexity of the epidemiological situation, and in strict accordance with the current updated legislation, the next elections of deputies of the Mazhilis of the Parliament of the Republic of Kazakhstan, elected by party lists and the Assembly of the People of Kazakhstan, were held. According to their results, factions of the Nur Otan Party, the Democratic Party of Kazakhstan “Ak Zhol” and the People’s Party of Kazakhstan appear in the composition of the deputy corps. Secondly, and very importantly, the Council notes that it is necessary to expand citizens’ access to constitutional control. However, this seems to be just a general or populist statement, without any concretization or justification; the Council goes on to saying that it had repeatedly raised the issue of expanding in the future the range of subjects authorized to appeal to or address the Council in accordance with Article 72 of the Constitution (back in 2001 it proposed to grant this right to individuals but only to the Prosecutor General and the Minister of Justice). Nowhere has it truly supported authorizing the individual subjects such as citizens to apply to the

Council with their petitions and cases. Third, the Council rightly noted that Kazakhstan had earlier ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty. Thus, the Republic undertook to bring the Criminal Code and other laws into line with this international treaty. Taking into account the fundamental nature of the constitutional right of everyone to life,<sup>14</sup> the particularities of the sources of criminal law, the requirements of the Basic Law and the international treaty, this implementation work should be completed, in order to harmonize the Criminal Code and other legislative acts with the provisions of the Second Optional Protocol. Fourth, the Council also stated that as part of the humanization policy, it was advisable to consider the possibility of using the institution of exemption from administrative liability on the basis of an amnesty act (article 63 of the Code of the Republic of Kazakhstan on Administrative Offenses).

#### IV. LOOKING AHEAD

No major changes or shifts in the constitutional law, practice and policy have been observed during 2021. The only constitutional control body, the Constitutional Council, continues playing its political role even if by the Constitution itself its authority and independence are not to be interfered with by any structure, or institution, or individual. Any hopes for its potential in terms of changing the situation with constitutional legality and the ongoing dual power practice in the country appear right now to be naïve at best. Unless a significant challenge or true reform or a radical change in the political will of the ruling elite happens in the near future, the constitutional practice in the country is expected to remain more or less the same. Be it as it may, the next year 2022 will show.

#### V. FURTHER READING

R. Atadjanov, “Building the State of Law (Rechtsstaat) in the Countries of Central Asia: An Unachievable Dream or Realistic

Objective?” (2021) 3 (92) *Pravo i gosudarstvo* 52 [Law and State, in English]

E. Bekbaev, “Powers of the Parliament for the Legal Security and Protection of the Constitution of the Republic of Kazakhstan” (2021) 4(93) *Pravo i gosudarstvo* 25 [Law and State, in Russian]

I. Tretyak, “The Main Provisions of the Constitutional Conflictology Theory and Its Practical Significance” (2021) 3 (92) *Pravo i gosudarstvo* 71 [Law and State, in Russian]

1 Unlike what would happen after the reported period, as shown by the violent events which shook the entire country right in the beginning of the subsequent year 2022.

2 In fact, these questions have been raised by Kazakhstani lawyers already since 2020 when the first resolutions from the sanitary doctors started to be issued. See, e.g., the following news piece titled “Jurist schitaet postanovleniya glavnogo sanvracha Kazahstana nezakonnymi – argumenty” [“A Lawyer Considers Decisions of the Chief Sanitary Doctor of Kazakhstan Illegal – Arguments”] published on 16 September 2020, available in Russian at <https://ru.sputnik.kz/20200916/yurist-postanovleniya-sanvrach-14970424.html> .

3 For example, the Resolution of the Chief State Sanitary Doctor of the Republic of Kazakhstan #42 “On Restrictive Quarantine Measures and Their Gradual Mitigation” adopted on 10 September 2021, full text available in Russian at [https://online.zakon.kz/Document/?doc\\_id=34566834](https://online.zakon.kz/Document/?doc_id=34566834) .

4 Article 10 of the Law of the Republic of Kazakhstan “On Legal Acts”, full text of the Law in Russian is available at [https://online.zakon.kz/Document/?doc\\_id=37312788&pos=3;-116#pos=3;-116](https://online.zakon.kz/Document/?doc_id=37312788&pos=3;-116#pos=3;-116)

5 See the Analysis of the Normative Resolution of the Constitutional Council of the Republic of Kazakhstan #1 issued on 4 June 2021 in the Part Regulating the Activities of Legal Consultants, by Farid Bakhtiyar oglu Aliyev available in Russian at <https://online.zakon.kz/> . See also the preceding 2020 contribution by this report’s author.

6 Full text in Russian is available at [https://online.zakon.kz/Document/?doc\\_id=31713581&show\\_di=1](https://online.zakon.kz/Document/?doc_id=31713581&show_di=1) .

7 Full text of the Constitution in Russian is available at [https://online.zakon.kz/document/?doc\\_id=1005029&pos=46;-54#pos=46;-54](https://online.zakon.kz/document/?doc_id=1005029&pos=46;-54#pos=46;-54) . The referenced provision of the Constitution has been commented upon by the Constitutional Council in its acts three times before: in 2000, 2006 and 2009.

8 See the full text of the Resolution in Russian at <https://online.zakon.kz/> .

9 The Analysis of the Normative Resolution of the Constitutional Council of the Republic of Kazakhstan #1 issued on 4 June 2021 in the Part Regulating the Activities of Legal Consultants, by Farid Bakhtiyar oglu Aliyev available in Russian at <https://online.zakon.kz/> .

10 The Analysis of the Normative Resolution of the Constitutional Council of the Republic of Kazakhstan #1 issued on 4 June 2021 in the Part Regulating the Activities of Legal Consultants, by Farid Bakhtiyar oglu Aliyev available in Russian at <https://online.zakon.kz/> .

11 Ibid.

12 See Ibid.

13 See the Law of the Republic of Kazakhstan adopted on 27 December 2019 “On the Introduction of Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Improving Criminal and Criminal Procedural Legislation, and Strengthening the Protection of Individual Rights”, full text is available in Russian at [https://online.zakon.kz/Document/?doc\\_id=39975530&pos=1;-17#pos=1;-17](https://online.zakon.kz/Document/?doc_id=39975530&pos=1;-17#pos=1;-17)

14 It should be noted here that in accordance with Kazakhstan’s reservation that it made when ratifying the Second Protocol to the ICCPR, death penalty will apply in Kazakhstan but only during

the time of war, not during peacetime; in other words, the death execution may be applied for the commission of crimes during armed conflict. Therefore, it is not abolished completely, and this also means that the constitutional right to life in Kazakhstan’s law continues to remain a relative right, not an absolute one. Hence, it reflects the current understanding of this right in modern international human rights law.



# Kenya

Jill Cottrell  
Katiba Institute, Nairobi

## I. INTRODUCTION

Constitutional dramas in 2021 played out against a backdrop of the COVID-19 pandemic, as in the rest of the world, though Kenya was an economy in a poor state even before the pandemic, with a worrying level of government debt that has more than doubled since 2015, and imminence of elections (August 2022).

The main, more specifically constitutional issue in 2021 was a continuation from previous years: the effort to change the constitution, at least in part to facilitate a certain result in the 2022 presidential election.

The take-over of Nairobi County by the national government was referred to in the 2020 Survey. At that time the ineffectual governor had no deputy (see 2019 Kenya Survey). I should have mentioned that in 2020 the Governor, despite being subject to bail conditions that severely restricted what he could do, nominated a Deputy (Anne Kanunu), while he was also being prosecuted for corruption. In 2021, a court opened the way to her approval by the county assembly, formal installation as Deputy Governor, and acting Governor. Meanwhile the Governor had been successfully impeached by the assembly before the Senate in December 2020, which was upheld by the High Court.<sup>1</sup> Kanunu finally became substantive Governor in November 2021, after the Supreme Court had disposed of the Governor's final attempt to reverse events.<sup>2</sup>

The ICON Kenya Survey 2019 described the President's refusal to appoint some of the 41 people proposed (in what should be a binding 'recommendation') by the Judicial Service Commission for appointment or promotion in the judiciary. In 2021, he finally appointed all but six. The former Chief Justice said the Presi-

dent should be impeached for this refusal. There was one case on the subject – with interesting reasoning – during the year (case 5 below).

Kenya appointed its first woman Chief Justice: Martha Koome. This brings to three, out of seven, the women judges of the Supreme Court (quorum five). For the first time the make-up of the court satisfies the “Not more than two thirds of either gender” requirement of the Constitution. (It is, however, not clear what constitutes “a body” for that constitutional purpose – the court, the whole judiciary, or the superior judiciary?<sup>3</sup>) The Deputy Chief Justice was already a woman. Until 2028 it seems likely the top two judges will be women. (Each may serve as such for 10 years).

The Parliament neared the end of its term still with over two thirds male members. The now retired Chief Justice's efforts to get the President to dissolve Parliament on the basis of Article 261 (see Kenya Survey 2020) didn't realize.

COVID-19 remained a medical, social and legal challenge. Throughout the year, rules about the use of masks in any public space, indoors or outdoors, remained in force. A curfew was in effect until October, though not for as long a period as at the beginning of the outbreak. Courts sat mainly virtually.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

*The President, his Deputy, Odinga and the Building Bridges Initiative*

The soap opera of Kenyan constitutional politics continued. Particularly, the ramifi-

cations of the 2018 “handshake” between President Uhuru Kenyatta and his defeated presidential opponent of the 2017 elections, Raila Odinga, played out.

The estrangement between the President and his Deputy, William Ruto, became increasingly overt. Under the Constitution 2010, the Deputy comes to office as an electoral running mate of the President and can only be removed by impeachment. Under the old Constitution, presidents appointed could dismiss the Vice-President like any Minister. Some commentators have regretted the change, feeling it weakens the President.

The DP was identified with a new political grouping, the United Democratic Alliance (UDA). By late September, Ruto was claiming the support of 150 MPs (out of 349). In May, a Senator, Isaac Mwaura (a list member representing persons with disability under Article 98(1)(d)), had been removed for having left his party, having been dismissed from the party by disciplinary committee.<sup>4</sup> This was the first time this provision of the constitution<sup>5</sup> (or a related one in the previous constitution) had ever been invoked. However, the High Court held the dismissal from the party wrongful and the Tribunal in error, including because his party and the Deputy President’s party had a coalition agreement, so Mwaura had not furthered the cause of another party.<sup>6</sup> The Speaker then reinstated him as Senator.

There was some support for the idea of impeaching Ruto. For example, a relatively small party, Amani National Congress, said it had asked its legal team to draft articles of impeachment. A year later its leader, Musalia Mudavadi, is hoping to be Ruto’s running mate in the August 2022 presidential elections. The constitutional amendment bill that was the main outcome of the Handshake process (see 2020 Kenya Survey) continued its progress as the subject of a “popular” initiative, under Article 257 of the Constitution. In December 2020 its sponsors had submitted several million signatures to the electoral commission. In January 2021 the Commission verified 1.4 million of them. The Bill then went to the county assemblies, of which more than half voted to approve it. They had no power to make any changes to it. It then went to the Parliament where, by May, it was approved in each house.

Court challenges were constantly made to this process. The story now shifts to the court cases section of this paper.

### *Judicial appointments*

The President finally formally appointed most of the 40 judges he had declined to proceed with. Of the six he did not include, two had been on the High Court bench that decided, less than a month earlier, against the president’s project, the BBI – something that did little to dispel a sense that the president was not being objective in this matter. (See case 5)

### *COVID-19 and the Constitution*

There has been a good deal of dissatisfaction with the way the COVID-19 outbreak has been dealt with by public authorities, especially from a human rights perspective, as research yet to be published will show. Here only one case is discussed (see case 8), and not so much a human rights case.

## III. CONSTITUTIONAL CASES<sup>7</sup>

### *David Ndii v Attorney-General [2021] eKLR (High Court)<sup>8</sup> Amendment, Basic structure, popular initiative*

This was a consolidated case (8 separate petitions) challenging the Building Bridges constitution amendment Bill. Five judges of the High Court in May gave a unanimous judgment which held the entire process unconstitutional. With some partial dissents, the Court of Appeal in August upheld the lower court. The judgments touched on the substance of the amendments to a very limited extent (there were about 78 amendments to the Constitution in the Bill).

This note focuses only on a few most significant aspects. First, the High Court held that the Basic Structure doctrine, as developed in the Indian case of *Kesavananda Bharati v State of Kerala & Another* (1973) 4 SCC 225, applied in Kenya, and thus elements of the Constitution that can be described as its basic structure may not be amended by a process involving the people, and a program of civic education, opportunity to contribute ideas, debate in a constituent assembly and a national referendum. Some aspects of the Constitution, the High Court held, were so

fundamental that they could not be amended at all. This, they held, was true of the provisions on the process for deciding on electoral constituency boundaries – for 70 new constituencies included in the Amendment Bill. A second major holding was that the popular initiative procedure for amending the constitution could not be initiated by the President, or any other state officer or organ. The court also held that the presidential immunity did not preclude the president being sued personally for something that was clearly not in the exercise of his functions as president.

Another important holding was that the Independent Electoral and Boundaries Commission (or IEBC) had had only three of its statutory seven members when it confirmed the signature on the popular initiative, did not have a quorum under its Act, and thus could not validly take this action. There were several other holdings some of which were equally fatal to the whole BBI enterprise.

### *Human rights*

Human rights cases have been rare before the Supreme Court but in 2021 there were two, both concerning eviction matters, and the right to housing, among the economic and social rights recognized in Article 43 of the Constitution.

### *2. Mitu-bel Welfare Society v Kenya Airports Authority [2021] eKLR<sup>9</sup> Right to housing; structural injunction; use of international guidance; international law in Kenyan courts*

The Supreme Court held that people who have occupied public land for a considerable period, though they do not have title, do have a right to have their dignity respected and to be evicted, if this is necessary, in a humane way, with decent notice and with perhaps the offer of alternative sites for housing. The court endorsed the relevance of the UN guidelines on Development Related Evictions, and UN human rights bodies’ General Comments.

The court, disagreeing with the Court of Appeal, endorsed the use of the structural injunction (or ‘interdict’ - Kenyan lawyers often use this word taken from South African law), where the authorities are directed to

take certain steps. The Court of Appeal had held that, once judgment is given, the court has no further role, so it cannot insist that authorities report back to it.

The court elaborated the significance of Article 2(5) and (6) about the use of international law in Kenyan courts. As long as customary international law and treaties are relevant, and not in conflict with, “the Constitution, local statutes, or a final judicial pronouncement” Kenyan courts should apply them.

### 3. *Musembi v Moi Educational Centre Co. Ltd.* [2021] eKLR<sup>10</sup> Human rights – dignity, security, housing, children and elderly; compensation

This involved eviction of people in an informal settlement by a private concern, though, with police assistance. The Supreme Court held that there had been a violation of rights to dignity, security and housing, and specifically of the rights of children, including to shelter (Article 53), and of the elderly to dignity (Article 57). There was a violation because of the failure to obtain a court order for eviction. The Court drew a careful distinction between the obligations of the private concern and of the state. The former has an obligation to respect rights, but not to go further to protect, promote and fulfil them which are duties of the state (Article 21). The former had violated rights by the way it had conducted the evictions. And the state bodies had violated rights by their involvement in the evictions. Damages were awarded against both in favor of the evictees. The court also deplored the failure of the state to pursue more actively its obligations on the progressive realization of the socio-economic rights – but made no order on this issue.

Turning to non-Supreme Court human rights cases:

### 4. *Tatu Kamau v Attorney General* [2021] eKLR<sup>11</sup> Right to culture, Female Genital Mutilation

The human rights community, unusually, welcomed this defeat of an argument based on a right under the Constitution. The primary basis of the claim was the right to practice one’s culture (Article 44): the petitioner (a medical doctor herself) argued that an adult

woman has the right to undergo what is often called female genital mutilation (or circumcision). The High Court (three judges) held that this limitation on rights was “reasonable in an open and democratic society based on the dignity of women”, in view of the fact of the harmful effects on women of the practice, and of the fact that it is not clear that all women freely consent. The court also commented that “We are not persuaded that one can choose to undergo a harmful practice.”

### *Powers and duties under the Constitution*

### 5. *Katiba Institute v President of Republic of Kenya* [2021] KEHC 44212 (KLR) (Constitutional and Human Rights) Judicial appointments - President’s role

The President’s reluctance to appoint or promote a number of judges came before the courts yet again. The issue was essentially: what can be done if the President persistently fails to carry out a clear constitutional duty, especially in view of the fact that he has considerable immunity from personal suit or prosecution?

The court did issue an order of mandamus against the President. But, in view of the difficulty of enforcing this, said it was creating a new remedy: at the expiry of 14 days the President’s office would be treated as having no power, and the six judges not appointed would be deemed to have been appointed. The Chief Justice (and Judicial Service Commission) would be “at liberty to take all necessary steps to swear the six Judges”. The Chief Justice did not take advantage of this invitation, and by the end of the year the six judges were still not promoted or appointed.

### 6. *Katiba Institute v Attorney General* [2021] eKLR<sup>13</sup> Appointment to parastatal boards

This was, in effect, a challenge to the exercise of patronage by the President and sometimes Cabinet Secretaries (Ministers) in the appointment of parastatal and state corporation boards. The court did not accept that these positions were “offices in the public service” according to the Constitution, and thus to be appointed by the Public Service Commission. However, it did accept that many of the pieces of legislation about specific bodies and

appointments to them were unconstitutional in that they did not adequately reflect the requirements of the Constitution about values of transparency and accountability (Article 10) or principles of public service, notably competition and merit, and equal opportunities taking into account gender, ethnicity, diverse communities of Kenya and persons with disabilities (Article 232). The latter specifically apply to state corporations. Pre-Constitution statutes were to be read with changes necessary to comply with the Constitution. The court held that the specific appointments impugned in the case had not been made in compliance with these Articles. It declared 54 appointments wrongly made and invalid. The court quoted from the report of the Constitution of Kenya Review Commission (responsible for the constitution making process from 2000-2004): “There was considerable disquiet about the apparent inability of public officers to exercise powers independently of political pressure, and of the fact that appointment procedures even where clearly set out in the law, were often subordinated to demands of patronage. The clear impression being projected was that public service appointments were often based on criteria other than merit, competence or relevant experience.” In the event, the terms of office of those wrongly appointed had already come or were about to come to an end.

### 7. *Muruatetu v Republic* [2021- eKLR<sup>14</sup> death penalty, Supreme Court elaborates own decision

This is an odd “case”. It is an addendum to the Supreme Court’s decision in the mandatory death penalty case in 2017:<sup>15</sup> the Court had held that the obligation to impose the death penalty on anyone convicted of murder was unconstitutional. Its decision necessitated a large number of resentencing hearings for people previously convicted of that offence, because they had had no opportunity then to offer pleas in mitigation of sentence. It included a direction to the Attorney-General and other relevant bodies to produce a report on a framework for resentencing hearings. This report had been much delayed. Meanwhile lower courts had responded to the Supreme Court’s decision in a variety of ways, and produced a messy

situation, involving challenges to restrictions on choice of sentence in other sorts of cases. The Court in *Muruatetu (2)* wanted to sort out the mess. They did it primarily by saying that their *Muruatetu (1)* decision affected only murder cases. A lawyer might say “Of course – the Court could only decide the case in front of it”. But it is entirely right for later courts to decide whether the reasoning in one case can, even should, be applied by analogy to other situations. That is how, in the common law system, the law develops. What the court did in this case was to decide – or at least declare wrong – a lot of cases that had not come before it, had not been argued before it. Oddest was its statement that *Muruatetu (1)* could not be applied to robbery with violence – a less serious offence not involving death and sometimes involving quite minor behavior. Less controversially, it set out some useful guidelines for courts resentencing people previously convicted of murder.

#### 8. *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice* [2021] eKLR<sup>16</sup> Ombudsman, whether recommendations binding

The Commission on Administrative Justice (or Ombudsman, or CAJ) is a constitutional commission – a successor to a general human rights commission that the Constitution provided might be split. The specific complaint was of non-renewal of an appointment in a public body. The Commission decided that there had been a violation of the rights of the complainant (especially of fair administrative justice - the main focus of the Commission’s work) and recommended that he receive compensation and an apology. The government agency had declined to comply. The issue here was whether this recommendation was binding and could be enforced by a court.

The Court of Appeal, disagreeing with the High Court, held that the CAJ recommendation was binding. The Supreme Court disagreed. There was nothing in the Constitution or the Act establishing the Commission indicating that a ‘recommendation’ (the word used) was binding. In fact, if any implementing was to be done it seems to be the function of Parliament. One might add that the whole case, though probably correct, does show that the CJA’s Act is rather unclear.

#### 9. *Law Society of Kenya v Attorney General & another* [2021] eKLR<sup>17</sup> COVID-19 response

The Law Society challenged the directives of the National Security Advisory Committee, a non-statutory body, on the conduct of public meetings, as “unchecked utterances and political weaponization of public gatherings”. It had been giving directions, in a way that was held contrary to the Constitution - under which only the Director of Public Prosecutions, and not the national executive, may direct the police as to how to exercise their powers. The NSAC had directed the police “to investigate particular offence or offences and also to enforce the law against particular person or persons.” A further issue was the constitutionality of s. 5 of the Public Order Act, which formed the framework for the NSAC directives. That section regulates public meetings, requiring advance notice, for example. The Judge took the view that it was unconstitutional, on the basis of Article 24 of the Constitution that sets out the criteria for validly limiting human rights. However, he considered that an earlier decision of the Court of Appeal had held it to be constitutional and precluded him from declaring the section unconstitutional. Oddly, the case to which the Judge in the Law Society case referred, and deferred, seems to have nothing to do with section 5 of the Public Order Act.<sup>18</sup> It was about curfews, and involved a decision that two completely other sections of the Act were constitutional.

#### Other issues

#### 9. *John Florence Maritime Services Limited v Cabinet Secretary, Transport and Infrastructure* [2021] eKLR<sup>19</sup> Supreme Court, res judicata, constitutional cases

The Supreme Court dealt with a technical but important issue: does the rule (*res judicata*) that, if an issue has already been decided in an earlier case, affecting the same parties, it cannot be brought before the courts again apply when both cases are constitutional cases? The court decided it can (though, with caution). But the particular case before it was a constitutional case, while the earlier one was not (being a judicial review case not based on constitutional rights). The court elaborated the difference between the two types

of case. Particularly, in judicial review cases the issue is procedure used in making the decision reviewed, while constitutional cases can look at the whole issue decided, including whether it was the right decision. It can also give a wider range of remedies. This was all despite the fact that judicial review is now recognized in the Constitution, and the distinction between the two has become rather blurred.

#### 10. *Okiya Omtatah Okoiti v Judicial Service Commission* [2021] eKLR<sup>20</sup> appointment to tribunals by executive – constitutionality

As well as ordinary courts, various specialized tribunals decide issues relevant to particular ministries. This case challenged a large number of these because appointment and dismissal of their members was by the very ministry that would be interested in the cases they decided. The court agreed these are “subordinate courts” under the Constitution (Article 169(1)(d). Their judiciaries should be independent’; for them to be appointed by the ministries went against the separation of powers under the Constitution, and the way the members are appointed means fair (impartial) hearings are not guaranteed. The court ordered that any appointment or removal of these tribunals (it listed 24) must in future be done by the Judicial Service Commission (Article 172(1)(c)). And it ordered the Attorney General and Parliament to take “proactive steps” to get an existing Bill on tribunals passed into law within six months.

## V. LOOKING AHEAD

The big case of the year – the ‘BBI case’ - was, at the end of the year, about to be argued in the Supreme Court. By then it was clear that, even if the BBI constitutional amendment Bill was given the go ahead, it would be impossible to make constitutional changes before the August 2022 elections. However, it had become symbolic of the differences between the two major presidential candidates in that election. In addition it was natural for some to speculate about what would happen if the Supreme Court did reverse the lower courts’ decisions.

The election itself was naturally the main focus of discussion – at least in the media. An element in the discussion was the prospect of violence and how that was to be prevented (fears of a repetition of the events of 2007-8 were expressed).

Being the end of the possible terms of the current president the elections are particularly significant (incumbent presidents who might contest have never lost).

## V. FURTHER READING

Yash Pal Ghai and Jill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (2<sup>nd</sup> edition, Katiba Institute, 2021)

Yash Pal Ghai, Emily Kinama and Jill Cottrell Ghai, eds, *Ten Years On: Assessing the Achievements of the Constitution of Kenya 2010* (Katiba Institute, 2021)

Kenya National Commission on Human Rights, *Shadow Report of the Kenya National Commission on Human Rights on the Implementation of the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Commission, September 2021 - [https://www.knchr.org/Portals/0/10\\_09\\_2021%20Shadow%20Report%20of%20the%20Kenya%20National%20Commission%20on%20Human%20Rights%20on%20the%20African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf](https://www.knchr.org/Portals/0/10_09_2021%20Shadow%20Report%20of%20the%20Kenya%20National%20Commission%20on%20Human%20Rights%20on%20the%20African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf) <https://tinyurl.com/KNHCRBanjulShadow-21>)

NT Koske & T Milej 'The right to privacy under the Constitution of Kenya and the criminalisation of consensual sex between same-sex adults' (2021) 21 *African Human Rights Law Journal* 417-440

Victoria Miyandazi, *Equality in Kenya's 2010 Constitution: Understanding the Competing and Interrelated Conceptions* (Hart Publishing, 2021)

1 *Mike Sonko Mbuvi Gideon Kioko v Clerk, Nairobi City County Assembly* [2021] eKLR <http://kenyalaw.org/caselaw/cases/view/215077/> (upheld by the Court of Appeal in 2022).

2 *Speaker Nairobi City County Assembly v Attorney General* [2021] eKLR The Court declined to issue an advisory opinion including on whether the Governor could appoint a deputy when on bail on conditions including not accessing his office.

3 Cases have included *National Gender & Equality Commission v Judicial Service Commission* [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/135563/>.

4 He lost an appeal to the Political Parties Dispute Tribunal - *Isaac Mwaura Maigua v Jubilee Party* [2021] eKLR <http://kenyalaw.org/caselaw/cases/view/212845/>.

5 Article 103(3) and the Political Parties Act

6 *Isaac Mwaura Maigua v Jubilee Party* [2021] eKLR <http://kenyalaw.org/caselaw/cases/view/224270/>.

7 With thanks to Dudley Ochiel, Katiba Institute, for some suggestions.

8 <http://kenyalaw.org/caselaw/cases/view/212141/>.

9 <http://kenyalaw.org/caselaw/cases/view/205900/>,

10 <http://kenyalaw.org/caselaw/cases/view/216115/>.

11 <http://kenyalaw.org/caselaw/cases/view/209223/>

12 A system of "neutral citations" like this was introduced in 202. This one means Kenya High Court. 442<sup>nd</sup> case decided. The url is <http://kenyalaw.org/caselaw/cases/view/226691/>.

13 <http://kenyalaw.org/caselaw/cases/view/212831/>.

14 <http://kenyalaw.org/caselaw/cases/view/215422/>.

15 <http://kenyalaw.org/caselaw/cases/view/145193/>.

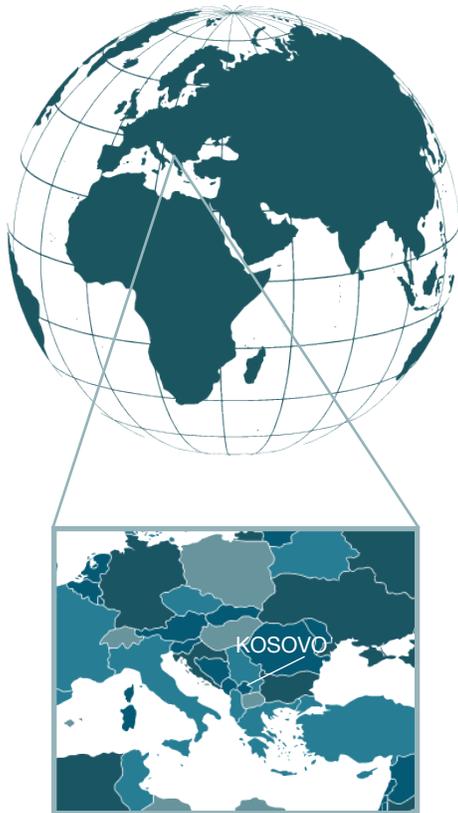
16 <http://kenyalaw.org/caselaw/cases/view/209732/>

17 <http://kenyalaw.org/caselaw/cases/view/217817/>.

18 *Haki Na Sheria Initiative v Inspector General of Police & 3 others* [2020] eKLR <http://kenyalaw.org/caselaw/cases/view/197033/>. The author has been unable to locate any other case that might have been intended.

19 <http://kenyalaw.org/caselaw/cases/view/217483/>.

20 <http://kenyalaw.org/caselaw/cases/view/209285/>.



# Kosovo

Prof. Dr. Visar Morina  
Professor of Constitutional Law  
University of Prishtina/Faculty of Law

Prof. Ass. Dr. Florent Muçaj  
Assistant Professor of Constitutional Law  
University of Prishtina/Faculty of Law

## I. INTRODUCTION

The year 2021 has been linked to a flurry of constitutional events, fueled in part by political developments and in part by the Constitutional Court's interpretations. On a number of occasions, the Constitutional Court has been asked to review decisions adopted by a parliamentary majority, reinforcing the necessity of adhering to constitutional norms when it comes to parliamentary decision-making in Kosovo. It should be noted that in terms of political context, after a Constitutional Court decision of December 2020 invalidated the election of the previous government in June 2020, the Assembly was dissolved and early elections were held in February 2021. Following the landslide victory of an opposition alliance led by the party Vetëvendosje, the new Assembly majority approved a new government in March 2021.<sup>1</sup>

This year has seen a number of constitutional cases in which the Kosovo Constitutional Court has found that the legislative and judicial powers of Kosovo have violated constitutional provisions. In the case of the Kosovo Assembly, the Constitutional Court ruled that the legislative majority's decision to dismiss members of the Kosovo Civil Service's Independent Oversight Board was unconstitutional. This ruling of the Court has once again reaffirmed the parliament's constitutional constraints in terms of legislative oversight of independent entities. The Constitutional Court has also expanded the con-

stitutional standards of gender equality in the context of exercising the right to vote (especially the right to be elected) by invalidating a Central Election Commission decision that barred female candidates for deputies from replacing deputies, who had been appointed to ministerial or municipal posts, despite having more votes than male candidates for MPs.

There have been no significant constitutional reforms in the last year. However, constitutional changes have been part of a national debate on important issues such as the introduction of vetting for judges and prosecutors and the establishment of a national bureau to collect illegally acquired property. The Ministry of Justice of the Republic of Kosovo has already begun the process of drafting constitutional amendments to allow the vetting of judges and prosecutors to take place in Kosovo. The Venice Commission, which is currently studying the modalities of constitutional changes in Kosovo, is anticipated to make a statement on the vetting process in relation to this initiative of constitutional reforms. It remains to be seen whether the initiated constitutional reform regarding the vetting process will be materialized given the fact that the Constitution of Kosovo is among the most rigid constitutions in the world and the current political composition of the Assembly is so diverse that it's rather difficult to obtain the required parliamentary majority for constitutional changes.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

One of the issues that have triggered debate in Kosovo during 2021 is the Government's plan for the vetting of judges initiated by the Minister of Justice. In September 2021, the first proposal for judicial vetting was presented to Prime Minister Kurti, foreseeing the establishment of new institutions and panels to vet judges in the judiciary. It has become very obvious that one of the major constitutional implications for the implementation of the proposed judicial reforms in Kosovo is amending the 2008 Kosovo Constitution, which requires broad parliamentary consent. It should be noted that any constitutional amendment requires for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo. Other than the discussions about prospective constitutional amendments in the 2008 Kosovo Constitution regarding the vetting of judges, no other plans for constitutional amendments have been materialized by the legislature during 2021.

Another issue that has sparked debate in Kosovo is the Venice Commission's opinion on the suggested revisions to the Law on the Kosovo Prosecutorial Council (the KPC)- in particular about possible constitutional changes emanating from this process. Some contextual background considering this process is useful here. On 26 October 2021, the Minister of Justice of Kosovo requested an opinion of the Venice Commission on the draft amendments to the law on the Kosovo Prosecutorial Council (the KPC). The draft amendments to the law on KPC seek to reduce the number of prosecutorial members of the KPC, to proportionally increase the lay members of the KPC, and to modify the procedure for their selection.<sup>2</sup> The opinion of the Commission has played an important role in making sure that the proposed legal reforms are not contrary to the European standards on rule of law and separation of powers. In fact, the Venice Commission has argued that while prosecutors elected by their

peers still represent a substantive part of this body (three members out of seven), the reform should not lead to the subordination of the KPC to the ruling majority anchored in the Assembly of Kosovo. In the Venice Commission's opinion, the election of all lay members by a simple majority in the Assembly would increase the risk of undue political influence over the KPC, which is not in line with European standards.<sup>3</sup> It remains to be seen how the proposed recommendations of the Venice Commission will be incorporated into the draft Law.

As far as constitutional jurisprudence is concerned, there have been a number of important constitutional cases that have shaped both, the legislative and the judicial decisions on constitutional terms. One of the most important decisions of the Kosovo Constitutional Court, which will be elaborated on below, concerned the Assembly's premature dismissal of the members of the Independent Oversight Board for Civil Service (Oversight Board). The Constitutional Court argued that the Assembly of Kosovo has exceeded its oversight competencies of the Oversight Board by the adoption of the decision to dismiss members of the Oversight Board on grounds of professional incompetence and for having acted not in compliance with the law. The Constitutional Court concluded that the Assembly does not enjoy a constitutional prerogative to assess how concrete cases have been decided by the Oversight Board since this constitutes interference in the work of the independent institutions and that the affected parties have the right to seek judicial review of the decisions of the Oversight Board. The Constitutional Court has significantly strengthened constitutional guarantees of equality and non-discrimination based on gender in the *Tinka Kurti* and *Drita Millaku* case. The Constitutional Court declared the decision of the Central Elections Committee, of not to nominate *Kurti/Millaku* as a replacement for an outgoing deputy, unconstitutional as it constituted a violation of the right to equality and the freedom of election in connection with Article 14 of the European Convention on Human Rights. Like in previous years, the vast majority of the cases addressed to the Constitutional Court were initiated by way of individual referrals and concerned

allegations for violation of subjective constitutional rights (concrete control of constitutionality). However, this report is mainly focused on requests for abstract control of constitutionality (abstract norm control) given the magnitude that these cases have had in Kosovo's constitutional landscape.

## III. CONSTITUTIONAL CASES

### *The Kurti/Millaku case and the protection of the constitutional principle of gender equality*

After the final results were announced by the Central Election Commission, held on 06 October 2019, the Party Vetëvendosje Movement appeared to be the winner of the elections and it won the majority of seats in the Kosovo Assembly. The election system of the Republic of Kosovo and the division of seats in the Assembly is carried out proportionally, thus based on the principle of gained ballots in elections, either by political parties or the listed candidates, represented as per open lists.<sup>4</sup> Applicants of this referral are two candidates for members of the Kosovo Assembly, Tinka Kurti and Drita Millaku. Applicants in this case challenge two decisions of the Supreme Court of the Republic of Kosovo, which were rejection judgments.<sup>5</sup> The Applicants filed individual referrals for protection of their constitutional rights and freedoms, based on Article 113 of the Constitution of Kosovo. In particular, the candidates for member of Assembly *Tinka Kurti* and *Drita Millaku* alleged that the challenged judgments of the Supreme Court breached the equality before the law, the elections law, and the relevant articles of the Constitution and the European Convention on Human Rights related to discrimination. The MPs of Vetëvendosje Party, who won mandates in the Assembly of Kosovo, in the elections of October 2019, lost their mandates as they were appointed in executive positions. As a result, according to the election system of Kosovo, the replacement of the Assembly members is carried out in a manner that the mandate of the MP is delivered to the candidate in the waiting list from the same party and of the same gender. Applicants *Tin-*

*ka Kurti* and *Drita Millaku* alleged in their referrals that the allocation of the parliamentary mandate (in case of substitution) was against the Constitution, as the consequent mandates were assigned based on gender criteria and not according to the votes gained. As a consequence, though the applicants (*Kurti* and *Millaku*) had more votes, the mandates were taken by other candidates who had less votes. According to the allegations and arguments of applicants, this came as a result of erroneous and anti-constitutional application of Article 112.2 of the Law on General Elections by the Supreme Court and other instances, which defines that: “A member of the Assembly of Kosovo, whose mandate is ended pursuant to Article 112.1 shall be substituted: a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election; [...]”.<sup>6</sup>

The Constitutional Court, however, concluded that *Tinka Kurti* and *Drita Millaku* were discriminated against on a gender basis due to the unconstitutional application of Article 112.2 of the Law on General Elections by the state bodies (Central Election Commission and Supreme Court). According to the Constitutional Court, the applicants should have won seats in the Kosovo Assembly as they had more votes than the male MP members, who substituted other members of the Vetëvendosje Movement. The Constitutional Court also concluded that Article 112.2 of the Law on General Elections is applicable on a gender basis only when the quota of 30% of representation of one gender (males or females) is at risk.<sup>7</sup>

#### *Slavko Simic v Assembly of Kosovo – representation of non-majority communities in the Government of the Republic of Kosovo*

This case was initiated with the Constitutional Court by the members of the Assembly of Kosovo who have guaranteed seats from the Serbian non-majority community. The applicants contested the constitutionality of the decision for election of the Government of the Republic of Kosovo, dated 22 March 2021.<sup>8</sup> They claimed that when the elected Government has more than 12 ministries, regarding the third ministry

from the ranks of non-majority communities, the Constitution does not clearly state whether this minister comes from the ranks of non-majority Serb communities or from other non-majority communities. However, according to applicants, article 96 paragraph 5 of the Constitution stipulates that ministers representing non-majority communities must be appointed “after consultation with parties, coalitions or groups representing non-majority communities in Kosovo”.<sup>9</sup> The applicants added that “the third minister is the Minister of Local Government Administration – Mr. Elbert Krasniqi who was appointed without consultation as a representative of the non-majority community in violation of Article 96 of the Constitution because he did not secure the support of (11) eleven deputies out of a total of (20) twenty deputies who, in accordance with Article 64 of the Constitution, represent the non-majority communities in Kosovo (non-majority Serb community (10) ten deputies and other non-majority communities (10) ten deputies). Therefore, in the present case, they considered that “the rights of non-majority communities in general and the Serb community, in particular, have been marginalized”.<sup>10</sup>

It should be noted that the Constitution of the Republic of Kosovo in Article 96 determines that the Government of the Republic of Kosovo shall have one (1) minister from the Serbian non-majority community and one (1) minister from other non-majority communities. If there are more than 12 ministries, then the Constitution of Kosovo defines that the Government shall have a third minister from the non-majority communities in Kosovo. The composition of the Government was voted on 22 March 2021 by the Assembly of Kosovo, with more than 12 ministries, which rendered Article 96 para. 3 applicable. However, the third minister was not chosen from the Serbian non-majority community.

The Constitutional Court argued that the Kosovo Constitution gives the Prime Minister discretion to decide from which of the non-majority communities a minister will be picked, it requires consultation/approval of the ‘community in question’ but the Constitution does not specify on concrete terms which is such non-majority community. The Court argued that “for the appoint-

ment of the “third” Minister in the Government, in this case the candidate for Prime Minister decides from which community “in question”, namely the “Serb community” or “the other non-majority” community wants to appoint the third Minister. And in this case the candidate for Prime Minister (i) consults with the community “in question”; or (ii) obtains their approval (if the candidate is not a deputy of the Assembly), namely: either (i) the Serb community, or (ii) other non-majority communities.

In this specific case, in the composition of the Government voted by the Assembly on 22 March 2021, the third minister did not come from the Serbian non-majority community, therefore, the Constitutional Court clarified that it was not necessary to have a prior consultation with this non-majority community.<sup>11</sup> Therefore, the Court considered that the allegation of the applicants of violation of paragraphs 3 and 5 of Article 96 of the Constitution, when appointing the “third” Minister in the Government, was ungrounded and found that the challenged decision is in compliance with paragraphs 3 and 5 of Article 96 [Ministries and Representation of Communities] of the Constitution.

#### *Abelard Tahiri vs. Assembly of Kosovo – Exceeding the constitutional competence limitation by the Assembly of Kosovo*

This case arose based upon a referral for constitutional review of the constitutionality of the Decision [no. 08-V-029] of 30 June 2021, of the Assembly of the Republic of Kosovo, by which five (5) members of the Independent Oversight Board for the Civil Service of Kosovo have been dismissed.

The Applicants (eleven (11) deputies of the Assembly) based on the authorizations defined by paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution argued that the Decision of the Assembly infringed the independence of the Board guaranteed by Article 101 [Civil Service] and Article 142 [Independent Agencies] of the Constitution. They further contended that “the Board, as an independent constitutional body, cannot be subject to interference by the Assembly and that for the collective dismissal of members of the Independent Oversight Board, none of the legal

criteria set out by the Law on the Independent Oversight Board for the Civil Service of Kosovo have been met”.<sup>12</sup>

The Constitutional Court declared the referral admissible and held that the “Independent Oversight Board is an institution established by Article 101 of the Constitution; (ii) the Constitution has defined to the Board the status of an “independent” institution in the exercise of its constitutional function, respectively, to “ensure the respect of the rules and principles governing the civil service”. The Constitutional Court further argued that “the Independent Oversight Board enjoys the prerogatives of a “tribunal” in terms of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the European Convention on Human Rights and that the decisions of the Independent Oversight Board are “final, binding and enforceable”; and (iv) the control of the legality of the decisions of the Independent Oversight Board is done by the initiation of an administrative dispute in the competent court, consequently, they are subject to the control of the judicial power”.<sup>13</sup>

While the Court did not contest the constitutional powers of the Assembly in exercising the oversight function of the independent institutions, it underlined that the “exercise of the competence to terminate the mandate precludes the termination of the same due to the “decision-making” of the members of the Independent Oversight Board, because such circumstances, (i) would infringe the institutional independence of the Board and its members, as it is defined by paragraph 2 of Article 101 of the Constitution; and (ii) would be contrary to the Assembly’s own determination that Board members enjoy immunity from dismissal for decision-making, as defined by the relevant provisions of the Law on the Independent Oversight Board for the Civil Service”.<sup>14</sup> It was on this ground that the Constitutional Court found that Decision [no. 08/V-029] of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo, is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution of the Republic of Kosovo ordering unanimously the repeal of such challenged decision of the Assembly of Kosovo.

#### IV. LOOKING AHEAD

Going back to last year’s situation, it’s not difficult to predict what the constitutional changes in Kosovo will be this year. The Kosovo Assembly has had some difficulty obtaining approval of legislation necessary to ratify international agreements. As a result, without a broad parliamentary majority, the idea of adopting constitutional amendments to establish a framework for the vetting process will be difficult to pass. The Venice Commission’s position on the concept paper on Kosovo’s vetting process, which is expected to be made public, will be equally crucial for this process. With regard to parliamentary developments, the Assembly of Kosovo has adopted in first reading the draft Rules of Procedure in an effort to improve the rules of legislative procedure adopted a decade ago. If the Assembly succeeds to adopt the new Rules of Procedure, this will bring some changes in the parliamentary life in Kosovo, such as the introduction of the Conference of Presidents, the accelerated legislative procedure for specific legislation, and some changes in the area of parliamentary oversight of the independent institutions. It is also hoped that the new Rules of Procedure will increase the overall quality of legislative lawmaking in Kosovo.

#### V. FURTHER READING

Visar Morina, Florent Muçaj, Entela Nikaj, Jeton Shasivari, Luz Balaj, Vetëqeverisja lokale: shqyrtime teorike dhe krahasimore (Konrad Adenauer Stiftung, 2021).

Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 October 2021).

- 1 The 2021 EU Progress Report for Kosovo. The report is available at [https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021\\_en](https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021_en).
- 2 The Kosovo opinion on the draft amendments to the law on the Prosecutorial Council, adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021) on the basis of comments by Mr António Henriques GASPARGAS (Member, Portugal) Mr Myron Michael NICOLATOS (Member, Cyprus) Mr James HAMILTON (Expert, Ireland) [https://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-AD\(2021\)051-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-AD(2021)051-e)
- 3 [https://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-AD\(2021\)051-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-AD(2021)051-e)
- 4 Constitution Republic of Kosovo, article 64 paragraph 1.
- 5 Tinka Kurti and Drita Millaku [2021] Judgment nr. KI 45/20 and KI 46/20, [1-2].
- 6 *Ibid* [154-164].
- 7 *Ibid* [154-172].
- 8 Slavko Simic and others vs Assembly of Kosovo, [2021] Judgment, KO 61/21 [4].
- 9 *Ibid*. [44].
- 10 *Ibid*.
- 11 *Ibid*, [124].
- 12 Summary of the case KO127/21, Applicant, Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo, Constitutional review of Decision No. 08-V-029 of the Assembly of the Republic of Kosovo, of 30 June 2021, for the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo. The summary is available at <https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-08-v-029-te-kuvendit-te-republikes-se-kosoves-te-30-qershorit-2021-per-shkarkimin-e-pese-5-anetareve-te-keshillit-te-pavarur-mbikeqyres-per-sherbimin/>
- 13 *Ibid*.
- 14 *Ibid*.



# Liechtenstein

Peter Bußjäger

Univ.-Prof. Dr.

Institute of Public Law, State and Administrative Theory

University of Innsbruck - Innrain 52d, A-6020 Innsbruck

## I. INTRODUCTION

In 2021 the Constitution of the Principality of Liechtenstein celebrated its 100 years anniversary.<sup>1</sup> The following contribution recapitulates the development of the Constitution, recent debates on modifications and some important judgements of the Constitutional Court.

The Constitution of the Principality of Liechtenstein (Landesverfassung = LV) of 1921 is primarily a further development of the Constitution of 1862, specifically in the context of parliamentary powers and fundamental rights. Its concept of constitutional review was inspired by the “Austrian model” or “Kelsenian model” of a specialized Constitutional Court elaborated first by the Austrian Federal Constitution (B-VG) of 1920. However, there was also some orientation towards Swiss constitutional law, for example, regarding the role of direct democracy and the catalogue of state goals in the Third Chapter of the Constitution (Art. 14 to 27 LV). These provisions were transplanted from the Constitution of the Canton of St. Gallen of 1890.

The catalogue of state goals is a remarkable difference from the Austrian Federal Constitution. While legal doctrine in Austria at that time understood the B-VG as a Constitution of “rules of the game”, the Constitution of the Principality of Liechtenstein seems to be a “Constitution of values”.<sup>2</sup>

According to Art. 2 LV, the Principality of Liechtenstein is a constitutional hereditary monarchy on a democratic and parliamentary basis, meaning there is a balance of power between the people and the Prince. The Parliament (Landtag) is the legal body representing the entire people and as such has

the duty of safeguarding and vindicating the rights and interests of the people.

The people exercise their rights through elections and popular votes and hold the right of initiative and referendum both on the legislative and constitutional level (see nearer Art. 64 and 66 LV) in their power.<sup>3</sup> Even if the *Landtag* is the legislator according to Art. 65 of the Constitution its decisions may be overruled by the voting of the people in a referendum on the ground of the beforementioned constitutional provisions.

Due to Liechtenstein’s dualist structure, the Prince must also sanction every law, and if he refuses to do so within 6 months the law is considered refused (Art. 9 and 65 par. 1 LV). People’s initiative on the ground of Art. 64 par. 4 of the Constitution (LV) was launched after which an initiative concerning a modification of the Constitution supported by 1500 Liechtenstein citizens eligible to a referendum in 2003 solved a long and exhausting “Verfassungsstreit” (“constitutional dispute”) on a general revision of Liechtenstein’s Constitution. The dispute had led the small country to the edge of a considerable state crisis. In the end, the Princely proposals were subject to revision and the result of the referendum. Since then, there have been no major revisions of the Constitution, although the Constitution has been amended several times.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. General remarks

The Constitution of the Principality of Liechtenstein remained unchanged in 2021, even

though the Corona pandemic influenced constitutional considerations in several aspects. The Prince did not exercise his far-reaching rights for emergency decrees in Art. 10 LV. Restrictions combating the Corona virus were imposed solely by the government and were based on Swiss law. Questions of the compatibility of these restrictions were challenged before the Constitutional Court, which had to decide in two cases on the lawfulness of the government decrees concerning the Coronavirus and its compatibility with the Constitution (see below III.).

## 2. Parliamentary elections

One reason why no major legislative projects were carried out, was that the parliamentary elections were held on 7 February 2021, and political attention was focused on these and the subsequent formation of the government and its governmental program.

The parliament of Liechtenstein (Landtag) consists of 25 deputies. Art. 46 par. 1 LV provides a system of proportional representation. The small state is divided into two electoral districts, the Upper Country (Oberland), which is represented by 15 members of parliament, and the Lower Country with 10 members. The Landtag has a legislative term of four years. According to Art. 46 par. 3 LV seats in the Parliament are only distributed among electoral groups that have obtained at least eight percent of valid votes cast in the entire country. This entrance clause is one of the highest worldwide.

Regarding the elections of 7 Feb 2021, it can be stated that there has never been a national election in Liechtenstein as close as in 2021.<sup>4</sup> In the end, the difference between the two major parties (Vaterländische Union = VU and Fortschrittliche Bürgerpartei = FBP, both conservative parties without deeper going ideological differences) was 42 party votes or a wafer-thin 0.02 percent in favor of the VU. Both governing parties gained votes compared to the elections in 2017 (VU: +2.1%; FBP: +0.6%) - as did the Freie Liste (FL), which can be counted as a “green” party (+0.2%) - and the first-time “Demokraten pro Liechtenstein” (DpL) (+11.1%), another conservative party with slightly populist orientation. Another party comparable to DpL, represented in the former Landtag, “Die Unabhängigen” (DU) declined from 18.4 to 4.2 percent, which means that the

party did not make it into the Landtag as Liechtenstein has, with 8% in international comparison, a very high entrance clause for political parties to get in the Landtag.

The close result between the FBP and the VU also affected the distribution of seats: For the first time, there was no party with the highest number of seats in the Landtag, as both major parties achieved the same number of mandates (10 each). Taken together, the two major parties gained three mandates compared to the last state election. Against this background, it can be rightly said that it was an electoral success for both major parties and thus also for the existing grand coalition.

According to the voter flow analysis of *Frommelt/Milic/Bochat*,<sup>5</sup> the vast majority of voters remained true to their party colors and voted for the same party as in the last election. The reasons for the switch from VU to FBP and vice versa are rarely of a substantive nature due to the almost congruent values of both constituencies. Those who switched sides, be it from the VU to the FBP or vice versa, conspicuously often gave the government team of their preferred party as the most important reason for voting (about 70%).<sup>6</sup>

This high stability of the election results already indicates that the COVID-19 pandemic had hardly any effect on the voting intentions of Liechtenstein voters. This points out further that public trust in Liechtenstein is comparatively high, even in times of the Corona pandemic.

It can be stated that the government’s performance during the COVID-19 pandemic is assessed positively by the majority of voters.<sup>7</sup> DU and DpL voters in particular, however, criticize the government for what they see as a very hesitant opening policy. It is not surprising that the somewhat populist DU lost almost five sixths of its former voters, most of them to the DpL (44% of all DU voters in 2017). However, a broad majority is satisfied with the government’s crisis management policy, which is also confirmed by the stable results of the VU, FBP and FL. In general, the majority of voters describe the government’s work in the last four years as rather good or very good. The change in the course of the election from an FBP government majority to a VU government majority can therefore not be seen as a settling of accounts with the old government.

## 3. Government and Parliament in times of the Corona pandemic

For a small state such as Liechtenstein it is particularly true that a time of crisis is a time of executive power. It was the government which passed decrees on combating the Corona virus based on the Swiss Epidemic Act, which was applicable on the ground of the Customs Union (see below the respective decisions of the Constitutional Court). The Landtag remained comparatively passive regarding legislative acts in the context of the pandemic even though it would have been in the position to enact autonomous Liechtenstein laws to combat the pandemic.

This does not mean that the parliament remained inactive. As it was stated in an analysis by Frommelt/Schiess Rütimann,<sup>8</sup> the Landtag unfolded its control function sufficiently.

## 4. GRECO and its evaluation report on Liechtenstein

GRECO, the grouping of states in the Council of Europe against corruption, has released its evaluation report on Liechtenstein<sup>9</sup> in autumn of 2020, which evaluated the effectiveness of the systems in place in Liechtenstein to prevent corruption in respect of members of parliament, judges and prosecutors. GRECO held that there are virtually no known instances of corruption-related practices involving persons holding these public offices. However, it identified a number of areas where preventive measures should be strengthened in order to tighten the already existing framework and to avoid any corruption-related misconduct that may fall under the radar.<sup>10</sup> The concerns of GRECO focused on the following three spheres of constitutional powers. GRECO missed a code of conduct for the members of the Landtag. There should be rules to clarify what is expected by the deputies regarding gifts and contacts with third parties that may influence their parliamentary decisions. Besides that, the deputies should be required to fill out regular public declarations of their assets and principal liabilities in accordance with the levels of transparency expected of parliamentary office in a democracy.<sup>11</sup>

Another aspect concerned the selection of judges. GRECO held that the selection of

judges is mainly in the hands of the Judges' Selection Committee (Art. 96 LV) which did not include any judges as full members by right. In order to comply with international standards, it was proposed, that a significant number of judges elected by their peers should compose the Committee as a way of guaranteeing the full independence of the judiciary. Integrity criteria should also be laid down for the purpose of selection. As one of the peculiarities of the judicial system the relatively high proportion of part-time judges, many of whom practicing lawyers, were identified. From the view of GRECO this situation would call for an in-depth reflection on the possible full professionalization of judges, which would considerably reduce the risk of conflicts of interest, and in any event the adoption of clear rules to avoid any conflict of interest in the specific case where judges simultaneously act a lawyers at the same time. Importantly, a judicial code of conduct ought to be adopted, together with practical guidance.<sup>12</sup>

The last point of GRECO's critics regarded the possibility of the government to remove a post and therefore its post-holder for economic and operational reasons which should be supplemented by appropriate safeguards to avoid any misuse of this power. Moreover, a code of conduct with practical guidance should also be adopted for prosecutors and this should be accompanied by dedicated training.<sup>13</sup>

In 2021, Liechtenstein's officials have taken various measures to comply with the recommendations of GRECO: Meanwhile, a code of conduct has been established in all courts of Liechtenstein<sup>14</sup> and in the public prosecution. The Judges' Selection Committee was supplemented by a member of the ordinary courts of Liechtenstein. All posts for judges are now publicly advertised.

Regarding the "professionalization" of judges, the recommendation of GRECO primarily refers to the Supreme Court, the Administrative Court, and the Constitutional Court. Only part-time judges work of these courts. It would be difficult for the small state to restructure these important institutions of its judiciary within a shorter period of time. It is should also not be overlooked that the part-time judges, some of whom also come from Austria and Switzerland, are also valu-

able because Liechtenstein law is largely received from these two countries, and they bring in their special knowledge on practice where these laws have been originated.

However, it has been possible to establish separate offices for both courts which allows for a sharper separation of the judicial and professional activities of the members of the courts.

### III. CONSTITUTIONAL CASES

The Corona-restrictions imposed by the government of Liechtenstein were orientated on the measures taken in Switzerland to combat the Corona virus. Due to the Customs Union with Switzerland, the Swiss Epidemic Act also had to be applied in Liechtenstein. On ground of Art. 4 and 10 of the Treaty on the Customs Union of 1923 and Art. 40 in connection with Art. 6 and 41 par. 3 of the Swiss Epidemic Act and Art. 65 in connection with Art. 49 of the Health Act of Liechtenstein the government passed decrees of measures combating the Corona virus (COVID-19-Verordnung), which has been amended several times.

These regulations were challenged before the Constitutional Court in two applications: The first (StGH 2021/081) contained a group of applicants who claimed that the existence of the norm directly violated their rights based on Art. 15 par. 3 of the Law on the Constitutional Court of the Principality of Liechtenstein. The second group (1.273 persons) made use of the instrument granted in Art. 20 par. 1 of the Law on the Constitutional Court (StGHG), whereafter a minimum of 100 citizens who are allowed to vote may bring a governmental decree before the Constitutional Court (StGH 2021/082). In the concrete cases the 3G-certification obligations were challenged before the Court. It was argued with Art. 9 and 11 ECHR and Art. 27bis (unhuman treatment), 28 (freedom of movement), 31 (equality), 32 (freedom), 33 (legally competent judge), 37 (freedom of religion) and 40 (freedom of expression) of the Constitution of the Principality of Liechtenstein. In both cases the applications remained

without success. While in StGH 2021/081 the Constitutional Court rejected some parts of the application because of a failure to meet its deadline and dismissed the other parts, the application StGH 2021/082 was completely dismissed.

In the following, the merits of StGH 2021/082 will be analysed.

The Constitutional Court emphasized a certain judicial self-restraint due to a double complexity of official decision-making in the fight against the Corona pandemic - both regarding the confusing and rapidly changing database and because of conflicting fundamental rights guarantees that must be weighed against each other (recital 3.4). Liechtenstein is particularly closely intertwined economically with its two neighboring states and is also legally obliged to take equally effective measures as Switzerland due to the Customs Treaty (recital 3.5).

The Constitutional Court regarded various fundamental rights on which the applicants grounded their complaints as not affected:

The prohibition of inhumane treatment (Art. 27bis LV), because the 3G-rule constitutes an incentive to vaccinate, but not even an indirect "compulsion to vaccinate" (Rec. 4.1.2). The right of domicile (Art. 32 LV), because the ordinance only impairs the use of commercial premises which affects the freedom of trade and commerce (Art. 36 LV).

The guarantee of property (Art. 34 LV) was seen as affected but the right has no independent protective effect alongside the freedom of trade and commerce (recital 4.1.3). The obligation to obtain a 3G-certificate is not mandatory for religious events which is why the complaint about freedom of religion (Art. 37 LV) was considered as unfounded (Rec. 4.1.4).

The Constitutional Court held that the temporary forced closures of the affected businesses during the lockdown constituted a serious encroachment on the freedom of trade and commerce. In contrast, the obligation to obtain a 3G-certificate leads to a loss of turnover (albeit in some cases a severe one), which is equivalent to a minor encroachment (recital 4.2.3) as it was possible to hold assemblies outdoors, provided that the required distance is maintained, or a mask is worn, and a protection concept must be provided for assemblies

of less than 50 people in closed rooms. Accordingly, there is only a slight encroachment on the freedom of assembly (Art. 41 LV, Art. 11 ECHR) (recital 4.3.2). In the present context, the collective expression of opinion in the form of freedom of assembly was affected; the fundamental right of freedom of opinion (Art. 40 LV, Art. 10 ECHR) is therefore no longer relevant (rec. 4.3.3).

The protection of the elementary manifestations of the personality under personal freedom (Art. 32 L) contains freedom of movement as a sub-area with, in turn, two sub-contents, namely protection against confinement on the one hand and protection against exclusion on the other. The Constitutional Court left open whether personal freedom was affected. Insofar as the Covid-19 certificate is based *inter alia* on the General Data Protection Regulation of the EU and thus on EEA law, there was no reason to review the constitutionality of this regulation due to the primacy of EEA law (recital 4.5.4). Apart from that, no individualized data is involved but only the proof of the certificate which only represents a slight encroachment on the right to data protection (Art. 32 LV (recital 4.5.5)).

In fact, pregnant women do not have the option of vaccination in the first trimester of pregnancy which concerns a biological difference between the sexes and does not constitute discrimination affecting human dignity (recital 4.6.3). The partial termination of state coverage of the costs of Covid-19 tests as of 1 November 2021 in exchange for the offer of free vaccination is reasonable (recital 4.6.6.2). A medical certificate puts persons who cannot be vaccinated or tested for medical reasons on an equal footing with persons who have a Covid-19-certificate (rec. 4.6.6.5). The differentiation between canteens and restaurants is justifiable due to their different functions (recital 4.6.7). Overall, the 3G-certificate obligation does not violate the principle of equality (Art. 31 LV) (Rec. 4.6.9). If the Minister of Health can imagine a “freedom of choice for private operator”, nothing was promised which is why good faith was not violated (rec. 4.7.3). There is only a slight encroachment on those fundamental rights that are affected (recital 4.8.2). The legal basis is sufficient: The powers regulated in Art. 40 in conjunction with Art. 6 of the Swiss Epidemics Act (EpA), which is

applicable based on the Customs Treaty, are vested in the government (recital 5.1.3). Corresponding measures are not designed to be permanent which is why it is important that the government regularly reports to Parliament and for Parliament to demand this, which has largely been done (rec. 5.1.5).

Certain restraints on the part of the State Court due to the double complexity of the official treaty obligations do not in any way result in a loss of sovereignty for a small state but ultimately in an increase in sovereignty. The principle of legality in criminal law (Art. 33 LV) only requires a formal law for custodial sentences. It is obvious that the penal norms cannot be more detailed than the measures whose non-compliance is to be sanctioned (recital 5.1.11.5).

A weighty public interest is given: The protection of physical integrity, the social objective of health care for all persons (Art. 18 LV), the protection of the population or the promotion of overall public welfare (Art. 14 LV) and the right to life (Art. 27ter LV). Covid is a highly contagious disease which is why the state has an eminent interest in taking measures that are as effective as those of the surrounding states. Negative economic effects have been taken into account through various packages of measures.

The encroachments on fundamental rights are proportionate. Appropriateness: The government’s assessment corresponds to the overwhelming scientific opinion.

Necessity: The utilization limit in the intensive care units must not be reached if possible - the success of these efforts cannot be used to justify the lack of necessity. The prevention of dramatic and ethically highly problematic triages also justifies far-reaching measures. Previous forecasts may prove to be too optimistic due to new virus variants. Reasonableness: The minimal risk of long-term consequences of vaccination is outweighed solely by the proven effects of Long Covid (rec. 5.6.3.2).

If the Liechtenstein authorities were to ignore the prevailing scientific knowledge and the foreign Corona measures because of the vehement rejection by part of the population this would not be objectively justifiable (recital 6.1). The government undertook a sufficiently prudent balancing of the fundamental

rights guarantees and the other interests (rec. 6.2). It is particularly important that the measures taken by the government are justified in detail to the public (rec. 6.3).<sup>15</sup>

## IV. LOOKING AHEAD

In the near future, no substantial changes in the Constitution of the political system are to be expected. Presumably, there will be discussions about the relationship between the government and the Landtag as an aftermath of the pandemic, as the Covid-19-crisis has strengthened the administration towards the legislation. As Liechtenstein has overcome the crisis comparatively well - under aspects of the health care system as well as under economical aspects - the balance of power is not endangered.

Discussions about a stronger professionalization of the Supreme Courts have not yet come to an end. Regarding the recommendations of GRECO, further discussions are to be expected. Concerning the appointment of judges, the concept of the selection of judges by a committee which proposes candidates to the Landtag for election on basis of Art. 96 LV has proved successful and without any public disputes.<sup>16</sup>

## V. FURTHER READING

Hilmar Hoch, Christina Neier, Patricia M. Schiess Rütimann(eds.), ‘100 Jahre liechtensteinische Verfassung. Funktionen, Entwicklung und Verhältnis zu Europa. Verlag der Liechtensteinischen Akademischen Gesellschaft.’ Band 62, 2021

IACL-AIDC Blog, ‘The Centenary of the Constitution of Liechtenstein’, <https://blog-iacl-aidc.org/centenary-constitution-liechtenstein>, accessed 4 March 2022

Zeitschrift für Öffentliches Recht. Austrian Journal of Public Law, *ZÖR*, Vol. 76, No. 4, 2021 Beiträge zum Kolloquium 100 Jahr-Jubiläum liechtensteinische Verfassung

1 Cf. Anna Gamper, 'Guest editorial: The Centenary of the Constitution of Liechtenstein' < <https://blog-iacl-aidc.org/centenary-constitution-liechtenstein/2021/10/5/guest-editorial-the-centenary-of-the-constitution-of-liechtenstein> > accessed 4 March 2022.

2 Cf. Peter Bußjäger, 'A Constitution of Values? The Constitution of the Principality of Liechtenstein and its State Goals' < <https://blog-iacl-aidc.org/2021-posts/2021/12/7/a-constitution-of-values-the-constitution-of-the-principality-of-liechtenstein-and-its-state-goals-bhfy> > accessed 4 March 2022.

3 A version of the Constitution in English is available under < <https://www.liv.li/files/rdr/Verfassung-E-01-02-2014.pdf> > accessed 4 March 2022.

4 Christian Frommelt, Thomas Milic and Philippe Rochat, 'Landtagswahlen 2021 – Ergebnisse der Wahlumfrage' < [https://www.liechtenstein-institut.li/application/files/1216/3065/8119/Beitrag\\_49\\_2021\\_Wahlanalyse.pdf](https://www.liechtenstein-institut.li/application/files/1216/3065/8119/Beitrag_49_2021_Wahlanalyse.pdf) > accessed 4 March 2022.

5 See Frommelt, Milic and Rochat (n 4).

6 Frommelt, Milic and Rochat (n 4) p. 4. Landtagswahlen, 4

7 Frommelt, Milic and Rochat (n 4) p. 5. Landtagswahlen, 5

8 Christian Frommelt, Patricia M. Schiess Rütimann, 'Die Rolle des Landtages in der Coronapandemie', 11 < [https://www.liechtenstein-institut.li/application/files/7016/3886/5772/2021\\_11\\_30\\_Landtag\\_Kurzbericht\\_Final.pdf](https://www.liechtenstein-institut.li/application/files/7016/3886/5772/2021_11_30_Landtag_Kurzbericht_Final.pdf) > accessed 4 March 2022.

9 Group of States against Corruption (GRECO): Fourth evaluation round, Evaluation Report, published on 16 December 2020 < <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a0bd14> > accessed 4 March 2022.

10 See GRECO (n 9) p. 1.

11 See GRECO (n 9) p. 1.

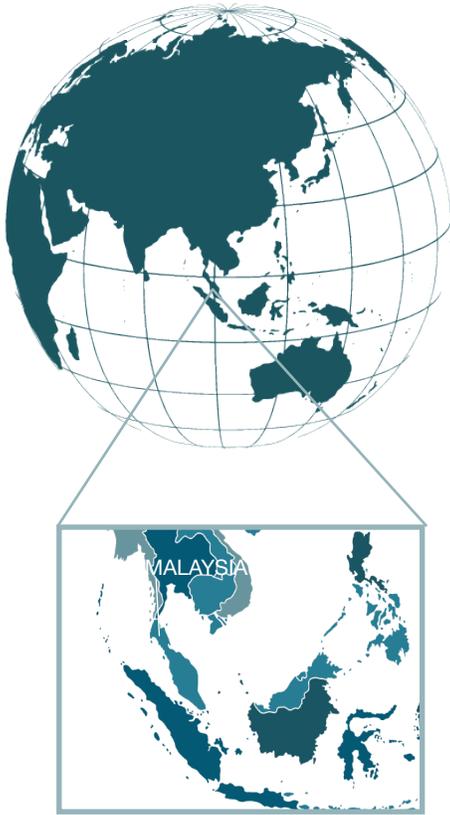
12 See GRECO (n 9) p. 1.

13 See GRECO (n 9) p. 1.

14 See i.e., the code of conduct of the Constitutional Court < <https://stgh.li/en/code-of-conduct> > accessed 4 March 2022.

15 StGH 2021/082. < [https://www.gerichtentscheidungen.li/default.aspx?z=prlBq63k1yOBI7\\_md-Vt5BN--wYUvEFYH4W8ygTbIRGHq4sOb3RPPTziqldvYxVoE8X\\_T9SwK2UJ9bNfvnmPPtogyw2](https://www.gerichtentscheidungen.li/default.aspx?z=prlBq63k1yOBI7_md-Vt5BN--wYUvEFYH4W8ygTbIRGHq4sOb3RPPTziqldvYxVoE8X_T9SwK2UJ9bNfvnmPPtogyw2) > accessed 4 March 2022.

16 Cf. Peter Bußjäger, 'Opinion 227/2002 on the Amendments to the Constitution of Liechtenstein Proposed by the Princely House and its Follow-up in Liechtenstein' in Simona Granata-Menhini and Ziya Caga Tanyar (eds.), *Venice Commission. Thirty-Year Quest for Democracy through Law 1990 – 2020 (Författarna och Juristförlaget i Lund 2020)*, p. 151.



# Malaysia

Andrew James Harding  
Professor,  
Faculty of Law, National University of Singapore

Dian A. H. Shah  
Assistant Professor,  
Faculty of Law, National University of Singapore

Wilson Tay Tze Vern  
Senior Lecturer,  
Taylor's University, Malaysia

## I. INTRODUCTION

From early 2020, Malaysia has experienced an unprecedented period of political instability that has tested many constitutional norms to the limit, especially those surrounding constitutional conventions involving the head of state.

On this occasion, despite a period of enormous uncertainty and an emergency proclamation lasting from 12 January to 1 August 2021, we are pleased to report some more positive developments in terms of governmental stability and an opening for constitutional reform. This change in fortunes is due to the appointment of a new Prime Minister, Dato' Sri Ismail Sabri Yaakob, on 20 August 2021, and the subsequent signing on 13 September 2021 of a Memorandum of Understanding (MOU) between the Government and the main opposition parties, with both sides pledging their support for political stability and reform up until 31 July 2022.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### a. Proclamation of Emergency

The year began with continued political uncertainty arising from the lack of a clear government majority in Parliament. Aside from political fragmentation arising from the

fracturing of the *Pakatan Harapan* (PH) coalition in February 2020, this situation was sustained due to the Speaker of Parliament's absurd repeated refusal, from March 2020 right up until August 2021, to allow the tabling and debating of several parliamentary no-confidence motions. This allowed the *Perikatan Nasional* (PN)-led federal government to remain in power even though its parliamentary majority had never at any point been clearly demonstrated. By most accounts, the government had at various times either lost its majority or had only a razor-thin majority of one or two seats. During the first half of 2021 the government was in a constant state of imminent collapse, which finally came in August when the *Barisan Nasional* (BN) coalition revoked its support for Prime Minister Muhyiddin Yasin, resulting in a second change of government in the span of 18 months.

The proclamation of a state of emergency on 12 January 2021 covered the whole of the Federation. This emergency proclamation was almost exactly similar to the one proposed by the Cabinet and rejected by the *Yang di-Pertuan Agong* (Malaysia's constitutional monarch) in October 2020, leaving the public to wonder what had changed in such a short time that would have led to the need for that which had so recently been decisively rejected. Ostensibly, the emergency proclamation was

based on the need for extensive measures to control the COVID-19 pandemic. Although the government could arguably have utilized existing ordinary laws to manage the pandemic, the Federal Constitution affords sweeping powers to the Executive to promulgate ordinances when a state of emergency is proclaimed. An emergency also allows violations of fundamental rights guarantees, including the freedom of expression.

There were two crucial constitutional and political implications of the proclamation, as a result of the Emergency (Essential Provisions) Ordinance 1/2021: elections at all levels were suspended, and Parliament was unable to meet, until the emergency proclamation lapsed on 1 August 2021. Apart from this, a second ordinance came into effect on 12 March 2021, which had implications for the freedom of expression. Crucially, the Ordinance, which applied extra-territorially, sought to restrict ‘fake news’ pertaining to COVID-19 or the emergency proclamation. Given the circumstances, it was difficult to avoid the conclusion that the real reason for the Prime Minister’s advice to the *Yang di-Pertuan Agong* to proclaim an emergency was based more on the tenuous parliamentary position of the government, rather than on the necessity of responding to threats to public health.

#### b. Ending Political Fragmentation: Constitutional Soft Law

When the Muhyiddin government fell, and in the absence of any practical possibility of an election, as seems to have become the norm the *Yang di-Pertuan Agong* personally assessed parliamentary support of the various prime ministerial candidates by interviewing all the MPs (as His Majesty had done in February 2020), reaching the conclusion that a majority supported Ismail Sabri, who had been Senior Minister of Defence and Deputy Prime Minister in the Muhyiddin cabinet. Accordingly, he was appointed Prime Minister with a demonstrable majority of six. As was the case in 2020, no vote of confidence in the new government was held, marginalizing further the Parliament’s most important role, which is to decide who shall

form the government. This precedent gives the head of state a large power to decide on government appointments in future.

The *Yang di-Pertuan Agong* had repeatedly stressed the need for politicians to come together and address the country’s needs, and in the dying days of his government, Muhyiddin had attempted to persuade the opposition to support the continuation of his premiership on the basis that reforms would be carried out in return for a confidence and supply agreement (‘CSA’). Ismail Sabri’s appointment appeared to put an end to such possibility, and yet, immediately on taking office, he too proposed a CSA with the opposition. This was rejected, but it led to a negotiation process to explore other possible arrangements, which issued eventually in the MOU signed on 13 September 2021.<sup>1</sup> It appeared to be neither in the interest of the government nor the opposition, given the political realignments and continuing fragility in support that had been seen, to precipitate a general election. This in turn created a unique opportunity for horse-trading between the two sides on the issues of stability and reform, and the outcome was a MOU that was as far-reaching as it had appeared unlikely to occur. It is of comparative interest as a form of constitutional soft law.

There was no precedent for this exercise. The drafters, who were lawyer-politicians on either side of the political fence, went through ten stages of drafting, in which both sides gradually adjusted demands and modified their stance. During the process the MOU’s wording became more precise and more legalistic. One concern of the opposition was that the MOU and its entire implementation process should be completely transparent.

The outcome of this process surprised many. A last-minute U-turn by the government created a unique opportunity for a political reset. It was described not as a CSA, nor as providing for a unity government, but as a ‘stability and transformation’ MOU. The distinction is important, as the opposition had already roundly rejected a CSA, and the MOU made it clear that the opposition would continue to perform its function as a democratic opposition. Thus, for example, although it indi-

cates the opposition will not vote the budget down, it also ensures that agreement is to be reached on the budget before it is presented to parliament. A CSA involves merely keeping the government in office with a parliamentary-approved budget and carries no other implications policy-wise. This MOU, on the contrary, embodies substantive agreement on (inter alia) important constitutional reforms. The MOU guarantees nothing, as it is not legally binding, but has already resulted in a symbolic constitutional amendment recognizing the special status of Sabah and Sarawak within the federal system, as well as the long-delayed implementation of a reduction of the voting age to 18.

Parliamentary reforms indicated in the MOU are extensive but have been long discussed. These include enhancement of parliament’s independence via a reintroduction of the Parliamentary Services Act, which was repealed in 2002. Select Committees are to be introduced based on ministerial portfolios; there are to be 15 of these, with specified powers and terms of reference. They are to have proportionate membership according to the parties’ numbers of seats in parliament, with half of them (chosen by the monitoring committee) chaired by the opposition.

The Prime Minister is to be limited to a single term of ten years in office, equivalent to two normal parliamentary terms. Constituency Development Fund allocations are to be granted equally to each MP, irrespective of party. The Leader of the Opposition as a PM-in-waiting is to be entitled to the same government information as the PM. In addition, judicial independence from the government of the day is to be strictly observed. This is clearly important, given upcoming trials and appeals concerning current leaders who have been charged with numerous counts of corruption.

The promises made by the opposition are specific to the government of Ismail Sabri, so that any change of leadership would dissolve the agreement. The opposition agrees that there will be no motion of no confidence in the government, and the government agrees there will be no dissolution of parliament before 31 July 2022. A monitoring committee

is provided for, with the job of meeting every two weeks during this period to ensure that it is being implemented. With the MOU, both sides can take credit for creating the governmental stability that is needed to deal with the pandemic and economic recovery measures. It was also apparent at the end of 2021 that neither side would be confident in going to the electorate at any early juncture. The date of 31 July 2022 was chosen on the basis that the vaccination process would lead, within this time-frame, to the possibility of holding an election, and that reforms embodied in the MOU would take around nine months to bring to fruition, given the norms for legislative process. Thus, the MOU will terminate on 31 July 2022 unless renewed by agreement, and it is stated that time is always of the essence, given the nine-month window for implementation. It is also provided that the agreement can be terminated by either side if not observed by the other.

It remains to be seen how far this informal process can be taken during 2022. A general election is likely in the second half of 2022.

### III. CONSTITUTIONAL CASES

1. *Iki Putra Mubarrak v Kerajaan Negeri Selangor and Others*<sup>2</sup>: Constitutionality of a state-level religious law criminalizing same-sex sexual activity ('sexual intercourse against the order of nature')

The Federal Court, Malaysia's apex court, has ruled that a state-level *Syariah* law criminalizing same-sex sexual activity (Section 28 of the *Syariah* Criminal Offences (Selangor) Enactment 1995) was unconstitutional. The constitutional challenge against this provision emerged when a Muslim man was arrested and charged in the Selangor state *Syariah* High Court for attempting to commit "sexual intercourse against the order of nature" with other non-Muslim males. The petitioner argued that the offence is already covered by Section 377A of the federal Penal Code, and thus the Selangor state legislature lacked the competence to legislate on the matter because the Federal Constitution's Ninth Schedule, List II explicitly precludes

state legislatures from passing laws on matters that are within the federal legislative competency (Ninth Schedule, List I).

The crux of the Court's decision was its interpretation of Article 74 of the Federal Constitution, which deals with the subject matter limitations of state legislative power. This was read together with the Ninth Schedule, List II and Articles 75 and 77 of the Federal Constitution. For the Court, state legislative power is – on a plain reading of the Ninth Schedule – limited by the Constitution. In addition, the Court – relying on constitutional history – determined that the constitution drafters had clearly envisaged Parliament as the only law-making authority with regard to matters in the Federal List, which covers criminal law and procedure. The federal legislature's overriding powers vis-à-vis the state legislature in specific matters is also spelled out in the Constitution (Article 76), as is the stipulation that any conflict between federal laws and state laws will render the latter void. In short, having regard to the text, context, and history of the Constitution, the Federal Court deemed that state laws that purport to regulate matters already regulated by federal laws are unconstitutional, thereby reinforcing Malaysia's scheme of federalism.

While this decision might strike many as straightforward, it is significant as it implicates religion – more specifically the status of state-level *Syariah* laws that govern Muslims in the country. For many years, there had been a tendency for the civil courts to avoid adjudicating on matters where Islam and Islamic law are implicated, preferring instead to let the *Syariah* courts decide. As a result, civil courts have shied away from attempts to declare *Syariah* laws unconstitutional, even if they are arguably contrary to the Federal Constitution's fundamental rights guarantees or go beyond the state legislature's legislative competence. In the broader context of the Malaysian socio-political sphere, issues on Islam are deeply divisive, politically charged questions. The decision in *Iki Putra Mubarrak* is therefore significant, particularly in recalibrating state-religion relations in Malaysia. It also emphasizes the Federal Court's willingness

to examine the constitutionality of state legislation that contravenes the arrangements in the Federal Constitution, even if these laws are framed as Islamic law.

2. *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan*<sup>3</sup>: Constitutionality of Statutory Limits on the Court's Judicial Power

The Federal Court continues to grapple with the question of whether the 'basic structure doctrine', which restricts constitutional amendments to only such which do not infringe the 'basic structure' of the constitution, applies in Malaysia. Here, this question most often plays out in the context of cases testing the nature and extent of judicial power granted by the Federal Constitution to the courts in Malaysia. This is because of a constitutional amendment in 1988 which purportedly limits the jurisdiction and powers of the superior courts to such as may be conferred by or under federal law.<sup>4</sup> Thus, whenever statute purports to oust the jurisdiction of the courts to examine a particular action or determination by the executive branch, the discussion often leads back to the question of how far this constitutional amendment has curbed the judiciary's powers.

In *Zaidi bin Kanapiah*, a detainee challenged the constitutionality of sections 4(1) and 4(2) of the Prevention of Crime Act 1959 (POCA), which provide that a Magistrate 'shall', on the production of a written statement signed by a police officer of a designated rank or the Public Prosecutor (as the case may be), remand the person in custody. This was impugned as an infringement of the courts' judicial power, since the Magistrate apparently had no discretion to refuse a remand order upon the written request of executive functionaries. The POCA being federal legislation, this case again raised the issue of the extent to which Parliament may by statute limit the judicial power of the courts under the present constitutional framework.

By a majority of 4-1, the Federal Court held that sections 4(1) and 4(2) should be interpreted such that the Magistrate in exercising the judicial power to grant remand does not have to act mechanically upon the production of requisite written statement but must

in fact direct his/her mind to the question of whether remand is justified in the circumstances. If it is not, the Magistrate may refuse remand notwithstanding the imperative language of the clauses and the production of the written statement. On that basis, the Federal Court upheld the constitutionality of these clauses, holding that they did not infringe the judicial power of the Magistrate to adjudicate on the remand application.

In a strong dissenting judgment, Chief Justice Tengku Maimun asserted that the imperative language of sections 4(1) and 4(2) effectively bound the judicial body (in this case, the Magistrate) to act in accordance with the directions of executive officers, and this was wholly inconsistent with the scheme of separation of powers envisaged by the Federal Constitution. This was, in fact, how these clauses had been applied in practice up to the case of *Zaidi bin Kanapiah*, as evidenced by the Court's setting aside of the remand granted on the basis that the Magistrate failed to exercise any judicial discretion in granting it. The Chief Justice would, accordingly, have held the clauses unconstitutional for infringing the judicial power which must continue to vest in the courts irrespective of the 1988 amendment.

*Zaidi bin Kanapiah* is the latest in a trio of cases in 2021 which pronounced on the judicial power of the courts in Malaysia after the constitutional amendments of 1988. In *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals*<sup>5</sup>, the Federal Court had earlier upheld by majority the constitutionality of section 15B(1) of POCA, which purports to insulate from judicial review the decisions made by the 'Prevention of Crime Board' (an executive body) on the continued detention of suspects under the POCA. In *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor*<sup>6</sup>, again by majority, similarly upheld the constitutionality of an ouster clause – this time section 59A of the Immigration Act 1959/63 – which insulates certain decisions made by the Director-General of Immigration from judicial review. In both these cases, vigorous dissenting judgments were given, in which Nallini FCJ (in both cases) and the Chief Justice (in *Maria Chin*) asserted the immutable character of the courts' judicial power by striking down the

ouster clauses which purported to subordinate this power to the diktats of executive bodies.

The nature and extent of judicial power in Malaysia remains contested following a palpable increase in recent attempts to challenge the constitutionality of ouster clauses. An important question that recurs in the trio of cases set out above is whether the judicial power of the courts is founded on the power-conferring clauses (Article 121(1) and 128 of the Federal Constitution) and therefore limited in nature, or inherent in the very notion of constitutional supremacy (Article 4(1)) and accordingly illimitable. This question may also be of contemporary relevance to other countries with 'legally supreme' written constitutions.

### [3. \*Suriani Kempe & Ors v Government of Malaysia\*<sup>7</sup>: Court Addresses Gender Discrimination in the Citizenship Laws of Malaysia](#)

The fundamental provisions governing the grant of citizenship are enshrined in Part III of the Federal Constitution, read together with the Second Schedule, and these provisions formed part of the historic 'social contract' on which the then Federation of Malaya was founded in 1957. However, sections 1(b) and 1(c) of Part II of the Second Schedule expressly provide that Malaysian citizenship will be granted as of right to every person born outside the Federation whose *father* is at the time of the birth a citizen (besides other criteria). Consequently, children born outside Malaysia to Malaysian *mothers* married to non-Malaysian spouses are not entitled to citizenship (except if the birth takes place in Singapore).<sup>8</sup>

Article 8(2) of the Federal Constitution provides that '*except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of ... gender in any law*'.<sup>9</sup>

In *Suriani Kempe*, a group of Malaysian citizens who had married non-Malaysian husbands and given birth to children abroad challenged the legality of the Government's decision not to grant citizenship to their children. This necessarily required judicial consideration of how to apply sections 1(b)

and 1(c), which expressly discriminate on the basis of gender but are also part of the Constitution itself.

The High Court at Kuala Lumpur held that sections 1(b) and 1(c) are to be read as though 'the word father includes the mother', and that accordingly the children were entitled to citizenship. This was because the Constitution is to be interpreted 'in light of its historical and philosophical context, as well as its fundamental underlying principles'. The Constitution should be interpreted 'harmoniously and purposively' in light of its clear provision in Article 8 that there shall be equality before the law and there shall not be discrimination on the basis of gender in the application of any law. The Court also surmised that the word 'father' was used in the Second Schedule because at the time it was drafted (in the 1960s) 'it was difficult to travel and usually it was the fathers who had to travel out of the Federation', whereas 'now everyone can travel easily'.

This is an interesting judgment that reflects a very progressive interpretation of the constitutional provisions, effectively reading words into the Constitution to achieve the fundamental aim of securing equality before the law. The 'organic theory' of constitutional interpretation, which the Court embraced in order 'to meet the needs of the current time', is a relative rarity in Malaysian constitutional jurisprudence, with the majority of judgments to date preferring a literalist approach. In that regard, *Suriani Kempe* was a breath of fresh air. It is also part of a series of cases this year in which the courts have pushed back against the generally restrictive approach taken by the Federal Government in applying the constitutional provisions on the grant of citizenship to children in doubtful situations.<sup>10</sup> The High Court decision, however, is presently being appealed before the appellate courts.

### [4. \*Attorney-General v Mkini dotcom & Ors\*<sup>11</sup>: Liability of News Portal for Anonymous Comments Scandalizing the Judiciary](#)

In the *Mkini dotcom* case, the Attorney-General of Malaysia commenced contempt of court proceedings against Malaysiakini, a

well-known online news portal with considerable pro-opposition readership, for certain comments left by anonymous readers on news articles published by the portal. These comments had made scurrilous attacks against the judiciary over the dropping of ongoing corruption charges against a former state chief minister, which was in fact a prosecutorial decision over which the courts had no control.

The Federal Court held that the news portal as a whole, but not its editor-in-chief personally, was liable for contempt of court. This was because the editorial team had failed to put in place a system to control and prevent offensive content posted by way of comments. The portal had to assume responsibility for taking the risk of facilitating a platform on which content scandalizing the judiciary could be posted and pass undetected for some time. A fine of 500,000 Malaysian *ringgit* (US\$ 105,500) was imposed on the portal, although this amount was swiftly raised through crowdfunding amongst the portal's readership.

The *Mkini dotcom* case illustrates the difficulty of maintaining online discussion spaces which can be misused by anonymous users (or users cloaked in fake identities) to post offensive, defamatory, and/or contemptuous content. The willingness of the majority of the Federal Court in this case to find the online portal in contempt of court, despite the absence of any evidence of actual knowledge of the contemptuous content on the part of its editors until the time the content was detected and removed, signifies a very tough stance on the protection of the court's reputation.

#### IV. LOOKING AHEAD

A federal parliamentary election appears likely to be called in Malaysia sometime this year, following a string of emphatic results favoring the *Barisan Nasional* (BN) coalition and its allies in state-level elections in Malacca, Sarawak, and Johor. If this occurs, it will be interesting to observe whether the same political parties and leaders who were in power prior to the watershed general election of 2018 will now reclaim political ascendancy.

In January 2022, Malaysia formally reduces the age of eligibility to vote in federal and state elections to 18 (from the previous 21) and implements automatic registration of all eligible voters (previously, eligible citizens could be disenfranchised if they failed to register in time). This is anticipated to increase the number of electors in the next federal election by nearly 20%, besides of course reducing the median voter age. Whether the new generation of voters will continue to endorse the established political set-up remains to be seen.

The Federal Court (Malaysia's apex court and court of final appeal) is set to rule this year on one of several corruption cases involving former Prime Minister Najib Razak, whose global notoriety following the 1Malaysia Development Berhad (1MDB) scandal in 2016 led directly to BN's fall from power. This decision will determine whether Najib becomes the first former prime minister in Malaysia to serve jail time, following his conviction by the High Court in 2020 which is now at the last stage of appeal.

Regionalist tendencies are on the rise in Malaysia's eastern states of Sabah and Sarawak following the fragmentation of political power at federal level. Besides the constitutional amendment discussed above, moves are afoot to give these states – which are essentially autonomous regions who partnered the then Malaya to form Malaysia in 1963 – greater control over revenue and development matters.

#### V. FURTHER READING

1. Dian A H Shah, "The Malaysian Election Commission: Navigating Electoral Authoritarianism and Political Change", (2021) 16 *Asian Journal of Comparative Law* 105.
2. Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (2nd ed, Bloomsbury 2022).
3. Tan Sri Mohamad Ariff Yusof & Lutfi Hakim Ariff, *Parliament Unexpected: Recollections of Parliament, Politics and Pandemic in Malaysia* (Matahari Books, 2022).
4. Salim Farrar & Paul Subramaniam, *Law*

*and Justice in Malaysia: 2020 and Beyond* (Sweet & Maxwell, 2021).

5. Tommy Thomas, *My Story: Justice in the Wilderness* (Strategic Information and Research Development, 2021).

1 For an analysis of the MOU, see: Andrew Harding and Dian AH Shah, “Governance by Memorandum: Constitutional Soft Law in Malaysia”, Int’l J. Const. L. Blog, Nov. 13, 2021, at <http://www.iconnectblog.com/2021/11/governance-by-memorandum-constitutional-soft-law-in-malaysia>.

2 [2021] 1 LNS 47 (Federal Court).

3 [2021] 3 MLJ 759 (Federal Court).

4 Federal Constitution, art 121(1).

5 [2021] 2 MLJ 822 (Federal Court).

6 [2021] 1 MLJ 750 (Federal Court).

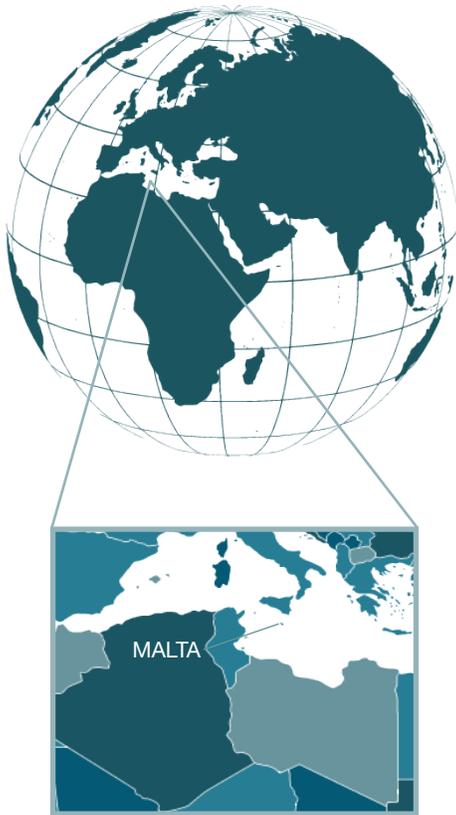
7 [2021] 8 CLJ 666; [2021] MLJU 1864 (High Court, Kuala Lumpur).

8 Federal Constitution, Second Schedule, Part II, s 1(d).

9 Emphasis added.

10 See eg *CCH & Anor v Registrar-General of Births and Deaths* [2022] 1 MLJ 71, in which the Federal Court extended citizenship to children abandoned at birth within the Federation in circumstances in which it can neither be proved nor disproved that the child was born a citizen of another country.

11 [2021] 2 MLJ 652 (Federal Court).



# Malta

Tonio Borg  
Associate Professor, University of Malta, Malta

John Stanton  
Senior Lecturer in Law, City, University of London, UK

## I. INTRODUCTION

The Maltese constitutional system continues to endure the effects of, and indeed the factors that contributed to, the assassination of investigative journalist, Daphne Caruana Galizia, in October 2017. A divisive figure, Caruana Galizia had been investigating alleged corruption, with an emphasis on the Panama Papers, which revealed potential links between senior Government figures and shell companies in Panama. From these flowed further allegations of money laundering and tax avoidance. Most notably, Keith Schembri, the chief of staff of former Prime Minister, Joseph Muscat, was arrested in March 2021 on charges of, *inter alia*, corruption and money-laundering. It is also alleged that individuals connected to the Government were responsible for Caruana Galizia's assassination; both investigations are ongoing. These allegations, though, and the potential involvement of Government figures goes to a much broader issue, which lies at the heart of recent constitutional developments on the Maltese archipelago: namely, concern for the rule of law and the extent of Government autonomy. These matters have, over the past few years, motivated internal and external focus on aspects of the Maltese constitutional order. In 2019, the President of Malta established a Constitutional Reform Committee that is committed to an ongoing exploration of how the system might best be reformed. This Committee has however not met for some time. In 2018, the Council of Europe's Venice Commission conducted close examination of the rule of law and how reforms might be introduced to enhance its

achievement and to combat growing concerns for corruption. The fruits of these efforts are discussed throughout this contribution and, since this is the first time that Malta has been featured in this collection, attention will include coverage of reforms that followed these events in July 2020.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2018, the Venice Commission undertook a visit to Malta to carry out an examination of its "legal and institutional structures of law enforcement, investigation and prosecution in the light of the need to secure proper checks and balances, and the independence and neutrality of those institutions and their staff whilst also securing their effectiveness and democratic accountability".<sup>1</sup> The report that followed identified a number of areas that needed urgent reform, offering proposals to that end. A number, though not all, of the recommendations made by the Venice Commission were implemented as part of reforms introduced in July 2020, these changes being heralded as "the most significant [reforms] since Malta became a republic in 1974".<sup>2</sup> The reforms, set out in Act No. XLIII of 2020 and introduced in July 2020, focused on the need, identified by the Venice Commission, to adjust the balance of power in Malta, in particular, through reducing the Government's influence in respect of certain appointments and strengthening anti-corruption mechanisms. Significantly, the government can no longer exercise discretion in the selection of judges, their appointment now being made

by the President on the advice of the Judicial Appointments Committee in which the members of the judiciary enjoy an inbuilt majority. The removal of judges from office is also no longer in the hands of the Legislature but is the responsibility of the Commission for the Administration of Justice, a body in which the judiciary enjoys a majority in membership. A decision by the Commission, upholding a request by the Justice Minister or the Chief Justice to remove a judge from office, can be sent for appeal to the Constitutional Court, composed of three judges.

Above and beyond changes to judicial appointment and removal, there are a number of further positions, which are now, following the 2020 reforms, also subject to appointment by a two-thirds vote in Parliament, rather than the absolute majority that could previously be achieved by the exclusive support of the party in power. These positions include the Chief Justice, the Chairman of the Permanent Commission Against Corruption, and – most notably – the President of Malta who can now be only removed from office for proved misbehavior or incapacity, by a two-thirds majority of all the members of the legislature. In addition, where the Attorney General takes a decision *not* to prosecute suspected cases of corruption, this can now be challenged through judicial review by, *inter alia*, the Permanent Commission Against Corruption. Furthermore, a Permanent Secretary, who is the top civil servant in a Ministry, can now only be nominated or removed from office by the President of Malta on the advice of the Public Service Commission (PSC). This is an authority that was established by the Constitution to regulate matters concerning the public service. Prior to the 2020 reforms, the PSC was merely consulted in the nomination and removal of these officers.

Concern for the extent of executive power, and the manner in which this intersects with the authority of the Constitution of Malta, underpins the next area of focus. During 2021, the Government attempted to pass Bill 198. This Bill tried to bypass the procedure for constitutional amendment by introducing changes to the Interpretation Act to give effect to policy that would have permitted public authorities, and not just

courts, to impose heavy administrative penalties. Under article 39 of the Constitution, criminal sanction can only be imposed by a court of law. Alongside this, in the 2016 case of *Federation of Estate Agents v. Director General Competition et*, the Constitutional Court had made it clear that heavy administrative penalties should be regarded as criminal sanctions and, therefore, also within the exclusive domain of the courts. In an effort to give public authorities greater regulatory power, however, and to alter the effect of the 2016 judgment, the Government attempted to introduce a constitutional amendment in 2020 that would've made fast the notion that administrative penalties could be imposed by public authorities. When this amendment failed to attract the necessary two-thirds support in Parliament, the Government introduced Bill 198. The Bill, amending the Interpretation Act, purported to alter the accepted definition of a “criminal sanction” by making clear that it did not include penalties of an administrative nature. The effect of this, in the narrow sense, would have been to overrule the judgment of the Constitutional Court and to provide that administrative penalties were not covered by article 39 of the Constitution. Government would then have been free to empower public authorities with the ability to impose administrative penalties. In the wider sense, the effect of Bill 198 would have been to amend the Constitution through the backdoor by allowing changes, passed by simple majority, to the words contained within the supreme instrument. The Constitution would not itself have been altered, but interpretation of words contained therein would have been adjusted to permit the Government to achieve its initial objective. Following a furor which arose and the criticism that followed,<sup>3</sup> Government referred the matter to the Venice Commission who made it clear that reforming the Interpretation Act, through the ordinary legislative process, to the effect that words within the Constitution would have a changed meaning was not acceptable. The Government therefore proposed a fresh constitutional amendment which was defeated again in July 2021 since it did not obtain the required two-thirds majority in Parliament.

The final constitutional development of note concerns amendment to the Malta's electoral process. In 2021, and following agreement between both the Government and the Opposition, Parliament amended the Constitution to introduce a gender corrective electoral mechanism. With effect from the 2022 general election, up to twelve additional parliamentary seats can also be assigned in equal numbers exclusively to unelected female candidates of the two political parties represented in Parliament that came closest to being elected. This mechanism will remain in force for twenty years. This reform was motivated by the reality that, before the 2022 election, ‘only nine of Malta’s... 67 members of Parliament ... [were] women, putting the country the second from lowest, after Hungary, for proportion of women MPs in Europe’.<sup>4</sup> This reform potentially means that almost a third of the House of Representatives can be female.

The years 2020 and 2021, therefore, have been significant for the Maltese constitutional order. Amid concerns for corruption and assassination, which continue to be the focus of investigation, myriad reforms and events, particularly in the context of input from the Venice Commission, have contributed to the continued development and evolution of the Maltese system. We now take a look at notable constitutional cases that occurred during 2021.

### III. CONSTITUTIONAL CASES

#### 1. *Bartolo Parnis and others v. Malta: Effective remedy*

In this case,<sup>5</sup> tenants had remained in occupation at the applicants' property following the end of their lease in 2002. Act XVIII of 2007 later permitted tenants whose lease had ended to remain in occupation at a reduced rent, thus providing the basis of their continued occupation. When the applicants (as landlords) challenged this continued occupation, they were successful, the Constitutional Court awarded damages and made clear that the 2007 Act would not protect the tenants from future eviction by the landlords. The applicants, however, appealed this decision to the European Court of Human Rights, ar-

guing that the remedy was insufficient and that the Court should have ordered the tenants be evicted. The Strasbourg court agreed and decided that the reluctance of the Maltese Constitutional Court to order the eviction of tenants protected by restrictive rent laws was in violation of Article 1 Protocol 1 of the European Convention on Human Rights, and that it amounted to a breach of the right to an effective remedy guaranteed by the article 13 of the Convention.

## 2. *Anna Mallia v. Judicial Appointments Committee et. Juridical interest*

Historically, the Maltese courts have taken a particularly strict approach to questions of legal standing (or juridical interest), “which according to the strict civil law notion means actual, direct and personal interest. This traditional interpretation of juridical interest ... [applies] also to public law actions, [and] has meant that certain actions of the public administration or public officers could not be scrutinized by the court or challenged by individuals or non-governmental organizations owing to the absence of any person or entity which had a direct, personal interest in an administrative act performed by a public entity”.<sup>6</sup> Indeed, Maltese law reports are awash with cases that demonstrate the restrictive approach taken to permitting challenge to the lawfulness of public action. In 2021, however, an important judgment of the Civil Court, First Hall, in constitutional jurisdiction, signified a departure from this historically strict approach. In *Anna Mallia v. Judicial Appointments Committee et.*,<sup>7</sup> a challenge was brought to the process through which 4 judicial candidates were selected and appointed in April 2021. Mallia contested that the Judicial Appointments Committee had not been properly constituted at the time that it made its decisions, and that it had made its selections according to rules at odds with the Constitution. In particular, Mallia challenged a rule that was adopted by the Committee, which stated that candidates would not be considered for judicial office within 2 years of their having been affiliated with a political party. She argued that this was contrary to criteria stipulated in the Constitution and, furthermore, a potential breach of an individuals’ freedom of associ-

ation, protected under article 12 of the European Convention on Human Rights. Mallia was arguing that the appointments process at issue might have potentially breached her right to freedom of association and freedom from unjustified discrimination. Since Mallia did not herself apply for judicial office in April 2021, and nor did she commit herself to do so in the future, she could not be said to have any direct or personal interest in the appointments process being challenged, and thus no juridical interest. The Civil Court, First Hall, however, turned to the jurisprudence of the European Court of Human Rights which gave a liberal interpretation to the notion of “victim” mentioned in the Convention.<sup>8</sup> Even though the Convention does not permit an *actio popularis* in human rights cases, it nonetheless acknowledges the notion of a “potential victim”. Consequently, the Maltese Court ruled that Mallia was a *potential* victim in this sense since in the future she *might* apply for a judicial post under the challenged procedure.

## 3. *Police v. Tarcisio Mifsud: The Constitutional Court and the right to a fair hearing*

In 2021, there were a number of cases brought before the Constitutional Court that alleged breaches of the right to a fair hearing. Through these cases, the Court made a number of findings that provided indication of the way in which the right is treated in the Maltese courts. Cases heard focused on a range of questions, including on how abandonment of court proceedings impact upon an individual’s right to a fair hearing,<sup>9</sup> on the appropriate level of detail expected from court judgments,<sup>10</sup> on the effect of Courts finding that article 6 ECHR have been breached,<sup>11</sup> and on the admission of evidence.<sup>12</sup>

One case worthy of particular mention, however, concerned the tactics employed by the Attorney-General in seeking to delay criminal proceedings brought against the former financial controller of Malta’s energy company, Enemalta plc. In *Police v. Tarcisio Mifsud*,<sup>13</sup> in which the defendant stood accused of corruption charges, the Attorney-General extended the duration of proceedings by persistently sending back and forth the records of the case for further examination of wit-

nesses. Mifsud consequently argued before the court that his right to a fair hearing had been breached by the Attorney-General’s delaying tactics. Both the First Hall of the Civil Court, in its constitutional jurisdiction, and later the Constitutional Court, agreed with this argument, noting that during a period of three years, in 15 out of 27 sittings nothing had been done. The Court therefore ordered the police and the Attorney-General to present all their evidence to the court within 4 months.

## 4. *Lorenza Zarb v. Charles Caruana et. The Constitutional Court and the right to property*

Another right, on which the Constitutional Court adjudicated during 2021, is the right to property. The Court was faced with a number of questions, including on the effects of a landlord seeking to repossess his property because he needed them more than the tenant,<sup>14</sup> on the effects of using primate land in the development of residential roads,<sup>15</sup> and on the point at which an individual’s right to property might be regarded as violated. One particular decision, however, merits deeper discussion.<sup>16</sup>

In the case of *Lorenza Zarb v. Charles Caruana et.*, an elderly woman was living with her disabled son in a property they rented in Vittoriosa, Malta. The parties had entered into a 21-year lease in 1991, when the law at the time – Act XXIII of 1979 amending Chapter 158 of the Laws of Malta – protected tenants by limiting potential rent increases to a maximum of double the original rate. When the lease came to an end, however, Zarb refused to vacate the property but was permitted to continue as tenant by the Rent Regulation Board. Under Act XXVII of 2018, however, which amended Chapter 158 of the Laws of Malta – the Housing (Decontrol) Ordinance – Zarb was required to pay 2 per cent of the current market value of the property. She brought a case, therefore, to the First Hall of the Civil Court, sitting in its constitutional jurisdiction.<sup>17</sup> Zarb’s challenge argued that the 2018 Act, and its rent provisions, breached her rights under article 1 of protocol 1 of the ECHR, as well as under article 37 of the Constitution of Malta. The

Court found in her favour, holding that Act XXIII of 1979 – the law in force when the parties entered into the lease – had created a legitimate expectation that Zarb would continue to enjoy possession of the property. On appeal,<sup>18</sup> however, the Constitutional Court overturned the decision of the lower court finding that the protective law of 1979 was itself in breach of the landlord’s right to property. Moreover, the Court noted that the difference between the original rent and that determined under the 2018 Act could be mostly paid by a rent subsidy scheme, launched by the Government, and for which the applicant did not even bother to apply.

#### IV. LOOKING AHEAD

Looking ahead, there are number of factors on which an eye should be kept. First, the potential for the constitutional reform. Though the aforementioned committee has not met for some time, the need for reform remains pressing and it is possible that the coming years will bring notable change. Secondly, the ongoing investigations into alleged corruption and the assassination of Daphne Caruana Galizia could reach their conclusions, potentially revealing concerns for the political climate in Malta. Thirdly, and finally, one of the thorniest constitutional issues is the question of the right to a fair hearing in criminal proceedings. The Maltese Constitution, unlike the ECHR, provides that criminal cases can only be decided by a court of law, and not by any other adjudicating authority. Indeed, the Constitutional Court also ruled in 2016 that this guarantee also applied to the imposition of hefty administrative fines which, because of their punitive nature, were still criminal sanctions and therefore could only be imposed by a court of law and no other public authority. This said, in the past, Parliament has permitted public corporations and authorities the right to impose hefty administrative fines, and there are constitutional human rights cases currently being heard against the Financial Intelligence Analysis Unit. Though these are still *sub judice*, the 2016 finding of the Constitutional Court is clear.

#### V. FURTHER READING

Tonio Borg, *Maltese Administrative Law* (Kite Group, 2021).

Tonio Borg, *Leading cases in Maltese Constitutional Law* (Kite Group 2019).

Ivan Martin, “Constitution reform bill defeated in Parliament” *Times of Malta* (14 July 2021).

John Stanton, “Malta: how the rule of law has been challenged by murder and corruption allegations” (*The Conversation*, 13 April 2021) < <https://theconversation.com/malta-how-the-rule-of-law-has-been-challenged-by-murder-and-corruption-allegations-157726>> - accessed 25 February 2022.

1 European Commission for Democracy Through Law (Venice Commission), “Malta – Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement” (Opinion No. 940 / 2018, 17 December 2018), [1].

2 Keith Micallef, “Landmark constitutional reforms approved unanimously by MPs” *Times of Malta* (30 July 2020), 5.

3 See, for example, Kevin Aquilina, Austin Bencini, Giovanni Bonello, and Tonio Borg, “We were right after all” *Times of Malta* (3 June 2021), 28; and Kevin Aquilina, Austin Bencini, Giovanni Bonello, and Tonio Borg, “Misreading the Venice Commission” *Times of Malta* (16 June 2021), 11.

4 Victor Paul Borg, “Malta’s proposed gender top-up system: Good intentions, questionable means?” (*International Institute for Democracy and Electoral Assistance*, 19 February 2021) <<https://constitutionnet.org/news/maltas-proposed-gender-top-system-good-intentions-questionable-means>> accessed 25 February 2022.

5 [2021] ECHR 790 (7 October 2021).

6 Giovanni Bonello and Tonio Borg, “Juridical Interest: a new meaning?” *Times of Malta* (3 January 2022), 28.

7 (FH) (2 December 2021) (234/21).

8 See: *Klass v. Germany* (1979) 2 EHRR 214 and *Norris v Ireland* (1989) 13 EHRR 186.

9 In *Kevin Zammit Briffa v. Registrar of Courts and Tribunals* (CC)(25 February 2021)(10/18), for example, the abandonment of an appeal before the Court of Criminal Appeal because the applicant had failed to attend the hearing amounted to a breach the right to a fair hearing. Since the application had recently moved house and notification of the appeal had been sent to his old address, it was deemed not have been appropriately communicated to him. In the case of *Emmanuel Portelli et v. Commissioner for Tax et* (CC)(27 January 2021) (88/18), by contrast, it was found not be a breach of article 6 of the European Convention on Human Rights where proceedings were abandoned because the appellants had failed to notify their lawyers and the Court about a change of address.

10 In *Emmanuel Hayman et v. Attorney General et* (CC)(27 January 2021)(44/17), the Constitutional Court clarified that, whilst judgments have to be motivated by appropriate reasons, there is no need to provide a detailed response in respect of every argument brought before the court. In a similar vein, in *George M. Spiteri v. Attorney General et* (CC)(17 March 2021)(26/18), it was held that it does not breach an individual’s right to a fair hearing when a judge only reads a summary of their judgment in the court, provided a full copy is deposited with the Court Registrar.

11 In the case of *Raymond Sammut v. Minister for Justice et* (CC)(27 January 2021)(50/17), it was held that just because the Constitutional Court had decided in one particular case that the composition of the Industrial Tribunal was acting in breach of article 6 ECHR, it did not mean that a third party had any right to re-open cases that had previously been decided by the Industrial Tribunal and which were *res iudicata*.

12 In *Police v. Ben Nasan Khaled Ibrahim* (CC)(27 October 2021)(135/19), a witness was prevented by the Court of Magistrates from giving evidence since their testimony amounted to hearsay. The Constitutional Court held that this could affect the right to a fair hearing, especially since it was not just a particular question that was disallowed but all of the witness’ testimony.

13 (CC)(1 December 2021)(114/18).

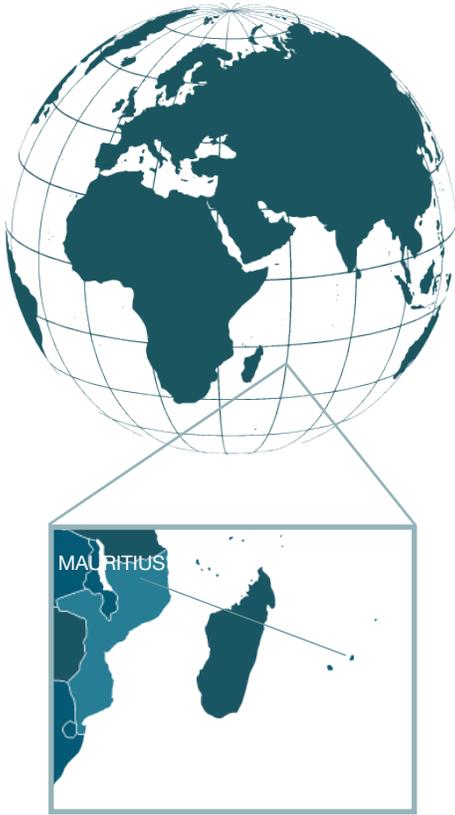
14 In the case of *Marilyn Tanti v. Joseph P. Vella et* (CC)(21 October 2021)(57/20), the Constitutional Court decided that the fact that, under Chapter 158 of the Laws of Malta, the owner of the property could not request repossession of his premises because he needed them more than the tenant amounted to a breach of the right to property under article 32 of the Constitution of Malta and article 1 of protocol 1 of the ECHR.

15 In the case of *Saviour Schembri et v. Lands Authority et* (CC)(30 June 2021)(45/15), the Constitutional Court found that the fact that private land had been used in the building of schemed residential roads did not amount to a forceful taking of possession, and thus a breach of the right to property. The Court held that such use amounted to a legitimate control of use of private property.

16 In *Louis Vincenti et v. Maria Herrera et.* (CC)(27 January 2021)(8/17), the Constitutional Court drew from Strasbourg jurisprudence (*Hutten- Czapska v. Poland* (2007) 45 EHRR 4) in making clear that for an interference of a person’s right to property to be regarded as lawful, it must be proportionate. They held that “[i]n each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State’s interference the person concerned had to bear a disproportionate and excessive burden” (*Hutten- Czapska v. Poland* (2007) 45 EHRR 4, [167]).

17 (FH)(25 February 2021)(31/19)(Mr. Justice G. Mercieca).

18 (CC)(30 June 2021)(31/19).



# Mauritius

Raunak Chaturvedi  
Undergraduate Student of Law  
Jogesh Chandra Chaudhuri Law College, University of Calcutta; India

Anjali Chaturvedi  
Member-Judge, District Consumer Disputes Redressal Commission, Jhargram  
Govt. of West Bengal

## I. INTRODUCTION

The year 2021, although being the year of COVID-19, was not overall rendered devoid of major constitutional developments in the State of Mauritius.

On one hand, we have the appointment of the first woman Chief Justice of the Supreme Court of Mauritius (hereinafter referred to as the Supreme Court), Justice Rehana Bibi Mungly-Gulbul, and on the other the ‘first-ever deployment’ of militarized police to suppress peaceful protestors in the capital city.

There were significant dissents with regards to the Offshore Petroleum Bill, which was labeled as being ‘corporate-friendly’ and introduced significant scope for corruption and arbitrariness. However, the Bill was ultimately passed.

Moreover, there were also updates that the Government was planning to intercept the encrypted web traffics, which was being termed as unconstitutional and against the freedom of speech.

However, the winner of the contest is the declaration of the retention of sensitive information of the citizens on the identity cards issued under the National Identity Card Act as being against the citizens’ right to privacy by the United Nations Human Rights Committee (hereinafter referred to as the U.N.H.R.C.).

There were significant protests against the scheme by Maharajah Madhewoo (the author), the Mauritian national who fought against the constitutionality of the scheme before the Supreme Court and also before the Judicial Committee of the Privy Council (hereinafter referred to as the Privy Council). However, both of them upheld the constitutionality of the scheme.

But the tables were turned when the U.N.H.R.C. labeled the arbitrariness and absence of reasonability involved with the retention of the sensitive data to be incorrect, thereby raising significant questions about the fundamental rights of the citizens of Mauritius.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major Constitutional development that happened in the State of Mauritius for the year 2021 was none other than the declaration of the National Identity Card scheme of the country as violating Article 17 of the International Covenant on Civil and Political Rights (hereinafter referred to as the Covenant), by the U.N.H.R.C.

People might wonder how is this related to Constitutional law?

The answer is that when the scheme’s constitutionality was challenged before the Supreme Court, it was observed that there was

an infringement of privacy under Section 9(1) of the Constitution of Mauritius (the Constitution), but this infringement was reasonable.

This decision was appealed against, before the Privy Council (which upheld the Supreme Court's decision).

Later this was scrutinized by the U.N.H.R.C. on receiving a communication from the author, a national of Mauritius, and it was observed that the scheme violated Article 17 of the Covenant.

The backdrop can be summarized as follows.

In 1985, an Act called the National Identity Card Act had been legislated, which provided for the issuance of an identity card containing the various details of the citizens of Mauritius. A register containing the name, gender, *etc.*, was to be maintained. Every citizen on attaining 18 years of age was required to apply for the card, stipulating that anybody could request for its production, but there was no compulsion to produce it.

In 2009, The Finance (Miscellaneous Provisions) Act amended the amount of personal information required to include sensitive personal information such as biometrics, fingerprints, *etc.*, and also empowered the Executive to expand the amount of information required for an application and to print on the card itself. The penalties for non-compliance were also increased drastically.

In 2013, another amendment was made, saying that a person empowered by law to identify a person could request the sight of the card and require its production. Also, the collection and processing of the biometric information were subjected to the Data Protection Act of 2004. Moreover, the National Identity Card (Particulars in Register) Regulations provided for this information to be recorded on a register.

The author challenged the constitutionality of the new biometric identity card before the Supreme Court, stating that it was violating his right to privacy as envisaged under Section 9(1) of the Constitution.

The Supreme Court accepted that there was an infringement of privacy under Section 9(1) of the Constitution but upheld the constitutionality of the legislation for the reason that the infringement was reasonable as it was in the interests of public order and safety, thereby being protected by Section 9(2) of the Constitution.

The Supreme Court said that the author had failed to prove how was collection and storage of such sensitive information not reasonably justified in a democratic society.

However, the Court also observed, after scrutinizing expert evidence, that, even if the technical difficulties were resolved, the existing storage scheme was subject to misuse and insecurity, thereby holding the 'indefinite storage and retention' of the biometric data as not being constitutionally justified.

In response, the authorities legislated the National Identity Card (Civil Identity Register) Regulations of 2015, thereby revoking the old Regulations and omitting the requirement of full biometric information on the register. Moreover, the Ministry said that the fingerprint data shall be stored only as long as the cards are issued. Also, all biometric data stored till September 2015 was deleted.

The National Identity Card (Amendment) Regulations of 2015 were also introduced, amending the 2013 Regulations to include a declaration stating that the applicant had no objection with his fingerprint's minutiae being collected and recorded for the production of the card and that the same shall be erased once the card is issued.

The author observed that as the non-application for the card was a crime, he had no option but to comply.

In 2016, the author appealed before the Privy Council, which too upheld the decision of the Supreme Court, although noting that the destruction of the biometric data after the issuance of the cards might adversely affect the ability to prevent identity fraud.

In 2017, further amendments were made, stating that the prescription of data to be in-

cluded on the identity card remains a power of the Executive.

The U.N.H.R.C., after making a note of the various arguments and the information made available to it by the parties, held that the storage of the fingerprints of the author on the identity cards as per the National Identity Card Act of 2013 would amount to a violation of his right to privacy as envisaged under Article 17 of the Covenant.

The U.N.H.R.C., while giving the decision, made references to the flaws that the scheme possessed, particularly the fact that the deletion of the data from the system after issuance of the cards would affect the ability of the authorities to prevent identity fraud, as already observed by the Privy Council.

Moreover, the U.N.H.R.C. also reiterated the fact that the State of Mauritius had not given substantive answers for the security measures that were being taken to prevent the prospective theft or loss of sensitive data. Thus, considering these points, the U.N.H.R.C. took its decision.

The U.N.H.R.C. held the scheme to be arbitrary and unreasonable.

However, the U.N.H.R.C. also held that the author's argument that "the data collection was unlawful", was incorrect.

Thereby, the U.N.H.R.C. ordered the State of Mauritius to take effective measures to prevent the misuse of the author's sensitive data being taken for the issuance of the card and also demanded a review of the grounds of the existing security system and also to prevent such violations in the future. The U.N.H.R.C. also asked the State of Mauritius to submit a report within 180 days with regards to the steps taken to implement the judgment of the U.N.H.R.C.

States throughout the world have tried to keep unaccounted vigilance on the citizens and Mauritius is no exception, but the recent decision of the U.N.H.R.C. has rendered the Mauritian State's efforts useless, restricting its interference.

The decision was passed by a majority of 16:2. Furuya Shuichi and Gentian Zyberi were the two dissenting Members.

### III. CONSTITUTIONAL CASES

1. *AAPCA (Mauritius) Ltd (In Receivership) and Anor v. Mauritius Revenue Authority*<sup>1</sup>: Right to Appeal only on grounds mentioned originally

In the above case, the applicant company was already in debt to the amount of Rs. 33,347,006 to the Mauritius Revenue Authority, represented as unpaid taxes and further, to the amount of Rs. 33,154,810 representing non-collectible debts.

The applicants had appealed against the decision of the commercial division of the Supreme Court before the Court of Civil Appeal. However, they were dissatisfied with the judgment of the Court and therefore, sought an application for the grant of the permission to appeal before the Privy Council, under Section 81(1)(b) of the Constitution.

While presenting their application, the applicants had mentioned a few more grounds for appeal. The Court, while reiterating its earlier decisions and upholding the objection raised by the respondent Counsel, said that a right to appeal lies only for the grounds which have been discussed already. Adding fresh grounds at the next stage of appeal would be unfair to the respondents and also to the Privy Council, as it would not have the detailed judgment of the lower Court(s) to scrutinize for the newly added ground(s) of appeal. Thus, denying the newly added grounds for appeal, the Supreme Court granted the permission to appeal to the applicants, on the grounds which had been already discussed.

2. *Bablee S. G. v. Sayed-Hossen S.A. and Ors.*<sup>2</sup>: Staying of, and striking portions from Election Petitions- Principles of Natural Justice upheld

The instant case was a very important one, as it dealt with two very important aspects,

*viz.*, the staying of an Election Petition, on the ground that an application for Judicial Review under Section 37 of the Constitution had been filed, thereby challenging the entire General Elections held on 7/11/2019 and the second prayer relating to the striking of portions from the impugned Election Petition, as being ‘frivolous, vexatious and irrelevant’.

The facts of the case might be summarized as follows.

The applicant and the respondent and co-respondents Nos. 4 and 5 of the instant case had contested the General Elections to the National Assembly of Mauritius, held on 7/11/2019, from Constituency No. 15, La Caverne and Pheonix.

When the results of the said elections were declared, the applicant and the co-respondents Nos. 4 and 5 were declared as elected.

Thereby, the respondent filed the impugned Election Petition under Section 45 of The Representation of the People Act, 1958 challenging the results of his constituency and thereby asking for a recounting of the results. Meanwhile, in January 2020, one Mr. S. Bhadain applied for Judicial Review of the General Elections under Section 37 of the Constitution.

The learned Senior Counsel for the applicant argued that if the Judicial Review application is allowed and decided upon, then the consequence might be the declaration of the entire General Elections held on 7/11/2019 as void.

Hence, the learned Senior Counsel prayed for the stay of the Election Petition till the Judicial Review application was decided upon.

However, the application for Judicial Review was already set aside by the Supreme Court.

The Court, in the instant petition, noted that even if the Judicial Review application would not have been set aside, still it would not have allowed the prayer to stay the Election Petition.

The Court reasoned that an Election Petition under Section 45 of The Representation of the People Act of 1958 and an application of Judicial Review under Section 37 of the Constitution were inherently different, as the procedure and time prescribed for the two of them were different.

It is categorically said that an Election Petition is unlike an ordinary civil dispute, where only private interests are involved.

The Court held that the time limit of 21 days to file an Election Petition under Section 45 of The Representation of the People Act was made so, to discourage the filing of vexatious applications and prevent the Assembly Members from being under the fear of a continuously hanging sword of their elections being challenged.

Thus, after quoting its earlier judgments, the Court held that the unnecessary staying of such Election Petitions would negate the very purpose of constituting a separate process while dealing with such petitions, which were to be dealt by the Court with celerity.

While coming to the second prayer of the applicant, the Court held that the power of the Court to strike paragraphs or petitions as per the Rules of the Supreme Court 2000 must be exercised with the utmost care and diligence and only in extreme circumstances. Moreover, the Court also pointed out that such applications to strike off the portions, either in part or in whole, of the opposite party, must not be based upon the mere *ipse dixit* of the applicant. The Court categorically held that if this power was to be used without due care, then it might result in the striking of genuine points from such impugned petitions which constitute genuine causes of action for the respondents. Thus, we might note that in this way the Supreme Court, indirectly, stressed the principles of natural justice, inherent in the Constitution.

3. *Daby B. v. The State*<sup>3</sup>: Right to a fair trial- Whether not postponing the trial breached it?

In the instant case, the appellant had been accused and held guilty of the offense of assault under Section 230(1) of the Criminal

Code of Mauritius. The appellant subsequently filed an appeal before the Supreme Court stating that because of the acts of her Defense Counsel, she had been convicted of the offense of assault and the rejection of the plea of the Defense Counsel to postpone the trial to obtain the brief of the prosecution had prejudiced the case, thereby violating the right to a fair trial of the appellant under Section 10 of the Constitution.

The facts of the case, if summarized, were that after being accused of the offense, the Counsel of the appellant (then accused) had, on the day set for the trial, intimated to the Court of the Magistrate through another Counsel that as the brief of the prosecution had not been sent to him, he required the date of the trial to be postponed. The dates had already been postponed by the Learned Magistrate earlier, quite a few times. The Learned Magistrate refused this request and thereby convicted the appellant (then accused) of the offense.

The Supreme Court, while delivering its judgment, held that in not giving a further date for trial, the Learned Magistrate instead upheld the right to a fair trial of the appellant, which also included the right to a fair trial within a reasonable time, as enshrined under Section 10(1) of the Constitution. Besides, the Court also observed that the records of the Court showed that the replacing Counsel for the appellant had approximately one hour to go through the brief, the case being a simple one. Also, the replacing Counsel, even after that, did not say that he would be unable to make submissions for the appellant and went on to give lengthy submissions after cross-examining the witnesses. Thus, for the reasons stated above, the Supreme Court rejected the appeal.

*4. Jootna N. v. The State<sup>4</sup>: Right to liberty is limited by parameters of danger that society might face due to the release of the accused.*

This case refers to a judicial blunder (as quoted by the Supreme Court in its judgment) committed by one of the Learned Magistrates in the State of Mauritius. Two brothers had been accused of serious offenses, of the same nature, under the Dangerous Drugs Act. However, when one brother, *viz.*

the applicant in the instant case, moved for bail, the Learned Magistrate granted bail to the other brother instead. The Director of Public Prosecutions even tried to rectify this judicial error, but due to procedural lacking, could not succeed.

The applicant then filed this application before the Supreme Court for the review of the bail. The Supreme Court, while categorically mentioning that this was a gross irregularity on the part of Learned Magistrate, stated that granting of bail to someone, that is, the right to liberty of a person is significantly limited by the parameters of any dangers that the society might face, due to the subsequent release of the person charged with serious offenses. The Supreme Court reiterated various judgments of the past, that had set out the principle that ‘liberty is a rule, detention an exception’. Thus, keeping in consideration these principles and reasoning and the other material facts of the case, the application was set aside with costs.

*5. LECLÉZIO J. M. v BISSETT M. J. R.<sup>5</sup>: Master and Registrar of Court acting as “taxing officer” not amenable to the appellate jurisdiction of the Supreme Court.*

In the instant case, the Supreme Court had to decide the issue of whether a Master and Registrar of the Court functioning as a “taxing officer” is amenable to the appellate jurisdiction of the Supreme Court or not.

The appellant’s claim to retainer fees amounting to Rs. 230,000 as a bill of costs under Rule 4(c) of the Legal Fees and Costs Rules, 2000 had been denied by an order dated 30 January 2017 by the Master and Registrar of the Supreme Court.

The Supreme Court held that while discharging his duties as a “taxing officer”, the Master and Registrar of the Supreme Court or any other Court, *per se*, is discharging administrative functions and not judicial functions. A conjunctive reading of Section 82 of the Constitution; Sections 19, 21, 22, and 69 of the Courts Act; and the Legal Fees and Costs Rules 2000 would reveal this. Thus, the Court rejected the appeal with costs.

*6. The Local Government Service Commission v. The Public Bodies Appeal Tribunal<sup>6</sup>: Marking sheets of the L.G.S.C. confidential documents- Appellate Tribunal should not disclose as per Constitution, unless necessary.*

In the above case, the Local Government Service Commission (L.G.S.C.) had appealed against the decision of The Public Bodies Appeal Tribunal, in respect of the determination of the decision of the Commission, appointing certain people to the post of Senior Health Inspector.

The Tribunal had passed the decision based on the reasonings that the process adopted by the Commission was *ultra vires* the law and suffered from many procedural irregularities.

The Supreme Court, while setting aside the decision of the Tribunal against the Commission based on the facts that it was against reasonability in the *Wednesbury* sense and was based on wrong considerations, iterated the point that the marking sheets were confidential in nature and therefore, they could not be disclosed to third parties, including the serving officers of the Local Government Service, who participated in the selection exercise. The Court then further went on to highlight Section 91A(9)(b) of the Constitution, thereby saying that the Tribunal must not refer extensively to the reports, documents, or materials of any Commission or other public body, except when required while making a decision. However, the Tribunal in the instant case had made extensive references to the marking scheme of the Commission during the selection process.

The Court, therefore, quashed the decision of the Tribunal for the above reasons.

*7. Lotun A. K. and Ors. v. The State of Mauritius<sup>7</sup>: Members of the Local Government Service Commission can be rightly terminated by President under Section 113(4) of the Constitution.*

In the instant case, three plaintiffs had filed complaints with summons before the Supreme Court, challenging the action of the President of Mauritius of terminating their ap-

pointments to the Local Government Service Commission.

The plaintiffs had been appointed by the President under Section 5 of the Local Government Service Act, as members of the Local Government Service Commission. Thereby, the terms and conditions of their appointment were communicated to them through a letter, which was subsequently altered and the altered terms and conditions were communicated by another letter. However, after the 2014 General Elections took place, the President terminated their employment, subject to Section 113(4) of the Constitution.

The plaintiffs said that their employment had not been made under Section 113 of the Constitution, but under specific legislation, that is, Section 5 of the Local Government Service Act. They argued that their employment could have been terminated only by the process as given under Section 6 of the Act and not otherwise.

The Supreme Court, while rejecting the arguments of the plaintiffs, held that the appointment of the plaintiffs to the posts of Members of Local Government Service Commission was done on the aid and advice of the Prime Minister. The Court said that the President cannot make such appointments on his own, as he is required to act on the aid and advice of the Cabinet or any other Minister, thereby, making him bound to remove the plaintiffs appointed by him, after any General Elections, as per Section 113(4) of the Constitution, as per the wishes of the Prime Minister. The Court further went on to enumerate the reasons why such a provision as Section 113(4) of the Constitution was brought into force. The Court reiterated many judgments and held that the main reason to have this provision was to empower the Government to remove certain political appointees of the previous regime, from key positions, after the new Government comes into power, to ensure smoother administration and relation between the Government and the officials. Citing the above reasons, the Court rejected the complaints, however, held that the only compensation that the plaintiffs were entitled

to be as per Section 52 of the Employment Rights Act (in force at the time of the termination of the plaintiffs).

#### IV. LOOKING AHEAD

The main challenge that awaits Mauritius is the prevention of further violations of the right to privacy of the citizens, as had been done by the National Identity Card scheme. Moreover, as being a State party to the Covenant, it has to also ensure that the violations of any other right(s) are also prevented. Breach of a citizen's right to privacy is a constitutionally protected, fundamental right. Thus, the same has to be kept under check. Other concerns with regards to other legislations, that is the Offshore Petroleum Act, and the concerns with regards to increased corruption and arbitrariness have also to be taken into consideration. Nevertheless, Mauritius has indeed sailed far in the pursuit of safeguarding the rights of the citizens, the Supreme Court playing a pivotal role.

#### V. FURTHER READING

1. Vishwanath Petkar, 'UN rights body finds Mauritius ID card law contrary to right to privacy' (JURIST, 23 July 2021) < <https://www.jurist.org/news/2021/07/un-rights-body-finds-mauritius-id-card-law-contrary-to-right-to-privacy/>> accessed 13 February 2022
2. JURIST Staff, 'Mauritius dispatches: new corporate-friendly oil bill raises corruption and climate change concerns' (JURIST, 6 November 2021) < <https://www.jurist.org/news/2021/11/mauritius-dispatches-new-corporate-friendly-oil-bill-raises-corruption-and-climate-change-concerns/>> accessed 13 February 2022
3. Nishan Degnarain, 'Mauritius In Crisis As Militarized Police Deployed Against Peaceful Protestors' (Forbes, 11 January 2021) < <https://www.forbes.com/sites/nishandegnarain/2021/01/11/mauritius-in-crisis-as-militarized-police-deployed-against-peaceful-protes->

[tors/?sh=50dbfa84bc48](https://www.forbes.com/sites/nishandegnarain/2021/01/11/mauritius-in-crisis-as-militarized-police-deployed-against-peaceful-protestors/?sh=50dbfa84bc48)> accessed 13 February 2022

4. Emma Woollacott, 'Mauritian government's plan to intercept encrypted web traffic marks 'death knell for freedom of speech' (The Daily Swig, 28 June 2021) < <https://portswigger.net/daily-swig/mauritian-governments-plan-to-intercept-encrypted-web-traffic-marks-death-knell-for-freedom-of-speech>> accessed 13 February 2022

5. Vishwanath Petkar, 'Mauritius president appoints first female chief justice' (JURIST, 16 November 2021) < <https://www.jurist.org/news/2021/11/mauritius-president-appoints-first-female-chief-justice/>> accessed 13 February 2022

- 1 *AAPCA (Mauritius) Ltd (In Receivership) and Anor v Mauritius Revenue Authority* 2021 SCJ 334 (Supreme Court of Mauritius)
- 2 *Bablee S G v Sayed-Hossen S A and Ors* 2021 SCJ 29 (Supreme Court of Mauritius)
- 3 *Daby B v The State* 2021 SCJ 144 (Supreme Court of Mauritius)
- 4 *Jootna N v The State* 2021 SCJ 32 (Supreme Court of Mauritius)
- 5 *LECLÉZIO J M v BISSETT M J R* 2021 SCJ 241 (Supreme Court of Mauritius)
- 6 *The Local Government Service Commission v The Public Bodies Appeal Tribunal* 2021 SCJ 315 (Supreme Court of Mauritius)
- 7 *Lotun A K and Ors v The State of Mauritius* 2021 SCJ 351 (Supreme Court of Mauritius)



# Mexico

Mauro Arturo Rivera León  
Assistant Professor  
University of Silesia in Katowice

Irene Spigno  
General Director  
Inter-American Academy of Human Rights

Alfonso Herrera García  
Professor of Constitutional Law  
Universidad Panamericana (Mexico City)

## I. INTRODUCTION

The second year of the COVID-19 pandemic in Mexico was marked by a national vaccination campaign coordinated by public health authorities. In 2021, there were two critical COVID-19 waves (in January and August). From a constitutional point of view, discussions arose regarding the equal distribution of vaccines without discrimination. Some legal cases concerning this issue remain under scrutiny.

At the same time, as will be highlighted in this text, 2021 stands out as a year where the Supreme Court ruled on some historical cases on abortion rights. These cases have no historical precedent in the country nor probably in Latin American comparative constitutional law. The decriminalization of abortion in Mexico positions it as one of the few Latin American countries that have reached this decision through the judicial route. In addition, it characterizes the Supreme Court as a progressive human rights court, having ruled upon what is very much a polarizing issue for any democratic society.

As will be developed more broadly, this year has also featured the constitutional amendment on the Mexican Federal Judiciary regarding anti-corruption measures, gender equality, and enhancing the judicial review by the Supreme Court. With this reform, the Court declared the beginning of the eleventh epoch of its jurisprudence (a new epoch is

established when a profound change to the legal system occurs).

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

One of the most significant constitutional developments in 2021 was the constitutional reform of the Federal Judicial Branch which was first published in the Federation's Official Gazette on March 11, 2021. The constitutional amendment was later followed by the reform of several other laws (the Organic Law of the Federal Judicial Branch and the Amparo Law, among others).

Among the most relevant aspects of this reform, are those related to the "constitutional controversies". Constitutional controversies are a procedure allowing the Supreme Court to settle conflicts of competence between powers or public bodies. Before the reform, constitutional controversies required a competence conflict under the Federal Constitution. The constitutional reform extends the possibility for this mechanism to be employed not only in relation to constitutional infringements, but also to human rights violations under international treaties.

The Constitutional amendment also introduced a binding precedents system. After the Constitutional amendment, the Supreme Court may, in Plenary Session (by an 8-votes majority) or Chambers (by a 4-votes major-

ity), issue binding precedents to all Judges if approved by a supermajority. The amendment extended a system that was already in force in actions of unconstitutionality and constitutional controversies to *Amparo* procedures.<sup>1</sup> This new system will not replace other criteria that the Mexican legal system foresees for the creation of case law (such as the reiteration and contradictory criteria) which, nevertheless, will no longer be used by the SCJN.<sup>2</sup> The previous system had been in place for more than 140 years (it was pre-constitutional).

There are also several changes in the direct *Amparo* review as well. Direct *Amparo* is a mechanism that allows rulings to be challenged according to a specific procedure. Direct *Amparo* rulings usually cannot be appealed. In extraordinary circumstances, a “revision” appeal could be filed when a direct *Amparo* ruling was engaged in analyzing the constitutionality of a statute or in the direct interpretation of an international treaty or a constitutional provision. The appeal was only admissible in matters of “importance and transcendence”. The amendment modifies this criterion to encompass the broader term of “exceptional interest in a constitutional or human rights matter”. Thus, the amendment granted further freedom to the Court in determining its jurisdiction (somewhat similarly to a certiorari) and strengthened its role as a Constitutional Court.

In the case of the Judiciary Council, the reform reaffirmed the irrevocability of its decisions, except for those referring to the assignment, ratification and removal of magistrates and judges, which can be reviewed by the Supreme Court. However, the amendment suppressed the Supreme Court’s jurisdiction to hear appeals pertaining to the appointment of federal judges (an ability bestowed upon the Court since 1994) and instead transferred that function to the Federal Judiciary Council).

In addition, the Federal Judiciary Council was assigned the power to concentrate the resolution of human rights violations in one or more judicial bodies as to provide a more efficient mechanism to solve such cases (Article 100 of the Constitution).

Another important the constitutional reform of the Federal Judicial Branch, published in the Federation’s Official Gazette on March

11, 2021 foresaw the possibility that the President may be accused and judged, during his term, for treason, acts of corruption, electoral crimes, and all crimes for which a citizen could be judged. Before the amendment, a President amendment a President could only be accused of treason and other serious crimes.

Additionally, at a legislative level, there have been some important developments. Article 2 of the Migration Law was reformed to include the principles of the best interests of the child, a gender perspective, and conventionality as part of the basis for action of Mexican authorities on migration. Moreover, further developments occurred pertaining to gender non-discrimination regulations. On November 22, 2021, section XXXIV of Article 9 was added to the Federal Law to Prevent and Eliminate Discrimination, which lists a series of acts of discrimination in accordance with Article 1 of the Constitution. This new section defines it as an act of discrimination to forbid, limit, or restrict breastfeeding in public places, thereby, protecting women’s right to breastfeed their children in public places, as well as children’s rights to health and food.

Finally, on September 14, 2021, The Federal Recall Act, Regulatory Law of Article 35 Section IX of the Constitution was published in the Official Gazette, its objective being to guarantee the exercise of the right to request, participate, be consulted on, and Vote on the presidential recall election due to the loss of trust, by universal, free, secret, direct, individual, and single non-transferable vote.

This law is particularly relevant because it serves as a guarantee of the political right to exercise public opinion on the presidential performance in a straightforward and regulated way. Voters may remove an elected official from powers if the legal conditions are met. This law was supported upon its proposal and from the start of his mandate by President Andrés Manuel López Obrador.

### III. Constitutional Cases

#### 1. *Declaratoria General de Inconstitucionalidad* 1/2018: Farewell to Marijuana prohibition for good (28/06/2021)

*Amparo* has been in effect in the Mexican legal culture as of 1841. *Amparo* allows the analysis of whether a statute is constitution-

al. However, the effects of *Amparo* are *inter partes*, thus, the statute remains on the books and may be applied to other individuals. In 2011, a constitutional amendment introduced a procedure called “the general declaration of unconstitutionality” (DGI) allowing *Amparo* precedents to trigger a procedure in which the Supreme Court may issue an *erga omnes* nullity if approved by a constitutional supermajority of 8 votes. The procedure was only successfully employed once in 2019 regarding an administrative provision.

The first chamber of the Supreme Court issued five *Amparo* rulings between 2015 and 2018 in which it declared that the General Health Act was unconstitutional as it prohibited recreational marijuana consumption. However, the effect of such rulings only pertained to the plaintiff. In DGI 1/2018 the Court struck down several provisions of the statute, thus settling a provisional regime of how to issue authorizations for its recreational consumption. It is only the second time in history (since the creation of the procedure in 2011) that the Court has successfully employed this procedure. The DGI 1/2018 deliberation revealed that the Supreme Court was highly divided regarding the interpretation of the DGI’s objectives and functioning.

#### 2. *Amparo Directo en Revisión* 2666/2018: The first *Amparo* General Binding Precedent (9/06/2021)

A person pleaded guilty (through plea bargaining). The judge sentenced the accused to prison and to pay compensatory damages. The victim appealed, claiming that the damages were too low. In establishing the damages, the judge employed the methodology prescribed by Article 30 of the state of Mexico’s Criminal Code, which states that such damages are calculated according to the provisions granted in the Federal Labor Act. The victim filed an *Amparo*, challenging Article 30 of the state of Mexico’s Criminal Code. The First Chamber of the Supreme Court upheld the law arguing that it applied only to a concrete type of crime and only under the circumstances where no evidence was available as to establish the amount of the physical damages entitled (and thus it did not apply to other types of damages).

Even though the Court abided by its previous case law, this ruling is highly significant. As explained before, in 2021 the Mexican Constitution introduced a system of binding precedents to the Supreme Court that radically changed *Amparo* precedents. Before 2021, *Amparo* could only produce binding case-law through a formalized procedure (called “*jurisprudencia*”) which required predominantly the adoption of the same criteria in five consecutive cases under supermajority requirements. ADR 2666/2018 was the first time in history that the Supreme Court issued a single *Amparo* ruling with immediate general precedential value.

### 3. *Amparo en Revisión* 271/2020: Rulings must all be public (3/02/2021)

Two civil associations filed an *Amparo* against the Judiciary of the state of Zacatecas. The associations claimed that the lack of open publication of rulings infringed the right to access public information and normative provisions from the General Act on Transparency and Access to Information (GATAI).

The First Chamber of the Supreme Court granted the *Amparo*. Even though both GATAI and the state’s law only allow access on rulings of “public interest” the Court concluded that all rulings shall be considered of “public interest”. Thus, the Federal and local judiciaries shall provide public access to all rulings. The Court stated that further limitations to this access are unconstitutional.

### 4. *Amparo en Revisión* 314/2020: Extradition is constitutional (12/05/2021)

The Government of the United States requested the extradition of a person on the basis of charges of money laundering and criminal association. Mexico started the extradition procedure according to the Extradition Treaty with the United States (ETUS) and the International Extradition Act (IEA). The person filed an *Amparo* claiming that Articles 3 and 13 of ETUS, as well as Articles 1 of the IEA, were unconstitutional given the fact that they did not provide a detailed framework of the internal procedures national authorities must fulfill while processing an extradition request. The plaintiff also argued that the IEA limits constitutional

rights to people subject to an extradition procedure to a higher standard than persons facing ordinary criminal procedures in Mexico. The First Chamber of the Supreme Court upheld both statutes. The Court stated that even though the Extradition Treaty with the United States does not foresee internal procedures, those procedures are provided by the International Extradition Act. Furthermore, in the procedure, the intervention of both the Ministry of Foreign Affairs (SRE) as well as judicial control guarantee due process and access to an effective remedy. Finally, the Court concluded that extradition and criminal procedure are different proceedings and thus may not be used as a parameter to demonstrate the alleged discrimination.

### 5. *Acción de Inconstitucionalidad* 16/2016 and *Amparo en Revisión* 129/2019: Surrogacy under analysis (7-8/06/2021)

Surrogacy is generally an unregulated issue in Mexico. Only the states of Sinaloa and Tabasco had surrogacy regulations by 2021. The Supreme Court had the opportunity to analyze Tabasco’s regulation through both abstract and concrete control. In *Acción de Inconstitucionalidad* 16/2016, The General Prosecutor challenged Civil Code on federalism grounds and claimed several regulatory problems with the surrogacy regulations. The Court issued a very technical opinion. In the first instance, the Court struck down an article that established technical aspects of the fertilization procedure and medical preconditions, on federalism grounds, while concluding that states do have the competence to regulate the civil consequences of surrogacy agreements. The Court also invalidated a provision that established an order of preference on parental rights considering that the best interests of the child shall be decisive in custody procedures. Furthermore, the Court struck down a provision that required both the signature of “the father and the mother”, considering it discriminatory as it hindered same-sex couples from being a party to such agreements. Finally, the Court held<sup>3</sup> a requirement that conditioned women’s participation to the consent of the “husband or concubine” to be unconstitutional as it was based on the stereotype that women may not autonomously exercise the right to motherhood. Finally, the Court recog-

nized that there was no constitutional obligation to establish that surrogacy contracts shall be free, precluding economic benefits.

In *Amparo en Revisión* 129/2019 a hospital specializing in assisted reproductive technology challenged the same statute analyzed above. The Court concluded that Article 380 of Tabasco’s Civil Code was unconstitutional insofar as it deemed void any surrogacy agreement in which “agencies, offices or third persons” had intervened as it limited freedom of commerce of Article 5 of the Federal Constitution. Furthermore, the Court claimed that requiring Mexican nationality to contract with parties on surrogacy agreements violates the right to equality and non-discrimination. The Court encouraged<sup>4</sup> Mexican legislative authorities to urgently regulate surrogacy in both cases.

### 6. *Amparo en Revisión* 1077/2019: Legal status of urgent actions of the UN Committee against Forced Disappearance (16/06/2021)

In 2013 a person disappeared, presumably taken by civil and police authorities. During detention, it was stated that the person was a suspect in a crime, but subsequently, the authorities did not inform anyone as to the person’s whereabouts. On the grounds of the lack of action by the prosecutor’s office, the person’s family filed a petition to the United Nations Committee against Forced Disappearance. The Committee issued urgent actions which authorities repetitively failed to comply with. The person’s family filed an *Amparo* claiming, *inter alia*, that the Prosecutor’s office had failed to meet the requirements established by the UN Committee against Forced Disappearance.

In the first instance, a District Court dismissed the claim concerning “Urgent Actions”. The judge concluded that, as urgent actions were not binding, its lack of fulfillment did not violate the plaintiff’s rights. The Supreme Court overturned the ruling and granted the *Amparo*. The First Chamber argued that international treaties shall be understood under a correlation between the *pro homine* principle and the principle of useful effect. Thus, the Court concluded that urgent actions were binding on national authorities and the failure to comply with them may be subject to judicial scrutiny.

7. *Acción de Inconstitucionalidad* 148/2017: Criminalizing abortion is unconstitutional (7/09/2021)

This case was probably the Supreme Court's landmark decision in 2021. The Coahuila's Criminal Code established a custodial prison sentence by way of punishment for voluntary abortions. Article 195 read as follows: "An abortion is committed by anyone who causes death to the product of conception at any time during pregnancy." While Article 196 stated: "One to three years' imprisonment shall be imposed on a woman who voluntarily performs her abortion, or on the person who causes the abortion with the woman's consent."

For the first time in Mexico's history, the Court ruled that it is unconstitutional to criminalize the termination of a pregnancy. The Court guaranteed women's (or an individual capable of pregnancy) right to decide without facing criminal consequences. Indeed, the Court recognized a constitutional right to legal, safe, and accessible abortion services at the initial stages of pregnancy.

The product of gestation deserves the protection that increases over time as the pregnancy progresses. However, this protection cannot ignore women's rights to reproductive freedom. With this understanding of the Constitution, punishing criminally women who voluntarily decide to terminate their pregnancy is forbidden.

Thus, the Court further struck down two normative provisions: article 198, which forbade health personnel to provide assistance on voluntary abortions, and article 199, which limited abortion to a 12-week period in instances of rape, insemination, or artificial implantation.

This decision reached a unanimous vote (eleven), more than the eight votes required by the Constitution to invalidate norms. The decision is binding on all judges in the country, both federal and state.

Finally, the Court struck down the rule that established a lesser penalty for the crime of rape between spouses, cohabitants, and civil partners (Article 224), compared to the penalty set for the crime of rape more generally.

8. *Acciones de Inconstitucionalidad* 106/2018 y 107/2018: When does life begin? Not from conception (9/09/2021)

The Constitution of the state of Sinaloa established that: "Any individual shall be under the protection of the law from conception to death" (Article 4). The definition clashed with reproductive rights. According to the aforementioned *Acción de Inconstitucionalidad* 148/2017, this freedom even implied the invalidity of criminalizing abortion.

In the first place, the Court considered that the states of the Federation do not have jurisdiction to define the origin of human life, nor can they establish the concept of "person" or whether it is possible to decide the moment from which a human being becomes a person and thus attains human rights. These fundamental aspects are exclusive matters and thus reserved to the Federal Mexican Constitution. Second, the Court found it unconstitutional to grant the status of a person to the embryo or fetus. The right to reproductive autonomy of women and people with the capacity to gestate cannot be limited based on the status of the embryo or fetus. According to the ruling, the embryo and fetus do not have the same legal protections as people who are born. Following the *Acción de Inconstitucionalidad* 148/2017, The product of gestation deserves protection that increases over time as pregnancy progresses. But this protection cannot ignore women's right to reproductive freedom, particularly abortion rights.

The Court held that Mexico must, of course, protect life in gestation as a constitutional value. At the same time, it must effectively protect the rights of women and individuals with capacity to gestate. Examples of this state protection are ensuring the continuity of desired pregnancies, ensuring prenatal care for all persons under its jurisdiction through healthy births, avoiding maternal mortality, among others.

9. *Acción de inconstitucionalidad* 54/2018: Conscientious objection to health services (20/09/2021)

The General Health Act, applicable throughout the national territory, provided doctors and nurses with a right to conscientious objection (Article 10). This right implied a

broad possibility of not participating in the provision of health services. It has two exceptions: when the patient's life is put at risk or in case of medical emergencies.

However, the Court struck down the referred article. It did not establish the necessary guarantees to protect the right to health, such as the right to access abortion with safe and non-discriminatory conditions for women.

This provision did not define the necessary guidelines and limits on the right to conscientious objection. Thus, exercising this right can jeopardize other people's human rights, particularly the right to health, both in public and private institutions. Therefore, the Court decided to establish minimum guidelines in this regard and urged the Congress of the Union to consider them when reforming the General Health Act.

10. *Contradicción de Tesis* 351/2014: Amparo courts as genuine human rights courts (28/09/2021)

In the "thesis contradiction" procedure, the Court does not resolve a specific dispute but seeks to unify thematic differences between federal courts. In this case, CT 351/2014 analyzed a discrepancy over the scope of Amparo justice versus ex officio control in the field of human rights.

The Court ruled that Amparo Federal Judges can carry out ex officio control of constitutionality over any provision involved in the Amparo trial (thus including provisions not applied in Amparo trials but in ordinary procedures submitted to review through Amparo).

The ruling abandoned a precedent established six years ago (*Amparo Directo en Revisión* 1046/2012, decided in 2015). In that case, The Court held that federal Judges and Courts could only invalidate procedural *Amparo* rules through ex officio review. The Court considered that Amparo courts could only carry out ex officio control over three procedural Acts: the Amparo Act, the Organic Act of the Judicial Power of the Federation, and the Federal Civil Procedures Code. The Court argued that federal courts lacked the authority to perform such a review in legislation applied in ordinary trials as they lacked jurisdiction.

On the contradiction of thesis 351/2014, the Court argued that it was understood that

Article 1 of the Constitution obliged all jurisdictional authorities to stop applying any provision that violates human rights. Thus, the Court concluded that Amparo judges were comprehended under such obligation and competent to perform such a control. The only monopoly that the Supreme Court can hold in the Mexican legal system is in the law's invalidation. However, there can be no monopoly in the practice of judicial review of legislation. If an Act is unconstitutional, it may be controlled in Amparo cases even if such concrete provision is not applied in the constitutional Amparo trial.

#### 11. *Controversia constitucional* 121/2012: Territorial boundaries of two states of the Republic (16/11/2021)

This case is unprecedented for the history of the Court as a tribunal for territorial conflicts. The Court ruled upon a dispute between two states over their territorial boundaries. The state of Oaxaca sued the state of Chiapas due to a decree of its Congress. The dispute involved a decree creating a new municipality (Belisario Domínguez)<sup>5</sup>. At the same time, Oaxaca requested the borderline definition between the two states.

The constitutional controversy over territorial problems has been tortuous in the Constitution and Mexican constitutional practice. In 2005, a constitutional reform eliminated boundary conflicts as a matter of the Court's jurisdiction. Nevertheless, in 2012, another constitutional reform restored that jurisdiction. Based upon the 2012 amendment, the Senate submitted to the Court a case that the Senate began hearing in 2005 (when it had the competence to decide such issues).

The Court opened its analysis by determining the nature and scope of the territorial disputes. According to Article 46 of the Constitution, these procedures are declaratory. It does not imply any ability for the judgment to annul. Thus, the judgment was only capable of fixing the territorial limit of the states of the Republic and not ruling on the validity of other public acts.

Secondly, the Court established the territorial boundaries that should govern between the two states. In order to resolve the problem, it considered expert geographical and cartographical reports focusing. This evi-

dence concluded that the border points that governed New Spain and the Captaincy General of Guatemala (currently a neighboring country of Mexico and the state of Chiapas) should be recognized. These historical territorial points integrate the current border between the litigating states. Thus, the Belisario Domínguez municipality was located in a geographical space that does not belong to the state of Chiapas.

Consequently, the Court ruled that the Congresses of both states must reform their Constitutions and legislations. These changes must incorporate the border points established in the judgment. The Court set them a deadline of 30 months to carry out these reforms. In addition, it ordered the state of Chiapas to make changes to its Constitution and the state legal framework to modify the limits of the municipality of Belisario Domínguez in the terms established in the ruling.

The Court also ordered that both states establish coordination mechanisms for the provision of standard public services to the population living on their border, under the supervision of the Federation. Finally, as it is an area with significant biodiversity, it was ruled that both states must establish a regional ecological management programme in the adjacent area.

#### 12. *Acciones de inconstitucionalidad* 95/2021 y 105/2021: Four in the Constitution is four in the Law. The unconstitutionality of the 2-year extension of the office of the Supreme Court's President (16/11/2021)

The Court struck down the 13th Transitory Article of the decree that issued the new Organic Act of the Judicial Power of the Federation. This article extended for two years the term of office of the current Court's President, also President of the Council of the Judiciary Council. This provision also extended the terms of all six members of the Council of the Judiciary.

Article 97 of the Constitution establishes that the Court shall elect its President on a four-year term. The provision also enables reelection as long as it is non-consecutive. For its part, Article 100 of the Constitution provides a five-year term in office for members of the Council and forbids their reelection. All cur-

rent members of the Council were sworn in under these constitutional terms.

A senator of the Green Ecologist Party of Mexico (in Spanish, PVEM), an ally of the majority party (Morena) in the Senate, Proposed such an extension. Majorities in both chambers (deputies and senators) approved the extended terms. The legal community considered this reform a political maneuver to maintain the judicial leadership preferred by the official party.

The legal extension of the constitutional periods was declared invalid by the unanimous vote of the Court's plenary. The Court also argued that the term extension violated the principles of constitutional supremacy, the division of powers and autonomy, and the independence of the judiciary. In this way, all judicial officials involved must terminate their positions according to the established constitutional deadline - the period initially determined at the time of their appointment. Consequently, Justice Arturo Zaldívar, who began his position as President of the Court on January 1, 2019, Will finish his term on December 31, 2022.

## IV. LOOKING AHEAD

For the first time in Mexico's constitutional democracy, a Presidential recall will occur on April 10, 2022. Multiple aspects of this citizens exercise are still being challenged before the Courts. One of those issues is the case of the allegedly insufficient public budget that the political powers approved to be provided to the National Institute of Elections (in Spanish, INE) to organize the consultation. The Supreme Court allowed INE through an interim measure to organize the recall election under the available budget, much less than required. Even if that meant there would be a lack of compliance with the requirements provided by law (for example, installing the necessary voting spots). In 2022, the Court will rule definitively upon whether the lack of public budget violates the political rights or the autonomy of a constitutional institution. Throughout 2022, the Supreme Court will probably decide several claims against major acts and public policies launched by the Executive branch. For instance, the constitutionality of a decree allowing the military

to participate in public safety actions. It will also analyze governmental austerity measures and the so-called “superdelegates” appointed by the President in each of the states of the Union. It should be noted that four of the eleven members of the Court were proposed by president López Obrador (four votes suffice to prevent the eight-vote supermajority necessary to strike down legislation).

1 Aquí la redacción que tenemos pareciera decir que el sistema se va a empezar a usar en acciones y controversias. El sistema era preexistente.

2 Aquí parece que decimos que el sistema no reemplazará a reiteración y a contradicción de tesis, pero que ya no se usará contradicción de tesis. Contradicción de tesis sigue viva y sí reemplaza a reiteración (no existe reiteración para la Corte).

3 Se repiten dos “declared”.

4 Se repite “urge” con “urgently” muy cerca.

5 En inglés no funcionan los referentes en español. En español podemos empezar con “Este decreto”, en inglés no. Siempre me lo corrigen.

## V. FURTHER READING

Alfonso Herrera, ‘México’, in Claudio Nash, Constanza Núñez, Natalia Morales and Marie-Christine Fuchs (eds.), *Constitución y estado de derecho. Experiencias comparadas* (Tirant Lo Blanch / Konrad Adenauer Stiftung 2021).

Alfonso Herrera, ‘A diez años de la reforma mexicana sobre derechos humanos: Una propuesta de cuatro fases jurisprudenciales’, in Víctor Bazán and Marie-Christine Fuchs (eds.), *Diez años de jurisprudencia constitucional en América Latina* (Tirant Lo Blanch / Konrad Adenauer Stiftung 2021).

Irene Spigno, ‘La vocación transformadora de la reparación del daño con perspectiva de género. Breves reflexiones sobre la jurisprudencia interamericana en los casos contra México’, in Laura Alicia Camarillo Govea and Andrés Javier Rousset Siri (eds.), *Proteger y reparar: aportes de la jurisdicción interamericana* (Universidad Autónoma del Estado de Baja California 2021).

Mauro Arturo Rivera, ‘De directores y orquestas: análisis comparado de la posición institucional del Consejo de la Judicatura Federal en México’, (2021) 159 *Boletín Mexicano de Derecho Comparado*, 1139-1179.

Mauro Arturo Rivera, ‘Towards a right to digital justice: the Constitutionalization of digital justice in Mexico’, in Dariusz Szostek and Mariusz Załucki, *Internet, and New Technologies Law: Perspectives and Challenges* (Nomos 2021).



# Montenegro

Mirko Đuković  
SJD Candidate in Comparative Constitutional Law  
Central European University

Aleksandra Vukašinović  
Chief of the Cabinet of the President  
Constitutional Court of Montenegro

## I. INTRODUCTION

The previous year in Montenegro could be described as a year of great expectations and small determinations. Minor improvements in government functioning<sup>1</sup> and political participation<sup>2</sup> were overshadowed by unstable government, ethnic divisions, the influence of religious communities in politics and the weakening of the judiciary. The overall progress in the EU accession was slow and unsubstantial.

The great expectation was the hope that after thirty years of rule of the Democratic Socialist Party (DPS), a new technocratic government would dismantle the corrupt and unjust state apparatus. What initially seemed like a plausible task to be accomplished, began to crumble before our very own eyes. The build-up of tensions between coalitions of the ruling majority, incompetence of the new administration to grasp the magnitude of the damage that needs to be repaired, small and big political bickerings on both sides of the aisle culminated in a debacle. Just as the consensus was reached and parliament adopted a set of legislation as a part of a major economic growth project aiming to improve living standards, business and investment environment and to reduce the grey economy in the labour market, approving new Prosecution Council, the smallest of three coalitions making the majority, cancelled trust to the government. This chain of events led to an inevitable slowdown of expected constitutional and legal developments. In addition, an ongoing political struggle to reach consensus over

an election of the new minority government suggests further stagnation in judicial and prosecutorial reforms, fight against corruption and organized crime.

Constitutional Court, likewise, was not without its troubles, including currently having three vacant positions on the bench. The prospects of reaching a political consensus of 2/3 majority to elect new judges in the current composition of the parliament are minimal. Thus, the Constitutional Court works with four out of seven judges, of whom one more will qualify for retirement in September 2022. Should one more judge be retired, without filling in the vacant spots, the Constitutional Court will be blocked.<sup>3</sup>

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

As the political conflicts took the spotlight, the judiciary was left to stagnate, which reflected on constitutional developments as well.

The new political and legal landscape was dominated by ethnic issues, the presence of religious communities in everyday political discourse, as well as strong polarization between two major political camps. The radical politics discourse was present on either side of the aisle, clouding the ideological or political program differences between parties.

As it was mentioned in the last year's contribution to this publication, the great win of the previous opposition was attributed at large to the civic protests against the Law on Freedom of Religion or Belief and the Legal Status of Religious Communities.<sup>4</sup> One

of the first moves of the new government and parliament majority was to change the mentioned Law, by adopting Amendments in January of 2021.<sup>5</sup> The church, consciously or unconsciously, entered the great gates of the political scene by influencing certain political and legal solutions even beyond the reach of the mere rights of religious communities. Vice versa, government officials have also begun increasingly to use religion in public discourse. This newly formulated relationship between the state and the church, among others, resulted in the submission of a Proposal to the Constitutional Court of Montenegro by the parliament on the violation of the constitutional principle of “separation of religious communities from State” by the President of Montenegro in December 2021.<sup>6</sup> A large number of legal misunderstandings stemmed from the application of the new Law on Pension and Disability Insurance. Accordingly, the retirement age pension for men is 66 years and 64 for women. The end of working life for both sexes is 67 years as defined by Labor Law. As it turns out, this provision could be unconstitutional as it puts male and female judges in a disparate and unequal position, since article 121 of the Constitution specifies that the duty of the judge must cease when they fulfil the requirements of the retirement age pension.<sup>7</sup> A request for review of the constitutionality of this Law was submitted before the Constitutional Court in August 2021 and is still pending. This also caused a great deal of attention due to the adoption of the Amendments to the Law on the State Prosecution, in July 2021. The Venice Commission, twice in its reports, warned of the possible danger of politicization of the judicial institution. Despite these warnings, amendments were adopted. The issue of constitutionality was raised by the Prosecutorial Council in June 2021 and this case, likewise, is pending before the Constitutional Court. The procedure for electing new judges of the Constitutional Court was a highly politicized topic. Namely, as soon as the new majority was formed, parliament annulled the public call for two vacant positions published by the previous government. The new call was announced and the candidates were interviewed but new judges are yet to be appointed. It should be noted that it passed almost two years since the Constitutional Court no-

tified parliament about the retirement of two judges. In the meantime, one more judge retired and in September 2022 the fourth one is expected to retire, leaving the Constitutional Court in an unprecedented situation.

The political experiment that was the so-called ‘expert government’, supported by the majority that was unable to maintain unity failed. The ruling coalitions stood behind the government that was comprised of mostly non-politically affiliated experts. However, ideological differences even within coalitions overshadowed any attempt to make this experiment work. Perhaps the only nexus in that odd political marriage was to dismantle the corrupt system that was created by the thirty years of DPS rule. It seems that was not enough.

Any attempt to make changes in the system was sabotaged by opposed views within the ruling majority. The fight against corruption and prosecution of those involved in the affairs of the previous regime was weak and mostly declaratory in the narrative of the majority. Civil Society on several occasions warned about harmful and repetitive patterns of behaviour such as non-transparency in the government.

### III. CONSTITUTIONAL COURT CASES

Even though the Constitutional Court worked in challenging circumstances and incomplete composition, some positive results have been achieved. The number of resolved cases in 2021 is higher than in the previous two years. While Court received 1,335 cases it also resolved 1,498. However, it is still facing a backlog of a large number of cases from previous years: 3395 pending cases.

This situation is a result of two trends that occur in the work of the Court: first, the length of proceedings and second, the non-execution of decisions of the Constitutional Court. The length of proceedings is a result of the lack of capacity of the Court as well as the constitutional complaint mechanism. While the lack of capacity is a matter of organization of the Court, which includes a bigger budget, capacity and know-how building, enhancing skills and employing versatile legal experts,

more cooperation with external experts through regional and European projects, the issues that constitutional complaint mechanism face require long term expert research and public debate and dialogue on how to make necessary changes to the mechanism so that the constitutional protection mechanisms are more efficient. Out of 62 judgments in cases against Montenegro, in which the European Court of Human Rights (ECtHR) found violations, 37 are violations of article 6 of the Convention. In 9 cases the right to a fair trial was violated, and the violation of the article was confirmed due to the length of the proceedings in 28 cases. This is one of the indicators that things need to change. However, due to the weak position of the Court in the system as well as the political instability, it is highly unlikely that any changes are possible. At least not in any foreseeable future.

The non-execution of the decision is something that previous contributions to Global Review touched upon. Namely, this happens when the legal positions of the Supreme Court and Constitutional Court differ. We see this as an issue that could become a major problem in the future. And thus, the first and the second cases in this contribution deal with enforcement issues as well as the effectiveness of the decision of the Court. The third case concerns the abstract control of constitutionality in which the Constitutional Court decided on the position of international treaties in the national legal order.

#### 1. *Case U-III no.1066/20 constitutional complaint from March 31<sup>st</sup>, 2021*

In this case, the Constitutional Court found a violation of the Right to a fair trial protected under Article 32 of the Constitution and Article 6 paragraph 1 of the European Convention on Human Rights (ECHR). In the interim, this case is not subject to analysis in its merits but covers the aspect of the relationship between the Constitutional and Supreme Court (and other courts) regarding a rising issue: execution of the decisions of the Constitutional Court. Namely, a constitutional complaint, *U-III no. 1066/20* was brought by Mr Miraš Miketić, for the fourth time, about the same legal matter. It is the game of the longest “different legal under-

standing” between two courts on the records. For nearly a decade, applicant is a hostage of legal uncertainty.

In previous cases before the Constitutional Court *Už-III br. 180/14 from 23 July 2014*, *Už-III br. 493/15 from 17 October 2018*, *U-III br. 384/19 from 18 July 2019*, the Court has found a violation of the right to a fair trial and repealed the judgments of the Supreme Court returning the case to the Supreme Court for a repeated procedure.

The subject of the procedure that preceded the one before the Constitutional Court is the determination of co-ownership rights and the conclusion of contracts. The reasons for the violation of the right to a fair trial relate to the arbitrary and erroneous application of substantive law, as the protection of this right guarantees from arbitrariness in the decision-making. The Supreme Court, per its legal understanding, made the decision, which, in the opinion of the Constitutional Court, is substantially similar to all previous ones, that the Constitutional Court initially repealed. All of these decisions ignored the orders of the Constitutional Court. Examining these decisions, we can only conclude that this is a situation of “legal spite” amongst the Courts that only hurts the individual.

We see three reasons behind this issue. The first one is normative, i.e., partial vagueness of legal provisions defining relations between Constitutional and other courts; the second is more practical and lies in the authority of the Constitutional Court and the third is lack of clarity of the decision itself.

The dispute between courts comes not only from the very different positions courts have in the legal system but also in the procedure of the execution of the decisions of the Constitutional Court. According to Article 77(2) of the Law on Constitutional Court “in the repeated procedure, the competent authority shall respect the legal reasoning of the Constitutional Court stated in the decision and shall decide in repeated proceedings within a reasonable time.” We acknowledge that courts may have different views on certain legal issues. Even so, the basic criterion to solve this, without doubt, is to understand the division of competencies defined in the Constitution. In addition to this, ECtHR holds that the decision of the Constitutional Court is the final one in the constitutional

dispute. The ECtHR goes further and states that even in those judicial systems where different branches of courts exist side by side and are competent and have the authority to give interpretations of the law, can achieve consistency in their interpretation without undermining legal certainty.<sup>8</sup> Strict and excessive formalism is also something that can deprive applicants of their right to access the court.<sup>9</sup> Regardless, each decision of the court should be reasoned but this does not mean that courts must give a detailed answer to every argument, as this clearly depends on the nature of the decision.<sup>10</sup>

Delivering decisions in a reasonable time is of paramount importance for the quality of the protection of the rights by the Court. But it should be noted that the constitutional complaint is a relatively new legal remedy, for which the Court was not prepared. Nevertheless, the applicant, in this case, has been deprived of his rights, and should this case end up before ECtHR, looking from this perspective the odds are in his favor.

## *2. Case U-III no.609/17 constitutional complaint from September 28<sup>th</sup>, 2021*

There are two reasons why we have selected this case for this year’s review. Namely, the Court found a violation of Article 3 (prohibition of torture) of the ECHR, and Article 69 (right to health protection) of the Constitution, while the applicant was serving a prison sentence. But, it did so four years after the constitutional complaint was lodged, and applicant Mr Petar Velimir was already out of prison.

The applicant complained to the Court against the actions of a state body - the Ministry of Justice: The Directorate for Execution of Criminal Sanctions, as he was imprisoned contrary to the High court’s decision. The High court found him guilty of the possession and distribution of heroin and sentenced him to 3 years in prison but it also simultaneously imposed a safety measure: compulsory treatment for drug addicts in the Specialised psychiatric institution “Dobrota” in Kotor. According to the ruling, the measure should last as long as the treatment is required, longer than the prison sentence if needed, provided that the time spent in the institution was included in the imprisonment sentence.

Due to the lack of accommodation capacity in “Dobrota”, the applicant was transferred to prison to serve his sentence by an act of the Ministry of Justice, stating that appropriate medical care will be provided in prison as well. In the assessment of the complaint, Constitutional Court considered an alleged violation of the right to health protection in conjunction with the prohibition of torture. The applicant in his submission to the court only complained about being deprived of appropriate medical care. The court found that failure to enforce the final judgment in the relevant part led to the violation of the applicant’s right to health. Due to the severity of his illness and the prison conditions, the measure is not appropriate nor proportionate to the purpose it was imposed for. The issues related to the medical treatment of prisoners fall under Article 2 (right to life), Article 3 (prohibition of torture) Article 8 (right to respect for private life) of the Convention, while the issue of partial non-execution of court decisions falls under the Article 6 of the ECHR (right to the fair trial). The approach of the Court, in this case, is interesting and somewhat unusual. It appears that it went beyond the framework of the ECHR jurisprudence that outlines clear criteria according to which certain acts are considered torture. Thus, the Court went a step further in the protection of human rights, arguing that the lack of adequate medical treatment amounts to torture.

While the decision of the Court is commendable, alas, it is belated. It took four years for the Court to decide on the matter that was ultimately resolved through the lenses of the article that prohibits torture. This is a paradox in itself. The length of proceedings remains to be a concern. If something is not done soon enough, the Court will not be seen as an institution that protects and keeps constitutional order. It will become a marginalized institution with no public trust and eventually a hindrance to effective and efficient human rights protection.

## *3. Case U-I no.20/21 from November 17<sup>th</sup>, 2021*

This case concerns the issue of conformity of laws with the Constitution and confirmed and published international agreements. The Court

rejected the initiative to open the procedure to examine the constitutionality of the Law on Ratification of the North Atlantic Treaty.

According to the applicant, the subject of this constitutional dispute is in the provision of Article 5 of the North Atlantic Treaty which is not in line with Article 91 of the Constitution. The article stipulates that the Parties to the Treaty agree that an armed attack against one or more of them is considered an attack against them all, and in such case, they will assist attacked parties, including deploying armed forces. Article 91 stipulates that the parliament decides on the use of the army in international forces by a 2/3 majority vote.

However, according to the Court, Article 91 is not relevant for the adoption of a law confirming an international agreement. Also, the same constitutional issue was raised in cases U-I br. 14/17 and U-I br. 18/17. The Court explained that it can only assess formal constitutionality, meaning the procedure for adoption of the law, and not the substantive content of the law. This indicates that the 2/3 majority in Article 91 of the Constitution, refers to the procedural requirement to approve the use of the Montenegrin Army unit in international forces, meaning it refers to the procedure for passing internal laws on these issues. This requirement has nothing to do with the adoption of the laws confirming international agreements.

This case is important from the aspect of determining the position of international agreements within the constitutional order and national legal system. In several cases, the court confirmed that the national legal system recognizes a hierarchy of legal norms whereas the norms in ratified and published international treaties have “supra-legal force”.<sup>11</sup>

Now what is interesting is that essentially the Court does not have the competence to perform constitutional review over international agreements in their substantive content. Article 149 of the Constitution does not recognize such a procedure. Furthermore, international legal provisions serve as a criterion for constitutionality review of domestic law, since Article 145 states that “the law must be in conformity with the Constitution and confirmed international agreements.” The question is what happens when the substantive content of the international agreement is not conformed with the national constitutional tradition?

Article 9 of the Constitution states that “ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation.” Currently, there is no constitutional mechanism that can prevent infiltration of a potentially unconstitutional norm in the national legal order through the system of ratification of international agreements. This potentially also questions Court’s competence to review EU laws once Montenegro is a member state. Unlike German Federal Constitutional Court questioning EU law supremacy, declaring European Central Bank’s bond-buying programs illegal, the Montenegrin Constitutional Court would simply not have the competence to examine such a case, should such proceedings be initiated in some imaginary future.

#### IV. LOOKING FORWARD

Comparative constitutional law taught us that political and ideological differences can influence the work of the court as well as the outcome of the proceedings. This year we have witnessed how political and ideological struggles reflect on the entire judiciary. As mentioned before, Constitutional Court was not immune to this. As a result of such struggles, there are still three vacant positions on the bench. Therefore, it is necessary to establish clearer and more precise criteria for the election of judges of the Constitutional Court. In the current political climate, reaching 2/3 majority to elect new judges might not be possible. In addition, if the consensus is reached it potentially influences the quality of elected judges due to the political trade-offs. In a long run, the political issues of this generation will be costly for the next one.

The Court also requires capacity building as well as serious and dubious research on constitutional complaint mechanism reform. Currently, there are 239 pending cases concerning conformity of laws and bylaws which indicates the gravity of the backlog and lack of the capacity of the Court. Some of these cases can have a bombshell effect

on the political climate that is already unstable enough.

#### V. FURTHER READING

Report of the British Institute Economic Intelligence Unit on the state of democracy available at <https://www.eiu.com/n/campaigns/democracy-index-2020/>

Law on Amendments to the Law on Freedom of Religion or Belief and the Legal Status of Religious Communities, Official Gazette of Montenegro no. 074/19 from 30.12.2019, 008/21 and 26.01.2021.

Opinion on the Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities, by Venice Commission No. 953 / 2019, CDL-AD(2019)010 from June 2019

Dos Santos Calado and Others v. Portugal, 2020

Fuklev v. Ukraine, 2005

Hiro Balani v. Spain, 1994

Gil Sanjuan v. Spain, 2020

Miessen v. Belgium, 2016

Nejdet Şahin and Perihan Şahin v. Turkey [GC], 2011

Van de Hurk v. the Netherlands, 1994

Zubac v. Croatia [GC], 2018

U-I no.18/13, No.20/13 and 22/13 (2015)

1 According to Report of the British Institute Economic Intelligence Unit on the state of democracy in the world Montenegro was upgraded from a hybrid regime to a flawed democracy with an improvement in the average score from 5.77 (81 place) to 6.02 (74 place).

2 Very good progress was recorded with regard to the transparency of the Parliament work, as well as promotion of gender equality in politics by establishing for the first time the „Women club “consisting of female members of all political parties represented in the Parliament.

3 The Constitutional Court of Montenegro decides by majority of vote of all judges, there is necessary quorum of 4 judges for deciding in plenum, while the work of in the panel of three judges deciding upon the constitutional complaint could hypothetically continue to be organized. (Article 151 of the Constitution)

4 The Law on Freedom of Religion, passed by the ex-government of the Democratic Party of Socialists (DPS) on December 27, 2019, provided that religious buildings and land that were the property of Montenegro until 1918, for which there is no evidence of religious community's property, become state property, for further please see: *Opinion on the Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities*, by Venice Commission No. 953 / 2019, CDL-AD(2019)010 from June 2019.

5 The new Law eliminated all provisions concerning the change in the status of property. It remained in the possession of the Dioceses of the Serbian Orthodox Church (SOC). In case that the state wants to register that property as its own, it can initiate a civil lawsuit. The possibility of resolving property disputes between the state and the church in administrative proceedings has been abolished. The provision from the previous Law, that a religious community must register, was abolished too. Official Gazette of Montenegro no. 074/19 from 30.12.2019, 008/21 and 26.01.2021.

6 Also, a requests for review of constitutionality on the Law on Amendments to the Law on Freedom of Religion or Belief and the Legal Status of Religious Communities is lodged before the Constitutional Court in January 2021.

7 In accordance with this Law, the Judicial Council stated the termination of the mandate of 9 judges of the ordinary courts in August 3<sup>rd</sup> 2021, and the Parliament of Montenegro terminated the mandate of the judge of the Constitutional Court in December 29th. By the end of the 2021, around 30 judges have been ceased from the duty.

8 *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], 2011, §§ 81-83 and 86; Additionally, the State has a positive obligation to organise a system for enforcement of final decisions in disputes between private persons that is effective both in law and in practice, see in *Fuklev v. Ukraine*, 2005, § 84.

9 For Supreme courts: *Zubac v. Croatia* [GC], 2018, § 97; *Miessen v. Belgium*, 2016, §§ 72-74; *Gil Sanjuan v. Spain*, 2020, § 34; and for a constitutional court: *Dos Santos Calado and Others v. Portugal*, 2020, §§ 118-130.

10 See in *Van de Hurk v. the Netherlands*, 1994, § 61 and *Hiro Balani v. Spain*, 1994, § 27.

11 Case law: U-I no.18/13, No.20/13 and 22/13 (2015)



# Myanmar

Melissa Crouch  
Professor  
Faculty of Law & Justice,  
University of New South Wales, Australia

## I. INTRODUCTION

On 1 February 2021, the military staged a coup in Myanmar. Coups are primarily political developments, yet coups can also raise issues for constitutional law. The coup signals a new era of direct authoritarianism in Myanmar. It marks the end of a period of military-state constitutionalism from 2011-2021 in which, broadly speaking, the government operated within the framework of the 2008 Constitution.

Since the coup, popular resistance has been widespread and fierce, centering around the Civil Disobedience Movement. There have been intermittent mass protests and a range of creative forms of dissent from boycotts of military-owned or affiliated companies to online social punishment campaigns against military officers, their relatives, and sympathizers.

In the first year of the coup, the consequences for society, politics and the economy have been catastrophic. The military has killed over 1,579 civilians, arrested 9,369, and issued a warrant for another 1,973 people.<sup>1</sup> The military, police and paramilitary groups have used extrajudicial means against opponents including both targeted and arbitrary violence.

Civilians have been arbitrarily arrested, some have disappeared, others have been tortured. The military has arrested family members of dissidents as hostages. Some accused languish in jail while enduring lengthy delays for a trial, others have been tried in closed door courts or military tribunals. The military has used the fiction of law and pure violence to suppress anti-coup efforts. The military has

also launched armed warfare in several areas, including Chin State, Sagaing Division, Karen State and Kayah (Karenni) State. This has led to increasing numbers of people displaced.

The coup raises several key legal and constitutional issues. First, I consider the illegality and unconstitutionality of the military's actions. I establish that the military takeover is a coup not a constitutional state of emergency. This should inform how the international community responds to the crisis, including the unresolved question of whether the military has the right to represent Myanmar at the United Nations. Second, I explain how the Constitutional Tribunal, Supreme Court and Union Election Commission have been co-opted, and how the courts are now being used to prosecute political dissidents while military tribunals operate in areas under martial law. The military's abuse of constitutional emergency powers and martial law is overt and blatant.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The military alleges that on 1 February it declared a constitutional emergency. The military has denied claims it is a coup government or military regime. The military has always been highly sensitive to how people refer to its role in politics. For example, in August 2017, there was debate in the legislature over whether the term 'dictatorship' was an appropriate description of the military regime prior to 2011.<sup>2</sup> The debate arose in the context of the Rohingya crisis, with a member of parliament suggesting that the crisis

was a direct legacy of the past dictatorship. Military legislators rejected the label ‘dictatorship’ to describe past military regimes and requested that the comments of the member be officially deleted from the records of the legislature. This is just one example, but there are many others. The military is invested in ensuring that its actions are understood through the lens of the 2008 Constitution, rather than as a coup.

The military’s façade of legalism is easily unmasked as a coup. As the pretext for exercising constitutional emergency powers, the military makes several claims related to the role of the Union Election Commission, the Pyidaungsu Hluttaw (legislature), the National Defence and Security Council, and the Supreme Court.

The military’s main pretext for the coup is its claim that there was electoral fraud in the November 2020 elections. After the military’s petition to the Electoral Commission failed to lead to an investigation, the military turned to the legislature.

The military alleges that the President and Speaker failed to respond to its call for a special session of the Pyidaungsu Hluttaw, the joint legislative body (s 82 of the Constitution). On 11 January, the petition was supported by 203 members of parliament including unelected military members and elected USDP members. The petition met the requirement of support from one fourth of legislators to convene such a special session (s 84). Matters that can be heard in a special session by the Pyidaungsu Hluttaw are matters that require immediate attention and are in the public interest (s 81c).

There is debate over how to interpret the constitutional power to hold a special session (ss 81-84). According to the military, as long as at least one fourth of members support a proposal, the President must instruct the Speaker to hold a special session (s83) and the Speaker must then hold a session; they have no choice. But this assumption does not hold for several reasons. The President’s role is to ensure that it is a matter the Pyidaungsu

Hluttaw should consider based on the notion of urgency or necessity and public interest. The President’s power can instead be understood as discretionary and as a recommendation to the Speaker, the Speaker also has discretion in deciding to convene a session.

The military’s view takes away the discretionary power of the President and Speaker and instead imagines them as administrators or as a rubber stamp.

In this instance, the President and Speaker based their decision to decline to hold a special session on the fact that disputes concerning the elections are the responsibility of the Election Commission, not the legislature. This decision by the President and Speaker not to hold a special session of the legislature is not a sufficient reason for a coup or the exercise of emergency powers.

Further, the military argues that because the incoming legislature is required to meet within 90 days of the election, and after 1 February that period had expired, the elected members are no longer eligible to take office. Instead, the 90-day rule (s 123) needs to be understood as a practical rule designed to ensure certainty about the timing of an incoming government and ensure no undue delays to holding office. The military cannot use this rule against elected members who have been physically prevented by it from forming government because they were arrested on the morning of 1 February.

The military’s actions have breached its own Constitution. For example, on 1 February, the military arrested the president. However, under the Constitution, the president has special status (s 58). The president is not answerable either to the legislature or to the courts, except via the constitutional impeachment proceedings (s 215). The president is not answerable to the military for actions undertaken while in office. The military or police have no powers to arrest a president.

The circumstances in which the military claims to have exercised constitutional emergency powers are also highly problematic.

The military claims that after arresting the president, one of the vice-presidents (affiliated with the military) stepped in as acting president (s 73a) and exercised emergency powers to hand over power to the Commander in Chief (s417, 418a). However, the president was not inactive for any of the reasons listed in the Constitution nor did he resign voluntarily (s71(a), 72); it is unconstitutional to remove the president from office by force.

The authority to exercise the power to declare an emergency requires the president (or acting president) to consult with the National Defence and Security Council (s 417). While the meaning of this consultation is open to debate, it suggests that a meeting of the Council should be held. The members of the Council include civilian office holders like the president, minister of foreign affairs and speakers of the two houses of the legislature (s 201). A meeting of the Council did not happen as many of these politicians were under arrest. The military reconstituted the Council with only its military members left; it has no power to do this.

The military claims that under this state of emergency power was transferred to the Commander in Chief (s 419). This section does give the Commander in Chief unusual powers, but the process was not followed.

Another issue is that the effect of a constitutional state of emergency on state institutions is intended to be temporary, not permanent (ss 417-18, s74a). If the President receives a report from the Commander-in-Chief to end the state of emergency and the term of the legislature has not expired, then the legislature can in fact recommence and elected members resume office for the remainder of the term (s 423). This means that if the emergency lasted for one year, the elected members of the legislature could take office for another four years after that (as the normal term is five years). It is clear the military has no intention of allowing this.

The Commander in Chief has taken power and formed the State Administration Council. He has removed many public of-

fice holders and replaced them with new appointees. In August 2021, he relabeled his regime a so-called ‘caretaker government’. A common strategy of authoritarian rulers is to amend a constitution to remove presidential term limits and therefore allow a sitting president to rule indefinitely. In Myanmar, the age limit of the Commander in Chief is 65 years old. In mid-2021, Min Aung Hlaing turned 65 years old and should have resigned. To avoid having to step down, he simply removed the age limit so that he could continue to serve indefinitely. The coup appears to have facilitated the one-man rule of General Min Aung Hlaing.

The military has taken many steps to create a legal façade, but it is a façade that has many holes and cracks. The overwhelming sentiment among people in Myanmar is that the military has breached the Constitution, the Constitution the military drafted to preempt constitutional democracy.<sup>3</sup>

### III. CONSTITUTIONAL CASES

There were no constitutional cases decided in 2021, due to the coup. If the Constitutional Tribunal was a genuine forum for constitutional dialogue, military-representatives of the legislature could have brought petitions to the Tribunal such as: Is the speaker required to hold a special session if 1/4<sup>th</sup> of representatives submit a proposal, or does section 81(c) on public interest apply? Is the issue of electoral fraud an appropriate matter for the Pyidaungsu Hluttaw to hear and within the public interest? Did the president have an obligation to compel the Election Commission to investigate? Is the Election Commission an independent body? Does the military have a constitutional right to demand a voter list from Election Commission? Does section 215 of the Constitution protect the president from being arrested? Was the Pyidaungsu Hluttaw required to suspend its first session pending the quo warranto case filed in the Supreme Court? Yet the military did not bring any cases. The military interfered with the bench by replacing many of the Tribunal members. The Constitutional Tribunal has effectively been rendered redundant.

The coup demonstrates that the military claims the authority to have the final say on the interpretation and application of the Constitution. Yet the military has no such powers. The Constitution does give the military the power to safeguard the Constitution (s 20f). This is a strange and unusual provision. A constitution has no need for protection by a military; a military has no role in safeguarding the Constitution. Section 20(f) does not explicitly give the military the power to interpret the Constitution or enforce its rules. That is supposed to be the responsibility of the Constitutional Tribunal.

The coup has also affected the Supreme Court and Election Commission. The military has circumvented the ordinary court system by setting up military tribunals in some areas, while trying some political opponents in special benches of the general court system and leaving others under detention without trial.

#### 1. The Union Election Commission and unfounded allegations of electoral fraud

Since November 2020, and repeatedly since the coup of 2021, the military alleges that there has been electoral fraud in the 2020 elections. The November 2020 elections faced a number of challenges and controversies, both because of covid-19 but also because of conflict in several parts of the country and the decision by the National League for Democracy (NLD) to postpone elections in some areas. Nevertheless, the elections went ahead and the NLD again won a majority, even though twenty-five percent of seats are reserved for the military.

The military alleges that the Election Commission failed to decide complaints and did not respond to its request for electoral documents such as voter lists, advance votes, and receipts, to verify the accuracy of voter lists.<sup>4</sup> There are several problems with the military’s request for electoral data and related allegations.

Not all the different kinds of documents the military asked for are public documents. While voter lists should be public documents, there is no central voter registry but 46,000 separate polling station voter lists,

based on data extracted from the population registry at the township level. Some of the other documents requested, like the actual votes, are not public documents.

The military as an institution does not have any special authority to request such electoral documents; it has no responsibilities regarding elections. Prior to the election, the draft voter lists were in fact circulated publicly to give people the opportunity to correct any errors.

The Election Commission received many complaints, but these were not heard before the incoming government was due to meet. The Election Commission is under no obligation to decide cases within a set time, although this is an obvious weakness of the electoral dispute rules.

Further, only the president has the power to make allegations and commence impeachment proceedings against the commissioners (s 400). The military has no authority to target the Election Commission for allegedly failing in its duties. The military’s allegation that commissioners were biased towards the government is a strange criticism because it points to a flaw in the system designed by the military – namely the perception of bias in the appointment of commissioners by the incoming government and who serve for the term of the government (s 398a). Ideally the appointment process would avoid the perception of bias, but even when it does not, perception of bias is not the same thing as proof of bias.

Overall, the Election Commission acted within its mandate and was under no obligation to release documents to the military. Since the coup, the military has removed all former electoral commissioners and replaced them. No timeframe has been set for a new election.

#### 2. The Supreme Court and the constitutional writs

Just prior to the coup in 2021, several petitioners sought the writ of *quo warranto*, a constitutional remedy that challenges a person’s right to take office (s 296(a)(iv), 378(a)(4)). While full details of the allegations are not avail-

able, the cases appear misplaced as they were brought against the Election Commissioners and the President. The cases should probably have been brought against a person who won office at the 2020 election, and whose right to take office the military sought to challenge.

If the case was an attempt to challenge a decision of the Election Commission, it was uncertain whether the Supreme Court could accept the case because decisions of the Election Commission are final (s 402). Only the president can bring impeachment proceedings against the Commissioners (s 400).

The military claims that because of the ongoing Supreme Court writs case in February 2021, the inauguration of the new government should have been postponed until this case was heard. There is no constitutional requirement to postpone a sitting of the legislature on the basis of a court case. The government had no intention to postpone the legislative session to await the outcome of the case. Instead, in order to prevent the incoming government from sitting, the military staged a coup on 1 February. It appears the Supreme Court never concluded the writs case or, if it did, its decision is not publicly available.

After the coup, the military also interfered with the Supreme Court by removing several judges from the bench, all of whom had been appointed by the NLD. The Supreme Court is still led by a Chief Justice who is a former military officer. The military has ensured the Supreme Court is coopted to its cause.

### 3. The criminal prosecutions of political dissidents

During the first month of the coup, the military imposed curfews, banned public assemblies of more than five people and restricted gatherings in many townships under Section 144 of the Criminal Procedure Code. The response of people was to protest on the street regardless of the restrictions, or to find creative ways around such restrictions, such as protesting in groups of five. Some protestors were arrested for breaching Section 144 orders.

Later months saw an escalation in violence and in the military's use of criminal law. The

military has arrested people from all walks of life – artists, movie stars, prominent businesspeople, politicians, students and civil society activists. Several foreigners were arrested, and an Australian academic and economist, Professor Sean Turnell, remains in arbitrary detention.

The military has used a raft of existing laws to punish its political opponents – banning organizations or punishing people under the Unlawful Associations Act or Counter-Terrorism Act; accusing political opponents of breaching covid rules under the Natural Disaster Management Law; targeting political opponents for defamation in relation to Facebook posts under the Telecommunications Act; and accusing political opponents of corruption under the Anti-Corruption Law or of breaching state secrets under the Official Secrets Act. The military has used a range of crimes related to treason or sedition under the Penal Code (eg s 122).

Many people who have participated in the civil disobedience movement, particularly doctors and nurses, have been accused by the military of crimes under section 505 and 505A of the Penal Code, which restrict freedom of expression.

The military has not hesitated to use the criminal law against its opponents or amend or expand the scope of criminal law.

### 4. Military Tribunals

On 8 and 9 February, the military declared martial law orders in some townships of Yangon and later, in May, in parts of Chin state. The military issued an order that cited section 419 of the Constitution, which is the power of the Commander in Chief to exercise all power or to delegate power (which presumes the process for declaring a state of emergency has been followed). The Constitution does not explicitly allow for martial law, although the military claims the power to do so.

From 14 March, the Commander in Chief has used martial law orders to delegate administration of these areas to the Commander of the Yangon Command in six townships in Yangon. According to the military, martial

law means that the military has complete control over these areas, rather than working through civilian administrators or judges. Under martial law, the military claims to have authority to hold special tribunals with Judges Advocate General (rather than civilian judges) for the trial of those accused of offences committed in these areas during the period of military administration.

The use of martial law is troubling as military commanders take over from civilian administrators. The declaration of martial law represents a significant decline in the situation in Myanmar. There are no limits on martial law in Myanmar; unlike in other countries with a history of martial law such as Pakistan or Bangladesh, the courts have never considered the legality of a declaration of martial law.

While English jurist AV Dicey was of the view that the military should not have the power of capital punishment, the military in Myanmar has empowered its military tribunals to impose the death penalty. The military courts have so far sentenced at least 90 people to death.<sup>5</sup>

## IV. LOOKING AHEAD

The coup may lead to military rule for several years, if not decades, in Myanmar. There are many parallels with how the military responded to the 1990 elections. The military alleges it will hold elections in the future, but its timeframe keeps shifting. Any elections held under military rule will lack legitimacy.

The grave abuses by the military mean that overwhelming public sentiment is in favor of a new constitution. For pro-democracy activists, it is no longer an option to attempt to return to the 2008 Constitution. The 2008 Constitution lacked legitimacy because it was drafted by the military; it has been tolerated for ten years, but after 1 February 2021 people were burning copies of their constitution as a sign of protest. The cruelty and violence of the military regime means that civil society is not willing to negotiate or compromise on its demands to return to civilian rule.

The peace process that had been ongoing since 2012 has now virtually collapsed, although the military claims to be continuing with the peace process.

There are unlikely to be any constitutional cases in the Constitutional Tribunal or Supreme Court in the immediate future. The Supreme Court may hear political trials that are not heard by the military tribunals or appeals from the lower courts.

Urban warfare is now a reality in many towns, including major centers of Yangon and Mandalay. In 2021, the military has formed militia groups, known as Pyu Saw Hti, to carry out violence and terror on its behalf.

The main pro-democratic opposition group, the Committee of Representatives of the Pyidaungsu Hluttaw (CRPH), has formed the National Unity Government.<sup>6</sup> In March, the CRPH issued an Interim Charter as a step towards a new constitutional vision for the future. There is an armed group affiliated with the NUG, known as the People's Defence Force.

The year ahead will see more large-scale war across the country, and the ongoing arrest and arbitrary detention of activists. The practical necessities of life – access to food and water, medical care, safety, shelter, a source of income, access to the internet – will become increasingly difficult. The number of people living in poverty will rise sharply and the covid-19 situation will be largely unknown in scale, while efforts to address the covid-19 situation remain highly politicized due to military control over the country's fragile and under-resourced public hospitals.

For the historical record, it is important to mark the military takeover of 2021 as a coup and reject the military's claims that it is a constitutional state of emergency. The military has circumvented the Constitution while claiming to work within it and ultimately rendered it meaningless.

## V. FURTHER READING

Melissa Crouch, 'Pre-emptive Constitution-making: Authoritarian Constitutional-

ism and the Military in Myanmar', [2020] 54(2) *Law & Soc. Rev.* 487-515

Melissa Crouch, *The Constitution of Myanmar: A Contextual Analysis*. (Hart Publishing, 2019)

Melissa Crouch, 'The Prerogative Writs as Constitutional Transfer' [2018] 38(4) *Oxf. JI of Legal Studies* 653-675.

Melissa Crouch, 'Democrats, Dictators and Constitutional Dialogue: Myanmar's Constitutional Tribunal', [2018] 16(2) *Int. JI of Con. Law* 421-446.

1 Assistance Association for Political Prisoners, 25 February 2022. See [aappb.org](http://aappb.org).

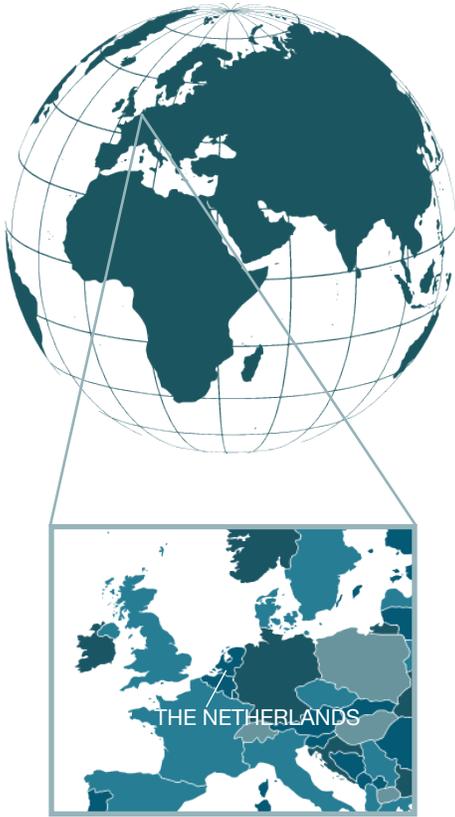
2 Melissa Crouch, *The Constitution of Myanmar: A Contextual Analysis* (Hart Publishing, 2019), pp 210-11.

3 Melissa Crouch, 'Pre-emptive Constitution-making: Authoritarian Constitutionalism and the Military in Myanmar', [2020] 54(2) *Law & Soc. Rev.* 487-515

4 *The Insights*, 'Debunking Voter Fraud Claims by the Myanmar Military'. 16 February 2021.

5 Radio Free Asia, 'More than 90 sentenced to death by military courts in Myanmar' December 2021, <https://www.rfa.org/english/news/myanmar/courts-12202021182046.html>

6 For information on these groups, see [crphmyanmar.org](http://crphmyanmar.org) and [gov.nugmyanmar.org](http://gov.nugmyanmar.org)



# The Netherlands

Jurgen Goossens

Full Professor of Constitutional Law

Utrecht University, Department of Jurisprudence, Constitutional and Administrative Law -  
Montaigne Centre for Rule of Law and Administration of Justice

Gert-Jan Leenknecht

Associate Professor of Constitutional Law

Tilburg University, Department of Public Law and Governance

Charlotte van Oirsouw

PhD Candidate

Utrecht University, Department of Jurisprudence, Constitutional and Administrative Law -  
Montaigne Centre for Rule of Law and Administration of Justice

Eva van Vugt

Assistant Professor of Constitutional Law

Utrecht University, Department of Jurisprudence, Constitutional and Administrative Law -  
Montaigne Centre for Rule of Law and Administration of Justice

## I. INTRODUCTION

This report first addresses two major constitutional developments. The first one is related to the government formation and the second one follows up on our analysis of the ‘Childcare allowance scandal’ as discussed in our previous report of 2020. Because Article 120 of the Constitution of the Netherlands forbids the constitutional review of Acts of Parliament by the judiciary, this report does not include ‘traditional’ constitutional case law of decisions rendered by a Constitutional Court. There were nevertheless judgments rendered in 2021 in the Netherlands with a constitutional impact that is relevant to an international audience. This report highlights and discusses two judgments, namely the Supreme Court decision in the case of the State v. Wilders, concerning the freedom of expression of politicians, and the climate case against Shell. We conclude by looking ahead towards 2022.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. Government formation 2021

#### 1.1. General aspects

On March 17, 2021, the general elections for the Lower House of Parliament took place. Government-Rutte III had already tendered its resignation on January 15, in response to the Childcare allowance scandal (see 2.). The formation of a new government started the day after the elections and took until January 10, 2022, resulting in the longest formation in the Netherlands to date (299 days).

Neither the Constitution of the Netherlands nor any Act of Parliament contain rules on the formation process. The Rules of Procedure of the Lower House (articles 11.1-11.3) state that the newly elected Lower House shall debate the election results, after which it decides on the appointment of an ‘*informateur*’ (a person who investigates possible coalitions) or a ‘*formateur*’ (a person who forms a new government based on an intended coalition). These persons report to the

Lower House regularly. Finally, the Lower House may declare certain political issues to be ‘controversial’, meaning the caretaker government may not make crucial decisions on those matters. The only *constitutional* rule regarding the formation process – an unwritten rule of Dutch constitutional law – is the rule of confidence, which is at the core of the Dutch parliamentary system: a new government needs the confidence of a majority in the Lower House (and, preferably, also in the Upper House).

The 2021 formation was especially complicated because of the fragmentation and polarization of the Lower House. The Netherlands has a proportional election system for both Houses of Parliament (article 53, paragraph 1 of the Constitution) and no electoral threshold. In March 2021, 17 parties acquired at least one of the 150 seats, which was a post-WWII record. Three right-wing or populist parties (PVV, FvD, JA21) won a total of 26 seats; 16 seats went to three left-wing parties (SP, PvdD, Bij1). The ‘middle ground’ was divided between 11 parties. Currently, there are 20 fractions, due to several split offs.

Another reason why the formation process took so long was because personal relations between the leaders of several parties had been damaged severely in the early stages of the process. Some rather revealing personal notes of one of the ‘*informateurs*’, insinuating that a critical MP of one of the previous coalition parties should be given a ‘function elsewhere’, unintentionally became public, leading to a heated debate in the Lower House. After that, it took months to restore trust among the political leaders. The lengthy process finally resulted in the old coalition being rebuilt. All that time, the government functioned under a caretaker status. Nonetheless, this government had the COVID-19 crisis to deal with, necessitating many far-reaching legislative and executive decisions. Furthermore, it had to prepare a new budget for 2022, and tackle urgent issues such as climate change and the housing crisis. Therefore, the government functioned mostly as a fully ‘missionary’ government. It is important to note that several of the resigning ministers, including the PM, were at

the same time involved in the negotiations to form a new government.

There were many complaints in the Lower House, and among the public, about the lack of transparency during the formation process. Again, there are no constitutional or other binding rules on this topic. Traditionally, negotiations take place behind closed doors, with regular reports from the ‘*informateur(s)*’ to the Lower House. In the election campaigns, several parties promised a new and more open style of governance and more transparency. Despite these promises, the formation process seemed even more secretive and less transparent than before.

## 1.2. Specific issues

### a) Appointing elected MP’s as state secretaries in a resigning government

During the lengthy formation, some members of the care-taking government, both ministers and state secretaries, quit while the negotiations for the new coalition were still far from concluded. To fill these vacancies in the meantime, three members of the Lower House were appointed as state secretary in the caretaker government *without* abandoning their seat in Parliament. Other members of the Lower House wondered whether this was constitutional. After all, for obvious reasons of separation of powers, Article 57, paragraph 2 of the Constitution states that members of Parliament cannot be ministers or state secretaries at the same time.

Article 57, paragraph 3, however, formulates an exception to this rule. According to this provision, a minister (or state secretary) who has tendered his resignation can combine his ministership (or state-secretaryship) with a membership of Parliament, until a decision is taken on his resignation. The idea behind this exception is as follows. In the Netherlands, it is standard practice that a Prime Minister tenders the resignation on behalf of the entire government. However, the resignation of these ministers and state secretaries can only be effectuated when a new government is formed, which obviously takes time. In the meantime, these resigning ministers and state secretaries usually remain in their post but might also candidate themselves for

the parliamentary elections and obtain a seat in the Lower House. In that scenario, Article 57, paragraph 3 allows them to combine both functions until a new government is formed.

The question was whether the three members of the Lower House that were appointed as state secretaries in the caretaker government fell under the exception of Article 57, paragraph 3. These members had not been part of the caretaker government when it tendered its resignation on January 15. On the contrary, they were members of the Lower House at that time and were re-elected on March 17. For that reason, some scholars argued that the exception was not applicable to this case. The resigning Prime Minister nevertheless argued that the exception of Article 57, paragraph 3 applied to resigning members as well as to new members of a care-taker government, since the resigning status of a care-taker government also extended to ministers and state secretaries that were appointed in that government after the resignation is tendered. Hence, in his view the situation was constitutional.

A majority of the Lower House remained in doubt, however, and asked the Council of State for constitutional advice on the matter. Due to the nature of the matter (the Lower House membership), the Council of State argued that neither the text nor the history of the Constitution gave a clear answer to whether MPs appointed as state secretary in a care-taker government ought to quit their Lower House membership. The Council of State therefore said that the Lower House had to decide for itself whether the situation was constitutionally permissible.

The three state secretaries in question immediately ended their parliamentary membership after the Council of State published its advice. A few days later, the Lower House adopted a resolution that stated that Article 57, paragraph 3 ought to be strictly interpreted, meaning that a member of the Lower House can never have a double function after that member is installed in the Lower House without a double function, and that no exception on Article 57, paragraph 1 exists, other than the situation in which a resigning minister or state secretary is elected as MP.

## b) Dismissal of a state secretary by the prime minister for publicly criticizing the government's COVID-19 policy

The tensions between the members of the caretaker government reached a climax in September, when one of the resigning state secretaries publicly criticized the government's COVID-19 policy. This action violated the constitutional principle of the 'unity of the Crown', which entails that the government speaks with a single voice. Any disagreement between ministers and state secretaries (and the King, for that matter) should be kept behind closed doors, and all ministers and state secretaries must support and loyally execute government decisions once these have been taken. This follows from the collective ministerial responsibility, laid down in Article 42, paragraph 2 of the Constitution.

The Prime Minister therefore dismissed the state secretary in question on September 25, 2021, through a Royal Decree. A Royal Decree is a decision of government, signed by the King and countersigned by at least one of the ministers (article 46, paragraph 1 of the Constitution). A problem here was that the Prime Minister only consulted the most directly involved ministers on the matter, and not the Council of Ministers as a whole. This situation is a violation of the Rules of Procedure of the Council of Ministers, which state that the dismissal of a minister or state secretary requires the deliberation and decision of the Council (Article 4, paragraph 2, sub k). In that sense, the dismissal was taken irregularly. The validity of the Royal Decree, however, is not affected by this procedural flaw.

### 2. Childcare allowance scandal: follow-up

Government-Rutte III tendered its resignation on January 15, 2021, following the parliamentary investigatory commission's damaging report called 'Unprecedented injustice'.<sup>1</sup> Childcare allowance payments were wrongfully stopped, and families were unjustifiably ordered to repay the full amount of childcare allowances they had received in the years before, which led to severe financial and personal problems. The parliamentary report concluded that due to an overheated political reaction to fight fraud, fundamental

principles of Rule of Law had been violated. According to the report, the victims were helpless against the powerful institutions of the State and did not receive the protection they deserved by the Tax Authority, the Ministry of Social Affairs, the government, the Council of State, and Parliament. The report also severely criticized the provision of information, among others of the Tax Authority to the ministers, the Lower House, the involved parents, the judiciary, and the media. The report recommended that everyone in the apparatus of the State should ask themselves how such a situation can be prevented from happening again, as the checks and balances failed to offer the necessary protection. As a result, 2021 brought about important debates on this topic, as well as several reports.

The President of the Administrative Jurisdiction Division of the Council of State stated that it could have contributed earlier to the necessary correction of the system failure of the legislator and the strict application of the law by the Tax Authority.<sup>2</sup> In a reflection report of the Administrative Jurisdiction Division published on November 19, 2021 it repeated that the court could and should have corrected the strict line sooner in view of proportionality and that it should have offered all parents involved better legal protection.<sup>3</sup> Moreover, at the request of the Lower House, the European Commission for Democracy through Law, the so-called Venice Commission, published an opinion on the legal protection of citizens. The Commission regards The Netherlands as a well-functioning state with strong democratic institutions and safeguards for Rule of Law. The Commission confirms that the shortcomings in individual rights protection were serious and systemic and involved all branches of government. Nonetheless, Rule of Law mechanisms in the Netherlands eventually did work, although it took too long. Therefore, the Commission formulated several proposals 'as food for thought' related to legislative power (e.g., the inclusion of hardship or proportionality clauses in future legislation), executive power (e.g., the improvement of the information flows and access to information), and judicial power (e.g., considering amending Article 120 of the Constitution

containing a prohibition of constitutional review of Acts of Parliament by the judiciary or the introduction of other mechanisms of constitutional review). Nonetheless, the Commission concluded that it is confident the ongoing reforms and further reforms will lead to an improvement of the situation avoiding a repetition of problems.

It should be mentioned that the settlement of the promised compensation scheme proves to be arduous. The National ombudsperson, for instance, formulated strong criticism about the complexity of the system of the recovery operation, carried out mainly by the newly established Executive Organization Recovery Allowances.<sup>4</sup> He observed a parallel between the mistakes made by the government in the childcare allowances scandal and the way of solving those same problems. The operation is complex and slow at the expense of the parents and children involved. Finally, on December 15, 2021, the coalition agreement of Rutte IV announced a fundamental reform of the current childcare allowances system to avoid a repetition of the past. It is the intention that the allowance will be paid directly to childcare institutions so that parents will no longer be faced with repayments. The first steps were announced to be taken by the new State Secretary for Allowances and Customs.

## III. CONSTITUTIONAL CASES

### 1. *State v. Wilders Sequel: Wilders II and the freedom of expression of politicians*

In our previous report of 2020, we discussed the conviction of politician and member of the Lower House Wilders for group defamation in *State v. Wilders* before the Court of Appeal of The Hague.<sup>5</sup> Although the Court did not impose any penalties, Wilders appealed to this conviction before the Supreme Court<sup>6</sup> and got irreversibly convicted for group defamation of the Moroccan people living in the Netherlands. The Supreme Court agreed with the Court of Appeal that the statement was disproportionately hurtful and that the right to freedom of expression of Article 10 ECHR did not prevent a conviction.<sup>7</sup>

The judgment of the Supreme Court is interesting from a constitutional perspective for two reasons. Firstly, the Supreme Court repeated the reasoning of the Appeals Court, stating that while politicians should be able to raise issues for the purpose of the public good, even when it may concern hurtful or shocking statements, politicians still bear the responsibility to refrain from making statements that conflict with the principles of democracy and Rule of Law. This includes statements that may directly or indirectly incite intolerance.<sup>8</sup> The Supreme Court furthermore stated that the necessity-test of Article 10 paragraph 2 ECHR should be understood in light of Article 17 ECHR, which prohibits the abuse of rights laid down in the Convention and becomes relevant where it concerns statements that are intolerant to the extent that they violate human dignity.

This demonstrates that the freedom of speech of politicians can be restricted when it is used to make statements that are unnecessarily hurtful. *Wilders II* thereby pulls Articles 137c and 137d of the Dutch Criminal Code into the sphere of a resilient democracy, making these provisions instruments that also defend a liberal and democratic state.<sup>9</sup>

## 2. *Shell*: climate change

In the Netherlands, civil courts are increasingly confronted with cases in which citizens and NGO's ask courts to interfere with government policies usually based on the support of Parliament. This challenges the primacy of politics and judicial restraint when societal interests are at stake. The prime example of such a case is the Urgenda climate case, which was elaborately discussed in our report of 2019. Building on the argumentation in the Urgenda case, a new climate case, this time not against the State but against the Royal Dutch Shell (RDS), revolves around the question whether a *private company* violated a standard of care interpreted in view of human rights obligations by failing to take adequate action to curb CO2 emissions contributing to climate change.<sup>10</sup> In 2019, seven Dutch NGO's and more than 17.000 individual claimants filed a class-action lawsuit against RDS before the District Court of The Hague. In a groundbreaking judgment of May 26, 2021, the Court ordered RDS to reduce

the global CO2 emissions of the Shell group, including its suppliers and its customers, by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy. The Court finds this obligation for RDS in the unwritten *standard of care* in Dutch tort law, which is an open norm that courts may interpret in light of changing social norms and standards, established consensus and internationally accepted standards. It is based on Article 6:162 of the Dutch Civil Code and the tortious act when acting in conflict with a legal obligation or 'what is customary in society according to unwritten law'. The latter concerns the standard of care.

As one of the largest producers and suppliers of fossil fuels in the world, the Shell group substantially contributes to global warming and dangerous climate change. The Court argues that this leads to serious human rights risks, more concretely concerning the right to life and the right to respect for private and family life as embedded in Articles 2 and 8 ECHR. Even though the claimants could not invoke these fundamental rights directly against Shell, the Court incorporates them in the interpretation of the standard of care applicable to RDS. According to the Court, it is an individual responsibility of companies to respect human rights, notwithstanding the action or inaction of states. For RDS it concerns an "*obligation of result*" regarding the Shell group's CO2 emissions, while regarding its suppliers and customers RDS has a "*significant best-efforts obligation*" via the Shell group corporate policy.

The Court holds that even though RDS is currently not in breach of its reduction obligation, the Shell group's policy is intangible, undefined, non-binding and it does not contain an emissions reduction target for 2030. As a result, the Court holds that there is a danger of imminent breach of the reduction obligation. On July 20, 2022, Shell appealed to the decision, but it must immediately begin to comply with the provisionally enforceable judgment. A fine, periodic penalty or civil damages could be imposed in the future if RDS would fail to comply with the judgment's obligation to reduce CO2 emissions. Even though the amount of climate cases around the globe is increasing, this

judgment is said to be the first of its kind where a court imposed a duty on a company to prevent dangerous climate change.<sup>11</sup> This judgment could generate a substantial impact to companies in a comparable situation, and it may serve as an inspiration to other courts in comparable cases.

## 3. COVID-19: parliamentary involvement and cases on constitutional rights and freedoms

The report of 2020 ended with the entry into force of the 'Temporary COVID-19 Measures Act' (hereafter: TCMA).<sup>12</sup> The question was raised whether the TCMA had to be kept in force. Nonetheless, the TCMA has been extended three times and has undergone several amendments. One interesting amendment concerned the enhancement of parliamentary involvement in the creation of ministerial decrees regarding new COVID-19 measures or the downscaling thereof. As a result, the Lower House can decide to disagree with the ministerial decree leading to an expiration of the ministerial decree, unless it concerns urgent circumstances requiring immediate action. Under the latter circumstances, the ministerial decree enters into force immediately.<sup>13</sup>

Furthermore, the Public Health Act was amended several times after the entry into force of the TCMA to provide a legal basis for several COVID-19 related measures, such as the use of COVID-19 access permissions for events<sup>14</sup> or the obligation to present a negative test result upon entering the Netherlands when returning from a high-risk area<sup>15</sup>.

Another impactful measure was the entry into force of a curfew on January 23, 2021. This curfew was not based on the TCMA, but on the Extraordinary Competences on Civil Authority Act (hereafter: ECCAA). The curfew entered into force with posterior agreement of the Lower House, which raised the question of whether the circumstances were of such a level of urgency that the application of the ECCAA was appropriate.<sup>16</sup> Stichting Viruswaarheid submitted this question before the District Court of The Hague, which ruled that the construction was unlawful, resulting in the deactivation of the cur-

few.<sup>17</sup> That same day, the Appeals Court of The Hague suspended the enforceability of the District Court's judgement.<sup>18</sup> Thereafter, the government prepared a new proposal for a curfew based on the TCMA, which entered into force six days after Court of Appeals' suspension.<sup>19</sup> The Court of Appeals later annulled the decision of the District Court, as it found that the legal basis of the curfew was appropriate due to the urgent circumstances and thereby met the criteria of proportionality and subsidiarity.<sup>20</sup>

#### IV. LOOKING AHEAD

Currently, the second reading of seven proposals to amend the Constitution is pending, in addition to the proposal to remove several transitional provisions, so-called additional articles, because they no longer serve a purpose. The proposed amendments concern the following proposals: 1° the introduction of a binding corrective referendum based on citizens' initiative on the national level; 2° the modernization of the secrecy of letters, telephone secrecy and telegraph secrecy to include all electronic communication; 3° the insertion of an unnumbered article before article 1 of The Constitution, i.e., a general provision, stating that the Constitution guarantees fundamental rights and the democratic constitutional state (*'rechtsstaat'*), 4° the amendment of the constitutional amendment procedure itself to ensure that only the Lower House that is elected after the publication of a Constitutional Revision Act in the first reading is authorized to initiate and complete the second reading (as already incorporated in the revised Rules of Procedure of the Lower House as of April 1, 2021), 5° granting the right to vote for a separate electoral college concerning the election of candidates for the Upper House to Dutch citizens living abroad, 6° the addition of disability and sexual orientation as grounds for non-discrimination, 7° the addition of a provision on the right to a fair trial. Finally, on March 16, 2022, local elections will be held.

1 Parliamentary Documents II 2020/21, 35510, no. 2, available at <[https://www.tweedekamer.nl/sites/default/files/atoms/files/20201217\\_eindverslag\\_parlementaire\\_ondervragingscommissie\\_kinderopvangtoeslag.pdf](https://www.tweedekamer.nl/sites/default/files/atoms/files/20201217_eindverslag_parlementaire_ondervragingscommissie_kinderopvangtoeslag.pdf)> accessed 23 February 2022.

2 Bart Jan van Ettekoven, 'Tussen wet en recht. Reactie van de voorzitter van de Afdeling bestuursrechtspraak van de Raad van State op het rapport Ongekend onrecht van de Parlementaire ondervragingscommissie Kinderopvangtoeslag' (2021) 101 *NJB* 98.

3 'Lessons from the childcare allowances cases. Reflection report of the Administrative Jurisdiction Division of the Council of State', November 2021, available at <[https://www.raadvanstate.nl/publish/library/13/reflectierapport\\_lessen\\_uit\\_de\\_kinderopvangtoeslagzaken.pdf](https://www.raadvanstate.nl/publish/library/13/reflectierapport_lessen_uit_de_kinderopvangtoeslagzaken.pdf)> accessed 23 February 2022.

4 National Ombudsperson, 'Report: Complaint justified, but no solution', 11 October 2021, available at <<https://www.nationaleombudsman.nl/system/files/bijlage/Monitor%20klachtbehandeling%20UHT.pdf>> accessed 23 February 2022.

5 Court of Appeal The Hague, 4 September 2020, ECLI:NL:GHDHA:2020:1606.

6 Supreme Court 7 July 2021, ECLI:HR:2021:1036, nr. 20/03005 (Wilders II).

7 *Ibid*, at 3.9.

8 *Ibid*, at 3.9.2.

9 Gelin Molier, Bastiaan Rijpkema & Jip Stam, 'Wilders II: Het onverdraagzaamheids criterium toegepast door de Hoge Raad', 42 *NJB* 3094, (2021), at 1.

10 District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, court-issued English version available at <[http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526\\_8918\\_judgment-2.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf)> accessed 24 February 2022.

11 M. Dolmans, G. Bourguignon, Q. De Keersmaecker, M. J. Preston & E. O'Brien, "Dutch Court Orders Shell to Reduce CO2 Emissions in first climate change ruling against a company", *Pratt's Energy Law Report* 2021, p. 275, also available at <[https://www.clearlygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company#\\_ftn5](https://www.clearlygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company#_ftn5)> accessed on 24 February 2022.

12 For a more complete overview, see: Geerten Boogaard, Michiel van Emmerik, Gert Jan Geertjes, Luc Verhey & Jerfi Uzman, 'Kroniek van het constitutioneel recht', 35 *NJB* 2599, (2021)

13 Article 58c (2) and (3) of the Act of 9 October 2008. 14 Act of 26 May 2021.

15 Act of 8 January 2021.

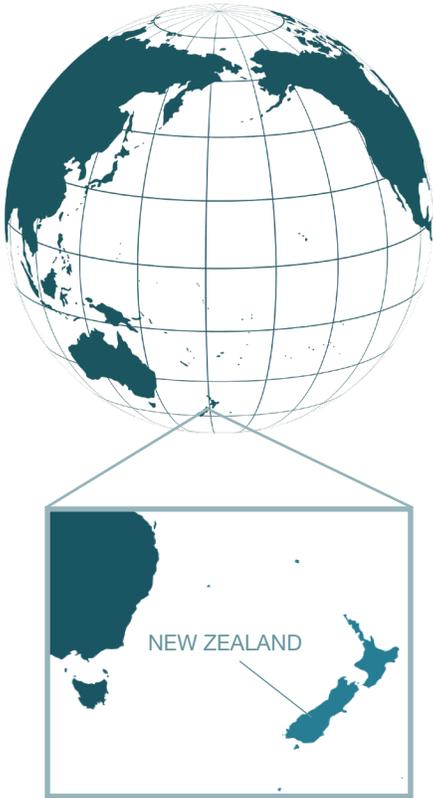
16 Parliamentary documents II 2020/21, 35722, nr. 4.

17 District Court The Hague 16 February 2021, ECLI:NL:RBDHA:2021:1100.

18 Court of Appeal The Hague 16 February 2021, ECLI:NL:GHDHA:2021:252.

19 Act of 22 February 2021.

20 Court of Appeal The Hague 26 February 2021, ECLI:NL:GHDHA:2021:285.



---

# New Zealand

Andrew Geddis  
Professor  
Faculty of Law, University of Otago

M. B. Rodriguez Ferrere  
Senior Lecturer  
Faculty of Law, University of Otago

## I. INTRODUCTION

New Zealand’s evolving response to the Covid-19 virus, in its different variants, continued to dominate the country’s public life. As we noted in last year’s review, “[b]y pursuing a ‘go hard, go early’ strategy that sought to completely eliminate the virus from the community, [New Zealand] was able to not only minimize the resulting death toll but also return much of everyday life to something close to normal.”<sup>1</sup> This elimination strategy remained in place throughout most of 2021, involving very tight constraints on who may cross the border into the country, a requirement for all those doing so to quarantine for two weeks in government facilities, and the ongoing use of regionalised lock-downs to quash the few Covid cases that managed to enter the community. However, as the country’s vaccination programme took effect, and with the arrival of first, the delta and then the omicron variants into the country, a new set of responses were put in place. These involved vaccination mandates for certain occupations, limits on how the unvaccinated may participate in social life, and requirements to wear masks in many public places. In order to provide a legal framework for these measures, a number of pieces of primary and secondary legislation were enacted and promulgated. Equally, the government’s actions to combat Covid-19 began to attract scrutiny in the courts through a number of challenges to different aspects of its response.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

For the first eleven months of 2021, New Zealand’s response to Covid-19 continued along the lines established in 2020. Extremely tight border restrictions that excluded virtually everyone except New Zealand citizens and residents, combined with mandatory quarantine stays for those permitted to enter, provided a largely effective seal against Covid-19 entering the community. Where a case of cross-border transmission was detected, lock-downs that required general home isolation and severely limited public activity were imposed until the virus was again eliminated. In between outbreaks, however, very few constraints applied to day-to-day life. These measures continued to be authorized by the Covid-19 Public Health Response Act 2020 and secondary legislation promulgated by government Ministers under the Act’s empowering provisions.

With New Zealand’s vaccination programme taking effect (ultimately resulting in some 94% of the adult population becoming fully vaccinated), and with the new and more virulent delta and omicron variants penetrating the country’s borders, the government’s response strategy shifted away from elimination at the end of 2021. Instead, certain public occupations – border workers, teachers, defence and emergency workers – were required to be vaccinated in order to keep their jobs. Other employers were empowered to adopt similar vaccination mandates for their workforce following a health and safety audit. Vaccine passes were required to

enter many public buildings or participate in gatherings of more than 25 people. Businesses in the hospitality sector wishing to provide on-premises service were restricted to serving vaccinated customers only. Contact tracing requirements for entering workplaces or attending public events were imposed. Masks became compulsory in most public indoor settings. These new “traffic light” restrictions were instituted via secondary legislation promulgated by government ministers,<sup>2</sup> which in turn was authorized by a new enactment passed by the Parliament.<sup>3</sup>

While opinion polls show a healthy majority of the New Zealand population continue to support the government’s overall response to Covid-19, a second year of living under the virus’ threat and resulting restrictions began to undermine what had formerly been near-complete public unanimity. Scrutiny of the government’s actions took four different forms. Parliamentary scrutiny applied to the enactment of all primary legislation, as well as ex-post facto review of secondary legislation through the Regulations Review Committee. However, scrutiny of the legislation authorizing the new traffic light restrictions was inappropriately restricted by the government. It used its majority to push this enactment through all stages of debate over a two day period with no opportunity for public input; a state of affairs that caused even the Speaker of House to criticize the truncated legislative process. The opposition parties, likewise, strongly criticized this move, as a part of their generally more critical stance towards Covid-19 measures in 2021. This return to a normal government-opposition dynamic represented a second form of scrutiny; political accountability as the opposition parties sought to expose and exploit faults in the government’s policies and actions.

The third form of scrutiny of the governmental response to Covid-19 took place through the courts, covering a wide variety of matters and with differing outcomes. An appeal from the High Court’s 2020 decision upholding the legality of New Zealand’s initial response to Covid-19 – *Borrowdale v Director General of Health*,<sup>4</sup> discussed in last year’s review<sup>5</sup> – was unanimously rejected by the Court of Appeal. Despite finding that granting consent to use the Pfizer Covid-19 vaccine technically may have been ultra vi-

res the relevant legislation, the High Court refused to declare the decision unlawful on the ground that the repercussions for the vaccination programme were too great.<sup>6</sup> A series of cases likewise unsuccessfully sought to challenge the imposition of vaccine mandates on certain occupations: the customs service;<sup>7</sup> border workers;<sup>8</sup> health workers and teachers.<sup>9</sup> However, the courts did find fault with other aspects of the government’s Covid-19 response. A failure to properly consider a businessman’s need to travel to and from the United States without entering government run quarantine on his return was ruled unlawful.<sup>10</sup> Likewise, the court declared unlawful the government’s decision to suspend, for Covid-19 reasons, the visa applications of Afghan nationals who had aided New Zealand’s defense forces in their operations in that country, thereby preventing them from being relocated when the Taliban took control.<sup>11</sup> And perhaps most importantly, the government’s failure to supply data to indigenous Māori health providers to enable them to reach still-unvaccinated Māori was declared to be unlawful.<sup>12</sup>

This last judicial decision echoed the fourth form of scrutiny applied to the government’s actions. The Waitangi Tribunal, being a permanent commission of inquiry, heard an urgent claim alleging that the government’s roll-out of the vaccination programme and decision to move to the traffic light restrictions failed to properly protect Māori. In particular, the claimants argued that the government failed to create a vaccination programme that properly engaged Māori (many of whom, for understandable reasons relating to colonization, are particularly vaccine-hesitant), then moved to a response strategy predicated on vaccination while Māori remained comparatively poorly protected. The Waitangi Tribunal substantially agreed with these claims, issuing a report that found the government’s policies constituted a breach of the Treaty of Waitangi.<sup>13</sup> While not legally obligating any particular governmental action in response, the findings constituted an indictment of the government’s priorities when responding to Covid-19. In essence, its chosen policies had neglected to adequately consider and protect the social group most at risk from the virus’s threat.

### III. CONSTITUTIONAL CASES

#### 1. *Fitzgerald v R: a new approach to rights-consistent interpretation?*

The most important constitutional case not to involve the New Zealand government’s response to Covid-19 was *Fitzgerald v R*,<sup>14</sup> a case that focused on the consistency of the “three-strikes” sentencing regime with the New Zealand Bill of Rights Act 1990 (NZBORA). Under this regime, introduced in 2010,<sup>15</sup> a graduated series of consequences applies when sentencing for qualifying serious offences. If an offender commits a qualifying offence,<sup>16</sup> they are given a “first warning” and an explanation about the operation of the regime.<sup>17</sup> If the same offender commits a second qualifying offence (other than murder), they are given a “second warning”, and must serve any imposed term of imprisonment without parole.<sup>18</sup> Finally, per s 86D(2) of the Sentencing Act 2002:

Despite any other enactment, if, on any occasion, an offender is convicted of [a third qualifying offence] other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.

Daniel Fitzgerald – who had a history of serious mental illness – committed his third qualifying offence in December 2016, when he grabbed a “woman by both her arms, pulled her towards him and told her he wanted to kiss her, before trying to kiss her mouth. She moved her head so that the kiss fell on her cheek.”<sup>19</sup> Mr. Fitzgerald was convicted of the qualifying offence of indecent assault, and although the sentencing judge acknowledged the offending was “at the bottom end of the range”<sup>20</sup> the judge nevertheless was required to sentence him to seven years’ imprisonment – the maximum sentence available for the offence.<sup>21</sup>

Two questions arose in Mr. Fitzgerald’s eventual appeal to the Supreme Court of New Zealand. First, whether the sentencing judge retained a discretion to discharge Mr. Fitzgerald without conviction notwithstanding the existence of the three-strikes regime. Second, whether it was possible to interpret the three-strikes legislative provisions as not applying where the consequences of the third strike would breach the NZBORA, s

9.<sup>22</sup> It is the second question that is of the greatest constitutional import and that which we consider here.

The parties had already agreed (alongside a unanimous Court) that the imposition of a seven-year sentence for Mr. Fitzgerald's offending would, amongst other things, amount to "conduct which is so severe as to shock the national conscience", and was thus in breach of s 9.<sup>23</sup> This right was not susceptible to reasonable limitation per the NZBORA, s 5. And so a majority of the Court held that as it was possible to interpret the three-strikes regime as not applying where it would require the imposition of a sentence in breach of s 9, they were under an obligation to do so per the NZBORA s 6.<sup>24</sup> Justice William Young, the lone dissenter on the Court, held that the rights-consistent interpretation of the three-strikes regime favored by the Court was unavailable and thus impermissible.<sup>25</sup>

The majority's judgments – and in particular, that of Winkelmann CJ – signal a subtle shift in the judicial understanding of the NZBORA, s 6 that makes this case of significant import. Section 6 – upon which the United Kingdom's Human Rights Act 1998, s 3 was modelled – imposes an interpretative command: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." The use of the passive voice obscures the potential strength of that command. Does "can be given" mean the Court should take a somewhat restrained role, looking to the text of an infringing enactment and determining whether it is reasonable to interpret the enactment in a less-infringing manner? Or must the Court take a more proactive role, striving as hard as it can to cure the infringing enactment up to the point it would run afoul of s 4 of the NZBORA, which prevents the Court from outright invalidating legislation? Until *Fitzgerald*, the former judicial approach generally was preferred. The hitherto leading case – *Hansen v R*<sup>26</sup> – held that s 6 only permitted an alternative interpretation of a rights-inconsistent enactment that was "genuinely open in light of both its text and its purpose",<sup>27</sup> or "reasonably or properly open [or] fairly open and tenable."<sup>28</sup> Winkelmann CJ expressly disagreed with the *Hansen* formulation:

"I have concerns that reading in the word 'reasonably' imposes a limitation which does not appear in the text and is also unnecessary, as the Act itself provides all necessary limits on the s 6 process. The word "reasonable" also tends to have perambulatory meaning – one person's strained but available meaning is another's unreasonable meaning."<sup>29</sup>

The Chief Justice went on to say – cheekily citing *Hansen* as authority – that she was content with the s 6 process permitting "tenable" meanings, because that is what "can be given" means.<sup>30</sup> However, the *Hansen* Court would not have considered bending an infringing provision until breaking point as amounting to a "tenable" interpretation, nor would they have permitted s 6 to allow the reading in of riders and exceptions that ran completely contrary to Parliament's intended meaning. This is what the *Fitzgerald* Court did, however, in reading in an exception to the infringing provision that it will not apply if its application breaches s 9 of the NZBORA. The Chief Justice justified that approach in the following terms:

"Reading in the exception this Court identified does not, therefore, nullify or disapply the underlying scheme, text or purpose of s 86D(2) or of the surrounding three strikes regime. Rather, as explained above, it gives better effect to the rights-consistent meaning and purpose the provision can be interpreted to have."

The rest of the majority were less forthright, with Arnold and O'Regan JJ relying on the supposition that the exception does "not deprive s 86D(2) of any meaning" because "it will be rare that sentences imposed under the three strikes regime would meet the high threshold set by s 9". If Parliament's intended meaning applies most of the time, then the Court has not rendered it invalid (as prohibited by the NZBORA, s 4). The problem is that it is abundantly clear that Parliament very much *did* intend for the provision to apply without exception, unjust consequences and all.<sup>31</sup> The majority held that for such a rights-infringing interpretation to prevail, Parliament must use far more explicit language.<sup>32</sup>

Justice William Young, in dissent, was similarly strident in his view of the s 6 directive. Section 86D(2)'s reference to "despite any other enactment", "on any occasion" and "the High Court must" seemed to him "to admit of no ifs and no buts."<sup>33</sup> That prevent-

ed the majority's interpretation, because the s 6 directive was "limited to what can be justified by reference to the text of the statute, allowing for purpose and applying ordinary principles of interpretation. If the interpretation contended for is not a starter on that approach, I see its adoption via s 6 as statutory revision, not interpretation."<sup>34</sup>

What to make of the apparent sea change in approach to s 6 adopted by the majority? In some ways, *Fitzgerald* is a limited precedent: it was common ground that the three-strikes regime breached s 9 in this instance, and also common ground that s 9 was not subject to a s 5 analysis (torture or cruel, degrading, or disproportionately severe treatment never being demonstrably justifiable in a free and democratic society).<sup>35</sup> That meant the Court could not truly reassess *Hansen*'s reconciliation of the operative provisions of the NZBORA: ss 4, 5 and 6. Moreover, the three strikes regime "has been considered almost universally, at least amongst the criminal bar, as simply bad law."<sup>36</sup> Perhaps, then, the *Fitzgerald* approach is restricted to particularly egregious examples of bad law, and is a black swan occurrence of where the Court is motivated to engage in a proactive interpretative activity. This would seem to be the hope of at least Arnold and O'Regan JJ who cited the situation of Mr. Fitzgerald as a "rare case".

Those hopes have not come to pass. In the five months since it was delivered, *Fitzgerald* has been cited ten times; and in at least three cases, has ignited appeals specifically on the basis that sentences imposed under s 86D(2) infringed s 9 of the NZBORA.<sup>37</sup> This effect bears the hallmarks of a judgment closer to statutory revision rather than interpretation, which is why it is perhaps just as well Parliament is currently considering legislation to repeal the three-strikes regime.<sup>38</sup> Whether *Fitzgerald* will have wider effects beyond the legislation at issue remains to be seen. Certainly, it seems it is an indication that the current Supreme Court Bench prefers a more progressive approach to the NZBORA than their forebears, and one that is in closer alignment to the United Kingdom,<sup>39</sup> and it will be very interesting to see its approach when it considers the next major NZBORA case.

## 2. *Moncrief-Spittle v Regional Facilities Auckland Ltd*: clarifying the reach of the NZBORA?

That major case will almost certainly be the Court's hearing of the appeal against *Moncrief-Spittle v Regional Facilities Auckland Ltd*.<sup>40</sup> One of the core issues in this case is scope of s 3 of the NZBORA. Section 3(a) of the NZBORA states that it applies to acts done by the "legislative, executive or judicial" branches of government. In addition, s 3(b) states it also applies to "any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law", which includes nominally private bodies. The approach to s 3(b) determines the scope of the NZBORA's application, but in the 30 years of its operation, has received relatively limited judicial analysis, and no direct analysis by the Supreme Court.<sup>41</sup> That will almost certainly change in that Court's eventual judgment in *Moncrief-Spittle*.

The local authority in New Zealand's largest city, the Auckland Council, owns Regional Facilities Auckland Ltd (RFAL), which manages several venues as trustee of Regional Facilities Auckland, a charitable trust. One of those venues is the Bruce Mason Centre. In August 2018, Lauren Southern and Stefan Molyneux were scheduled to speak at an event at the Centre. RFAL understood at the time of the booking that Molyneux and Southern were respectively "a renowned philosopher and author" and "a documentary filmmaker and best-selling author",<sup>42</sup> but they were also two self-described "alt-right" activists.<sup>43</sup> A month before Molyneux and Southern were due to speak, after it became aware that significant protests were planned to disrupt the event, RFAL decided to cancel the booking, and thus the event. The question for the Court of Appeal was whether this decision breached the audience's right to freedom of expression under the NZBORA, s 14. Thus, a preliminary question was whether RFAL was bound by the NZBORA when contracting with speakers to use its facilities.

The High Court had definitively held that RFAL was not so bound, because it had not exercised a public power in making and cancelling the contract.<sup>44</sup> While the Court of Appeal upheld the High Court's overall conclusion that RFAL's actions did not breach the

NZBORA as the decision to cancel the event was a justified limit on expressive rights, it disagreed on this preliminary point:

Society places a high value on freedom of expression and RFAL has the power to control public assets that are used for many forms of expression. The decision to cancel was made pursuant to a core statutory function and would directly affect the BORA rights of members of the public who wished to attend the event. That is the proper context in which to view RFAL's decision to cancel the [booking]. It ought not to be treated as merely a commercial decision subject to the same limitations for review as apply to ordinary commercial decisions that have only commercial consequences.<sup>45</sup>

The Court reached this conclusion after interweaving analysis of s 3(b) of the NZBORA with analysis of orthodox administrative law principles relating to the judicial review of private bodies. While these analyses are similar – as the Court acknowledged, "essentially the same"<sup>46</sup> – they are not identical. The scope of judicial review is determined under the Court's inherent jurisdiction, whereas its NZBORA jurisdiction is statutory. That statutory jurisdiction restricts the Court to looking to private actors only when they are performing a public function "pursuant to law", whereas its judicial review jurisdiction allows review of *any* decision that is in substance public or has important public consequences.<sup>47</sup> Although that distinction might only matter to public law anoraks, the fact that the Court of Appeal overlooked it – and the apparent fusion of administrative law and NZBORA principles it represents – is of significant interest, and an issue that has never been before the Supreme Court. Whether the apex court takes as significant and progressive a stance in this appeal as it did in *Fitzgerald* will perhaps indicate whether the latter was a black swan event after all.

## IV. LOOKING AHEAD

Oral arguments in the *Moncrief-Spittle* appeal were heard by the Supreme Court in late February of 2022, with a decision expected later in the year. The outcome of High Court challenges to the government's managed iso-

lation regime for travelers from overseas and to vaccine mandates for teachers and health care workers also will be announced. The government has indicated that Covid-19 restrictions will be revisited once the omicron variant passes through the country, with the pace of this process likely to engender further political and legal challenge.

## V. FURTHER READING

Philip Joseph, *Joseph on Constitutional and Administrative Law* (5<sup>th</sup> ed, Thomson Reuters 2021).

Dean Knight, 'New Zealand: Legal Response to Covid-19' (2021) in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* <<https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e4>> accessed 1 March 2022.

- 1 See Andrew Geddis and Marcelo Rodriguez Ferrere, “New Zealand Country Report”, I-CONNECT-Clough Center 2020 Global Review of Constitutional Law, (2021).
- 2 COVID-19 Public Health Response (Vaccinations) Order 2021; COVID-19 Public Health Response (COVID-19 Vaccination Certificate) Order 2021; COVID-19 Public Health Response (Protection Framework) Order 2021.
- 3 COVID-19 Public Health Response (Vaccinations) Legislation Act 2021.
- 4 [2021] NZCA 520.
- 5 See Andrew Geddis and Marcelo Rodriguez Ferrere, “New Zealand Country Report”, I-CONNECT-Clough Center 2020 Global Review of Constitutional Law, (2021).
- 6 *Nga Kaitiaki Tuku Iho Medical Action Society v Minister of Health* [2021] NZHC 1107.
- 7 *GF v Minister of Covid-19 Response* [2021] NZHC 2526.
- 8 *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012.
- 9 *Four Midwives, NZDSOS and NZTSOS v Minister of Covid-19 Response* [2021] NZHC 3064.
- 10 *Bolton v The Chief Executive of the Ministry of Business, Innovation and Employment* [2021] NZHC 2897.
- 11 *Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154.
- 12 *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 3319.
- 13 *The Waitangi Tribunal, “Haumara: The Covid-19 Priority Report”* WAI 2575 (20 December, 2021).
- 14 *Fitzgerald v R* [2021] NZSC 131, (2021) 12 HRNZ 739.
- 15 Sentencing and Parole Reform Act 2010.
- 16 A list of “serious violent offences” as defined by s 86A of the Sentencing Act 2002.
- 17 Sentencing Act 2002, s 86B.
- 18 Sentencing Act 2002, s 86C.
- 19 *Fitzgerald v R* [2021] NZSC 131, (2021) 12 HRNZ 739 [16] per Winkelmann CJ.
- 20 *Ibid.* at [19] per Winkelmann CJ.
- 21 Crimes Act 1961, s 135.
- 22 “Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”
- 23 *Fitzgerald v R* [2021] NZSC 131, (2021) 12 HRNZ 739 [79] per Winkelmann CJ.
- 24 *Ibid.* at [3].
- 25 *Ibid.* at [324]–[329], per William Young J.
- 26 *Hansen v R* [2007] NZSC 7; [2007] 3 NZLR .
- 27 *Ibid.* at [61], per Elias CJ.
- 28 *Ibid.* at [150], per Tipping J.
- 29 *Fitzgerald v R* [2021] NZSC 131, (2021) 12 HRNZ 739 at [58] per Winkelmann CJ.
- 30 *Ibid.* at [58] per Winkelmann CJ.
- 31 Andrew Geddis and Sarah Jocelyn, ‘Is the NZ Supreme Court Aligning the NZBORA with the HRA?’, U.K. Const. L. Blog (1 December 2021) (available at <https://ukconstitutionalallaw.org/>).
- 32 *Fitzgerald v R* [2021] NZSC 131, (2021) 12 HRNZ 739 at [218] per O’Regan and Arnold JJ.
- 33 *Ibid.* at [328] per William Young J.
- 34 *Ibid.* at [330] per William Young J.
- 35 *Ibid.* at [38] per Winkelmann J.
- 36 Tania Singh, *Fitzgerald v R* [2021] NZSC 131: *A Purposive Interpretive Remedy to the Sting of Three-Strikes?* [2021] NZLJ 388 at 388.
- 37 *Mitai-Ngatai v R* [2021] NZCA 695; *Phillips v R* [2021] NZCA 651; *Matara v R* [2021] NZCA 692.
- 38 Three Strikes Legislation Repeal Bill (2021).
- 39 Andrew Geddis and Sarah Jocelyn, ‘Is the NZ Supreme Court Aligning the NZBORA with the HRA?’, U.K. Const. L. Blog (1 December 2021) (available at <https://ukconstitutionalallaw.org/>).
- 40 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142.
- 41 *R v N* [1999] 1 NZLR 713 (CA) and *Ransfield v The Radio Network* [2005] 1 NZLR 233 (HC) being the core cases to consider this question
- 42 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142 at [12].
- 43 *Ibid.* at [15].
- 44 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2399, [2019] 3 NZLR 433 (HC).
- 45 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142 at [67].
- 46 *Ibid.* at [53].
- 47 *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11–12.



# Nigeria

Solomon Ukhuegbe, PhD, Adjunct Professor  
American Heritage University of Southern California

Gabriel Arishe, PhD, Professor  
Department of Public Law, University of Benin, Nigeria

## I. INTRODUCTION

Up-scaling the integrity of Nigeria's much-castigated electoral process remains a daunting challenge, and there is considerable pessimism whether electoral malfeasance can be eliminated or even significantly reduced. For the umpteenth time, reform of the Electoral Act 2010 was frustrated by a presidential veto in 2021, ostensibly because it included a provision regulating the nomination of candidates that, in the president's view, violated the rights of political parties. The political and social cohesion in the country has continued to degenerate, amplified by autonomy and secessionist agitations in the southern part of the country, many in 2021. Government's response in some instances included heavy deployment of full military might. The persistence of these agitations reflects the capacity (or the lack of it) of the political system to internalize and manage discontent, exacerbated by a weakness of conflict management and integrative institutions like the legislature and the judiciary. Judicial performance was uneven in 2021. Constitutional and statutory interpretation in some important cases was essentially mechanical exercises inattentive to the purpose and spirit of the materials interpreted.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. Electoral Act Amendment and the unremitting Presidential Veto

The Nigeria report for 2018 highlighted President Buhari's four-time (within ten months)

veto of the Electoral Act (Amendment) Bill 2018, which provided for electronic documentation and transmission of results. A new Electoral Act (Amendment) Bill 2021 passed by the National Assembly proposed mandatory direct primaries for selecting party candidates, mandates the electoral management agency, the Independent National Electoral Commission (INEC), to determine whether or not to adopt electronic transmission of results, amongst other changes to the election code.<sup>1</sup> The President rejected the new bill citing infringement of the democratic right of freedom of association by the mandatory direct primary clause and the prohibition of selection of candidates by consensus as his major reasons. The President pointed out that this also contradicted the rules of political parties registered with INEC which permit direct, indirect and consensus primaries.<sup>2</sup> He, finally, cited the cost implication of the proposed changes in that the conduct of direct primaries in all Nigeria's 8,809 wards will significantly increase the financial cost to the parties as well as the monitoring of such exercises by INEC.

Despite widespread displeasure by civil society and discontent in its membership, the National Assembly capitulated and removed the clauses objected to by the President. The reworked bill was adopted on January 31, 2022<sup>3</sup> and assented to by the president on February 25, 2022. The prolonged unsuccessful attempts at amending the more than a decade-old Electoral Act by three National Assemblies (the 7th, 8th, and 9th) is demonstrative of the dominance of the executive branch and the control it exerts on Nigeria's electoral process. Nigeria's political parties are weakly institutionalized and party machinery at the state level is controlled by the

State Governors. Hence, legislative reform of the Electoral Act 2010 to allow use of election integrity-enhancing technology, and to democratize the internal workings of political parties have been thwarted by them.

## 2. Ban on Twitter

The 2018 Nigeria report chronicled acts of repression of traditional media by the government in disregard of the constitutional guarantee of freedom of the press and dissemination of information (section 39). Government's aversion of critical reportage of its activities informs this authoritarian disposition to the press. There is a similar government distrust of the social media, especially since the '#EndSars Now' protest in 2020. This distrust came to the fore when the government indefinitely suspended Twitter's operations in the country from June 4 2021 in an obvious reaction to Twitter's deletion of President Buhari's post two days earlier that it claimed 'violated its policy on abusive behavior'.<sup>4</sup> The ban was not lifted until January 13, 2022 and only after the company agreed to government's conditions on the management of unlawful contents, registration of its operations in Nigeria, and a new tax arrangement.<sup>5</sup> Government's argument that the measures are required for a proper assessment of revenues of social media outfits appears misplaced given the economic loss to the nation caused by the ban,<sup>6</sup> a measure that is in any case difficult to justify because the right to internet access is auxiliary to the right to freedom of information (s. 39 of the Constitution).<sup>7</sup>

## 3. EndSars Protests' Reports

The 2020 Nigeria Report noted the setting-up of judicial panels of inquiry by states into the EndSARS Protest. Although most states submitted their reports in 2021, only the reports of Lagos, Ekiti, Ondo, and Bayelsa States were publicly submitted.<sup>8</sup> The other states have either not made their reports public<sup>9</sup> or have not yet submitted them to the federal government.<sup>10</sup> Lagos State alone has published its panel of inquiry report. Lagos State's Judicial Panel of Inquiry report on the EndSARS' incident at the Lekki Toll Plaza was submitted to the state government

on November 15, 2021, and made public about three weeks thereafter.<sup>11</sup> Expectedly, the report generated a lot of reactions because it covered events at the epicenter of the protest, the toll plaza. The report established use of live ammunitions at this location by soldiers on October 20, 2020, resulting in death and injury of identified victims. However, the indicting findings of the panel were rejected by the Federal and Lagos State governments with the latter releasing a white paper which justified rejection of the contested findings with claims of 'inconsistencies and contradictions in the entire JPI [Judicial Panel of Inquiry] report'.<sup>12</sup> The federal government through its information minister deprecated the report as 'the triumph of fake news and the intimidation of a silent majority by a vociferous lynch mob'.<sup>13</sup>

## 4. Secessionists' Agitations and Leaders' Arrest

Secessionists' agitations in the country in 2021 were significant, and although not new in Nigeria, the massive rallies in the south-west region and the deteriorated security situation in the south-east were disquieting. Secessionist's agitation by the Indigenous People of Biafra (IPOB) based in the south-east, for the creation of the Republic of Biafra gained momentum from 2013. The self-declared leader of IPOB, Mr. Nnamdi Kanu, a British-Nigerian, was arrested on October 14, 2015, by security forces and arraigned on charges of terrorism and treasonable felony. From August 2015 and August 2016 there were public demonstrations and other gatherings in the south-east region in support of the agitation for Biafra and for his release. The Nigerian authorities responded with force against protesters, including soldiers firing live rounds that resulted in a high number of fatalities,<sup>14</sup> though the military and the police deny this. This, rather than deter, heightened the level of agitation, with public sympathy attracted to their course. Following a spate of assassinations and kidnappings IPOB was officially proclaimed a terrorist organization under the Terrorism (Prevention) Act resulting in further crackdown on suspected IPOB members.<sup>15</sup> After almost two years of incarceration, Mr. Nnamdi Kanu was on April 28, 2017, released on bail<sup>16</sup> on health

grounds by a court. He escaped from Nigeria during a military raid on his hometown later that year and continued his campaigns for secession outside the country by radio broadcast, speaking tours and fundraising. He was arrested in Kenya, allegedly by INTERPOL, and flown to Abuja on June 27, 2021.<sup>17</sup> As this was not a judicial extradition, his supporters consider it extraordinary rendition. His trial was ongoing at the time of this report.

In a similar vein, secessionist's rallies were led by Mr. Sunday Adeyemo (alias 'Igboho'), self-acclaimed leader of the agitation in south-west Nigeria, for the creation of an independent Yoruba nation. On July 1, 2021, two days to a planned mega rally in Lagos, men of Nigeria's secret police (DSS) invaded his residence where two of his aides were killed in a shoot-out and a dozen others arrested. This compelled him to cancel the rally and go underground.<sup>18</sup> After the DSS declared him wanted based on alleged stockpiling of arms, a three-week manhunt for him by the security agencies began. On July 19, 2021, Mr. Adeyemo was arrested at the Cadjehoun Airport in Cotonou, Benin Republic by INTERPOL while enroute to Germany.<sup>19</sup> Mr. Adeyemo was still in Benin Republic at the time of writing this report.<sup>20</sup>

Amnesty International reports series of human rights violations from January to August 2021 by Nigerian security forces in their crackdown on violent agitation for secession by IPOB<sup>21</sup> whose armed wing, the Eastern Security Network (ESN), was accused of a series of attacks on government infrastructure, including police stations, prisons, and public buildings, and killing several persons including police officers, traditional monarchs, and heads of government agencies.<sup>22</sup>

Although the constitution declares Nigeria to be one indivisible country,<sup>23</sup> the challenges of weak social/political cohesion have spurred agitations for self-determination. A group from the predominantly Fulani/Hausa of northern Nigeria filed a suit at the Federal High Court in 2021 seeking an order granting the secession request of IPOB.<sup>24</sup> Given previous alleged ethnic acrimony, this is almost certainly a subterfuge to obtain judicial validation of the indivisibility of Nigeria.

## 5. Anambra State Governorship Election

The governorship election in Anambra State held on Saturday November 6, 2021, and supplementary voting on Tuesday November 9, 2021. In the results declared by INEC, the candidate of the ruling All Progressives Grand Alliance (APGA) in the State, Charles Soludo, was declared winner, thus retaining the state as the stronghold of the party. The poor voter turnout, only 10 percent, was the lowest since 1999. Voter apathy resulted from loss of faith in the electoral process<sup>25</sup> and heightened voters' fear of possible election day violence due to incessant clashes between IPOB and the security forces, even though over thirty-four thousand security personnel were deployed on election day. Only one of the three losers, Mr. Andy Uba (All Progressives Congress) filed an election challenge at the Election Petitions Tribunal notwithstanding that his party formally accepted the election results. The tribunal has till early June 2022 to deliver its verdict.

Given that it is generally considered a reasonably transparent election, it is unlikely that the tribunal will overturn the results.<sup>26</sup> However, pre-election judicial intervention reviewing the qualification of candidates of political parties with, in some instances, judges choosing who should be a party's candidate is worrisome. Deliberately restrained judicial intervention in the selection of party candidates in future will enhance voters' authority.

## 6. Passage of Petroleum Industry Bill

As part of efforts to solve restiveness in Nigeria's oil-rich region and to engender transparency, the Petroleum Industry Bill (PIB) which proposed major reforms was presented to the sixth National Assembly by late President Umaru Yar'Adua. Due to competing political and ethnic interests, the PIB was stalled in the sixth, seventh, and eighth National Assembly respectively. It was finally passed by the present ninth assembly on July 1, 2021, though not without controversy about the host community trust fund (which was 10 percent in the original bill as against the 2.5 percent in the version re-presented by Pres-

ident Buhari, 5 percent recommended by the National Assembly's committee, and finally 3 percent approved by the National Assembly).<sup>27</sup> President Buhari signed the PIB into law on August 16, 2021.<sup>28</sup> Though the bill promises innovation and economic benefits, the delay in its passage attests to the huge divide in Nigeria's polity where the legislative process is burdened by ethnic competition for resources.

## III. CONSTITUTIONAL CASES

### 1. Rivers State v FIRS: *Fiscal Federalism*

The government of Rivers State approached the Federal High Court for determination that the federal government lacks constitutional authority to legislate on or collect value added tax (VAT), withholding tax, education tax, and technology tax. The court on August 9, 2021, ruled in favor of the government of Rivers State affirming that it was unconstitutional for the Federal Inland Revenue Service (FIRS) to collect VAT.<sup>29</sup> By this decision, states are to legislate on and collect VAT in their states, thereby introducing a multiple VAT regime in the country. Following competing directives from Rivers and Lagos States as to whom businesses should pay VAT, the Federal Government secured a temporary restraining order from the Court of Appeal,<sup>30</sup> which has been appealed against by Rivers State to the apex court. The decision of the Supreme Court is expected this year.

FIRS has been responsible for collecting VAT throughout the country for redistribution to the federal and state governments according to a sharing formula. Rivers State which generates the second largest amount of VAT (after Lagos State) is dissatisfied with its monthly share of the VAT revenue pool as states with meagre contribution to VAT get a disproportionate share under the extant sharing criteria.

The Federal High Court ruling on VAT has been both criticized<sup>31</sup> and applauded. It has far-reaching implications and complications. If each state enacts its own VAT law (as Lagos did immediately, charging 6% as

against the current 7.5% in the federal law), there would be multiple VAT payments on the same product across the thirty-six states of the federation being a tax borne by the final consumer. Another obvious economic backlash is that about thirty states of the federation rely more on the redistribution of VAT revenue for survival because of their poor internal revenue generation.<sup>32</sup> After the expected Supreme Court ruling, a political solution may be resorted to.

### 2. FRN v El Zakzaky: *Retroactive Criminal Legislation*

On July 28, 2021 a Kaduna State High Court discharged and acquitted the detained leader of the Islamic Movement in Nigeria (IMN), Ibrahim El-Zakzaky, and his wife of all charges brought against them in 2018 on the ground that while the alleged offence was committed in 2015, the penal law under which they were charged was enacted by the Kaduna State government in 2017, thereby breaching the constitutional prohibition of retroactive criminal legislation.<sup>33</sup> El Zakzaky has been released from detention. Though the immediate reaction of Kaduna State was the announcement of its intent to appeal the ruling,<sup>34</sup> it seems highly unlikely that the constitutionality of the impugned legislation can be justified.

### 3. FRN v Justice Ofili-Ajumogobia: *Judicial Immunity*

A judge of the Federal High Court, Justice Rita Ngozi Ofili-Ajumogobia, was charged by the Economic and Financial Crimes Commission (EFCC) before a Lagos State High Court on November 28, 2016, for receiving gratification and unlawfully receiving huge sums of money. The charge was struck out in 2019 on the ground that, being a serving judge, the National Judicial Council (NJC) has to discipline her for misconduct before criminal charges can be filed (in line with Court of Appeal ruling in the case of *Nganjiwa v FRN*).<sup>35</sup> The EFCC had, however, by December 28, 2017, written a petition to the NJC against Justice Ofili-Ajumogobia, and, on September 18, 2018, the NJC rec-

commended her dismissal from the judiciary, which, on November 7, 2018, was approved by President Buhari (section 292 (1) (b) 1999 Constitution). Following this development, the EFCC filed afresh at the Federal High Court the earlier charges against the dismissed judge, but because Ofili-Ajumogobia meanwhile successfully got a court to quash the NJC recommendation for her dismissal,<sup>36</sup> the judge handling her criminal trial ruled that the quashing order nullified her dismissal and the defendant again had immunity against criminal prosecution under the *Nganjiwa* principle,<sup>37</sup> even though the quashing order did not include an order directing her reinstatement to office. This ruling is intriguing because there is a pending suit where Justice Ofili-Ajumogobia is challenging the constitutionality of her sack,<sup>38</sup> which is incongruous with the notion that she has been reinstated. This ruling makes it plain that *Nganjiwa v FRN* is a bad precedent that should be overruled.

#### 4. Orji Uzor Kalu v EFCC: *Constitutional Rule against Double Jeopardy*

Mr. Orji Uzor Kalu and his co-defendants were charged before the Federal High Court on May 16, 2016, for corruption by the EFCC and were convicted and sentenced on December 5, 2019. The trial judge, Mr. Justice Idris, was elevated to the Court of Appeal (June 20, 2018) before the completion of trial and delivery of judgment. He was, however, given a written authorization to continue the trial by the President of the Court of Appeal by section 396(7) of the Administration of Criminal Justice Act (ACJA) (which permits a judge who has been elevated to a higher court to complete pending criminal cases within an approved time to avoid another judge starting the trial *de novo*). Following an appeal by a co-defendant, Mr. Jones Udeogu, the Supreme Court, on May 8, 2020, declared section 396(7) of the ACJA to be in conflict of the Constitution and consequently nullified the entire proceedings and conviction of Mr. Jones Udeogu and ordered his retrial at the Federal High Court.<sup>39</sup> Mr. Orji Uzor Kalu was consequently released by the Nigerian authorities from

prison for the purpose of re-arraignment with Mr. Jones Udeogu. Mr. Kalu filed an action before the Federal High Court against his re-arraignment and the court (Mr. Justice Ekwo) gave an order prohibiting his retrial<sup>40</sup> based on the constitutional provision that a person who has previously been tried before and was convicted or acquitted cannot be charged again on the same facts except upon the order of a court.<sup>41</sup> This decision is erroneous on many grounds. First, because the entire proceedings and conviction were nullified as being unconstitutional by the apex court, such trial and attendant consequences (whether conviction or acquittal) were recognized no longer. Second, even assuming this was not the case, then contrary to the assertion of the judge that “the trial of (Mr. Kalu has) been pronounced a nullity by the Supreme Court in its judgment...”,<sup>42</sup> only Mr. Jones Udeogu was referred to as the appellant by the apex court and so the nullification order was directed at him alone. Following this reasoning, Mr. Kalu should have been allowed to continue his jail term. Would this have been logical? Could he have continued his jail term on a nullified trial/conviction? In effect, the Federal High Court judgment is tantamount to an acquittal. The outcome of the EFCC’s appeal against this judgment is being awaited at the time of this report.

#### 5. Joseph Nwobike SAN v FRN: *Constitutionality of Criminal Legislation*

Dr. Joseph Nwobike, a Senior Advocate of Nigeria, was charged to court for ‘attempting to pervert the course of justice under section 97(3) of the Criminal Law of Lagos State No.11 of 2011’ for which he was convicted and sentenced by the Lagos High Court. On appeal to the Supreme Court, the conviction was reversed majorly on the reasoning that the offence was not an economic and financial crime - the only offences the EFCC is empowered to investigate and prosecute. Furthermore, that the offence of ‘attempt to pervert the course of justice’ provided for in section 97(3) of the Criminal Law of Lagos State “is not defined,” thereby contravening section 36(12) of the 1999 Constitution.<sup>43</sup> The decision of the apex court that section

97(3) is unconstitutional is difficult to support. The offence of perverting the course of justice has its origin in common law. Baron Pollock succinctly described the offence as: ‘the doing of some act which has a tendency and is intended to pervert the administration of public justice’.<sup>44</sup> The list of acts which can pervert the administration of justice cannot be exhaustively listed and will depend instead on the circumstance of a case. So, all that the prosecution is required to show is a ‘specific intent to pervert the course of justice coupled with acts which are not only intended to have this result, but which factually have a tendency so to do.’<sup>45</sup> The offence is a wide one which has as its hallmark the presence of a conduct which is designed to, and which may lead to a miscarriage of justice. Section 97(3) is a reproduction, in whole, of section 126(2) of the Criminal Code Act applicable in the southern states of Nigeria which has its origin in common law. The trial judge at the High Court had found that: “The Defendant by giving money to Mr. Justice Yinusa, interacting with the Judge without the opposing counsel present, as admitted by him under cross-examination and maintaining a relationship which gave the appearance of gaining special favor”<sup>46</sup> had done act which have the tendency to pervert the course of justice. It is clearly impossible to define or outline all acts which will amount to a perversion of justice.

## IV. LOOKING AHEAD

Two off-season governorship elections – Ekiti and Osun States – will be held in 2022. The constitutional reform programme of the present National Assembly is expected to be concluded in 2022. Two seats in the Supreme Court became vacant in 2021 by retirement and death respectively. Justice Samuel Oseji died in September 2021. In 2022, three Justices will retire by age. It is expected that there will be six appointments to the court in 2022.

- 1 Henry Umoru and Levinus Nwabughogu, "NASS passes Electoral Act Amendment Bill 2021" November 10, 2021 <<https://www.vanguardngr.com/2021/11/nass-passes-electoral-act-amendment-bill-2021/>>
- 2 Jibrin Ibrahim, "The President and the Electoral Bill 2021," December 24, 2021 <<https://www.premiumtimesng.com/opinion/502313-the-president-and-the-electoral-bill-2021-by-jibrin-ibrahim.html>>
- 3 Leke Baiyewu, "National Assembly transmits amended electoral bill to Buhari for assent," January 31, 2022 <<https://punchng.com/breaking-national-assembly-transmits-amended-electoral-bill-to-buhari-for-assent/>>
- 4 Nimi Princewill and Stephanie Busari, "Nigeria bans Twitter after company deletes President Buhari's tweet," June 5, 2021 <<https://edition.cnn.com/2021/06/04/africa/nigeria-suspends-twitter-operations-intl/index.html>>
- 5 Emmanuel Akinwotu, "Nigeria lifts Twitter ban seven months after site deleted president's post," January 13, 2022 <<https://www.theguardian.com/world/2022/jan/13/nigeria-lifts-twitter-ban-seven-months-after-site-deleted-presidents-post>>
- 6 Rebecca Ejifoma, "222 Days of Twitter Ban in Nigeria and Matters Arising," January 17, 2022 <<https://www.thisdaylive.com/index.php/2022/01/17/222-days-of-twitter-ban-in-nigeria-and-matters-arising/>>
- 7 Kate Mathiesen, "The Human Right to Internet Access: A Philosophical Defense" (2012) 18 *International Review of Information Ethics* 9; Daniel Joyce, "Internet Freedom and Human Rights" (2015) 26 *European Journal of International Law* 2.
- 8 "#EndSARS Group Demands Lagos, 18 States' Panel Reports To Be Made Public, Indicted Policemen Prosecuted," November 27, 2021 <<http://saharareporters.com/2021/11/27/endsars-group-demands-lagos-18-states%E2%80%99-panel-reports-be-made-public-indicted-policemen>>
- 9 "#EndSARS Judicial Panels: 28 states complete assignment — Osinbajo," August 27, 2021 <<https://www.premiumtimesng.com/news/headlines/481498-endsars-judicial-panels-28-states-complete-assignment-osinbajo.html>>
- 10 "#EndSARS: Oyo, Ogun, Taraba, others fail to submit report one year after," December 12, 2021 <<https://punchng.com/endsars-oyo-ogun-taraba-others-fail-to-submit-report-one-year-after/>>
- 11 Olasunkanmi Akoni, "EndSARS: Lagos releases full judicial panel of inquiry reports online," December 5, 2021 <<https://www.vanguardngr.com/2021/12/endsarslagos-releases-full-judicial-panel-of-inquiry-reports-online/>>
- 12 Segun James, "Lagos White Paper Rips Apart Panel's Report on #EndSARS," December 1, 2021 <<https://www.thisdaylive.com/index.php/2021/12/01/lagos-white-paper-rips-apart-panels-report-on-endsars/>>
- 13 Fikayo Olowolagba, "Lagos EndSARS report not reliable — Lai Mohammed," November 23, 2021 <<https://dailypost.ng/2021/11/23/lagos-endsars-report-not-reliable-lai-mohammed/>>
- 14 See "Nigeria: At least 150 peaceful pro-Biafra activists killed in chilling crackdown" November 24, 2016 <<https://www.amnesty.org/en/latest/news/2016/11/peaceful-pro-biafra-activists-killed-in-chilling-crackdown/>>
- 15 Wale Odunsi, "Biafra: Army begins crackdown on IPOB, others," September 8, 2017 <<https://dailypost.ng/2017/09/08/biafra-army-begins-crackdown-ipob-others/>>
- 16 Oludare Richards, "Nnamdi Kanu finally released on bail," April 29, 2017 <<https://guardian.ng/news/nnamdi-kanu-finally-released-on-bail/>>
- 17 Cletus Ukpong, "Nnamdi Kanu speaks from detention, reveals how he was arrested in Kenya — Lawyer," July 15, 2021 <<https://www.premiumtimesng.com/news/headlines/473720-nnamdi-kanu-speaks-from-detention-reveals-how-he-was-arrested-in-kenya-lawyer.html>>
- 18 Wale Odunsi, "Yoruba Nation: Sunday Igboho goes into hiding after cancelling Lagos rally," July 1, 2021 <<https://dailypost.ng/2021/07/01/yoruba-nation-sunday-igboho-goes-into-hiding-after-cancelling-lagos-rally/>>
- 19 Kayode Oyero, "How Sunday Igboho beat security at Benin Airport before his eventual arrest," July 21, 2021 <<https://punchng.com/how-sunday-igboho-beat-security-at-benin-airport-before-his-eventual-arrest/>>
- 20 Dapo Akinrefon, "Sunday Igboho faces fresh charges in Benin Republic," July 28, 2021 <<https://www.vanguardngr.com/2021/07/sunday-igboho-faces-fresh-charges-in-benin-republic/>>
- 21 "Nigeria: At least 115 people killed by security forces in four months in country's Southeast," August 5, 2021 <<https://www.amnesty.org/en/latest/news/2021/08/nigeria-at-least-115-people-killed-by-security-forces-in-four-months-in-countrys-southeast/>>
- 22 Raphael Ede, "South-East turns battlefield for separatists, security agents, 255 killed in nine months," October 27, 2021 <<https://punchng.com/south-east-turns-battlefield-for-separatists-security-agents-255-killed-in-nine-months/>>
- 23 S. 2(1).
- 24 Sodiq Oyeleke, "IPOB: Northern coalition asks court to allow Igbo secede," October 26, 2021 <<https://punchng.com/ipob-northern-coalition-asks-court-to-allow-igbo-secede/>>
- 25 See Kabir Yusuf and Ebuka Onyeji, "Analysis: Anambra 2021 governorship election records 'historic low' voter turnout," November 10, 2021 <<https://www.premiumtimesng.com/regional/ssouth-east/494588-analysis-anambra-2021-governorship-election-records-historic-low-voter-turnout.html>>
- 26 YIAGA Africa, "Situational Statement on the 2021 Anambra Gubernatorial Election," November 6, 2021 <<https://yiaga.org/situational-statement-on-the-2021-anambra-gubernatorial-election/>>
- 27 Taiwo Amodu, "NASS Passes PIB, 13 Years After," July 2, 2021 <<https://tribuneonline.com/nass-passes-pib-13-years-after/>>
- 28 Mary Izuaka, "Buhari signs PIB, ignores concerns over 3% host communities fund," August 16, 2021 <<https://www.premiumtimesng.com/news/headlines/479516-buhari-signs-pib-ignores-concerns-over-3-host-communities-fund.html>>
- 29 Suit no: FHC/PH/CS/149/2020 by Mr. Justice Stephen Pam.
- 30 Appeal no: CA/PH/282/2021.
- 31 Kola oyekan, "A misguided decision in Attorney general of Rivers versus FIRS case," September 28, 2021 <<https://guardian.ng/features/a-misguided-decision-in-attorney-general-of-rivers-versus-firs-case/>>
- 32 Simon Kolawole, "Ending the war over VAT," September 11, 2021 <<https://www.thecable.ng/ending-the-war-over-vat>>
- 33 S. 36(8).
- 34 Abubakar Ahmadu Maishanu, "Defiant Kaduna government vows to appeal acquittal of El-Zakzaky, wife," July 30, 2021 <<https://www.premiumtimesng.com/news/headlines/476556-defiant-kaduna-government-vows-to-appeal-acquittal-of-el-zakzaky-wife.html>>
- 35 (2017) LPELR-43391.
- 36 Suit No. FHC/ABJ/CS/638/2018 (Justice Binta Nyako, Nov. 28, 2019).
- 37 Ameh Ochojila, "Court frees Justice Ofili-Ajumogobia of money laundering charges," November 20, 2021 <<https://guardian.ng/news/court-frees-justice-ofili-ajumogobia-of-money-laundering-charges/>>
- 38 "Ofili-Ajumogobia's Long Walk to Freedom" November 28, 2021 <<https://www.thisdaylive.com/index.php/2021/11/28/ofili-ajumogobias-long-walk-to-freedom/>>
- 39 Suit No: SC.622c/2019, May 8, 2020.
- 40 Suit No: FHC/ABJ/CS/73/2021, September 29, 2021.
- 41 S. 36(9).
- 42 At p. 6 of the CTC.
- 43 Suit No: SC/CR/161/2020 (December 20, 2021).
- 44 Quoted from Mitchell C. Davies, 'Due Propriety in Perverting the Course of Justice' (1993) 57 *J Crim L* 380.
- 45 *ibid*.
- 46 Note. 43, at 19.



---

# North Macedonia

Jasmina Dimitrieva  
Associate professor  
Law Faculty, University of Goce Delcev

Lydia Tiede  
Associate Professor  
Department of Political Science, University of Houston

## I. INTRODUCTION

North Macedonia experienced another challenging year in terms of public health, the economy, energy, education, and inter-ethnic relations. Political conflict was also rife. Since the 2016 elections, the Social Democratic Union of Macedonia (SDSM) with the major Albanian party Democratic Union for Integration (DUI) and a few smaller parties comprised the coalition government to lead the country. The major opposition party is the Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity (VMRO-DPMNE). In 2021, local elections took place, with the opposition winning the elections in most of the municipalities and the capitol of Skopje. The Prime Minister took responsibility for the SDSM’s poor election results and resigned from his position, which led to a serious political crisis in the country. Efforts were being made to elect a new government without holding early national elections.

Following the 2018 Prespa Agreement with Greece, the country changed its Constitutional name from the Republic of Macedonia to the Republic of North Macedonia. In return, Greece no longer blocked the country’s integration into NATO and the EU. However, expectations to commence the negotiations for EU membership, were subsequently blocked by a veto from Bulgaria requesting additional concessions from North Macedonia on issues of interest to Bulgaria.

The country is still struggling to cultivate a democratic legal culture and to implement constitutionally mandated principles related to the rule of law, including equality before the law (Articles 8 and 9 of the Constitution of North Macedonia). In particular, the slow processing of cases involving high-level officials about abuses of their positions and corruption has made the public question whether all involved officials in these crimes have been prosecuted, and whether some of these high-level cases will be statute-barred, as stipulated by the 1996 Criminal Code and its subsequent amendments (Articles 107-108).

The Constitutional Court has been working without 3 of its 9 judges since June 2021. While the majority needed to issue decisions requires the presence of only 5 judges, operating without one third of the judges casts doubt on the legitimacy of the work of the Court. Although the Parliament that selects the Constitutional judges is fully operational, it has not disclosed the reasons for the delay of judicial appointments to the public. The situation will become more dire as another Constitutional Court judge’s mandate will end in 2022. This may impede the Constitutional Court’s decision-making, in situations in which one judge is sick or unavailable for some other reason.

Construction of buildings and highways, urban planning and related environmental and communal issues continue to attract the attention of the general public and experts, as these adversely affect citizens’ standard of living, by converting public parks, roads and

school yards into construction land for private investors. In response to public outrage, the President Stevo Pendarovski, refused to sign the Law on Legalization of Illegal Buildings passed by Parliament in 2021. The President considered that the Law did not protect the public interest and infringed upon the Constitutional principles of the rule of law and equality found in Articles 8 and 9 of the Constitution and the Law provided amnesty for those involved in illegal construction. The competent Ministry submitted a fresh draft of this law to the Parliament, which reportedly legalizes the building of houses in the national parks and the protected lake coasts.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In October, local elections took place in the city of Skopje and the 80 municipalities. Biometric voters' identification technology was introduced as a requirement for voting for the first time in the country's elections. There were multiple failures of the equipment, which was hectically introduced without prior testing. While citizens had to provide their fingerprints in order to vote, they were not given information about protection and privacy of their personal data, such as what happens to their fingerprints after voting, who has access to this data, how fingerprints would be stored, protected from possible abuses and whether they would ultimately be destroyed.

As a result of the election, a female candidate, Danela Arsovska, was elected as mayor of the capital city of Skopje (which has approximately 30% of the country's population) by a public vote for the first time ever. This could have been regarded as a step forward for gender equality in politics, but only 2.46% of elected mayors in the country are female.

The ruling party SDSM won the mayoral elections in 19% of the municipalities. Following the local election results, on December 22nd the Prime Minister Zoran Zaev, who used to lead the SDSM, submitted an official resignation as the Prime Minister to the Parliament due to what he viewed as his responsibility

for the party's loss of the local elections. Zaev also resigned as a leader of the SDSM.

Zaev's resignation was followed by the entire Government's resignation as required by article 93 of the Constitution. Before the official resignations, the opposition VM-RO-DPMNE announced that they held a majority of seats in the Parliament allowing them to elect a new Government. This did not come to fruition because the opposition did not have the required majority as one MP, supportive of the opposition, failed to attend the no-confidence vote session of the Parliament held on November 11.

On December 29th, in accordance with the Constitutional procedure, the President of the Republic, Stevo Pendarovski, mandated that Dimitar Kovachevski, who replaced Zaev as the SDSM leader, form a Government. The new Government must be elected by the Parliament with an absolute majority (61 MPs), based on the proposal for the composition of the Government and its program, submitted within 20 days from December 29th. Since no early elections were held, the new Government, will continue the 4-year term of the former Government, terminating in 2024.

In August, the Government finally approved the Draft Law on State Compensation for Victims of Violent Crimes and submitted it to the Parliament for adoption. The Draft Law is based on the principle of solidarity and consistent with the Constitutional principles of human rights protection, equality and protection from forced labor. It requires payments of compensation by the state to victims of human trafficking, domestic and gender-based violence, sexual violence, homicide and serious bodily injury. This law, once adopted, will represent a novelty in the legal system, enabling the victims of violent crimes to receive not only monetary compensation and support for rehabilitation, but also symbolic social recognition of the suffering they have undergone. The obligation for compensation of victims by a state scheme is stipulated in two Conventions of the Council of Europe: the Convention on Preventing and Combating Violence against Women and Domestic Violence and the Convention on Action against Trafficking in Human Beings. Both

Conventions were ratified by North Macedonia in 2018 and 2009, respectively.

As reported previously, the criminal justice system in North Macedonia is very slow in dealing with the corruption cases, which were disclosed to the public through illegally wire-tapped conversations of the country's top official.<sup>1</sup> In 2021, the saga continued with only a few judgments pronounced by the first instance criminal court. In the so-called "Torture" case, the ex-chief of the Secret police and police officers were acquitted of the charges for ill-treatment during the arrest of a former Minister of Interior. In the case named "Target - Fortress" the same ex-chief of the Secret police from the above case was found guilty of a mass illegal wire-tapping and destruction of the wire-tapping equipment and sentenced to 12 years of imprisonment, along with 10 more defendants. The case named "Treasury" was also concluded by the first instance court. It concerns embezzlement of public funds by 4 officials, including top officials, who were found guilty and sentenced to prison for 5 to 15 years.

Other high-profile cases have been pending before the first instance criminal courts for the past 4 to 5 years. Although the complexity of the cases, the behavior of the defendants and the pandemic have contributed to the delays in the proceedings, the period of the court proceedings seems unreasonably long. These cases are in the public interest, because they involve the abuse of official position, embezzlement of public funds and misappropriation of municipal property. What is at stake is the protection of public funds and state/municipal property, as well as citizens' confidence in the rule of law and the country's justice system.

## III. CONSTITUTIONAL CASES

1. *Constitutionality and rights violations alleged for prosecution and removal of Vladimir Panchevski, past president and judge of the Basic Court of Organized Crime and Corruption in Skopje*: U.No. 161/2019 and No. 283/2020

Vladimir Panchevski, judge and prior president of the Basic Court of Organized Crime

and Corruption, was indicted by the Skopje Basic Prosecutor's Office for improperly assigning cases to judges and in 2019 the Judicial Council terminated his judgeship. In 2020, the Veles Basic Court convicted Panchevski for manipulating and abusing the electronic integrated Automatic Computer System for Court Cases Management (ACMIS) which allocates cases to the judges in the criminal court and for "directly assigning cases to handpicked judges" (U.S. State Department) between 2013 and 2016. The Constitutional Court reviewed two cases related to this matter in 2021.

#### a) *ACMIS case regarding court rules of procedure*

The Constitutional Court decided the first case, U.No. 161/2019 on January 21st, 2021. It involved the constitutionality and legality of the Court Rules of Procedure as they related to the manual distribution of cases to judges. The Court reviewed claims that these procedures violated constitutional principles related to equality, violated the European Convention on Human Rights Article 6 related to fair trial rights, and were inconsistent with the Law on the Courts. After reviewing these laws and rules, the Constitutional Court found the case inadmissible and without substantive merit.

The Court's decision found that the Law on Management of Court Cases determined the goals and scope of the ACMIS and that the Court Rules of Procedure, Article 174 properly allowed the Court president to determine the criteria for automatically distributing cases to judges as long as each judge of the court received the same number of cases. The Court held that this procedure was compatible with the Law on Management of Court cases and did not violate constitutional principles regarding the impartial assignment of judges to cases, equal access to courts, and fair trial rights.

#### b) *Panchevski's rights related to his conviction and dismissal*

On December 9th, 2021, the Constitutional Court reviewed Case No. 283/2020 related to Panchevski's request for protection of

freedom and rights (Article 110.3) guaranteed by the Constitution. He claimed that his prior conviction and the termination of his position violated several articles of the Constitution, in particular, violation of freedom of belief, conscience, thought, freedom of expression (Article 16 of the Constitution), the right to participate in political affairs (Article 23) and protection from discrimination based on political conviction (Article 9) by Decision OSZ no. 1/2020 of the Appeal Council of the Supreme Court on June 26, 2020. Panchevski's claim focused on how the procedures related to his dismissal and conviction as well as how other allegations regarding his publication of texts regarding illegal wire-tapping between 2008 and 2015 undermined his reputation and contributed to his dismissal.

The Court rejected as inadmissible, Panchevski's request regarding violations of the above-mentioned rights. The Court affirmed the Constitutional amendment and Article 52(6) of the Law on Courts stating that judicial office was incompatible with membership in a political party or execution of other public office or profession. The Court also acknowledged that although Article 10 of the European Convention on Human Rights guaranteed freedom of expression, it allowed some restrictions preventing judges' interference in the legislative and executive branches and requiring judges' impartiality.

Specifically, the Court stated that Panchevski's engagement with the media and texting related to the so-called illegal wire-tapping bombs (referred to in our Global Report of 2019) when a special law was in a process of being adopted cannot be considered compatible with Article 52 para 6 of the Law on the Courts or the basic values of the Constitution. Such acts exceeded his authority as a judge/court president and have a negative influence on the public regarding the authority and impartiality of the courts. The Court stated that a judge may express his personal or expert opinion for social issues via NGOs and judges' associations, whereby his opinion would be supported by other judges. The Court found that Panchevski's removal procedure was also in line with the law.

#### 2. *Selection of a construction company for highways construction by a special law: U no. 85/202*

On July 15th, 2021, the Parliament adopted a special law on nominating a strategic partner to construct parts of highways in the western part of the country<sup>2</sup> by a shortened procedure.<sup>3</sup> The law, *inter alia*, stipulates a direct negotiation between the Government of North Macedonia and the company, Bechtel and Enka JV, for the construction of parts of the respective highways. The new law suspends the prior Law on Public Procurement for all needed procurement of goods and services, as well as allows an average of 60 instead of 40 working hours prescribed in the Law on Labor Relations. The extended hours triggered a public statement by the Union of Trade Unions (SSM), expressing a concern for workers' rights protection.<sup>4</sup> The Anti-corruption Commission also pointed out that adoption of the impugned law by a shortened procedure ran contrary to the National Anti-Corruption Strategy and Action Plan.

The Anti-corruption Commission presented a case before the Constitutional Court with well-developed arguments, *inter alia*, claiming that the impugned law was contrary to the Constitutional principle of the rule of law, as it suspended other applicable laws and interfered with legal certainty. The impugned law has many loopholes - it was inconsistent with other laws and thus, enables arbitrary application of the law, political influence and trading with influence. Furthermore, the Anti-corruption Commission alleged that the impugned law was contrary to Article 55 of the Constitution, which guarantees market freedom, equality and regulations against monopolies. The only exceptions, the Anti-corruption Commission argued, were the interests of the defense, protection of public health and of the environment, none of which befitted the purpose of the impugned law. The impugned law, was not adopted in the public interest, and it encouraged conflicts of interest and corruption.

The Constitutional Court did not take the opportunity to examine, in substance, the complaints raised by the official anti-corruption authority in the country about this law, which

was considered controversial in the public eye. It simply rejected the request as manifestly unfounded. The Constitutional Court held that Parliament had the competence to adopt *lex specialis* when it considered it fit. The Court also declared itself incompetent to examine the incongruity between various laws, without even looking at the hierarchy of the legal acts, depending on the type and majority with which the relevant laws were adopted. The Constitutional Court held, that the exception to the usual procurement procedure allowed under the new law did not automatically open a door for impunity. The Constitutional Court found that the Government was justifiably playing the role of a market subject, not a market regulator. The Government, as the market subject by this law, nominated its “strategic partner” for building this important highways’ project. The Constitutional Court stated that it did not have competence to rule on any legal gaps in the impugned law, or to determine its consistency with the Rules of Procedure of the Parliament or, the National anti-trafficking strategy and action plan.

In a separate dissenting opinion, Judge Darko Kostadinovski explained that while the public interest behind highway contracts was clear, the means to achieve this legitimate aim should have been based on the Constitution and compatible with its fundamental values. He considered that the law breached the rule of law, as certain parts of the law in question were not sufficiently foreseeable in terms of rights and obligations for its subjects, especially for the construction workers, and thus, could lead to arbitrariness. He, *inter alia*, stated that the Court had to examine the compatibility of the suspension of the Law on Labor Relations with respect to the excessive working hours against the Constitutionally guaranteed right to rest.

The Constitutional Court did not dwell much on the public interest or the justification for the law. Likewise, it did not examine the “proportionality of the means with the aims” of the impugned law. Moreover, the Constitutional Court did not analyze the limits of the Parliamentary law-making competence in light of the fundamental value of freedom of market and entrepreneurship or the account-

ability of the Government for proper management of public funds and procurement. The Constitutional Court did not explain the rule of law principle and its tenets according to the Constitution, which would make an exception from the public procurement rules acceptable. It should be considered that, one of the high-level corruption cases, the so-called “Trajectory” case mentioned above concerns construction of a highway without a public procurement procedure. Therefore, the Constitutional Court should have examined this case on the merits and provided a thorough analysis in light of the respective Constitutional principles, which are tenets of a democratic society. The latter would have been especially important in this moment, when transparency and good financial management of public funds are the key to enable the country’s exit from economic, environmental and energy crises. The newly elected President of the Constitutional Court firmly stated that the judges were not subjected to any political pressures.<sup>5</sup> A well-reasoned decision on controversial issues and examining the substance of the complaints, would have precluded the need to even give such a statement.

### 3. Requests for protection of individual rights and freedoms

The Constitution of North Macedonia, Article 110, 1 (3), gives the right to request protection of a limited number of Constitutional freedoms and rights (the requests). From 1991 until 2021, 333 requests were submitted to the Constitutional Court.<sup>6</sup> Of 333 requests 72% were rejected as inadmissible, 16% were examined on the merits and only 1.2% of the requests were granted. In 2021, of 13 requests examined by the Constitutional Court, 7 concerned alleged discrimination on multiple grounds, such as political or ethnic affiliation, social origin, two complained of violations of multiple rights, one alleged a breach of freedom of expression, one alleged a violation of the right to political association, one a lack of implementation of an ECtHR<sup>7</sup> judgment and the last one a violation of fair trial standards.<sup>8</sup> These requests were mostly rejected as inadmissible on the basis of *ratione personae*, *ratione temporis* and *ratione materiae*, which are a lack of legal standing to file a request, non-compliance with the

2-month time-limit and requests outside of competence of the Constitutional Court.

Retrospectively, the question arises as to the reasons behind the low number of admissible and granted decisions on individual’s requests for protection of the Constitutional rights and freedoms of political association, non-discrimination, belief and expression. Whereas, one of the reasons might be insufficient resources of citizens to file such requests, other reasons might be more structural and procedural. The Institute of Human Rights, in its Profound Analysis, concludes that such requests cannot be considered an effective legal remedy within the meaning of the European Convention of Human Rights, ratified by the country in 1997.<sup>9</sup> It does not appear that the Constitutional Court is making any efforts to find out the reasons for the ineffective protection of the Constitutional rights of individuals within its competence. Furthermore, the Constitutional Court adopts its own rules of procedure for dealing with such requests. Therefore, it is in the Court’s purview to make necessary procedural changes to increase the effectiveness of this legal remedy. For example, the Court could extend the deadline for submitting such requests from 2 months to 6 months.<sup>10</sup>

## IV. LOOKING AHEAD

There are significant challenges and concerns for North Macedonia in 2022. There is a hope that the EU integration process, which has been stalled by neighboring Bulgaria, will continue despite the diplomatic efforts to reach a solution.

If the Coalition SDSM-DUI manages to persuade at least 61 MPs to cast their votes, the country will have a new Government to deal with the economic, environmental and other problems faced by the nation. However, the Government might lack support in the Parliament for implementing long needed comprehensive reforms. The opposition did not hide its intention to hold early elections after it won the local elections. So, there is a possibility that early national elections will be held in 2022. If so, the political parties will

focus on winning the elections, rather than dealing with deep-rooted policy problems.

It is of utmost importance all judges of the Constitutional Court to be elected by the Parliament as soon as possible, to avoid any paralysis in the decision-making of the court, as well as to preserve its legitimacy.

Adoption of the Law on State Compensation of the Victims of Violent Crimes by the Parliament would represent a step in the right direction to provide social justice to the most disadvantaged in society.

## V. FURTHER READING

IFIMES, 2021 North Macedonia: Is EU heading towards its next historical mistake? OSCE/ODIHR, North Macedonia, Local Elections, 17 October 2021: Statement of Preliminary Findings and Conclusions and Second Round, 31 October 2021: Statement of Preliminary Findings and Conclusions Stephan Haggard, Robert Kaufman, Backsliding: Democratic Regress in the Contemporary World Appendix, 2021, pp.115-128

1 All for Fair Trials, <http://sudskodosie.all4fairtrials.org.mk/> accessed on January 14, 2021.

2 Official Gazette of the Republic of North Macedonia, no. 163/21.

3 According to the Rules of Procedure, a bill can be adopted by a shortened procedure, provided that it is not a complex or voluminous law, when it abrogates laws or law provisions, or it harmonizes the laws with the EU *acquis Communautaire*.

4 <https://www.ssm.org.mk/mk/reakcija-na-ssm-po-odnos-na-chlenot-12-od-predlog-na-zakonot-za-utvrduvanje-na-javen-interes-i> accessed on January 1, 2022.

5 Statement of the President of the Constitutional Court <https://www.novamakedonija.com.mk/makedonija/kacarska-tvr-di-deka-nema-politichki-pritisok-vrz-ustavniot-sud/> accessed on January 5, 2022.

6 Profound Analysis of the Constitutional Court of the Republic of North Macedonia, Human Rights Institute, 2021, p. 52.

7 European Court of Human Rights.

8 [http://ustavensud.mk/?page\\_id=12559&cat\\_id=82](http://ustavensud.mk/?page_id=12559&cat_id=82) accessed on January 7, 2022.

9 *Ibid.*

10 Article 51 of the Rules of Procedure of the Constitutional Court of the Republic of North Macedonia <http://ustavensud.mk/wp-content/uploads/2017/09/Delovnik-precisten-tekst-1.pdf> accessed on January 7, 2022.



# Islamic Republic of Pakistan

Marva Khan

Assistant Professor (Tenure Track)

Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences

## I. INTRODUCTION

This report entails a synopsis of seminal judgments passed by Pakistan's High Courts and Supreme Court exercising their constitutional jurisdiction. The report covers some of the most prominent political and constitutional controversies of Pakistan-Tehreek-e-Insaf's (PTI) rule in the federal government. This includes the Presidential reference filed against J. Qazi Faez Isa, a sitting Supreme Court Judge; the excessive appointments of Special Assistants to the Prime Minister recruited by Prime Minister Imran Khan; and the constitutional limitations of secret ballots in voting procedures. Other issues addressed by the Supreme Court which are highlighted in this report include the powers of the caretaker government with respect to appointments, the question of whether constitutional court judges are immune against writ petitions; snubbing of another attempt by High Court to exercise *suo moto* powers; addressing discriminatory pension policy for deceased civil servant's daughters; and sustainable development.

Pakistan also has four provincial and one federal High Courts, which have original jurisdiction to hear constitutional cases. While there were several cases to choose from, this report sheds light on the high courts addressing the scope of presidential power to grant remissions to convicts under Article 45 of the Constitution; the much welcome end to virginity testing in Pakistan by Justice Ayesha Malik, who later became the first woman to be appointed as a judge of the Supreme Court; the evaluation of the Sindh High Court on exercising judicial review of

governmental policy regarding conducting in-person examinations during third wave of Covid-19; challenge brought against Punjab Government's appointment policy which excluded transgenders; Lahore High Court's evaluation of the scope of their review powers over the executive in the very hotly contested Al-Arabia Sugar Mills scandal launched by the PTI government; and reservations raised against the appointment procedure of judges of High Courts and Supreme Court of Pakistan.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

To date, Pakistan has had three constitutions. The current constitution enforced is titled the Constitution of Islamic Republic of Pakistan, 1973 ('Constitution'). One of the most hotly contested constitutional issue in Pakistan was marked by a clash of institutions in the country.

Justice Qazi Faez Isa is one of the 17 judges sitting in the Supreme Court of Pakistan. He took an oath for this position in 2014 and is expected to become the Chief Justice of the Supreme Court in September 2023 for almost 13 months. Known for having firm opinions, which he does not shy away from expressing, he became mired in controversy when he authored the strongly worded judgment in *Suo moto case number 7/2017*, also famously referred to as the *Faizabad Dharna* (sit in) Case. The *Tehreek-e-Labaik Pakistan* (TLP), then led by Khadim Hussain Rizvi, brought the nation's capital to a halt through its anti-state protest at Faiz-

abad. Their instigative speeches were aired live by some news channels, which also allowed them to call on supporters from across the country. The army was called in by the civilian government, to aid in their dissipation, but they refused, leading to further disruption and damage to state properties. Once the sit-in ended, a video of the then director-general of the Punjab Rangers Maj-Gen Azhar Navid Hayat came to light where he was distributing money amongst the TLP protestors.<sup>1</sup>

The Supreme Court had been hearing a case against these protests and issued a harsh judgment in *Suo moto case number 7/2017*. The Supreme Court admonished the TV channels which aired TLP's anti-state speeches live, allowing them to amass a larger crowd. J. Isa, while emphasizing that rights cannot be exercised by violating other citizen's rights, was also critical of the armed forces for their perceived support of religious parties such as TLP and using them against political parties.

In the 2018 General Elections, PTI and its chairman Imran Khan came to power after a very controversial election. For over the first decade of his political career, Imran Khan was unable to mobilize people or gain any significant support and hence, PTI never gained any representation in the Parliament. He often presented pro-right, anti-minority, and anti-establishment comments. When the 2013 general elections drew close, he became closer to the military establishment and won representation in the KPK provincial assembly and became part of the opposition in the Parliament. He used this tenure to initiate protests against the ruling parties, terming them "corrupt" and the reason behind Pakistan's weak economy. After the controversial 2018 general elections, PTI was able to form a coalition government in the Parliament, and Imran was elected as the Prime Minister.

At this point, J. Isa was already in hot water due to his anti-military stance in the judgments. The then Prime Minister Imran Khan had the Federal Board of Revenue initiate proceedings against J. Isa and his

family, to develop a case of "assets beyond means". He further instructed the President to initiate proceedings against him in the Supreme Judicial Council, which made their way to the Supreme Court. At one point, the issue became so controversial, with several news reports of intimidation faced by him and his family, that Justice Isa demanded live telecast of the court proceedings – a request which was immediately dismissed by the Supreme Court.<sup>2</sup>

In a 9-1 order, the Supreme Court threw out the reference filed against Justice Isa by terming the reference to be "invalid". However, this was not the end of the matter as seven of the 10 judges ordered the Inland Revenue Department and the Federal Board of Revenue to seek explanations from Justice Isa's wife and children on the nature and source of funding for three properties in their names in the United Kingdom and submit a report to the registrar of the Supreme Court – a measure strongly opposed by the three remaining judges on the bench.

As the kerfuffle continued, the Supreme Court took up the matter again in review under Article 188 of the Constitution. This time, the reference was closed off entirely and the order of conducting an inquiry against Justice Isa and his family by the FBR was set aside. Finally, in April 2021, the Supreme Judicial Council, headed by the then Chief Justice of the Supreme Court Gulzar Ahmed, decided that it will not pursue the matter against Justice Isa any further.<sup>3</sup>

This decision was seen as a major victory for judicial independence in Pakistan. The Supreme Court has long been seen as furthering the wishes of the establishment throughout history – validating military coups every time they are enforced, and declaring them as unconstitutional only after the end of the dictatorial reigns. The reference against Justice Isa was seen as a tool for curbing independent and critical voices on the Supreme Court. However, despite the prolonged and controversial proceedings, the final outcome was warmly welcomed by the legal fraternity and the civil society.

### III. CONSTITUTIONAL CASES

This section entails a brief synopsis of seminal judgments passed in 2021 by Constitutional Courts in Pakistan.

#### 1. *Justice Qazi Faez Isa v President of Pakistan* PLD 20 21 Supreme Court 1: Presidential Reference against sitting Supreme Court Judge

On the advice of the then Prime Minister Imran Khan, President Arif Alvi had filed a reference against J. Faez Isa (one of the 17 judges of the Supreme Court of Pakistan) in the Supreme Judicial Council, which was then taken up by the Supreme Court itself. This was one of the most hotly contested issues of PTI's tenure. The now deposed Prime Minister, and Chairman PTI Imran Khan acknowledged that his was a mistake. The state argued that J. Isa, his wife, and children owned assets beyond means, after J. Isa issued judgments critical of the state, including the military establishment. The Federal Board of Revenue was asked to conduct an inquiry. The majority opinion found the Presidential reference to be without any legal effect, and consequently quashed it. The Supreme Court dismissed the review petition filed against this judgment.

#### 2. *Government of Balochistan v Abdul Rauf* PLD 2021 Supreme Court 313: Caretaker Government

Once the National Assembly (lower house of the Parliament) and provincial assemblies complete their term or dissolve, a caretaker government and cabinet come into power till new elections are held. The main question in this case was how much power can the caretaker setup exercise? Can they make policy decisions with long-term impact, including carrying out recruitments and making permanent appointments, even if the vacancies had been announced by the outgoing government? The judgment explains how the powers of the caretaker set up are restricted to carrying out the daily functions of the state as opposed to handing over a new set-up to the incoming government. Thus, the caretaker government cannot make fresh appointments, transfers, and postings during its lim-

ited tenure. J. Ijaz-ul-Ahsan also questioned the transparency of the appointments made by the Caretaker government.

### 3. *Munsif Awan v Federation of Pakistan* PLD 2021 Supreme Court 379: Special Assistants to the Prime Minister

Former Prime Minister Imran Khan hired numerous persons as “Special Assistants to Prime Minister” during his tenure, an act for which he was vociferously criticized. Apart from the issue of extra remuneration to be paid, there was criticism that no such post existed in the Constitution, and many of these advisors failed to meet requirements of people “in service of Pakistan”, including some who held dual nationalities. J. Ijaz-ul-Ahsan highlighted that Article 260(1) excluded Special Assistant to Prime Minister from the domain of “service of Pakistan”, thus there was no constitutional bar on their appointments. With respect to the validity of their appointment, Court held that the Prime Minister was empowered under Rule 4(6) of the Rules of Business, 1973. The Court concluded that these Special Assistants were not part of the federal cabinet and stand on a completely different footing from the advisors to the President (Article 91 of the Constitution allows the President to appoint up to five advisors on the advice of the Prime Minister).

### 4. *Gul Taiz Khan Marwat v Registrar Peshawar High Court* PLD 2021 Supreme Court 391: Immunity of Constitutional Court judges against Writ Petitions

The main question under consideration in this case was whether the executive, administrative or consultative actions of the Chief Justices or Judges of a High Court are amenable to the constitutional jurisdiction of a High Court under Article 199 of the Constitution. The Court found that the word “person” as used in Article 199, does not include the Supreme Court and the High Courts. Furthermore, it was held that there is no distinction in the Courts’ judicial and administrative functions, overturning *Ch. Muhammad Akram v. Registrar, Islamabad High Court*, and others (PLD 2016 SC 961). The Court went further to include the Feder-

al Shariat Court within this protected domain as well, being one of the superior and constitutional courts.

### 5. *Presidential Reference under Article 186 of the Constitution* PLD 2021 Supreme Court 480 & PLD 2021 Supreme Court 825: Scope of Secret Ballots

The President filed a reference under Article 186 of the Constitution which grants advisory jurisdiction to the Supreme Court. Article 226 of the Constitution stipulates “[a]ll elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot”. President Arif Alvi filed a reference seeking the Supreme Court’s opinion on whether this provision only applied to elections held under the Constitution, and not on other elections, such as the upcoming Senate Elections which are conducted under the Elections Act, 2017. The Court found this reference to be maintainable, since it entailed constitutional interpretation – the exclusive domain of superior courts, including the Supreme Court. The majority opinion relied on *Niaz Ahmad v. Azizuddin and others* (PLD 1967 SC 466) and held that “secrecy is not an absolute” and emphasized the obligation on the Election Commission of Pakistan to conduct fair elections, and use any technology necessary for this purpose.

### 6. *Mian Irfan Bashir v Deputy Commissioner Lahore* PLD 2021 Supreme Court 571: High Court’s Suo Moto Powers an example of judicial overreach

In a case regarding removal of billboards, being heard at the Lahore High Court, the Court took up the matter of motorcycle riders not wearing helmets. The High Court used *suo moto* powers (without there being any petitioner or complainant) and ordered petrol stations to refuse service to any rider who came without wearing a helmet. The Supreme Court held that the High Courts cannot exercise judicial power when no dispute exists, and the High Courts cannot take up matters on their own by exercising *suo moto* powers – this order being an example of judicial overreach as opposed to judicial review. The Lahore High Court’s order was

consequently found to be unconstitutional, illegal and without jurisdiction. It must be noted here that the only court explicitly granted *suo moto* powers under the Constitution is the Federal Shariat Court. However, the Supreme Court started exercising *suo moto* powers under Article 184(3) in instances of public interest litigation. Every time any High Court has attempted to expand its constitutional jurisdiction by exercising *suo moto* powers, it has always been rebuked by the Supreme Court.

### 7. *Gul Zameen v Government of Khyber Pakhtunkhwa* PLD 2021 Peshawar 68: Presidential Remission

In this case, the Peshawar High Court clubbed together multiple petitions pertaining to President’s power to grant remission in sentences under Article 45 of the Constitution. There were two notifications issued regarding presidential remissions on the occasion of *Eid-ul-Adha* 2013 and Pakistan’s Independence Day, 2014. Both notifications entailed exceptions. The Court held that the President has unfettered power to grant remissions under Article 45. Furthermore, the Courts cannot amend the notifications, and have to apply them in totality unless it violates a law, or is found to be discriminatory. Relying on *Nazar Hussain v the State* (PLD 2010 Supreme Court 1021), the Peshawar High Court held that classification when exercising presidential power to grant pardons, commute sentences, and offer remissions is permissible as long as it is based on “reasonable” or “intelligible” differentia”.

### 8. *Al-Arabia Sugar Mills v FIA* PLD 2021 Lahore 226: Judicial Review of Executive Powers

The PTI government’s tenure was marked with vengeful cases against political opposition and their families, most of whom have been exonerated. In this case, the Federal Investigation Agency (FIA) and the Securities and Exchange Commission of Pakistan (SECP) initiated investigation of “assets beyond means” against Al-Arabia sugar mills, owned by the sons of former Punjab Chief Minister, and President PML-N Shahbaz Sharif. The aggrieved party sought judicial review of political-

ly motivated actions of FIA, SECP under Article 199 of the Constitution, due to which Suleman and Hamza Shahbaz's assets for frozen by NAB. J. Shahid Karim relied on *Brig. Rtd. Imtiaz Ahmad v. Government of Pakistan through Secretary Interior Division, Islamabad and 2 others* (1994 SCMR 2142) to assess the limits on the High Court when interfering with executive powers. The Court held that while the FIA had authority to seek information from SECP, the SECP ought to have acted as an independent authority as opposed to trying to meet the end goals of the federal government.

#### 9. *Faizullah v Punjab Public Service Commission* PLD 2021 Lahore 284: Transgender Rights

The Punjab Public Service Commission (PPSC), responsible for hiring governmental employees within the province, advertised an opening for "Lecturer (Male/Female)". A transgender candidate's application was rejected for not falling within the advertised gender binary. Citing *Muhammad Aslam Khaki and others v. S.S.P. (Operations) Rawalpindi and others* (PLD 2013 SC 188) and the Transgender Persons (Protection of Rights) Act, 2018, the Lahore High Court expressed displeasure for the discriminatory treatment meted out to the petitioner. The Court held that "being a transgender person is neither an option nor a preference but a recognized and respectable third gender all over the world." The Court further ordered the PPSC to draft a comprehensive policy for implementation of the Transgender Persons Act.

#### 10. *Ghulam Yasin Bhatti v Federation of Pakistan* PLD 2021 Lahore 605: Judicial Appointments

The 18th and 19th Constitutional Amendments changed the appointment procedure for High Court and Supreme Court Judges via Article 175A of the Constitution. The post-19th Amendment procedure has come under strict criticism for granting excessive power to the Chief Justice, often resulting in appointments based on nepotism instead of meritocracy – which

was the subject of this case. The petitioner challenged the vires of Rule 3(2) of the Judicial Commission of Pakistan Rules, 2010 in light of Article 8 (enforcement of Fundamental Rights) and Article 25 (right to equality). The application proposed that there be a formal examination and interview procedure instated, similar to the recruitment procedure of the Civil Service Exams in Pakistan (highly competitive exams for induction into the federal bureaucracy). The Lahore High Court held that the petitioner failed to show how the 2010 Rules were ultra vires the Constitution and dismissed the petition.

#### 11. *Shumaila Salman Shah v Federation of Pakistan* PLD 2021 Sindh 476: Judicial Review of policy on conducting examinations during Covid-19

The National Command and Operation Centre (NCOC) was formulated in Pakistan to oversee and issue policy directives regarding Covid-19 and its management across the country. In 2021, the NCOC ordered that student sitting for O, A, and AS Level external Cambridge Examinations will have to sit for in-person exams, as opposed to getting grades based on the School Assessed Grades since the outbreak began in Pakistan. Concerned parents filed a petition challenging this order, arguing that mandating in-person exams during the third wave violates Articles 4, 8, 9 and 25 of the Constitution (right to be dealt in accordance with law; enforcement of fundamental rights; right to life; and right to equality). Considering that the NCOC had also formulated stringent procedures for the in-person examinations, which had been shared with the British Council (responsible for conducting the exams), there was no violation of fundamental rights, and hence the Sindh High Court refused to interfere in governmental policy.

#### 12. *Province of Punjab v Kanwal Rashid* 2021 SCMR 730: Pension benefits for unmarried daughter of civil servants

The question considered in this case was whether an unmarried daughter of deceased civil servant parents can draw the pension of

both her parents simultaneously or instead, entitled to draw the pension of only one of her parents. In pursuance of a clarification of the rules issued by the Finance Department, she had been asked by the Attorney General to stop drawing pension of one of her parents, and further return the pension she had drawn in the past. Rule 4.10 of the Punjab Civil Services Pension Rules, 1963 allows unmarried daughters of deceased civil servants to keep drawing pension till they are married. The High Court held that the Finance Department had no authority to issue clarifications on the matter; even if it were legal, the notification could not have a retrospective effect; and sons can draw salary of both parents till they turn 24, hence this clarification was discriminatory and violative of Article 25 of the Constitution. This reasoning was upheld by the Supreme Court in appeal.

#### 13. *DG Khan Cement Company Ltd v Government of Punjab* 2021 SCMR 834: Sustainable development

In 2002, the Punjab Government issued a notification that new cement plants, and expansion of pre-existing cement plants will not be done in "negative area" of Districts Chakwal and Khushab, which was challenged by the petitioner for being without lawful authority and violating their constitutionally protected right to freedom of trade, and right to be heard (Articles 18, and 10 of the Constitution). The Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 does allow the Government to demarcate negative areas. J. Mansoor Ali Shah further highlighted that zoning in light of national interest and health under the Ordinance will include sustainable development in light of "climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice". J. Shah relied on Precautionary Principle, In Dubio Pro Natura and Environmental Legal Personhood, urging co-existence of man and nature, and dismissed the petition.

14. *Sadaf Aziz v Federation of Pakistan* 2021 PCrLJ 205 Lahore: End of VirginitY Testing in rape case

This is a monumental judgment passed by J. Ayesha Malik, who subsequently became the first woman to be appointed as a Supreme Court Judge in Pakistan. The petition challenged carrying out virginity testing of unmarried women in rape cases. This involved checking if the hymen was intact and carrying out the “two-finger test” which determined how “easily” admitted two fingers (ease/pain-free access attributed to promiscuity). J. Malik ruled that there was no scientific evidence supporting virginity testing and the consent form signed by the victim before this invasive examination was misleading as there were no details of what the medical examination would entail, nor any semblance of the victim retaining the right to not withdraw consent at any point, without being incriminated of adultery herself. J. Malik ruled that prior sexual history of the victim was inconsequential in rape prosecutions. J. Malik also found that virginity testing violative of the victims’ constitutionally protected rights to life, equality, privacy, and dignity (Articles 9 and 14 of the Constitution, 1973). She further noted that this practice ought to be abolished across Pakistan, and not just in the Province of Punjab. Subsequently, the Supreme Court upheld this line of reasoning in *Atif Zareef v the State*.

#### IV. LOOKING AHEAD

2022 started off with political and constitutional upheaval in the country. Resolution of vote of no-confidence was initiated by Prime minister Imran Khan, who tried to dissolve the national assembly – an attempt thwarted by the Supreme Court (detailed judgment awaited). It remains to be seen whether the newly elected Prime Minister Shahbaz Sharif will be able to complete the National Assemblies term, or give in to the opposition’s demands for fresh elections.

Justice Ayesha Malik’s appointment as the first Supreme Court Justice earlier this year was also hotly contested, and many stake-

holders are pushing for reforms in the judicial appointment process for the High Courts and Supreme Court. Whether a more inclusive system based on meritocracy will be developed remains to be seen.

#### V. FURTHER READING

Marva Khan & Atif Sheikh, *Accessible ICT as a Ray of Hope for Disability Rights in Pakistan* *Accessible ICT as a Ray of Hope for Disability Rights in Pakistan*, in ACCESSIBLE TECHNOLOGY IN THE DEVELOPING WORLD (MICHAEL STEIN & JONATHAN LAZAR EDS. OCT 2021).

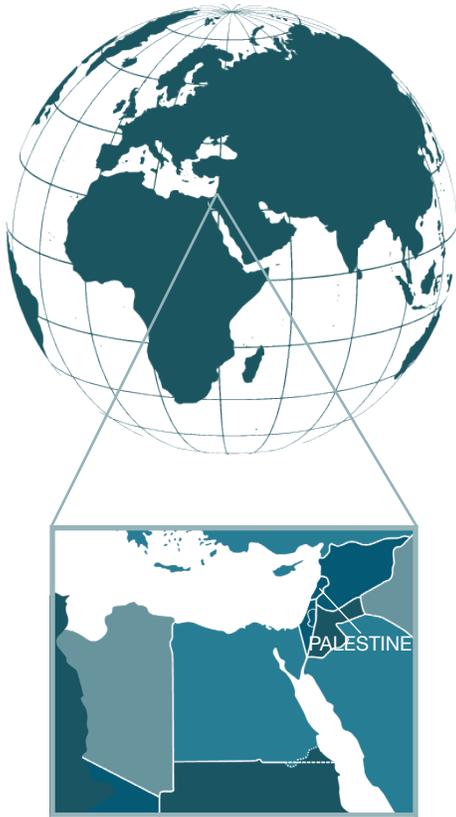
Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice (Springer) available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Flink.springer.com%2Fcontent%2Fpdf%2F10.1007%252F978-3-030-73835-8.pdf&clen=4620621&chunk=true>

LUMS Law Journal Volume 8, available at <https://sahsol.lums.edu.pk/law-journal/volume-8>.

1 <https://www.bbc.com/news/world-asia-42149535>

2 <https://www.dawn.com/news/1618062/sc-dismisses-isas-plea-for-live-telecast-of-hearing>

3 <https://www.dawn.com/news/1620968>



# Palestine

Sanaa Alsarghali

Assistant Professor of Constitutional Law, and Director of the Constitutional Studies Center, An-Najah National University, Palestine

Newar Bdair

Fellow, Constitutional Studies Center, An-Najah National University, Palestine

Saja Majdoubeh

Researcher, Constitutional Studies Center, An-Najah National University, Palestine

Farah Attatrah

Research student, Constitutional Studies Center, An-Najah National University, Palestine

## I. INTRODUCTION

2021 can be considered a year of political instability in Palestine, especially in terms of the endeavour to rebuild Palestinian democracy. Indeed, politics in Palestine has been facing an array of serious challenges in recent years. The geopolitical changes in the area, exacerbated most recently by the COVID-19 pandemic, and Israeli aggressions in May 2021 has instilled a sense of hopelessness regarding Palestinian statehood in general and has left negative impacts on Palestinian livelihoods. Against this background, there was a call for summer elections in Palestine but later they were postponed. These events have put into the spotlight, once again, the urgent necessity of resolving Palestine's constitutional processes, and have showed the type of relationship between the Palestinian institutions. Without making progress in these areas, the task of state building would be severely curtailed.

The constitutional issues of 2021 in Palestine are still very much being influenced by the consequence of the Supreme Constitutional Court's ruling of dissolving the Palestinian Legislative Council (PLC) in 2018 - a decision that took on increased relevance during the Covid-19 pandemic. Against this backdrop, Palestine President Abbas declared and renewed the state of emergency protocols in 2020, and later in 2021. Like the 2020 state of emergency declarations and extensions,

the 2021 declarations lacked constitutional ground as the Basic Law (BL) requires an approval of two thirds of the PLC in order to extend the state of emergency. In 2021, President Abbas kept enforcing state of emergency declarations with Decree- Laws based on Article 43.<sup>1</sup> In fact, this continuous action in 2021 suggests the president's willingness to replace the PLC authority/powers<sup>2</sup> by extending emergency declarations on his own.<sup>3</sup> The president had not taken such an action during the 2007 crisis, setting a worrying precedent in 2020, thus marking a significant constitutional change in the *modus operandi* of Palestinian constitutionalism.<sup>4</sup> For example, the president declared eight presidential decrees concerning the state of emergency and eight decree laws confirming the extensions of the state of emergency in 2021.<sup>5</sup>

This year's report focuses on the call for elections, separation of powers doctrine, and a constitutional case that paved the way for faster creation of administrative courts.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### General Elections

*The Palestine Report 2019* discussed the call for elections as a main requirement by the Constitutional Court in the wake of its

landmark judgment of dissolving the PLC in 2018. The court's decision to dissolve the PLC and to request the start of the election process, however, has neither solved Palestine's constitutional crisis nor helped in reviving democratization. Despite election proceedings being 'earmarked' to be held six months after the PLC's dissolution, the ruling has failed to materialize, perpetuating the absence of a functioning PLC. Political commentators have noted that the failure to hold elections might be due to a lack of political will as the leading political parties are unsure they will maintain their majority.<sup>6</sup>

Within this current political climate, the possibility for holding elections is remote, and therefore other avenues need to be explored for introduction of constitutional reform. One such avenue may lie with the Palestine Liberation Organization (PLO) - the body that represented Palestine in the Oslo Accords that initially founded the The Palestinian National Authority (PNA).<sup>7</sup> This body, arguably, has the authority to take responsibility for constitutional reform despite the weakening of its institutions in favor of the PNA's counterparts since the signing of Oslo Accords. The PLO's capacity to become 'active' in Palestine's constitutional arrangements lies on the preamble of the BL. It states:

*'...The birth of the Palestinian National Authority in the national homeland of Palestine (...) under the leadership of the Palestine Liberation Organization, the sole, legitimate representative of the Arab Palestinian people wherever they exist.'*<sup>8</sup>

The preamble provides the hierarchy of the different governing bodies of Palestine, and it is relevant during this period of political limbo when emergency powers have become the norm and questions regarding the legitimacy of the PNA, its institutions and ultimately the president himself, have arisen.<sup>9</sup>

The PLO's involvement in constitutional matters is crucial with regards to understanding how a new president could succeed Mr. Abbas. This is a question many are beginning to ask in this period of hazy political circumstances which are preventing legislative and presidential elections.<sup>10</sup> For example,

during periods of political stability, the BL stipulates in Article 37b that the PLC speaker is considered the interim replacement of the president, should it become necessary.<sup>11</sup> However, as the PLC has officially been dissolved by the 2018 judgment, this would not be possible - despite Hamas' continuing the holding of PLC sessions in the Gaza Strip (separate from the West Bank). Due to these exceptional political circumstances, the PLO could intervene and offer its own legislative assembly - Palestinian National Council (PNC) and speaker to fill the void until elections are held.<sup>12</sup>

This connection between the PLO and PNA became particularly apparent when President Abbas announced that presidential, PLC and PNC elections would be held in the spring and summer of 2021. In his first Presidential Decree-Law No. 3,<sup>13</sup> Abbas called for general elections and invited all voters of the nation to a general, free, and direct election via secret balloting in order to elect a new PLC and a new president. The presidential decree stated that the voting for the long-defunct PLC would take place on May 22, 2021, followed by presidential elections on July 31. Article 2 of the decree considered the PLC elections the first stage. Article 3 stated that the formation of the PNC shall be completed on August 31, 2021, in accordance with Article 5 of the Basic Law of the PLO. This connection between the PLC and the PLO goes back to the decree with the power of law President Abbas issued in 2006 prior to Fatah and Hamas clash when he considered all members of the PLC, including Hamas members, to be part of the PNC. This is significant as it highlights the constitutional authority of the PNC even in relation to the PLC's domestic issues.

However, this relationship between the PLO and the PNA has always been shrouded in ambiguity, and is perhaps a hindrance to the end goal of building a functioning Palestinian state. Decree law No.1 of 2021 amending Election Law of 2007 is a case in point. It stated in Article 2, the following: "The phrases 'National Authority, Chairman of the National Authority,' wherever they appeared in the Original Law, shall be replaced with the

phrases 'State of Palestine, President of the State of Palestine'."<sup>14</sup> Simply put, the relationship between all these bodies is confusing. Indeed, the exact roles of what each institution can play to resolve the current political stalemate are being continually debated - and unfortunately, it appears to be a largely academic exercise due to Palestine's status as an uncertain and unstable institutional entity.<sup>15</sup>

Whilst the call for elections in 2021 could be considered as, primarily, an effort to get the divided Palestinian house in order, it has arguably had the opposite effect. The political infighting between Fatah and Hamas, the leading political parties, is preventing any semblance of unity forming - which is crucial amidst the increasing aggression of Israeli occupation policies. In addition, Palestinian political elites may have played a part in shaking voters' trust that elections might even take place. Their decision to place restrictive age limitation (28-year-old) and financial constraints (\$20,000) on those who could run for office, suggest an attempt to maintain the political status quo (a status quo which is not preventing or even slowing down Israel's expansion policies).

Furthermore, the Palestinian elections are now indefinitely postponed due to Israel restrictions on ballots in East Jerusalem which is violating the terms of Oslo Accords. These accords state that Palestinians in Jerusalem have the right to participate in Palestinian elections. Thus, a call for an election without East Jerusalem's participation could be considered an act of ceding Palestinian territories.

## 1. Statutory Developments

In 2021 forty-eight decree laws and twenty-six presidential decrees were issued.<sup>16</sup> It was another year that confirmed the need for an active PLC and a doctrine of separation of powers to be activated instead of a sole executive authority controlling the political scene. In this section, we will shed light on the decrees-laws concerning civil society, unions, and judiciary, as they are supposed to be watchdogs on the actions taken by the executive authority. However, these decrees have confirmed the pattern of executive power abuse used since PLC suspension and dissolution.

## 2. Decree- Law No. 7 of 2021 Concerning the Amendment of the Law No. 1 of 2000 on Charitable Associations and Civil Society Organizations/ Decree- Law No. 9 and No. 17 concerning unions and federations

President Abbas has promulgated Decree-Law No. 7 of 2021 regarding the amendment of Law No. 1 of 2000 on “Charitable Associations and Civil Society Organizations”, published in the *Official Gazette* (The Palestinian Gazette) on March 3, 2021. Yet, this legislation violates some of the procedural and substantive constitutional rules stipulated in the amended Palestinian BL. Officially, for the constitutional requirements for Article 43 to be enforced (thus allowing the president to promulgate decrees that have the force of law) were not met in this case due to the absence of “intolerable necessity” as a constitutional condition to be realized. Pursuant to this debate, the enforced law on associations and bodies that was passed by the Palestinian Legislative Council in 2000 is still in conformity with the basic purpose of its adoption. It regulates all the detailed matters that govern the course of its functions. Furthermore, the timing of the promulgation of this decree-law has concurred right after the promulgation of the decree that called for holding the PLC elections, which effectively contributed to the decree being recognized as an unfulfilled “state of necessity”.

Objectively, the new amendments took place in (8) successive articles; they tackled detailed topics that infringed the parameters of independence regarding civil associations and entities, thus hindering their right to freely carry out their activities as stipulated under the provisions of Article 26 of the Palestinian BL. Article 2 included some of those amendments whereby associations and entities are obligated to submit to the competent ministry an annual action plan and an estimated budget for the coming fiscal year. The aforementioned type of associations and entities are compelled to be consistent with the said ministry’s plan and to submit a data-detailed comprehensive financial report on the preceding fiscal year. This report should reflect the impact of implemented projects and activities, without indicating the basis or standards of that reference. This in turn gives the power to the competent min-

istry to restrict the work of such associations and entities and effectively monitor their work progress. In spite of the constitutional texts that have explicitly confirmed their full-fledged freedom and independence in carrying out their activities and objectives.

Elsewhere in this decree-law, the provisions of the constitutional confiscation surpassed the provisions of the constitutional confiscation. For example, Article 4 granted the cabinet the power to establish a system that governs the terms and conditions of illegal aid and fundraising. At the same time, it granted ministry of interior, represented by the minister himself, the power to take the decision to liquidate an institution after suspending its functions, stripping away its movable and immovable funds and contents, and transferring them to the public treasury or any other equivalent Palestinian association he/she sees fit. The constitutional infringement also appeared flagrantly in Article 6 of the decree-law. It stipulated that the cabinet shall establish a system, to which it will define the fees that shall be paid by the association or a civil entity for new requests it makes to the competent ministry if such fees were not spelled out in the law. All the aforementioned refer to a clear violation of the provisions of Article 88 of the BL, which stipulates that the imposition, amendment and abolition of general taxes and fees shall only be enforced by the law, without assigning this jurisdiction to any system established by ministers. After the debates and public refusal, the decree got suspended by -the decree-law No.18 which explicitly indicated that further discussions with interested parties would take place to reach an agreement.

During this period, a number of challenges arose and showed that the democratic atmosphere was narrowed down to power struggle between the politicians over their positions in the coming stage. As a result, Decree-Law No. 9, published on March 5, 2021, postponed holding elections for trade unions, federations and popular organizations for six months. This Decree-Law, however, was overthrown by Decree- Law No. 17. There is a clear contradiction between announcing the holding of general elections and postponing union elections without justification, and then calling for union elections to proceed in the same manner. The fate of elections has come

in the hands of one person: the president. The union elections should have taken place according to their original timeline as they are a pressing necessity to create a conducive environment for the legislative elections, but Decree-Law No. 9 and Decree- Law No. (7) related to charities divided the local elections into two stages: one in 2021 and the other in 2022 (Cabinet’s Resolution No. 18/123/16 of 2021). This behavior shows a state of confusion that casts a dark shadow over the political system and increases the internal divide between the West Bank and the Gaza Strip.

## 3. Judiciary situation in light of the issuance of three decree-laws regarding the judiciary by the Palestinian president

The deep involvement of the Executive Authority in the work of the Judicial Authority has continued even after numerous attempts of pursuing judicial reforms by the PNA. One of the key judicial reforms was the formation of National Justice Sector Development Committee in 2017 which had a mandate to submit a comprehensive vision of developing the justice sector and judiciary. This committee consisted of officials together with a few academics. However, it excluded representatives from the Gaza Strip, and consulted only once with some Palestinian civil society organizations throughout its mandate that lasted for one year.<sup>17</sup> As a result of the committee’s recommendations, 2019 was the beginning of a deep crisis in the Palestinian judiciary history,<sup>18</sup> when the Permanent Judicial Council was replaced by the Transitional Judicial Council (TJC) with a mandate of one year to reform and develop the judiciary, inter alia.<sup>19</sup> The TJC’s mandate was later extended to another six months.<sup>20</sup> On 30 December 2020, President Abbas issued three decrees-laws in relation to the judiciary using his aforementioned legislative power set out in Article 43 of the BL. The three decree-laws were published on January 11, 2021, in the *Official Gazette* holding numbers 39,<sup>21</sup> 40, and 41 of 2020. The decree-laws respectively addressed the formation of regular courts, amended the Judicial Authority Law No. 1 of 2002 and established administrative courts.

This issuance, seen as an unjustified interference by the Palestinian Executive Authority

in judicial affairs, has increased the concerns among human rights actors, including civil society organizations, on the judiciary situation and the negative implications on the human rights status in the State of Palestine.<sup>22</sup> In addition, it raised the question, again, regarding the “urgency” for the decree-laws as a key prerequisite for the constitutional validity, according to Article 43. Further, the Decree-Law No. 39 of 2020, issued individually by the head of the Executive Authority, explicitly repeals whole integrated legislation of a special nature that relates to the work of the Judicial Authority: “Law of the Formation of Regular Courts No. 5 of 2001” enacted by the PLC.<sup>23</sup>

Besides questioning the decree-laws and nature of constitutionality, their substance clearly violates the basic principles guaranteed by the BL as well as Palestine’s international obligations, most notably, the principles of separation of powers and the independence of judiciary. A few examples of violating basic rights and public freedoms are explained below:

#### 4. Decree- Law No. 40 of 2020 Concerning the Amendment of the Judicial Authority Law No. 1 of 2002

One concern in the decrees is Article 5/1/h of the decree-law, which reiterated what was required in the original law: “The judge shall meet ‘health conditions’ for appointment”. The article lacks elaboration of these conditions. It may exclude people with disabilities from potential judicial appointments. The reform committee and the TJC left this matter unresolved and therefore such term is subject to broad interpretations that may constitute an explicit violation of Article 9 of the BL that states: “Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, color, religion, political views or disability”.<sup>24</sup>

In addition, Article 14 of the Decree-Law unprecedentedly offers an exception from the retirement age when it comes to the Chief Justice of the High Court (the head of the TJC). While the retirement age for judges is 70, the law by decree-law states that this provision shall not apply to the Chief Justice. This contradicts equality before law constitutional principle set out in Article 9 of the BL and the abstract and general principles of law.

This is not only in violation of Article 9, but also of Article 26 of BL which guarantees the judge’s rights to freedom of expression, association and peaceful assembly.

The following constitutional case will discuss Decree-Law No. 41 of 2020.

### III. CONSTITUTIONAL CASE NO. 10/2021, PROCEEDED BY THE PALESTINIAN SUPREME CONSTITUTIONAL COURT ON NOVEMBER 24, 2021

Constitutional Case No. 10/2021 was raised in order to challenge the constitutionality of the stipulation of Paragraph 3 of Article 54 of Decree-Law No. 41 of 2020 on Administrative Courts, published in the extra-ordinary issue No. 2 of the Official Gazette on November 11, 2021. It stated: “The provisions enacted by the Supreme Court/ Court of Cassation in its capacity as an administrative court does not concede an appeal by any means or forms.”

The Supreme Constitutional Court ruled on the above-mentioned lawsuit through the original direct action, as it is one of the accessible mechanisms under Article 27/1 of the Supreme Constitutional Court Law No. 3 of 2006 and its amendments.<sup>25</sup>

The court ruled that Paragraph 3 of Article (54) of Decree Law No 41 is unconstitutional. This is due to its contradiction with Article (30), Article (104) and Article (117) of the amended Basic Law. In addition, the court ruled that Paragraph 3, which is part of a transitional article in the decree law, contradicts and violates the principle of litigation at two levels before the administrative courts which is stated in Article (6)/1 in the same decree.

Article (6)/1 reads:

“The administrative courts are of two levels:

- 1- Administrative Court.
- 2- Supreme Administrative Court”

The court also stated that paragraph 3 affects the principle of equality between litigants who should have the same legal references. In other words, the court argued that by applying Paragraph 3, the litigation opportunities for litigants who have administrative

lawsuits at the time of the decree entry into force will not be similar to litigants whose administrative appeals will be considered after the appointment of members of the newly formed Administrative Courts. In this way, the first group of litigants will not benefit from the two level of litigations that the decree law states in Article (6)/1.

This ruling suggests that the Supreme Constitutional Court was concerned in guaranteeing constitutional justice. Therefore, In the conclusion of its ruling, the court stated that the effect of this judgment shall be enforced from the date the Decree-Law No. 41 of 2020 is published. In sum, the decision of the Constitutional Court, states that all decisions issued by the Supreme Court/ Court of Cassation in its capacity as an administrative court shall be subject to appeal starting from 11 January 2021, the date of publishing the decree.

Some constitutional and legal scholars argued that the constitutional court decision causes confusion within the legal status established by the High Court in its administrative capacity; especially decisions issued between January 11, 2021 and November 24, 2021 (the latter date being the day the judgment was issued by the constitutional court on this case).

Despite this criticism, the Constitutional Court decision might also be viewed as a way to guarantee citizen’s constitutional right of having two levels of litigation: Administrative Court and the Supreme Administrative Court, a basic constitutional right that was re-emphasized by Article 6 of the decree law.

The court ruled that Paragraph 3 of Article (54) of Decree Law No. 41 is unconstitutional. This is due to its contradiction with Article (30), Article (104) and Article (117) of the amended Basic Law. In addition, the court ruled that Paragraph 3, which is part of a transitional article in the decree law, contradicts and violates the principle of litigation at two levels before the administrative courts which is stated in Article (6)/1 in the same decree.

Article (6)/1 reads:

“The administrative courts are of two levels:

- 1- Administrative Court.
- 2- Supreme Administrative Court”

The court also stated that paragraph 3 affects the principle of equality between litigants

who should have the same legal references. In other words, the court argued that by applying Paragraph 3, the litigation opportunities for litigants who have administrative lawsuits at the time of the decree entry into force will not be similar to litigants whose administrative appeals will be considered after the appointment of members of the newly formed Administrative Courts. In this way, the first group of litigants will not benefit from the two level of litigations that the decree law states in Article (6)/1.

This ruling suggests that the Supreme Constitutional Court was concerned in guaranteeing constitutional justice. Therefore, In the conclusion of its ruling, the court stated that the effect of this judgment shall be enforced from the date the Decree-Law No. 41 of 2020 is published. In sum, the decision of the Constitutional Court, states that all decisions issued by the Supreme Court/ Court of Cassation in its capacity as an administrative court shall be subject to appeal starting from 11 January 2021, the date of publishing the decree.

Some constitutional and legal scholars argued that the constitutional court decision causes confusion within the legal status established by the High Court in its administrative capacity; especially decisions issued between January 11, 2021 and November 24, 2021 (the latter date being the day the judgment was issued by the constitutional court on this case).

Despite this criticism, the Constitutional Court decision might also be viewed as a way to guarantee citizen's constitutional right of having two levels of litigation: Administrative Court and the Supreme Administrative Court, a basic constitutional right that was re-emphasized by Article (6) of the decree law.

#### IV. LOOKING AHEAD

This year's report shows developing constitutional ethos in Palestine requires a robust framework, and a rebuilding of trust between the leadership and the people, especially after postponing the long-awaited elections. Elections are needed to reactivate Palestinian institutions that hopefully will be able to secure stability, and legitimacy, for any polit-

ical regime. Indeed, even if holding elections is currently a 'pie-in-the-sky' notion, the potential benefits of future elections are nevertheless invaluable, especially in Palestine's current context of a twin-transition: becoming a state, and a democracy that is based on respecting the separation of power doctrine.

#### V. FURTHER READING

Asem Khalil, 'Palestinian Constitutionalism: A Stalled Project' (2020) 1 *Journal of Constitutional Law in the Middle East and North Africa*, pp. 4-26.

Elias Al-Hihi, and Asem Khalil, *International Law within the Palestinian Legal System: A Call to Grant Human Rights Treaties a Special Constitutional Status* (يلودلا نون اقلال) حنم ل قوعد: بين يطلسل فلان نون اقلال ماظن لا يف صاخ يروتسد عضو ناسن الا قوق ح تادامع [تيزيل جنالاب] (May 16, 2020). <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3453191](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453191)>

Sanaa Alsarghali, 'The Dissolution of the Palestinian Legislative Council by the Palestinian Constitutional Court: A Missed Opportunity for Reform' *IACL-AIDC Blog* (1 July 2021) <https://blog-iacl-aidec.org/menaregion/1-7-21the-dissolution-of-the-palestinian-legislative-council>.

Sanaa Alsarghali, 'Palestine and the State of Exception: A Perfect Marriage?' in Simon Mabon, Sanaa Alsarghali and Adel Rushaid (eds) *State of Exception or Exceptional States: Law, Politics and Giorgio Agamben in Middle East* (I.B. Tauris, London 2022).

1 Sanaa Alsarghali, 'Palestine', in R Albert, D Landau, P Faraguna and S Drugda (eds.), *2020 Global Review of Constitutional Law*, I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2020, pp. 222-226.

2 Sanaa Alsarghali, 'ما ل ح: اناشتسالا لاج و نيطسلف' (Palestine and the State of Exception) (March 31, 2020). Available at SSRN: <https://ssrn.com/abstract=3565092> or <http://dx.doi.org/10.2139/ssrn.3565092>

3 Ibid n1.

4 Sanaa Alsarghali, "The Dissolution of the Palestinian Legislative Council by the Palestinian Constitutional Court: A Missed Opportunity for Reform" IACL-AIDC Blog (1 July 2021) <https://blog-iacl-aidc.org/menaregion/1-7-21the-dissolution-of-the-palestinian-legislative-council>.

5 <https://lab.pna.ps/ar>

6 <https://www.aljazeera.com/news/2019/12/15/are-palestinian-elections-on-the-horizon/>

7 United Nations, 'Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords)'. *UN Peacemaker*, September 13, 1993. <https://peacemaker.un.org/israelopt-osloaccord93>

8 Basic Law Preamble (2003 Amended Basic Law), <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>.

9 Ibid n3.

10 Lynk, Michael., Irene Khan, Clément Voule, 'Palestinian election: Free, fair, democratic and credible vote must include East Jerusalem', *reliefweb*, (July 26, 2021) <https://reliefweb.int/report/occupied-palestinian-territory/palestinian-election-free-fair-democratic-and-credible-vote>; Rasgon, Adam. 'EU, including Germany's Merkel, pressures Palestinians to hold elections'. *Times of Israel* (27 December, 2019) <https://www.timesofisrael.com/eu-including-germanys-merkel-pressuring-palestinians-to-hold-elections/>.

11 Basic Law Article 37/b (2003 Amended Basic Law), <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>.

12 Ibid n3.

13 <https://www.elections.ps/tabid/1127/language/en-US/Default.aspx>

14 Decree Law No (1) of 2021 Amending Decree Law No 1 of 2007 of General Elections.

15 Nathan J. Brown, 'Subordinating the PLO' <https://carnegie-mec.org/diwan/86870> Accessed April 12, 2022

16 Ibid n4.

17 Al-Haq, 'Al-Haq's Comments on the Justice Sector Development Committee's Report and Draft Law by Decree Amending the Judicial Authority Law' (3 January 2019) <https://www.alhaq.org/advocacy/6116.html> accessed 27 February 2022.

18 For more on this see: Asem Khalil and Sanaa Alsarghali, 'Palestine' in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *Global Review of Constitutional Law* (I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College 2020), Available at SSRN: <https://ssrn.com/abstract=3593594> or <http://dx.doi.org/10.2139/ssrn.3593594>

19 Decree-Law No. 17 of 2019 on the formation of the Transitional Judicial Council.

20 Decree-Law No. 27 of 2020 on the extension of

the Transitional Judicial Council mandate.

21 This was later amended by Decree-Law No. 29 of 2021 published in the *Official Gazette* on October 27, 2021.

22 For more, see: ICHR, 'Statement by Civil Coalition for the Reform and Protection of the Judiciary and the Independent Human Rights Commission on the Amendment of the Judicial Authority Law No. 1 of 2002' <https://www.ichr.ps/media-center/3023.html> accessed 2 February 2022; Al-Haq, 'Position Paper by the Palestinian Human Rights Organizations Council on Amendment of the Judicial Authority Law No. 1 of 2002' <https://www.alhaq.org/ar/palestinian-human-rights-organizations-council/17768.html> accessed 2 February 2022; Addameer, 'Civil Society Organizations Call for the Termination of All Judicial Decree-Laws' <https://rb.gy/imyurb> accessed February 2, 2022.

23 Article 24 of Decree-Law No. 39 of 2020.

24 The Palestinian Basic Law, 2003 Amended Basic Law, available at: <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>.

25 For more on the rulings of the original case, see: Muhammad Abdel Basset, *Jurisdiction of the Supreme Constitutional Court in Constitutional Matters* (Alexandria: Mansha'at al-Maaref Publishing, 2002), 609; Adel Al-Hiyari, *Constitutional Law and the Jordanian Constitutional System* (N.P, 1972), 250; Abdel Aziz Salman, *Systems of Control over the Constitutionality of Laws*, "A Comparative Study between Various Legal Systems and Egyptian Law (Cairo: Saad Samak for Legal and Economic Publications, without publication), 63.



# Panama

Carlos J Bichet Nicoletti

Research Fellow – JSD Candidate in International Human Rights Law

Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law / Notre Dame Law School, University of Notre Dame.

## I. INTRODUCTION

Two major issues marked the year 2021 for constitutionalism in Panama. On the one hand, the country saw the failure of a drive for constitutional reform through the process of a Parallel Constitutional Assembly by popular initiative. And, on the other hand, our constitutional system continued facing the unprecedented impact and challenges that the Covid-19 pandemic posed on fundamental rights. Hence, the 2021 Report on Panama, the first published in this series, focuses on these major issues, plus the outline of other important cases that have a deep impact on gender equality and environmental issues.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

There are several constitutional developments worth highlighting. On a symbolical but important note regarding gender equality, in October 2021, President Laurentino Cortizo designated Judges Miriam Yadira Cheng and Maria Cristina Chen Stanziola to the Supreme Court's Civil and Administrative Chambers, respectively. After being ratified by the National Assembly, these judicial appointments mean that starting in January 2022, there is a majority of women (5 out of 9 Supreme Court judges) serving in the Panamanian highest court for the first time in its republican history.

2021 also saw the failure of several citizen initiatives to promote a Parallel Constitutional Assembly for the drafting of a new constitution. Since its introduction in

the 2004 Constitutional Reform, the method of the Parallel Constitutional Assembly has been much discussed in Panama. In a broader context though, the public debate in Panama has been, for the last several years, marked by the need for constitutional reform and the most suitable method to make it happen. In the last three presidential terms (since 2009), candidates have won the presidency having promised, amongst other things, constitutional reform. Ricardo Martinelli in the 2009-2014 presidential period, appointed a 'commission of notables' tasked with drafting a constitutional reform package that did not pass the National Assembly. For his part, Juan Carlos Varela in the 2014-2019 period promised during his presidential campaign that if elected he would present to the National Assembly a proposal for the instauration of a Parallel Constitutional Assembly, an action that never materialized. Lastly, in 2019, incumbent president Laurentino Cortizo presented a constitutional reform package that ignited a series of protests from social movements and civil society, which was eventually withdrawn from discussion in the National Assembly as a way to calm the popular turmoil.

In 2004 the method of Parallel Constitutional Assembly was introduced through a constitutional amendment. Article 314 of the Constitution stipulates that 'a new Constitution could be adopted' through a Parallel Constitutional Assembly. This Assembly can be convened by the Executive with the support of an absolute majority of Parliament or directly by the Legislative Branch with the affirmative vote of two-thirds of its members. Moreover, this provision also creates a process of convening the Parallel

Constitutional Assembly through popular initiative, with the signatures of at least 20 percent of the number of citizens who composed the electoral registry in the previous year. The completion of this threshold would immediately trigger an announcement for the election of the Parallel Constitutional Assembly by the Electoral Tribunal without any possible challenge from the constituted powers. The doctrinal and academic debate is not settled, though, in labeling this method as yet another form of constitutional amendment or rather as a proceeding (within the constitution) of drafting a completely new constitution with the only limitation that the eventually new proposed constitutional draft could not alter the incumbent mandates and terms of previously elected authorities.

Given the climate for constitutional reform and previous failed attempts, in 2020, several popular initiatives were promoted by different civil society groups to trigger the process for the recollection of signatures. Three movements or political platforms, some of them a mixture of opposition political parties and civil society organizations, formally petitioned (acting separately) to start the process: Movimiento Justicia Social, Movimiento Panama Decide, and Firmo por Panama. In 2021 the Electoral Tribunal, through several decrees proceeded to regulate the process in accordance with Article 314 of the Constitution once the different initiatives were officially presented. Through Decree 2 of 2021, the Tribunal set up the whole process for the recollection of signatures and through several other Decrees, amended the provisions to include and regulate several technological alternatives (mainly through mobile devices and kiosks) to the recollection of physical signatures. The rationale being not only the modernization of the process as a whole but also due in part, to the COVID-19 pandemic and several mobilities and public gathering restrictions that were being enforced by the Ministry of Health throughout the six months that the signatures were to be gathered.

In the resolutions answering the petitions, the Tribunal also clarified the exact number of required signatures (20 percent of the members of the electoral registry of the previous

year) and set up that number in 580742 signatures that were to be collected in a six-month period that was to start after activists were given proper training by the Electoral Tribunal. The three initiatives had between early to mid-December 2021 for the recollection of the signatures (the exact dates depending on the moment they were cleared by the Tribunal to start the process after the activists' training sessions). By the end of December 2021, the Electoral Tribunal had to bring to an end the entire process as neither of the initiatives had attained the required number of signatures. The initiative with the most signatures was Firmo por Panama (composed of, amongst others, two major opposition parties and the Panamanian Bar Association) with a little over 11000 adhesions. In total, the three initiatives were only able to gather around 3% of the signatures, with the Movimiento Panama Decide tallying up 5005 and Movimiento Justicia Social only 320.

There are several factors that can shed some explanation for the dismal number of signatures recollected. On the one hand, the COVID-19 pandemic had deeply affected sociopolitical dynamics. At the same time, collecting the required number of signatures in only six months was not an easy feat for a country the size of Panama. Similarly, the number of signatures required for the popular initiative would amount to the inscription of more than 15 national political parties (some 35000 signatures required). Lastly, even though the popular initiative was ultimately a failure, it spurred an important political debate in the country between those who claim that the Parallel Constitutional Assembly is an undue undemocratic constraint to the constituent power and those who believe that it is a legitimate (and perhaps only viable) alternative for much-needed constitutional reform.

### III. CONSTITUTIONAL CASES

#### *1. Corte Suprema de Justicia Fallo N° S/N (10 September 2020): Female Sterilization.*

The decision is officially dated 10 September 2020 by the Supreme Court; however, it was published in the Official Gazette

N°29239-B of 12 March 2021, thus rendering official legal effect from the date of its publication in 2021. This is far from the ideal scenario, herein decisions being published in the Official Gazette months later has become normalized in Panamanian judicial practice.

The facts of the case revolve around the constitutional challenge to Articles 3 and 4.2 of Law 7 of 5 March 2013, which establish the regulatory framework for female sterilization. In concrete, Article 3 stipulates that women older than 23 years and with two or more children could request, in the public medical system, a sterilization procedure free of charges. Furthermore, Article 4.2 adds a further requirement by prescribing that the procedure can only be administered if there exists a medical need or recommendation.

The petitioners argued that said requirements contravene several constitutional provisions such as Article 4 (clause on the respect of international law), Article 17 (de minimis clause in the constitution establishing that the rights therein contained should be interpreted as a minimum that does not exclude other rights and human dignity), Article 19 (equality before the law), Article 109 (right to health), Article 110 (the State obligation to provide healthcare), and Article 112 (duty of the State to establish demographic and population policies in accordance with the country's social and economic development). Moreover, the challengers also contended that the disputed provisions violated norms and principles of international human rights law, such as Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and generally the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para), and the International Covenant on Economic, Social, and Cultural Rights.

The Procuraduria General de la Nacion (Office of the Attorney General), called to provide an opinion on the proceedings in accordance with Article 206 of the Constitution, established that, indeed the challenged norms contravened several constitutional clauses and international human rights law.

The Attorney General was of the concept that by establishing different requirements for the practice of sterilization procedures for men and women there was a violation of the principle of equality before the law based on gender and that in accordance with the Convention do Belem do Para (Art 12.1) women are to receive medical attention, including family planification, in conditions of equality with men. It also was of the opinion that by establishing a differentiated treatment for the provision of a public service, the challenged norms violated Articles 4, 17, and 19 of the Constitution, putting women in a condition of disadvantage. The opinion concluded by generally stating that reproductive health included the option to take informed choices as part of the general right to health.

The Plenary of the Supreme Court, acting as Constitutional Chamber was not of the same opinion. On a 5 to 4 vote, the majority found the impugned provisions constitutional. They argued that as standing, the norms were an advantage for women, given that previously the stipulated age for sterilization was thirty-three. The decision is full of controversial passages, such as the opinion that the requirements were not a detriment to women's reproductive health given that they only regulate the manner in which a public service is rendered and not establish any prohibitions *per se*. Furthermore, in a sweeping fashion, the majority dismisses the claim of equality before the law by stating simply that the challenged norms do not discriminate between men and women, given that although men and women are equal before the law, the latter's physical and biological characteristics, specifically motherhood, makes an intrinsic distinction in reproduction terms between sexes from which one can derive that 'in that sense, men and women cannot be put in an equal stance'. The majority confusingly added that by not taking into consideration economic and material differences (given that women with means could have the procedure in private medical practices), the challenged provisions do not discriminate between women as the requirements are the same without distinction of economic and class position. A very formalistic reading of the notion of material equality.

Four judges presented dissident votes arguing, amongst other things, that the impugned

provisions violated the principle of equality before the law, both between men and women (as men are only required to be older than 18 years old and express their will) and between women of resources who can afford private medical procedures and those who are not able. All the more strikingly, the majority did not explain the rationale behind their decisions thoroughly. They did not provide a standard of review or a proportionality test in accordance with Inter-American case law.

## 2. Corte Suprema de Justicia Fallo N° S/N (13 May 2021): Unconstitutionality of circulation restrictions on the basis of sex and identity card (or passport) number during the COVID-19 pandemic.

The decision was published in Official Gazette N° 29361 of August 2021. The impugned provisions were numerals 1 and 2 of Resolution N° 492 of 6 June 2020 issued by the Health Minister which, limited mobility during the Covid-19 pandemic. The challenged numerals stipulated that circulation restrictions during the pandemic were going to be based on sex and the numbers of national identity cards or passports in the case of foreigners. Pre-determined timeframes were established based on the last number of identity documents. Women were allowed to circulate the streets according to their numbers on Mondays, Wednesdays, and Fridays, while men could circulate in the same conditions on Tuesdays, Thursdays, and Saturdays.

The petitioner argued that these restrictions contravened Articles 27 and 38 of the Constitution, respectively, the freedoms of circulation and assembly.

The Procurador de la Administración, who was called to provide an opinion in accordance with Article 206 of the Constitution in unconstitutionality proceedings, declared that in his view, given the state of emergency declared by Cabinet Resolution 11 of 13 March 2020 due to the COVID-19 pandemic, the Minister of Health was entitled to regulate all matters not envisioned in the Sanitary Code. Thus, by using emergency regulatory powers, the impugned provisions were constitutional.

The Supreme Court decided differently, though. In a 6 to 3 majority decision, the

Court declared the unconstitutionality of the impugned provisions. In a striking difference with the previously commented case, the Court applied a proportionality test, balancing the restrictions with the aforementioned rights and also taking into account the obligation to apply a conventionality control, interpreting all the provisions against the background of the American Convention of Human Rights.

In implementing the proportionality test, the Court dismissed the allegation that the challenged provisions violated the right to freedom of assembly as there was nothing in the provisions that intrinsically affected the right to assembly. It then assessed the restrictions in light of the right to freedom of circulation. However, in answering whether a ministerial resolution would be the suitable and legitimate way to affect constitutional rights, the majority enter into a discussion of the application of the principle of legality and the hierarchy of norms. In this point, is where the Court ultimately decided that the challenged provisions were unconstitutional not because they might have violated Articles 27 and 38 of the Constitution (freedoms of circulation and assembly), or Article 22 of the American Convention of Human Rights, but because, by using an improper legal avenue, the Court was confronted with a violation of Articles 184.14 and 17 of the Constitution. Article 184.14 explicitly stipulates an attribution of the President of the Republic with the respective Minister of the adequate sector to regulate (issue bylaws) the laws issued by the National Assembly. The Minister of Health, by regulating (and filling the lacunae) stipulated in the Sanitary Code through a Ministerial Resolution that had no participation of the President of the Republic had violated Article 184.14 by issuing a norm that affected fundamental rights (freedom and assembly) without proper attribution.

The majority cited the 'Principle of Universality' as the avenue for declaring the unconstitutionality of the challenged provisions for different reasons as those argued by the petitioner in its written memorial and allegations. As the ultimate guardian of the Constitution, the Court took on the attribution of interpreting the impugned provisions against the backdrop of the Constitution as a whole

and not merely the allegedly affected rights. The case is worth highlighting, amongst other things, as Panama was one of the few jurisdictions where circulation restrictions were imposed in the midst of the pandemic based on sex. This raised important issues and challenges beyond those addressed in the decision as to news and social media constantly highlighted the concrete affectations these measures had on some vulnerable groups, such as transgender individuals whose gender identity did not match one of their official documents.

### 3. *Corte Suprema de Justicia Fallo N° S/N (7 October 2021): Constitutionality of Cabinet Resolution N° 11 of 13 March 2020 which declared a National State of Emergency.*

This decision contains the most important constitutional challenge to the regulatory regime put in place by the Panamanian government in the context of the COVID-19 pandemic by directly disputing the constitutionality of the declaration of a state of emergency by the Panamanian government on 13 March 2020. Even though the constitutional action was filed in mid 2020. It was not until October 2021 that the decision was taken and later published in Official Gazette N° 29419 in November 2021. The petitioner argued that the entire Cabinet Resolution which declared the state of emergency was unconstitutional as it violated Article 200 of the Constitution. This latter provision stipulates the attributions of the Cabinet (*Consejo de Gabinete*, composed of the President of the Republic, the Vice-President and the Ministers). The petitioner claimed that nowhere in this lengthy list of attributions and functions it is stated that the Cabinet may declare a state of emergency through a Cabinet Resolution. As a matter of fact, the petitioner argued, there is no such thing as a ‘state of emergency’ in the Panamanian Constitution. Foreseen in the Constitution is what Article 55 and 200.5 labels as a ‘state of urgency’. A state of urgency can be declared in the case of ‘external war’ or ‘grave internal disturbance of the peace and public order’. In which case, after being decreed by the Cabinet must be assessed by the National Assembly if prolonged for more than 10 days for it to be ratified or revoked by the Legislative Branch.

Throughout the pandemic, the Panamanian government has not used the legal figure of ‘state of urgency’, but rather used the qualification of ‘state of emergency’. Thus, the petitioner argued that the impugned Resolution violated Articles 55 and 200 of the Constitution, given that the ‘state of emergency’ had effects as well on the exercise of constitutional rights.

The Attorney General (Procuraduría General de la Nación), giving opinion in accordance with Article 206 of the Constitution in the proceedings, stipulated that Resolution N°11, as purposefully stated in its wording, was grounded not in the Constitutional sense of the state of urgency but in Article 79 of Law 22 of 2006 which regulates public procurement and contracts. As a matter of fact, the Resolution’s purpose is a declaratory of a state of emergency for setting up a special procedure that would streamline and give flexibility to public procurement processes in order to have the resources and materials for combatting the pandemic. Article 79 stipulates that it is an attribution of the Cabinet ‘to declare an emergency’ to allow public entities to acquire goods and services through special procedures.

The Court rejected the petitioner’s argument by stating that Article 55 was not directly applicable in the case at hand as it did not consider that the pandemic amounted to a situation of ‘external war’ or ‘grave internal disturbance of the peace and public order’ warranting a declaration of state of urgency. The Court also made emphasis on the distinction between the Colombian figure of ‘state of economic, social, and ecological emergency’ in a lengthy citation of how the Colombian Constitutional Court reviewed the imposition of this measure.

Even though it seems clear the distinction between emergency for the purposes of Article 79 of the national procurement law and urgency as espoused by Article 55 of the Constitution, which eventually leads to the recognition of the constitutionality of Cabinet Resolution N° 11, the overall case leaves a lot for discussion. As declared by Judge Olmedo Arrocha in his reasoned vote, the fact that the Executive cites Resolution N° 11 as a legal basis in communications to the Organization of American States where

it declares that certain rights have been suspended due to the Covid-19 pandemic, and the general wording of the Resolution which ‘declares a national state of emergency’ rather than a more nuanced expression, seems to ultimately conflate the Resolution with a declaration for the purposes of Article 55 of the Constitution with the caveat that it has no explicit temporal scope and avoids parliamentary control.

### 4. *Corte Suprema de Justicia Fallo N° S/N (21 December 2017): Minera Petaquilla S.A.*

The original decision in the declaration of unconstitutionality of the state contract with Minera Petaquilla S.A., as seen from the official citation of the case is of 2017. What makes this case interesting is that following the Court’s decision, the lawyers representing the company (now Minera Panama) filed several requests, injunctions, and motions, some of them completely unheard of in the Supreme Court’s constitutional practice, that stalled the final decision and publication of the case until 22 December 2022 (exactly four years) when it appeared in Official Gazette N° 29439, thus substantially delaying the decision’s legal effects.

The petitioners (two constitutional suits were merged in the proceedings) argued that Law N° 9 of 25 February 1997, which contained the contract between the State and Minera Petaquilla S.A. contravened Articles 4 (obligation to respect international law), 17 (effectiveness of rights and *de minime* clause), 19 (equality before the law), 46 (non-retroactivity of laws), 50 (primacy of public interest), 118 (guarantee of a healthy environment), 159 (attributions of the legislative branch), 184 (attributions of the President of the Republic), 257 (on the State’s rights and public goods), 259 (public interest on private concessions for exploiting natural resources), and 266 (the primacy of public procurement processes for public works and purchases) of the Constitution as well as Article 11 of the San Salvador Protocol (right to healthy environment) and 12 of the International Covenant on Economic, Social, and Cultural Rights (right to health).

Two different Attorney Generals provided an opinion in accordance with Article 206 of the Constitution arguing, that the impugned law

was constitutional. Amongst their arguments was the fact that some of the alleged constitutional provisions were to be considered programmatic, hence could not be judicialized through a constitutional action.

The Supreme Court declared that the impugned law was unconstitutional. It reached this conclusion though, through other means than those alleged by the petitioners. The Court completely avoided the discussion of impacts that open-pit mining has on environmental rights and the right to health, thus, missing a chance to provide substance to both of these rights in Panamanian constitutional practice. Instead, the Court found several procedural violations in the discussion and approval of Law 9 of 1997 (containing the contract with Minera Petaquilla S.A.) attributable to the legislative branch by side-stepping a public offering call for the mining concession. In doing so, the Court stipulated that Law 9 of 1997 contravened Articles 17, 32 (due process clause), 159, 257, and 266 of the Constitution.

Lawyers for Minera Petaquilla (Minera Panama) interposed a series of legal resources such as clarification, annulment, and another constitutional challenge. All these were dismissed by the Court arguing that the Minera Panama was not a party to the proceedings, as actions of unconstitutionality do not have parties in the traditional sense of general civil proceedings. Hence, Minera Panama had no standing to present what were clearly unfounded and dilatory legal tactics. Astonishingly though, the Court emitted these dismissals four years after the initial decision which, according to Panamanian constitutional law cannot be challenged, only clarified.

#### IV. LOOKING AHEAD

2022 envisions several important constitutional issues. Already the Supreme Court has admitted the start of proceedings against a decision of the Electoral Tribunal regarding the criminal immunity for electoral candidates. This means that the Supreme Court could review an electoral matter already adjudicated by the Electoral Tribunal, something that is far from regular constitutional practice. Noteworthy also, is the fact that a pending decision on matters of same-sex

marriage has long been overdue as a constitutional challenge was presented in 2016 with the Court having yet to emit a decision.

#### V. FURTHER READING

Sebastian Rodriguez Robles, ‘La pandemia de COVID-19 en la Republica de Panama: las decisiones del Estado durante la emergencia y sus consecuencias’ in Nuria Gonzalez Martin (ed), *Covid-19 y su circunstancia. Una visión jurídica plural de la pandemia. Volumen V: Reflexiones comapradas*. (Instituto de Investigaciones Juridicas UNAM 2021).

Sergio Garcia Rendon, ‘Panama y el Estado de Derecho durante la pandemia’ in Marie-Christine Fuchs and Leandro Querido (eds), *Covid-19, Estado de derecho y procesos electorales en Latinoamerica* (KAS – Transparencia Electoral 2021).



# Peru

César Landa Arroyo

Dr., Minister of Foreign Affairs , former President, Peruvian Constitutional Court, Professor, Pontificia Universidad Católica del Perú

Maria Bertel

Dr., Post-Doc, University of Graz

Luis A. López Zamora,

Research Fellow

Department of International Law and Dispute Resolution, Max Planck Institute Luxembourg for International, European, and Regulatory Procedural Law

## I. INTRODUCTION

In 2021, Peru celebrated 200 years of independence as a republic, yet the high expectations for the year end could not be met. Ongoing conflict between the conservative and liberal forces paralyzed the country once again, further complicated by the nearly equal strength of both political camps. Left-wing candidate Pedro Castillo won the presidential elections with a razor-thin majority and his government faced serious pressure from opposing forces, which were only partly acting within democratic rules from the beginning. Therefore, courts in general, and the Constitutional Court specifically, were once more called to uphold and/or reestablish the democratic order.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The first semester of the year was marked by the presidential election and the fight between the political parties of the two candidates running for the presidency, Keiko Fujimori of the conservative forces faced off with his opponent, Pedro Castillo, a left-wing candidate, with Castillo finally winning the election by a hair with 50.13% of the votes. Although backed by the majority of Congress, the first cabinet of the newly elected government—led by prime minister

Bellido—resigned after only 70 days. It was followed by the second cabinet, led by Mirta Vásquez. The bumpy start of the government continued: ten ministers resigned from the government in the first five months as well as several other high officials. President Castillo faced a request for vacancy in Congress, which was not successful. It does not come as a surprise then, that while writing this report in February 2022, this second cabinet was succeeded by a third (lasting only a few days), which will be followed by a fourth one. This fourth cabinet will be presented to Congress on March 8, 2022 to secure a vote of confidence, in accordance with Article 130 of the Constitution. The notable ongoing instability is due to the groups represented in Congress, where forces of the extreme right that seek to destabilize the fragile government are still represented. Therefore, the difficult relationship between the executive and the legislative powers, which has caused problems in the past already, continues.

The strained relationship between the executive and the legislative powers has impacted the constitutional order and constitutional developments, which are reflected in the activity of the Constitutional Court and other institutions meant to safeguard the respect for fundamental rights, such as the control and balance of public and private powers. This also shows the great significance of democratic institutions in Peru, which cannot be overestimated.

The first development worth mentioning are the changes in the Rules of Procedure of Congress. Before the end of the (last) legislative period, the former majority of Congress approved a fourth ordinary legislative period by amending the Rules of Procedure of Congress with the aim of preventing the upcoming attempts at reforms announced by the incoming president. The introduction of a fourth legislative period (June 13–16, 2021) would have made it possible to approve constitutional reforms, since Art. 206 of the Peruvian Constitution requires either two-thirds of the votes in Congress in two consecutive legislative periods or an absolute majority plus a referendum for the approval of a constitutional reform. The changes of the Rules of Procedure of Congress are worth mentioning in relation to their connection to constitutional developments because the amendment suddenly opened up the possibility of not only speeding up constitutional reforms but also securing them at a time when it was unclear whether it would be possible to obtain the necessary majority for the second vote on the law seeking constitutional reforms in the newly elected Congress. As we will further explain below, the Constitutional Court declared the amendment of the Rules of Procedure unconstitutional. The unconstitutionality of the amendment of the Rules of Procedure of Congress led to the revocation of the constitutional amendments adopted in this fourth ordinary legislature. Therefore, the Court did not examine the constitutional amendments themselves. Their revocation is only the consequence of the unconstitutional reform of the Rules of Procedure of Congress. These amendments consisted of three laws: the first one, Law No. 31280 would have changed Art. 112 of the Peruvian Constitution by introducing a duty to maintain residence in the country for the president of the Republic after having concluded his or her presidency. Ex-presidents would have been forced to stay in the country for a year or first obtain the permission of Congress to leave the country. The second amendment would have been applied to Art. 21 of the Constitution, which deals with national patrimony. Law No. 31304 would have strengthened the protection of cultural patrimony of the nation, i.e., ensuring that undiscovered cultural patrimony located in the subsoil and underwater areas

of the national territory would be owned by the state. The third reform planned was Law No. 31305, which would have been directed at strengthening the fight against corruption within the framework of the lifting of banking and tax secrecy.

Apart from these unsuccessful constitutional changes, several other developments all linked to the fragile democratic system are worth mentioning. First, Keiko Fujimori's party greatly called into question the election results. In that regard, the numerous claims filed by the lawyers of the loser of the presidential election, Keiko Fujimori, must be mentioned. It was the first time ever in the history of the Republic (not considering coup d'états) that an election was contested on such a massive scale. Although international observers such as the Organization of American States (OAS) or the European Union (EU), as well as national observers had no doubts that the elections were duly held, Fujimori and her party questioned the elections and took legal actions that undermine the certainty of the election results. The competent authority to decide such cases is the "Jurado Nacional de Elecciones" (National Jury of Elections), which has decided more than 1,000 cases.

Another development linked to democracy is connected to the big corruption scandal in the Peruvian judiciary ("Los Cuellos Blancos del Puerto" or "The white collars of the port") covered by the reports of the last years. For the first time in history, the National Board of Justice ("Junta Nacional de Justicia"), which is the successor of the former National Council of the Judiciary ("Consejo Nacional de la Magistratura"), dismissed active judges and prosecutors from their positions for serious ethical and administrative infractions linked to corruption. The judges and prosecutors dismissed had been involved in the corruption scandal commonly referred to as the "white collars of the port."

The last development worth mentioning is the criminal complaint filed against Alberto Fujimori (in power 1990–2000) and his ministers of health, Alejandro Aguinaga, Marino Costa, and Eduardo Yong - alleging their involvement in the forced sterilizations of more than 1,000 women, mostly from the Andean regions. During the Fujimori administration, more than 340,000 tubal ligations

and 24,000 vasectomies were performed as part of a policy to reduce poverty without the consent of the people, thus constituting serious violations of human rights. The judicial power accepted the claim and criminal proceedings were initiated.

### III. CONSTITUTIONAL CASES

In the following section, we present a selection of cases of constitutional relevance due to either their impact on the political process or on the preservation of human rights.

#### 1. *Caso Ana Estrada: Amparo Process*

At the core of this case lies the serious illness of Ana Estrada Ugarte, who was suffering from polymyositis, an incurable, progressive and degenerative disease. The Peruvian ombudsman filed an amparo claim at the Superior Court of Justice of Lima (Eleventh Constitutional Circuit Court, "Décimo Primer Juzgado Constitucional de Lima") with the aim of allowing her to legally take part in a euthanasia procedure without those third parties assisting her with the procedure being criminally prosecuted. In its decision (Exp 00573-2020-0-1801-JR-DC-11) of February 22, 2021, the judge ordered the Ministry of Health to respect Ana Estrada's decision to end her life based on the right to freedom to live and die with dignity. Moreover, the presiding judge declared Art. 112 of the Criminal Code inapplicable in the case of Ana Estrada Ugarte. This allowed third parties to intervene without being subject to criminal charges when they assisted Ana Estrada Ugarte with the euthanasia procedure. However, the request that the Ministry of Health be ordered to issue a directive regulating the medical procedure for the application of euthanasia in situations like those of Mrs. Ana Estrada Ugarte was deemed inadmissible. Therefore, the decision only applies to the case of Ana Estrada Ugarte.

#### 2. *Concentration of the national print media market: Amparo process*

Almost eight years after having filed an amparo claim at the Superior Court of Lima (Fourth Constitutional Circuit Court, "Juzga-

do Constitucional de Lima”), the Court decided the case (Exp. 35583-2013). The claimants had laid down their constitutional concerns against the acquisition of several other media companies by one media group (the El Comercio Group), arguing that the El Comercio Group controlled 80% of the written press market. Article 61 of the Peruvian Constitution states that radio, television, and other means of expression and social communication may not be subject to any form of monopoly, neither directly nor indirectly and neither by the state nor by (private) individuals. Based on this argument, the Court declared the purchase contract null and void. The judge also declared the claim well founded and considered the right to freedom of expression and information protected by the Constitution of Peru (Art. 2, Para. 4, Art. 61) and in violation of the American Convention on Human Rights (Art 13).

The decision is of utmost relevance because it is the first court case where the constitutional control of monopolies, dominant positions, and hoarding is examined and rebuked. Moreover, it is of interest that the Grupo El Comercio (which as the majority owner of Canal 4 and Canal N has cross-ownership of media outlets) in the second round of the presidential elections strongly supported Keiko Fujimori and abused its dominant position in the media market. This led to sanctions issued by the Ethics Tribunal of the Peruvian Press Council (Caso No. 006-2021 Grupo La República / CPR (América TV) y PPI (Canal N); Resolución No. 003-TdE/2021).

### *3. Provisional suspension of the selection process of the members of the Constitutional Court: Amparo Process / precautionary measure (“medida cautelar”)*

This decision on a precautionary measure in an amparo claim of the Superior Court of Lima (Third Constitutional Circuit Court, “Tercer Juzgado Transitorio”) led to the provisional suspension of the selection process of six members of the Constitutional Court. The election process was scheduled to take place in Congress on July 7–8, 2021 (Exp. 02425-2021-42-1801-JR-DC-3). The judge based its arguments on the violation of the principles of publicity, impartiality, trans-

parency, and meritocracy in the selection of candidates for the Constitutional Court since Congress had not made the necessary information public as the respective law (Art. 35 de la Resolución Legislativa n 006-2020-2021-CR) requires. According to the decision, the parliamentary act scheduling the election did not meet constitutional and international standards provided by the Inter-American Commission and the United Nations, which guarantee that integral and suitable persons with an adequate training and the legal qualifications for the position should be selected to ensure impartiality and judicial independence.

In the current process for the election of the new magistrates of the Constitutional Court, the new parliamentary commission has rejected requests to observe the process and for voluntary interviews of the candidates to be conducted by an international panel of independent jurists.

### *4. Splitting up the legislative periods: Control of the constitutionality of the amendment of the Rules of Procedure of Congress*

In its judgment of November 11, 2021, No. 918/2021 (joined cases 00019-2021-PI/TC, 00021-2021-PI/TC y 00022-2021-PI/TC), the Constitutional Court declared the amendment of the Rules of Procedure of Congress according to Legislative Resolution 021-2020-2021-CR unconstitutional. As previously explained, Legislative Resolution 021-2020-2021-CR would have introduced another legislative period, which in turn would have enabled the then majority of Congress to approve certain constitutional reforms, which, according to one alternative of Art. 206 of the Peruvian Constitution needs the approval of two-thirds of the members of Congress in two following legislative periods. The constitutional reforms planned had already obtained the first vote in Congress, and to be passed, required a second vote in the next legislative period. It was unclear whether in the newly elected Congress the constitutional reforms planned would secure the necessary majority in the second vote. Changing the Rules of the Procedure of Congress and introducing a new legislative period (by splitting the third legislative period) prior to the elections allowed for a

second vote in Congress before the elections, in which the constitutional reforms were approved. Therefore, by quickly changing the Rules of Procedure of Congress, Art. 206 Peruvian Constitution could be circumvented. It is not surprising that the Constitutional Court did not accept this change. It argued that although Congress had the power to modify its rules of procedure in an exclusive and discretionary manner, it was required to obey the limits provided by constitutional law (Recital 48). Therefore, for the Constitutional Court, the problem was not the splitting of the legislative period in abstract but its improper use, which aimed at altering compliance with the requirements of the Constitution to carry out parliamentary actions that are especially important for the legal system (Recital 40). Since constitutional reform is the only norm for which the introduced new ordinary legislative period makes a difference, the Court assumed that the purpose of splitting the third legislative period was to obtain a second favorable vote in the successive ordinary legislature (to have to hold a referendum to carry out the constitutional reform; Recital 39). To declare the legislative resolution amending the Rules of Procedure of Congress unconstitutional, the Court argued that the supremacy of the Constitution be upheld, which, according to the Court, is the idea underlying Art. 206 of the Peruvian Constitution (Recital 43). In case of constitutional reforms not undergoing a referendum (first case of Art. 206 of the Peruvian Constitution), the Constitution requires Congress to wait a certain period of time before it casts its second vote, thus guaranteeing time for parliamentary debate and reflection (Recital 45). According to the Court, the introduction of a new legislative period in Congress did not meet the constitutional requirements of Art. 206 but rather served to bypass it, for which reason it declared the legislative resolution unconstitutional (Recitals 48–49). Since the Constitutional Court exercises an ex-post-control, not only had the amendment of the Rules of Procedure taken place, but based on the changes, constitutional reforms had been passed. Based on the principle that the newly introduced fourth legislative period depends on the validity of the legislative resolution and the legislative resolution had been declared uncon-

stitutional, the Court argued that the declaration of unconstitutionality must extend to the amendments (Recital 50) but not to other laws, for which the introduction of the fourth legislative period did not make a difference. The Court therefore declared the constitutional reforms passed with the second vote in the fourth legislative period unconstitutional (Recital 51). In our opinion, we could thus classify them as *unconstitutional constitutional amendments*.

#### 5. *Right to identity and non-discrimination on the grounds of gender: Claim to prefix the name of the father with that of the mother*

The Peruvian Civil Code foresaw in its Art. 20 that the last name consists of the name of the father and the name of the mother. Up until the decision of the Constitutional Court (Sentencia 641/2021, Exp. No. 02970-2019-PHC/TC) parents could not choose in which order the surnames appeared. The case arose when Jhojana Rudas Guedes, the daughter of Marcelina Rudas Valer and Nivaldo Guedes da Rocha, reached the age of majority and solicited an identity document. The authority denied it and instructed her to first get her birth certificate corrected. Her birth certificate listed Rudas Guedes as her surname, thus listing the mother's name first and then the father's name. The background for this was that the father had initially not acknowledged paternity; thus, the birth certificate first contained only the surname of the mother, Rudas Valer. Later, when the father accepted paternity, the name was changed to Rudas Guedes. Correcting the birth certificate would have meant that Jhojana Rudas Guedes would have had her last name changed. The Constitutional Court held that this would have violated Jhojana Rudas Guedes' right to identity as well as the principle of equality and non-discrimination on the basis of sex in the choice of surnames. Therefore, the Court held that Art. 20. of the Peruvian Civil Code has to be interpreted in a manner that enables parents to choose the order of the names of the mother and the father as parts of the last name for their child. Accordingly, it ordered a re-interpretation of Art. 20 of Peruvian Civil Code, which

is in line with the Constitution, and which Congress was required to fix.

#### 6. *Installation of antennas: Right to a balanced environment*

In a decision (Sentencia 668/2021, Exp. No. 01272-2015-PA/TC) regarding municipal rules on the construction of cell phone antennas, the Constitutional Court further developed its jurisprudence on the right to a balanced environment. The amparo lawsuit in favor of the inhabitants of the constitutional province of Callao against the Provincial Municipality of Callao was brought to the Constitutional Court by IDLADS Peru, the Instituto de defensa legal del ambiente y el Desarrollo sostenible Perú. The amparo lawsuit centered on the regulation of private works by a Municipal Ordinance, which—according to IDLADS Peru—constituted a threat to the right to enjoy a balanced and adequate environment for the development of human life and health.

On this occasion, the Constitutional Court drew attention to Art. 67 of the Peruvian Constitution, which laid down the unavoidable obligation of the State to follow a national environmental policy. This implied that the State takes action and develops measures to develop or promote preservation and conservation of the environment in the face of human activities that may affect it. Such national policies must allow for the integral development of all generations of Peruvians who possess the right to enjoy an environment that is suitable for their well-being (Art. 2, Para. 2) and the right to the protection of their health (Art. 7, Recital 29). Against this background and the missing scientific consensus on the harm of electromagnetic radiation, the Court emphasized that the so-called “precautionary principle” had to be followed (Recitals 32–33). It argued that although there was no scientific consensus as to whether electromagnetic radiation from cellular telephony causes damage to people's health and alters the balanced development of the environment in which they live, the State—through its various authorities, including regional and local governments—had to adopt a preventive and precautionary approach and provide measures to regulate the provision of telecommunications services, taking into

consideration the possible damages that may be incurred by the presence of cellular telephone stations or antennas and other similar devices in areas inhabited by people to effectively ensure the preservation of the environment and the health of such citizens (Recital 34). According to the Constitutional Court, the ordinance in question regarding the constructions of antennas and similar devices on private ground was unconstitutional. The Court ordered, that until its revision the ordinance could not be applied.

## IV. LOOKING AHEAD

As in the last years, much will depend on the stability of the government and the relationship between the executive and the legislative powers. It is expected that the fourth cabinet of President Castillo, which was sworn in at the beginning of February 2022, will continue to follow the path of its predecessors. Among other plans, Castillo had announced the creation of a new Constitution and a desire to invoke a Constituent Assembly. Given the difficult situation with Congress, which is rather uncooperative when it comes to reforms, it is not surprising that this plan has already failed. It is anticipated that further reforms will be difficult to achieve. Moreover, 2022 will bring challenges for the judiciary. We can expect that the politically complicated process of the election of new magistrates of the Constitutional Court will finally take place. Additionally, the replacement of judges will be conducted and led for the first time by the aforementioned National Board of Justice, which up until now has only decided disciplinary cases.

## V. FURTHER READING

César Landa Arroyo, ‘Balance Constitucional 2021’ (*Enfoque Derecho*, 16 December 2021) <<https://www.enfoquederecho.com/2021/12/16/balance-constitucional-del-2021/>> accessed 26 February 2022.



# Portugal

Ana Teresa Ribeiro  
Professor of Law  
Universidade Católica Portuguesa

Catarina Santos Botelho  
Professor of Law  
Universidade Católica Portuguesa

## I. INTRODUCTION

Following the events that occurred in 2020, 2021 was, once again, impacted by the effects of the COVID-19 pandemic. All the more so that the year began with the imposition, in January, of a new confinement, that lasted until mid-March, due to a spike in the number of new cases<sup>1</sup>.

In addition, the year ended in political crisis since, due to the Government's inability to gain parliamentary support to approve the States' Budget, the President of the Republic determined the dissolution of the Assembly of the Republic and called for legislative elections. For its part, the Portuguese Constitutional Court (PCC) dealt with sensitive issues, providing rulings on the admissibility of medically assisted death, the enforcement of the COVID-19 regulation, the right to property, cybercrime, and the criminalization of the mistreatment of animals.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Similar to what happened in 2020, in 2021, the Covid-19 pandemic and the subsequently implemented restrictive measures hindered a promising economic growth, creating an unprecedented social and sanitary crisis<sup>2</sup> and amplifying the Portuguese democratic system's structural fragilities.<sup>3</sup> Consequently, Portugal, ranked as a "full democracy" by the Democracy Index in 2019, and downgraded to a "flawed democracy" both in 2020 and in 2021.<sup>4</sup> In 2020, there were some demo-

cratic concerns over the replacement of the fortnightly parliamentary debates with the Prime-Minister by monthly debates and the restrictions to fundamental rights and liberties outside of a constitutional state of emergency framework. This situation remained unchanged in 2021. Hence, it is not surprising that the outcome should be the same: the Portuguese democracy displays some flaws that require correction.

As the EU recovery funds spending programme became a national priority, the political debate intensified and the support from the Government's leftist allies gradually deteriorated.<sup>5</sup> In December 2021, the Parliament rejected the proposal for the 2022 State's budget. Subsequently, the President of the Republic, Marcelo Rebelo de Sousa, decided to dissolve the Parliament and to schedule general elections. From a constitutional perspective, the Parliament's dissolution was not a necessary consequence following the rejection of the aforementioned proposal. Still, the Portuguese Constitution allows the President a wide margin of discretion in this domain. In fact, while the Government's removal by the President has a substantive constitutional limitation – it may only occur "when it becomes necessary (...) in order to ensure the normal operation of the democratic institutions" (Article 195, par. 2, of the Portuguese Constitution) –, for the dissolution of the Parliament there are only the following constitutional limitations: "The Assembly of the Republic may not be dissolved during the six months following its election, during the last six months of the President of the Republic's term of office, or while a state of siege or a state of emergency is in force" (Article 172, par. 2, of the Constitution).

Nevertheless, the Parliament's dissolution did not come as a surprise, since the President had warned that he would resort to this mechanism if the proposal for the State's Budget was rejected. Still, despite that and the wide margin of presidential discretion, dissolutions come with a political cost.<sup>6</sup> In this recent case, some argued that scheduling elections would not solve the political impasse. Since the transition to democracy, the Portuguese Parliament has been dissolved seven times. The former President António Ramalho Eanes dissolved the Parliament three times, in 1979, 1983, and 1985. Former President Mário Soares dissolved the Parliament in 1987, while former President Jorge Sampaio resort to it in 2002 and 2004. And former President Aníbal Cavaco Silva dissolved the Parliament in 2011. Not all these dissolutions carried the same political weight. While some reflected an explicit political crisis within the Parliament (such as in 2011), others (such as in 2004) were more delicate, as they derived from the President's belief that the parliamentary majority did not offer enough political stability.

### III. CONSTITUTIONAL CASES

#### 1. Medically assisted death<sup>7</sup>

The President of the Republic requested the anticipatory review of constitutionality of several rules of Decree no. 109/XIV of the Assembly of the Republic, that enshrined the conditions in which the anticipation of medically assisted death shall not be punished.<sup>8</sup> According to article 2, paragraph 1, of this decree, one may only resort to the anticipation of medically assisted death if the requirements contained in this provision are observed. Thus, the recipient should be “in a situation of intolerable suffering, with definitive injury of extreme severity according to scientific consensus or incurable and fatal disease”. The President raised the question of the excessively indeterminate character of the concept of “intolerable suffering” and of the notion of “definitive injury of extreme severity according to scientific consensus”.

The PCC began by analyzing whether the admissibility of the anticipation of medically assisted death, under certain conditions, encroaches on the inviolability of human life,

enshrined in Article 24, par. 1, of the Portuguese Constitution.<sup>9</sup> In this regard, the Court (with the support of 8 out of 13 Justices) held that the right to live cannot be transformed into a duty to live under any circumstances. And, in a secular, plural, and democratic society, the tension between the duty to protect life and the respect for personal autonomy should be resolved through political-legislative options made by democratically elected representatives of the people.

To this effect, the anticipation of medically assisted death requires the creation of a legal system that safeguards both in material and procedural terms the fundamental rights here at stake, namely the right to life and the personal autonomy of those who ask for the anticipation of their death and of those who collaborate towards it. Consequently, the requirements for the admissibility of the anticipation of medically assisted death should be *clear, precise, predictable, and controllable*.<sup>10</sup> Therefore, and concerning the concept of “intolerable suffering”, the PCC found that although indeterminate, it is determinable following the rules of the medical profession. Hence, it was not considered excessively indeterminate and, to that extent, incompatible with any constitutional norm.<sup>11</sup>

However, the Court considered that the concept of “definitive injury of extreme severity in accordance with scientific consensus”, due to its imprecision, does not allow – even considering the normative context in which it is inserted – the delimitation, with the indispensable rigor, of the situations in which it can be applied.<sup>12</sup> Due to this insufficient normative density, the PCC found this rule to be inconsistent with the principle of determinability of the law.<sup>13</sup> Therefore, paragraph 1 of Article 2 of the aforementioned Decree was found to be unconstitutional (and, consequently, so was the rest of the legal text). Still, the door has been left open for future parliamentary initiatives that meet the normative density requirements it demands.<sup>14</sup>

#### 2. Covid-19 jurisprudence

##### 2.1. Crime and punishment<sup>15</sup>

To begin, it is worth mentioning that the Portuguese constitutional review model is hybrid, as it shares characteristics of the

monist/Kelsenian model, as well as traits of the diffused model of judicial review. In comparison with the Italian, German, and Spanish systems of judicial review, the Portuguese system has some unique features, since ordinary courts are also given powers of judicial review. Accordingly, when ordinary judges find the norm(s) applicable to a case to be unconstitutional, they do not suspend the process and address that question to the PCC. Instead, they shall immediately dismiss the application of such norm(s) in the judicial process (Article 204 of the Portuguese Constitution). Nevertheless, matters before the ordinary courts can still be referred to a court outside the ordinary jurisdiction – the PCC – following an appeal.<sup>16</sup>

In 2020, during the constitutional state of emergency, the Portuguese Government issued Decree no. 2-B/2020, aimed at executing Presidential Decree no. 17-A/2020, which renewed the state of emergency.<sup>17</sup> In order to enforce emergency measures dictated by the ongoing sanitary crisis, such as lockdowns, curfews, and others, Article 43, par. 6, of Decree no. 2-B/2020 increased in one third the minimum and maximum punishment for the crime of disobedience.<sup>18</sup> Later on, a court of first instance in Lisbon (*Tribunal Judicial da Comarca de Lisboa Norte*), in a case where the defendant refused to comply with a police injunction to return home and observe the undergoing lockdown, stroke down Article 43, par. 6, of Decree no. 2-B/2020, on the grounds of unconstitutionality.

As required by the Portuguese Constitution, the Public Prosecution Office (*Ministério Público*) appealed to the PCC<sup>19</sup>, who then analyzed whether the Executive has the constitutional power, under a state of emergency, to issue norms in matters concerning crime and punishment (an area that is constitutionally reserved to parliamentary statute).<sup>20</sup> The Court (with the support of 3 out of 5 Justices) held that the power to execute the declaration of a state of emergency, encompassing all the measures suitable and necessary to restore constitutional normalcy, is directly based on Article 19, par. 8, of the Constitution. The Executive is thus empowered to issue secondary norms in matters of crime and punishment. To the PCC, such power is based on an extraordinary title (the

declaration of a state of exception); is temporary and precarious (not lasting beyond the declaration itself); and is aimed at a specific goal (to restore constitutional normalcy).<sup>21</sup> Furthermore, if one were to draw the opposite conclusion, that would render the entire constitutional regime of states of exception virtually inoperative and nonsensical. Still, the emergency power of the Executive “is far from arbitrary or untrammelled: on the one hand, its exercise is bound to the principle of proportionality and subject to judicial review; on the other hand, the Executive is politically accountable to the President and to the Parliament (article 190), the latter having the specific constitutional duty to monitor the execution of the declaration of a state of emergency or state of siege (article 162).”<sup>22</sup>

## 2.2. Crime of disobedience<sup>23</sup>

During the state of constitutional emergency, the health authorities determined the prophylactic isolation of a citizen, at his home, for 14 days. However, he decided to go outside during that period of isolation and, according to Article 348, paragraph 1, a), of the Criminal Code and to Article 3, paragraphs 1, b), and 2, of Decree no. 2-B/2020 of the Presidency of the Council of Ministers, such behavior was framed and punished as a crime of disobedience.

This person was charged and tried for disobedience, but the Criminal Court refused to apply the Government’s decree, considering that a new crime was at stake, for which the latter lacked powers. Following the defendant’s acquittal, the Public Prosecutor appealed against this decision to the PCC.

The Court started by questioning whether the inclusion of a disobedience crime in the Government’s decree was truly innovative. In fact, the Law of the State of Siege and State of Emergency (LSSSE) already enshrined, in its Article 7, the crime of disobedience.<sup>24</sup> Thus, the Government would only have exceeded its powers if it had gone beyond that legal provision.

The PCC also assessed the compatibility of the decree with the principle of determinability of the law. It held that there is a legal and logical continuity between the LSSSE, the authorization by Parliament, the Declaration of State of Emergency by the Presi-

dent of the Republic, and the Government’s decree that implements it. Thus, the main issue was to determine whether such a continuity (particularly important whenever a disobedience crime is at stake) allowed any average person to establish a connection between a prohibited conduct (leaving home) and the diplomas that contained such ban. In this case, the Court considered that the sequence of relevant acts allowed any person to understand the connection between the Declaration of the State of Emergency and its execution. For this reason, the PCC unanimously concluded that the Government had not created a new crime by criminalizing the violation of the duty of confinement and, consequently, had not exceeded its powers. Therefore, this rule was not unconstitutional and the decision of the Criminal Court was reversed.

## 3. Fundamental rights<sup>25</sup>

This judgment was issued on a concrete review of constitutionality, following a request presented by a landlord who had sought to oppose to the renewal of a rental contract, pertaining to a property where a commercial establishment of effective historical interest was installed. In fact, Civil Courts, invoking Acts nos. 6/2006 and 42/2017, had granted the tenant’s request to renew the contract for another five years. Which, according to the landlord, led to the encroachment of his right to property, since it precluded the exercise of a contractual ability that ought to be seen as one of the powers to administer one’s assets (which fall within the sphere of protection afforded by such right).

The PCC began by stressing that the right to property never takes on an absolute or preeminent value in relation to other opposing rights and values, such as the social-utility reasons associated to rental contracts. And, in this case, there were at stake not only the protection of a commercial activity, but also the protection of cultural heritage (one of the State’s fundamental tasks), and the preservation of the identity-related characteristics of the urban fabric. Taking these interests into account, the Court considered that the challenged norms restricted the right to property in an appropriate, necessary, and proportionate way. In fact, the continued presence of an establishment

or entity can play an important role in preserving the value of the historical, cultural, and social interests associated with both the activity undertaken there and the characteristics of the rented place itself. Furthermore, the PCC pointed out that this measure was not excessive, since it was limited to a restricted universe and with a small impact on the owner’s legal position. And, finally, the Court considered that it safeguarded the tenant’s and the community’s interests, without weighing disproportionately on the owner’s right.

Furthermore, the application of the aforementioned diplomas was not considered to be retroactive (as argued by the appellant), since this situation was not fully consolidated at the time of their entry into force. And, finally, the PCC concluded that, contrary to the landlord’s arguments, his legitimate expectations and legal security had not been affected, since he had tried to oppose to the continuity of the rental agreement only after the entry into force of the new regime.

For these reasons, the challenged norms (and the interpretation they were given by the courts) were not considered to be unconstitutional.

## 4. Cybersecurity<sup>26</sup>

In this ruling, issued under an anticipatory review of constitutionality, requested by the President of the Republic, the PCC analysed the Article 5 of Decree no. 167/XIV, of the Assembly of the Republic (which amended article 17 of Act no. 109/2009 – known as the Cybercrime Law).

In fact, while Article 17 of the Cybercrime Law determines that the seizure of electronic mail and records of communications of a similar nature shall be determined by a judge, Article 5 of Decree no. 167/XIV allowed for this measure to be decided by a “competent judicial authority”.

Firstly, the Court assessed this rule considering the restriction it entailed on the fundamental right to secrecy of correspondence and other means of private communication and on the fundamental right to protection of personal data in the field of computerized systems (Articles 34 and 35 of the Portuguese Constitution). And it concluded that the rules in question allow an interference in electronic correspondence and may also

enable the access to personal data (since the operations necessary to seize electronic mail entail a considerable risk of access to protected personal data relating to the user's correspondence, traffic, and content data).

Since these rules clearly imply the restriction of fundamental rights, their effect shall be limited to what is strictly necessary. And, in this context, judicial intervention constitutes an additional guarantee in weighing the rights and freedoms affected by the course of a criminal investigation. Therefore, a legal solution that waives the need for a prior authorization from a judge concerning criminal investigation acts that involve the invasion of citizens' private sphere will only be constitutionally legitimate in exceptional cases and if there is a full, robust, and well-defined justification. These conditions were not met by the provision in question, which was, for this reason, considered to be unconstitutional, for violating the fundamental rights to the inviolability of correspondence and communications and the protection of personal data in the context of the use of information technology, as well as the principle of the reserve of the court, the specific competences of the investigating judges, and the constitutional guarantees of defence in criminal proceedings (contained in Article 32 of the Portuguese Constitution).

#### 5. Mistreatment of companion animals<sup>27</sup>

This ruling was issued under a concrete review of constitutionality of Article 387 of the Penal Code (which punishes the death and mistreatment of companion animals with the penalty of imprisonment).

The PCC stressed that since the restriction of fundamental rights (deprivation of liberty, due to imprisonment) shall only take place under certain conditions, namely, to ensure the protection other constitutionally enshrined rights or interests, regardless of its ethical underpinnings, the criminalization of the maltreatment of animals shall only be acceptable assuming that the Constitution provides for the protection of animals.

This means that the legislative evolution (which allowed the acknowledgment of animals as more than mere objects), albeit well-founded and presumably irreversible, is not enough to justify this deprivation of liberty. This must stem from the Constitution it-

self, which, according to the Court, does not provide in that sense. In fact, even though the protection of nature and the environment is constitutionally enshrined (in Article 66), this only allows a collateral protection to animals (as part and in connection to the environment, and not due to their intrinsic value). While the norm under analysis protects animals as such, as individuals.

One could argue that the constitutional interest in criminalizing this offence lies not in the intrinsic import of animals, but in their importance for human beings, and is therefore based in the principle of human dignity. But due to its highly abstract nature, this principle is unsuited to provide the basis for the restriction of fundamental rights. Human dignity is at once somewhat more and somewhat less than a right. It confers unity and coherence on the whole constitutional system, providing guidance to the interpretation of constitutional norms. But, invoked in an isolated manner, it could be used arbitrarily, given its extreme subjectivity.

For this reason, the Court judged Article 387 of the Penal Code to be unconstitutional, although it noted that this does not signify that the Portuguese Constitution is opposed to the criminalization of this conduct. It merely means that, at the moment, the Constitution does not provide the necessary basis for this effect. Still, this decision only has *inter partes* effects, which means that the aforementioned norm is still in effect.

### IV. LOOKING AHEAD

In January 2022, general elections might change the Portuguese political scenario. In 2019, after a second 'contraption' (a post-electoral alliance known as '*geringonça*') failed, the centre-left socialists from the Socialist Party (PS) decided that they would rule as a minority government and seek support from the communists (PCP), the Left-Block (BE), and the 'People, Animals and Nature Party' (PAN) when necessary.<sup>28</sup>

There is a lot of anticipation towards the imminent general elections. After a dissolution of the Parliament, alterations in the equilibrium of political powers are expected. Regarding the electoral processes, many have argued for an amendment to the legislation

that could address several problems, such as the very low turnout rate and the distance between the electorate and the politicians.

The restriction of fundamental rights during the pandemic and the rulings of unconstitutionality by the PCC in 2020 and 2021 might perhaps incentive some changes: (i) as asked for by the majority of the Portuguese literature, a sanitary emergency law could be approved to circumvent a "chaotic body of law and administrative regulations";<sup>29</sup> (ii) in parallel, will 2022 bring a much-awaited constitutional amendment? The last amendment was in 2005 and, since then, the Parliament was unable to approve a constitutional amendment due to the high rigidity of the Portuguese amendment process;<sup>30</sup> (iii) furthermore, state liability cases over unconstitutional measures approved during the pandemic might arise.<sup>31</sup>

### V. FURTHER READING

Botelho, Catarina Santos, "Transnational constitutional law", R. Grote, F. Lachenmann, & R. Wolfrum (eds.) *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford University Press, 2021.

Gil, Ana Rita, "Detention of Unaccompanied Migrant Children in Portugal: A Call for a Clinical Sociology Intervention", Yvonne Vissing and Sofia Leitão (eds.) *The Rights of Unaccompanied Minors – Perspectives and Case Studies on Migrant Children*, Springer, 2021, pp. 201-228.

Rocha, Armando, *Private Actors as Participants in International Law – A Critical Analysis of Membership under the Law of the Sea*, Hart Publishing, 2021.

Queiroz, Benedita/ Maduro, Miguel Poirares, "You can't sit with us. Discrimination against women in football: a commentary of the case Mariyam Mohamed vs. Asian Football Confederation (AFC) elections", *Revista do Direito do Desporto*, III (9), 2021.

Vicente, Marta, "Portugal", Bridge Network Country Report, 2021, available at <https://bridgenetwork.eu/report/portugal/>

- 1 See Decree no. 3-A/2021, of 14 January, and Decree no. 4/2021, of 15 March.
- 2 Ana Teresa Ribeiro and Catarina Santos Botelho (2021), 'Portugal', in Richard Albert, David Landau, Pietro Faraguna & Simon Drugda (Ed.), *2020 Global Review of Constitutional Law*, I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 242-246.
- 3 Miguel Piores Maduro and Catarina Santos Botelho (2021), 'Democracia', in Ricardo Paes Mamede & Pedro Adão e Silva (coord.), *Governar em Estado de Emergência – O Estado da Nação e as Políticas Públicas 2021*, IPPS-ISCTE, 83-88.
- 4 *Democracy Index 2020 – In sickness and in health?*, and *Democratic Index 2021: the China challenge*, The Economist Intelligence Unit, 2021 and 2021. See Miguel Piores Maduro and Catarina Santos Botelho (2021), 'A democracia portuguesa em tempos de pandemia', in M. P. Maduro & P. Kahn, *Democracia em Tempos de Pandemia*, Princípiã, Cascais, 163-182.
- 5 Catarina Santos Botelho, "2022 parliamentary elections in Portugal: The seductiveness of socialism?", *Diritti Comparati – Comparare i diritti fondamentali in Europa*, 2022, available at: <https://www.diritticomparati.it/2022-parliamentary-elections-in-portugal-the-seductiveness-of-socialism/>
- 6 *Idem, ibidem*.
- 7 Judgement no. 123/2021, of 15 March.
- 8 We follow closely the ruling's summary provided by the PCC, available at: <https://www.tribunalconstitucional.pt/tc/en/acordaos/20210123s.html>.
- 9 Par. 23 to par. 32.
- 10 Pars. 38 and 39.
- 11 Par. 38 to par. 43.
- 12 Par. 44 to par. 48.
- 13 See Articles 2, 24, and 165, no. 1, par. b), of the Portuguese Constitution.
- 14 Teresa Violante, *Not Yet but Soon: The Portuguese Constitutional Court's decision on medically assisted death*, *VerfBlog*, 2021/3/22, <https://verfassungsblog.de/not-yet-but-soon/>.
- 15 Judgement no. 352/2021, 27 May. We follow closely the ruling's summary provided by the PCC, available at: <https://www.tribunalconstitucional.pt/tc/en/acordaos/20210352s.html>.
- 16 See Catarina Santos Botelho, "Between Shared and Unique Constitutional Traits – The Portuguese Constitutional Tradition", *Working Paper - European Law Institute Project on Common Constitutional Traditions (CCT) in Europe*, 2020, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3688308](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3688308).
- 17 Declared in Presidential Decree no. 14-A/2020.
- 18 Provided for in Article 348, par. 1, b), of the Penal Code.
- 19 Article 280, par. 3, of the Portuguese Constitution.
- 20 See Article 165, par. 1, c), of the Portuguese Constitution.
- 21 Pars. 10 to 12.
- 22 Par. 12.
- 23 Judgement no. 921/2021, of 9 December. We follow closely the ruling's summary provided by the PCC, available at: <https://www.tribunalconstitucional.pt/tc/en/acordaos/20210921s.html>.
- 24 By "infringement of the provisions of the declaration of the state of emergency or of the state of emergency or of this law, in particular as regards its execution."
- 25 Judgement no. 115/2021, of 4 February. We follow closely the ruling's summary provided by the PCC, available at: <https://www.tribunalconstitucional.pt/tc/en/acordaos/20210115s.html>.
- 26 Judgement no. 687/2021, of 30 August. We follow closely the ruling's summary provided by the PCC, available at: <https://www.tribunalconstitucional.pt/tc/en/acordaos/20210687s.html>.
- 27 Judgement no. 867/2021, of 10 November. We follow closely the ruling's summary provided by the PCC, available at <https://www.tribunalconstitucional.pt/tc/en/acordaos/20210867s.html>.
- 28 Catarina Santos Botelho, "2022 parliamentary elections in Portugal: The seductiveness of socialism?", *cit*.
- 29 Teresa Violante and Rui Lanceiro, *The Response to the COVID-19 pandemic in Portugal: A success story gone wrong*, *VerfBlog*, 2021/3/04, <https://verfassungsblog.de/the-response-to-the-covid-19-pandemic-in-portugal-a-success-story-gone-wrong/>
- 30 Catarina Santos Botelho, "Constitutional narcissism on the couch of psychoanalysis: Constitutional unamendability in Portugal and Spain", *European Journal of Law Reform*, 21 (3), 2019, pp. 346-376.
- 31 Carla Amado Gomes, "Responsabilidade civil extracontratual do Estado e(m) estado de emergência: Dez breves notas", *e-Pública*, 7 (1), 2020, pp. 170-183.



# Romania

Bianca Selejan-Guțan  
Professor  
„Lucian Blaga” University of Sibiu

Elena-Simina Tănăsescu  
Professor  
University of Bucharest

## I. INTRODUCTION

2021 was a year without major formal constitutional events in Romania - elections, referendums, constitutional amendments. However, the constitutional stage was animated by politically-generated instability and motions of non-confidence. In respect of the constitutional case law, the central point of debate was the differences between the Court of Justice of the European Union and the Constitutional Court of Romania on the application, by the national courts, of the primacy of the EU law. Unlike in 2020, although the Covid-19 pandemic dominated the social and economic life, it was little reflected in constitutional cases.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### a. Political turmoil

After the December 2020 elections, a governmental majority was created by three political entities - PNL (Liberal National Party), USR (Union Save Romania) and UDMR (Democratic Union of the Hungarians in Romania), leaving PSD (Social Democratic Party) and the new-entry right-wing extremist AUR (Alliance for the Union of Romanians) in the opposition. The new coalition had an optimistic start, but the atmosphere has quickly deteriorated, especially due to the ongoing pandemic, but also to social and economic problems generated by different views among the members of the gov-

ernmental coalition on the redistribution of national wealth (claims on increased salaries and pensions, allocation of public funds for local communities etc.) and reaction to the global energy crisis. Therefore, after a few months marked by rough moments between the main members of the parliamentary majority (PNL and USR), the coalition broke in September 2021 and a long governmental crisis began. In October 2021 the government was dismissed by the Parliament through a motion of non-confidence. Ideological and contextual differences between the two “traditional” parties (PNL and PSD) led to a long period of governmental instability, with two presumable prime ministers appointed by the President of Romania, one of them rejected by the Parliament and one withdrawing his candidacy. After more than two months of an ad interim government, whose constitutional prerogatives were drastically limited, with the pandemic crisis developing dramatically without significant measures being taken, on 25 November 2021 a new government was officially instated on the basis of a new majority formed by PNL, PSD and UDMR. The Constitutional Court had a marginal involvement in the matter, being called to solve a “legal conflict of a constitutional nature” related to the motion of censure, but the decision did not influence the outcome of the crisis.

### b. EU law havoc

One of the most important constitutional issues in 2021 was the controversy on the relationship between domestic and European Union law generated by an ill-fat-

ed dialogue between the case law of the Court of Justice of the European Union (ECJ) and the Romanian Constitutional Court (RCC). The saga started in 2018 and revolved around changes brought to the laws on judicial organization which established a Special Section of the General Prosecutor's Office (SIOJ), endowed with the competence to investigate criminal offences allegedly committed by magistrates. The creation of this section was seen from the onset as a potential pressure tool on magistrates and a threat against the independence of the judiciary; therefore, its dismantlement has been repeatedly required or suggested by domestic and international actors (see our previous reports 2017-2018). The RCC found most of the legislative changes establishing the SIOJ constitutional, but the political majority installed after the 2020 elections repeatedly claimed its intentions to remove the section by once again changing the legislation (the draft law is still pending in Parliament).

Meanwhile, various Romanian courts referred preliminary questions to the ECJ, asking it whether SIOJ is compatible with EU law and particularly with the European Commission's Decision 2006/928 establishing the Cooperation and Verification Mechanism on Romania (CVM). The first ECJ judgment on the matter came on 18 May 2021, with the Court firmly stating that, since "Decision 2006/928 falls, as regards its legal nature, its content and its effects over time, within the scope of the Accession Treaty", it is "binding in all its elements for Romania", and it "imposes on Romania to achieve as soon as possible the benchmarks it sets out. As long as these objectives are formulated in clear and precise terms and are not subject to any conditions, they have direct effect." Thus, the ECJ made clear the nature and legal effects of the original legal instrument which is the CVM, enjoining binding and direct effect to the benchmarks fixed by this mechanism. At the same time, the ECJ has put forward a substantive approach of the rule of law, thus creating a potential mandatory character for the recommendations made by the European Commission in its regular reports (para.2 of the operative part of the judgment).

Specifically, on the SIOJ, the ECJ held that its creation may represent an additional guarantee for the independence of magistrates only if it did not "allow complaints to be introduced in an abusive manner, inter alia for the purpose of interfering in sensitive ongoing cases, including complex and high-profile cases related to high-level corruption or organized crime" (para.218). Nonetheless, since the ECJ noted that "practical examples drawn from the activities of the SIOJ are such as to confirm the realization of the risk [...] that this section is akin to an instrument of political pressure" (para.219), in fact it summoned national courts to consider its creation in breach with EU law unless justified by an objective purpose which it serves exclusively. The ECJ ruling on this part clearly sets a guide for national judges by stating that they can disapply provisions of national law which are contrary with EU law (CVM requirements included), with a direct reference to the ones related to the SIOJ.

The response from the RCC came on 8 June 2021, through Decision 390/2021 [*nota bene*: the hyperlink leads to the decision translated in English, which is missing the dissenting opinion!] in which the Court practically tried to render void of any effect the ECJ judgment by forbidding national judges to apply EU law directly and disregard contrary domestic provisions: "a national court does not have the power to analyse the conformity of a disposition of the internal law, *declared constitutional by virtue of Article 148 of the Constitution*, with the European law provisions". Although the RCC accepted that, according to Article 148, Romania cannot adopt a piece of legislation contrary to its obligations as a Member State of the EU, it suggested that this prohibition would have "a constitutional limit based on the concept of national constitutional identity". However, the Court does not define this concept, there or elsewhere. The RCC also held that, since the ECJ established that obligations arising from Decision 2006/928 of the European Commission are mandatory for all national authorities which collaborate with the European Commission (para. 177), "only the political authorities have the duty to respect and apply this judgment and *not the courts*." In the most controversial part of the deci-

sion, which set the basis for the conflict with the ECJ's view, the RCC held that the operative part of the ECJ judgment where the European Court said that a national court is authorized to disregard a national law that is contrary to the scope of Decision 2006/928 "has no basis in the Romanian Constitution because the CVM reports elaborated according to Decision 2006/928 (...) are not rules of European law that a national court can directly apply by disregarding a national norm. The national judge cannot be put in the situation of deciding to apply with priority some recommendations, to the detriment of a law declared constitutional by the Constitutional Court". Moreover, the RCC even declared that the ECJ ruled *ultra vires* when empowering national judges to disapply national law contrary to EU law. In a dissenting opinion, two judges drew attention to the fact that the ECJ judgment of 18 May 2021 could have become an additional argument for the Romanian Constitutional Court to change its approach with respect to EU law, especially by reference to Decision 137/2019 (see our 2019 Report) where the RCC stated that the Commission's Decision 2006/928 has no constitutional relevance in Romania and refused the dialogue with the ECJ on this matter. The dissenting judges also reminded that Article 148(4) of the Constitution binds all public authorities to guarantee the implementation of the obligations resulted from the act of accession and from the primacy of EU law over the domestic one.

In the meantime, judges who observed the ECJ judgment of 18 May 2021 and disappplied SIOJ related provisions were subjected or threatened to be subjected to disciplinary proceedings before the Superior Council of Magistracy. Other courts started to address preliminary questions to the ECJ on this new development of the domestic case law.

The next episode of this saga took place towards the end of the year, when the ECJ issued a second judgment on the same matter, stating once more the primacy of EU law, and particularly the importance of EU standards on rule of law and independence of the judiciary. In its *Euro Box* judgment of 21 December 2021, the ECJ ruled on five requests of the national judges that

concerned “the problem of the application of the Constitutional Court’s case law on the rules of criminal procedure applicable in cases of fraud and corruption is liable to breach the Union’s law, especially the dispositions that aim at the protection of the financial interests of the Union, the guarantee of the independence of judges and the value of the rule of law, as well as the principle of primacy of the Union’s law”, including the decisions of the Romanian Constitutional Court by which the gathering of evidence with the help of the intelligence service was “declared unconstitutional”, thus determining the retroactive exclusion of evidence from criminal cases but also the decision of the RCC by which it declared illegal the composition of the 5-judges panels of the High Court of Cassation and Justice (see our report on 2018). Once again, the ECJ reiterated the need for the national courts to apply with priority the EU law, disregard contrary provisions, including constitutional case law, that would affect the rule of law and legal certainty: “the decisions of the constitutional court are binding on the ordinary courts, on the condition that national law guarantees the independence of the said constitutional court especially from the legislative and executive powers (...). However, if the national law does not guarantee this independence, these dispositions of the EU law are opposing to such a regulation or national practice, as such a constitutional court is not able to ensure the effective jurisdictional protection required by Article 19 para. 1 second point, TUE.” The ECJ thus implied that the required guarantees of independence of the RCC are missing in these cases (all of them being decisions given in “legal conflict of constitutional nature” and affecting pending and final high-level corruption cases) and therefore that national judges must be able to disregard such a case law. The Romanian Constitutional Court answered with a press release signed by its president, saying that “the conclusions of the CJEU judgment according to which the effects of the principle of the EU law primacy are binding upon all authorities of a member state, without any obstruction from a national legal disposition, including the constitutional ones, and according to which the national courts are bound to automatical-

ly disapply any national rule or practice contrary to a disposition of the EU law, require the revision of the current Constitution. In practice, the effects of this Judgment can occur only after the revision of the Constitution which cannot be made *ex officio*, but only at the initiative of certain legal subjects, with the observance of the procedure and in the conditions prescribed in the Constitution of Romania” [our translation from the Romanian original version]. Albeit only a press release, thus a non-legal document, this statement may easily become a form of pressure against national judges, because the law on the status of magistrates provides as a disciplinary offence the “disregard of the Constitutional Court’s decisions”.

To conclude on this point, the ECJ and the RCC still remain far from a true dialogue on the issue of the primacy of EU law, including the acts establishing and related to the CVM. 15 years after Romania’s accession to the EU, the CVM has not been lifted yet and the issues that determined its establishment - high degree of corruption and the problems regarding the independence of the judiciary - are still not solved.

### c. Pandemic stillness

Finally, the Covid-19 pandemic carried-on, but with the peculiarity that it caused no major constitutional controversy with regard to restrictions imposed in order to contain it. Romania displays a rather low rate of vaccination and a relatively strong undercurrent of antivaxxers. However, public authorities constantly avoided to make compulsory vaccination or the Covid-19 green pass, while limitations to fundamental rights have been mild and their implementation scarcely observed, including by enforcement agencies.

## III. CONSTITUTIONAL CASES

### a. Institutional arrangements

The trend of declaring laws unconstitutional on formal grounds, especially for not observing the principle of bicameralism was maintained. However, the formalism of the RCC stopped short with regard to compulsory

consultations during the legislative process in Parliament. Thus, although the Romanian Constitution provides for consultative bodies next to Parliament (Legislative Council, Economic and Social Council, Superior Council of Magistracy, Supreme Council for Defence) the case law of the RCC is fluctuating with regard to their constitutional relevance. Thus, the legislation dealing with Covid-19 pandemic has been adopted without Parliament even asking for the opinion of the Legislative Council or of the Economic and Social Council and the RCC validated this rather unconstitutional behaviour (see Decisions 221/2020, 381/2021, 391/2021).

The rights-based case law of the Constitutional Court was not very rich in 2021. However, some interesting cases and trends can be singled out.

### b. Social and economic rights

The economic crisis that accompanied the pandemic is associated to a series of cases regarding social and economic rights.

For example, the rights of persons with disabilities were put forward in an unconstitutionality claim against an Emergency Governmental Ordinance from 2017, which removed from legislation some measures for creating and maintaining jobs intended for this group of persons. The RCC found that the legislator has, according to Article 50 of the Constitution, the obligation to provide as many measures of this kind as possible, and that the same article forbids their removal from legislation. Therefore, the respective dispositions were declared unconstitutional (Decision 906/2020, published in 2021).

In the same vein, the Court decided that the exclusion, on grounds of the moment of the occurrence of the disability, from the benefit of reducing the retirement age for persons insured through the social insurance system for lawyers has a discriminatory character and therefore is unconstitutional (Decision 60/2021).

The discrimination on grounds of sex was the object of an interpretative decision, where the Court held that the law concerning the laying

off of public servants on the sole ground of reaching the retirement age is constitutional only insofar as the female public servants are allowed to require the continuation of their work, in identical conditions with the male public servants (as the retirement age is different for the two categories), i.e. until 65 years of age (Decision 112/2021).

### c. The right to a fair trial

A controversial decision from the point of view of the effects upon the judiciary made the first page, although apparently, was meant to reinforce the right to a fair trial. The unconstitutionality complaint before the Court regarded the articles from the Code of Criminal Procedure on the reasoning of court decisions. After reminding that the reasoning is an element of “transparency of justice”, the Court held that, in order to effectively ensure the fair trial guarantees, the said reasoning must take place at the moment of the pronouncement of the judgment. Therefore, said the court, “the provisions of the Code that allow the issuing of the reasoning at a later date are unconstitutional for breaching Article 21 (3) of the Constitution, on the right to a fair trial „as interpreted, according to Article 20 of the Constitution, according to Article 6 of the European Convention on Human Rights”, as well as for going against “human dignity and the rule of law as supreme values set forth by Article 1(3) of the fundamental law.” The RCC invoked the role of the judiciary “to re-establish justice within the society” by acts with full legitimacy, therefore the absence of motivation should be considered as an absence of such legitimacy. In the Court’s view, the execution of a judgment that has not been motivated at the moment of its pronouncement is contrary to human dignity.

The decision comprises a dissenting opinion of two judges, which emphasized the absence of the competence of the RCC to decide on the merits: the unconstitutionality referral should have been rejected as inadmissible because the Court cannot replace the Parliament in its legislative function: “in the present case, the author of the referral asked the Court to impose the obligation for the

judge to give the reasons of the judgments on the date of pronouncement, which would mean the transformation of the Constitutional Court in a positive legislator, which is not allowed by the Constitution”. Moreover, the interpretation by the Constitutional Court of ordinary legislation apart from their conformity with the Constitution is breaching, in the view of the dissenting judges, Article 126(3) of the Constitution which sets forth that the High Court of Cassation and Justice ensures the uniform interpretation and application of laws by the other courts.

Following the decision, the Parliament has changed the provisions declared unconstitutional, requiring the reasoning to be provided at the moment of the pronouncement and allowing the delay of the pronouncement for maximum 120 days for meeting this requirement.

### d. The right to compensation of damages for unlawful pre-trial custody

In Decision 136/2021 the RCC found unconstitutional the compensation - provided by the Code of criminal procedure - for damages incurred by persons against whom unlawful pre-trial custody has been imposed. The claimant considered that the legal provision is too restrictive because it makes patrimonial compensation conditional exclusively on the criterion of the unlawfulness of the deprivation of liberty, proven through a final court decision in that sense, and refuses to take into account an alternative criterion, namely the acquittal decision handed down by a court. The reasoning of the RCC started from the observation that Article 52(3) of the Constitution provides for a mandatory compensation to the person aggrieved in case of a miscarriage of justice, but went further and considered that the Romanian Constitution provides a higher standard of protection for individual liberty than the Convention for the Protection of Human Rights and Fundamental Freedoms since this right to compensation is recognized in respect of both unlawful and unjust deprivation of liberty. Decoupling the concept of miscarriage of justice from a judicial assessment of the case at hand, based on the evidence presented in that specific case, the RCC declared that

a miscarriage of justice may also be found from the point of view of the outcome of the trial, which may be found unjust by the person that may have been acquitted, without specifying the criteria used for this evaluation of the case at hand. In a separate opinion two judges draw attention to the fact that such a decision trespasses the powers of the legislative by extending the civil liability of the State beyond the scope of the concept of miscarriage of justice as covered by Article 52(3) of the Constitution and Article 5(5) of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of Protocol No 7 to that Convention.

### e. Pandemic-related cases

Covid-19 pandemic has not been high on the agenda of the RCC in 2021. If in 2020 the RCC invalidated three laws in as many cases it had before it, in 2021 it dealt with 10 cases (Decisions 307/2021, 327/2021, 343/2021, 344/2021, 381/2021, 391/2021, 392/2021, 416/2021) and invalidated only one provision of the law specifically meant to deal with Covid-19 pandemic (Law no. 55/2020). Thus, in Decision 392/2021 the RCC ruled that administrative acts issued on the basis of Law no.55/2020, which have limited applicability for only 30 days, cannot be challenged in court within a time limit that ensures effectiveness of the review and that is contrary to the constitutional principle of free access to justice (Article 21 of the Constitution). Consequently, Law no.55/2020 has been revised and a special period of limitation for the judicial review of those administrative acts has been created.

However, in all remaining cases, the RCC either found that applicants have not substantiated enough their claims or decided that legal provisions were constitutional and, when imposing restrictions on fundamental rights, respected the principle of proportionality. In this context it is interesting to note a reversal of case law adopted only in 2020: in Decision 458/2020 the RCC found that measures restricting the free circulation of persons may only be imposed through a law and not through an order of the minister of public health even if the prerogative was granted to the min-

ister by the relevant law on public health, while in Decisions 381/2021 and 416/2021 it found that the same type of measures (and more specifically, wearing masks indoors and out-doors) have both a preventive-educative and a punitive-repressive character and they may imposed through an administrative act because this has been made possible by a law on public health. Equally interesting is the fact that the judge who wrote the majority opinion in Decision 458/2020 this time changed his mind and signed a concurrent opinion in Decision 381/2021 explaining why mandatory masks are a limitation of individual freedom.

[riviste.unimi.it/index.php/NAD/article/view/15826/670](https://riviste.unimi.it/index.php/NAD/article/view/15826/670)

B. Selejan-Guțan, *A Tale of Primacy Part. II: The Romanian Constitutional Court on a Slippery Slope*, VerfBlog, 2021/6/18, <https://verfassungsblog.de/a-tale-of-primacy-part-ii/>

#### IV. LOOKING AHEAD

2022 may well be a test-stone for the coalition supporting the Government and for the administrative capacity of Romania to implement the National Plan for Resilience and Recovery, an EU tool meant to boost economies that suffered severely during the Covid-19 pandemic.

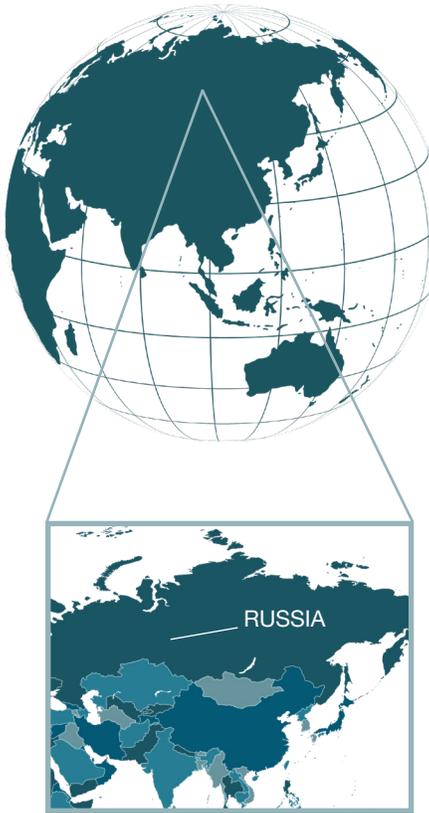
A constant feature of the past four years, changes to the laws on the judicial system are still awaited and may happen in 2022, particularly in the context of the judicial dialogue engaged between the ECJ and the RCC on the topic of the special prosecutorial section on the investigation of magistrates.

Also, in 2022 the RCC will celebrate its 30<sup>th</sup> anniversary and its composition will be renewed by one-third, due to the end of three judges' terms of office.

#### V. FURTHER READING

B.Selejan-Guțan, E.S.Tănăsescu, *A Tale of Primacy. The ECJ Ruling on Judicial Independence in Romania*, VerfBlog, 2021/6/02, <https://verfassungsblog.de/a-tale-of-primacy/>

E.S.Tănăsescu, *The Independence of Justice as Proxy for the Rule of Law in the EU- Case Study – Romania*, Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società (NAD) n°1/2021, p.102-122, <https://>



# Russia

Ilmira Galimova  
PhD  
Sapienza University of Rome

## I. INTRODUCTION

For Russia, the year 2021 was an important period in terms of defining the system's dynamics in the near future. This year, the State Duma elections held on 17-19 September have brought a sweeping victory to the ruling party. This implied the confirmation of the President's agenda on the renovation of the constitutional system. In fact, during the 2021 year, the federal legislation concerning electoral matters has been significantly modified to reflect the 2020 constitutional reform. Moreover, in keeping with President's course of renewal, an important federative reform was being implemented to strengthen the principle of unity of "public authorities". Unfortunately, the deputies' work of bringing the federal norms into conformity with the constitution was not always limited in the accurate modification of separate articles but often resulted in the elaboration of the brand-new national framework law, as has been the case of the Act on Organization of Power in Constituent Entities.

In addition to updating primary legislation, the Duma continued to revise the legislation with the aim of "protecting the country from any attempt to influence politics from the outside". This trend of having a hostile attitude towards everything foreign was especially clearly seen in 2021, when the list of "foreign agents" more than doubled. Over this year, further restrictions have been introduced on the activity of NGOs while relations with international organizations have become increasingly tense and mistrustful. Not only in the diplomatic field does Russia seem to have clashed with the 'Western world' – a real ideological battle has developed within the European institutions. In two

occasions, the experts of the Venice Commission expressed their criticism over the Russian legislation questioning regularity of the 2020 constitutional reform and condemning application of the law regarding the status of "foreign agents".

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Undoubtedly, the State Duma elections have represented the most anticipated event in 2021, although few observers were surprised by the results. Once again, the "United Russia" party confirmed its leadership: it won 324 of the 450 seats in parliament, most of which were obtained in single-member constituencies. This would allow the party to approve any draft law, even regarding the amendment to Constitution, without considering possible disagreements or disputes that might arise in the lower house.

Overall, the Duma elections have revealed the inertia of the parliamentary parties' dynamics, as the great share of seats was distributed between the same well-known four parties represented in parliament since 2007. However, it should be noted that a newcomer rival "New People" became a 'fifth' party, having managed to gather more than the 5% of the vote required to enter parliament.

As regarding the performance of major parties in the Duma elections, few experts would deny that the outcomes are more a result of continuous *ad hoc* adjustments of the electoral mechanism than an expression of sincere support for the parties. Firstly, the various restrictions on passive electorate introduced gradually in recent years have diminished the political pluralism in Russia. Shortly before

the start of the 2021 Duma campaign, some important changes to the laws regulating the activities of “extremist organizations” and NGOs labelled “foreign agents” have been approved by the deputies. These new rules temporarily banned any person involved in extremist activities from the electoral competitions to any elective office and penalized those who collaborated with NGOs labelled “foreign agents” forcing them to use a special tag on all campaign materials. Moreover, the introduction of multiple-day voting, together with the expansion of the e-voting, has complicated the job of election observers and significantly raised the risks of ballot box stuffing. The confusing administration of the remote electronic voting in Moscow for the Duma elections is a striking example of how the new technology might be detrimental to the credibility of electoral process.

The 2021 year saw several changes introduced to the primary legislation to implement the 2020 constitutional reform. The main national acts on electoral matters have been modified in the part regarding a series of requirements for the candidates contesting for elective positions, while the act on civil servants has been supplemented with the ban on the right to hold public office or positions in public administration for Russians with dual citizenship or the permanent residence permit in the territory of foreign state.

Moreover, the Duma approved drafts which increased liability for breach of current legislation, providing for higher financial penalties for the violation of the legislation on gatherings or on the circulation of information on the net, as well as imposing new obligations on NGOs declared “foreign agents”. At the same time, different legislative proposals concerning the introduction of the crime of torture or the notion of ‘domestic violence’ and repeatedly requested by representatives of civil society have not yet received a response from the deputies. Some concerns were raised about the irregularities of the legislation regulating the activities of NGOs and mass media outlets labelled “foreign agents”, especially after the Supreme Court’s decision on the liquidation of Russia’s oldest and most prominent human rights organization *Memorial*.

In 2021, the major development was probably the introduction of the concept of “public

authority” at the level of primary legislation. Therefore, two different drafts have been elaborated to relocate the federal and regional bodies of state authority, together with the local self-government bodies, within a single “unified system of public power”. The first one, concerning the regional level, was approved in December and lifted the ban on governors from being elected for two consecutive terms. Moreover, it expanded the grounds for the early termination of the powers of regional senior officials due to the loss of the President’s confidence. For the heads of the constituent entities, new measures of responsibility such as warning, reprimand, dismissal, and temporary suspension from duties were introduced; all of them could be applied by the President of the Russian Federation.

The new discipline concerning the organization and functioning of the regional bodies is too detailed, and it even incorporates the rules regarding the name of the regional head’s office. This decision was highly criticized by deputies of the Parliament of the Republic of Tatarstan who denounced the attempt by the federal legislator to “standardize a series of organizing aspects which fall exclusively within the competence of the regional bodies”.

The second draft, still under consideration in the lower house, regards the organization of the local self-government in Russia. The latter, according to the constitutional reform, has become a part of a system of public authority. Among the most important changes, the document proposes the strengthening of the powers of the regional authorities vis-à-vis the local self-government bodies: in particular, the governors will now be able to select candidates for the office of mayor and initiate the removal of the latter in case of “systematic failure to achieve the performance indications”. Moreover, the draft gives a start to a new municipal reform as it changes completely the current ‘two-level’ model for the municipal divisions in Russia. According to the document, rural and urban settlements will be incorporated into larger municipal and urban circuits within the next five years. Consequently, the self-governing bodies at the lowest territorial level will be eliminated and it could become much more difficult for Russian authorities to guarantee the proximity of the local administration on the vast Russian territory.

It is therefore possible to note a certain rethinking of the role of local self-government in the system of the Russian authority, as well as the major aspiration toward centralization that can be inferred from the draft texts. The approval of both documents, at the end, will result in the creation of a new organizational model of power in Russia inspired by an idea of ‘vertical’.

### III. CONSTITUTIONAL CASES

#### 1. The case on repeated beatings

In its ruling no. 11-P of April 9, the Constitutional Court of the Russian Federation recognized article 116.1 of the Criminal Code as unconstitutional and ordered the federal legislator to change the legislation. This provision establishes liability for beatings inflicted by persons subjected to administrative punishment.

The norm was challenged by a resident of the Orenburg region Lyudmila Sakova. The woman was systematically beaten by her brother. In 2018, he was brought to administrative responsibility, and later, for repeated violence, to criminal responsibility. In October 2019, having an unexpunged and outstanding conviction, he beat his sister again and was brought only to administrative responsibility. Ms. Sakova tried to challenge this “legal paradox” generated by the article 116.1 whereby after administrative and criminal punishment for the same crime, administrative measures are again applied to the aggressor. According to the applicant, the disputed provision does not provide effective protection against domestic violence and does not allow a person already convicted of the same act to be brought to criminal responsibility for beatings.

To explain this paradox, it is necessary to recall the modification of the reference legislation that took place several years ago. In fact, when in 2016 the Parliament decided to partially decriminalize the beatings, the legislator did not take into account the fact that in the context of domestic violence the repetition of acts of aggression often occurs. As a result, in the current discipline, it is established that beatings committed against family members and other people involve

criminal responsibility only if these acts are repeated several times during the period when a person is subjected to administrative punishment. Therefore, when this period expired, the acts of violence are again assessed as an administrative offence, just like if they were committed for the first time.

The Constitutional Court shared Ms. Sakova's argument and recognized the challenged provision as inconsistent with the Constitution of the Russian Federation to the extent that it does not ensure proportionate criminal legal protection of the right to personal inviolability and the right to protection of personal dignity from violence when beating was inflicted or other violent acts inflicting physical pain were committed by person with criminal conviction for the same offence or offence with similar *corpus delicti*. According to the judges, by establishing the administrative sanctions for the first inflicted beatings and criminalizing relapse, "the legislator should not have ignored the previous conviction for this act, since it indicates an increased public danger, the persistence of the behavior and the person's inclination to resolve conflicts with violence".

The Court has ordered the federal legislator to amend the Criminal Code of the Russian Federation to ensure the elimination of the unconstitutional aspects of the legal regulation on criminal liability for beatings. However, it should be noted that the Constitutional Court has not dismantled the entire two-level punishment mechanism as established in the 2016.

## 2. The case on multiple-day single-person pickets

By the Judgment No. 19-P of 13 May, the Constitutional Court of the Russian Federation assessed constitutionality of Article 7, paragraph 11 of the Federal law "On gatherings, meetings, demonstrations, parades and picketing" and Article 20.2, paragraph 2 of the Code of Administrative Offences, as these interrelated provisions served as basis to decide on the possibility to recognize a series of single-person pickets held for several days as a "public event", and to bring their organizer to administrative liability for holding such picketing without prior notification in the established order.

In February 2020, Irina Nikiforova organized through social networks a series of pickets against the construction of an incineration plant in Kazan. For several weeks, different activists have participated in picketing, though, only one picket involving one person was held per day. Nevertheless, Ms. Nikiforova was brought to administrative responsibility as the organizer of an 'uncoordinated' public event as, according to the judge, it was held in breach of legal requirement to give prior notice to the local authorities.

The greatest critical point of the Russian legislation on gatherings is represented by a mandatory rule that establishes the obligation to reach an agreement between the parties (the organizers of the event on the one hand, and the public authorities on the other) in relation to the place, date, and time of the event. From this point of view, the requirement to submit a prior notification is the first step for reaching such agreement and it aims to provide the authorities with information on the scale of event, its route or duration in order to take all reasonable measures to ensure security. In practice, this provision puts the organizers in the weak position, thus transforming the rule on the obligation to give prior notice into some kind request of a previous permission.

Until 2012, the prior notification requirement was not extended to single-person pickets and the 'solitary picket' was considered a key method of public protest in Russia (see paragraph 1.1 of Article 7 of the Act on Peaceful Assemblies). After the relevant amendments were made, the courts were allowed to consider as a "single mass event" a series of pickets united by a common theme and organization and held at relatively close distance.

The Russian Constitutional Court has been already called on several times to rule on the constitutionality of the legislation regarding the regulations in the conduct of mass events in the past and has repeatedly declared its provisions in conformity with the Constitution of the Russian Federation. In the 2013 Constitutional Court ruling, the 2012 amendments were declared in conformity with the Constitution and a single picket, for the first time, were called a "hidden form of a collective public event". According to the judges, the implications of such pickets, in particular con-

centration of a significant number of citizens, obstruction of pedestrian or vehicular traffic, disruption of the regular operation of public utilities, etc., are comparable to those of collective public events. In line with this logic, the mere presence of a sufficiently large number of people in one place carries certain risks. Since 2013, the practice of applying this provision was very heterogeneous, while in most cases, courts took the line of a broader interpretation of the prior notification requirement. As a result, a number of activists have been fined for organizing or participating in such 'mass' pickets.

Moreover, in December 2020, the legislation was supplemented by a clause according to which the court will be able to recognize as one public event the picket queue, i.e. a set of acts of picketing carried out alternately by one participant at a time and united by a single plan and a common organization. These changes made it almost impossible for Russian citizens to avoid administrative penalties while exercising their right to freedom of peaceful assembly. However, it must be said that the new version of Russia's law on demonstrations was not yet under the consideration of the Constitutional Court, thus it is not clear whether the so-called picket queue may be considered as a mass event.

The Constitutional Court's decision of 13<sup>th</sup> May is probably the umpteenth attempt to determine the criteria for recognizing pickets as public events. In particular, the challenged provisions were recognized as not being in conformity with the Constitution of the Russian Federation insofar as they permit a broad discretion in interpreting the norms. The judges stressed that the temporal dimension must be also taken into consideration: only the pickets held simultaneously may pose direct threats of violence or danger to public safety. Otherwise, the measure of bringing administrative responsibility for holding pickets without prior notice does not meet the principles of necessity and proportionality.

Whilst this clarification provided by the Constitutional Court significantly narrowed the definition of the mass event, however, it did not definitively clarify the precise margin that distinguishes an ordinary picketing from one deemed dangerous to public order.

### 3. The case on the impossibility to elect the mayor within a reasonable time

Municipal deputies Afinogenov, Volsky and others approached the Constitutional Court with a request to assess the constitutionality of Articles 40.3 and 44.1, item 6 of the Federal Law “On General Principles of organization of local self-government in the Russian Federation” (Local Self-Government Act), as well as article 27.2 of the Law of St. Petersburg “On the organization of local self-government in St. Petersburg”. The challenged norms define the powers of the representative bodies of municipalities to establish under the charter of municipality the voting rate for election of head of municipality by representative body of municipality. The deputies pointed to the legal consequences of establishing a requirement for a qualified majority of deputies’ votes to elect the mayor which may lead in practice to the impossibility of electing a new head for the next term, and hence the non-rotation in office. The latter happened in one of the municipality formations located on the territory of St. Petersburg city.

Just before next municipal elections, the Municipal Council of Liteyny District of St. Petersburg has amended the Charter replacing the simple majority vote rule by the qualified majority vote rule for the election of the head of the municipality. It is important to note that, according to the Charter, the mayor is elected from among the deputies of the municipal council and exercises the powers of its chairman.

On September 8, 2019, the regular elections of deputies of the municipality were held. All the 20 deputies were elected, of which more than half are the members of the one political party. As a result, the new deputies could not elect the head of the municipality on the basis of the changed norm, and the previously elected head retained his powers. Some of the deputies, not agreeing with the amended provisions, tried to challenge them. According to the applicants, the contested legal provisions do not comply with Articles 6, 19, 32 (Part 2) and 130 of the Constitution of the Russian Federation, since they allow to include in the charter of the municipality a provision which establishes a qualified majority rule for the election of mayor, thereby

preventing the implementation of the will of the people expressed in municipal elections and the principle of alternation in power. However, the courts pointed out that the legislation does not prohibit the establishment of a rule in the statutes of the municipality according to which a candidate who receives at least two-third of the votes becomes a head of municipality.

In its Judgment No. 50-P of 23 November, the Constitutional Court has pointed out that the establishment of a requirement for a qualified majority of votes, as it was provided for by the Charter of the Liteyny District, is by no means an isolated example. This can be regarded as a manifestation of the independence of the population in determining the structure of local self-government bodies in accordance with the general principles of organizing local self-government established by the Local Self-Government Act in accordance with the Constitution (Article 131.1). Furthermore, the current legal framework does not contain any prescriptions regarding such a majority. There is also no prohibition on establishing this rate.

In general, according to judges, the procedure for electing the head of the municipality by the representative body of the municipality should be aimed at ensuring the possibility of holding a timely and effective election of the head of the municipality within a reasonable time. Nevertheless, in a situation where due to the increased voting rate the head of the municipality cannot be elected, this provision creates *de facto* additional conditions for maintaining the powers of the previously elected head of the municipality beyond the term of office. At the same time no regulatory restrictions on repeating this situation eventually have been established by now, judges noted. Thus, the current legal regulation that provides for a fixed-term mandate of mayor, nevertheless, overlooks the implementation of the principle of periodic turnover of elected officials of local self-government. In fact, the norm that defines the powers of the municipal councils to establish the voting rate for election of mayor creates unacceptable legal loopholes which make it possible for the previous head of municipality to remain in power for the longer term in case of impossibility for the municipal deputies to find an agreement on the valid candidacy for mayor’s office.

Consequently, while the challenged norm was generally recognized as conformant to the Constitution of the Russian Federation since it reflects the autonomy of population in determining the structure of local self-government bodies, the same provision was recognized as not conformant to the Constitution of the Russian Federation to the extent that the qualified majority vote rule for the mayor’s election is not accompanied in the current legal framework by a certain guarantee norm strengthening power alternation. The Constitutional Court ordered the federal legislator to integrate the current legal framework with specific provisions.

## IV. LOOKING AHEAD

The year 2021, hence, is characterized by the continuous Parliament’s work of implementing the constitutional amendments approved in 2020. As a result of the reforms in the center-periphery relations, in the coming years, Russia is likely to see the transition to a new power structure, far more centralized than that which was institutionalized in the 2000s-2010s.

Part of this process has already taken place within the judicial branch with the phasing out of statutory and constitutional courts in the Russian regions. The next step will concern the implementation of mechanisms for strengthening control over the executive bodies of the constituent entities, as well as strengthening supervision of the effectiveness of the Russian municipal bodies in the implementation of national programs.

However, these changes, even if they seem very relevant, will not entail shifts in the political and administrative structure since the top-down control mechanism has already been built and solidified in previous years by financial or political means.

In this context, municipal reform attracts the greatest interest. The decision to eliminate the organs of local self-government at the lowest level, seems to bring Russia back to some decades ago, at the beginning of the 90s, when, in order to give the impetus to local democracy, the establishment of self-government in urban and rural settlements was initiated with huge effort by the Russian authorities. Still, we will have

to wait to see the concrete results of these transformations.

## V. FURTHER READING

Venice Commission, ‘Interim opinion on constitutional amendments and the procedure for their adoption’ CDL-AD(2021)005

Venice Commission, ‘Opinion on the Compatibility with international human rights standards of a series of Bills introduced to the Russian State Duma between 10 and 23 November 2020, to amend laws affecting “foreign agents”’ CDL-AD(2021)027



# The Democratic Republic of São Tomé and Príncipe

Jonas Gentil

Invited Professor/Associate Justice/Researcher Legal

University of São Tomé and Príncipe/School of Magistracy of the State of Rio de Janeiro, Brazil

Former judge of the Constitutional Court of São Tomé and Príncipe

Researcher on CEDIS, NOVA School of Law, Portugal

## I. INTRODUCTION

This report aims to present the political, legislative, jurisprudential, and doctrinal evolution of the Democratic Republic of São Tomé and Príncipe's (DRSTP/STP) Constitutional Law in 2021. In this regard, and first of all, we would like to bring the controversial measures adopted by the Santomean Government in the context of COVID-19 pandemic in 2020, which had repercussions in 2021. We find it important to stress that the state of liberal democracy proved to be stable, at least according to the main international and regional indicators<sup>1</sup>, which is also the internal convention. In these terms, there were no major constitutional changes or relevant political conflicts, despite the absence of certain legislation. Additionally, the legislative agenda led to the approval of relevant acts and the Santomean Constitutional Court (SCC) adopted relevant decisions depending on the matter, considering its recent and controversial autonomy process in relation to the Supreme Court of Justice (SCJ) occurred in December 26<sup>th</sup>, 2017 and, consequently, the conflicting electoral process of 2018. In the same way, relevant studies on political, constitutional and legal matters about DRSTP were published<sup>2</sup>. Thus, we can conclude that this process, although absolutely necessary, is still lacking, as no significant changes in the constitutional system have happened as expected. Nevertheless, we must say that the country managed in the best way possible with the adversities.

## II. SÃO TOMÉ AND PRÍNCIPE'S DEMOCRATIC HISTORY

The DRSTP is an African island State located in the Gulf of Guinea (GG), in the Atlantic Ocean (West Africa), being the second smallest State on the African continent as well as the smallest State among those belonging to the Community of Portuguese Language Countries (CPLC)<sup>3</sup>, with an area of 1001 km<sup>2</sup> of which 859 km<sup>2</sup> is Sao Tome, and 142 km<sup>2</sup> is Principe. The country's capital is the City of Sao Tome. According to the latest official data from the National Institute of Statistics (NIS) for 2020 on the general population, the population is estimated at 210,240 inhabitants<sup>4</sup>.

The RDSTP is a former Portuguese colony which gained independence on July 12th, 1975<sup>5</sup>. The Independence was negotiated between Portugal and the Movement for the Liberation of São Tomé and Príncipe (MLSTP), with the two parties concluding a transitional agreement on November 26th, 1974, in Algiers. This Movement, after the independence, was based on the Soviet model, that governed the State in a one-party regime between 1975 and 1991. According to Kevashinee Pillay and Nélia D. Dias, "[d]ue to political and economic failure, in 1990 the socialist regime was replaced by a multiparty democracy with a semi-presidential regime"<sup>6</sup>. The change to the multiparty system occurred after a constitutional *referendum* held on August 22nd, 1990<sup>7</sup>. Since then, the democratic system in the DRSTP has functioned with relative normality and pres-

idential elections have been held regularly, despite on-going political instability and a frequent change of government<sup>8</sup>. However, for the first time in our recent democratic history, the last legislature (2014-2018), led by Prime Minister Mr. Patrice Trovoada (President of the ADI Party), completed its mandate to the end, opening the way to a culture of, we hope, stability.

The first Constitutional Law dates from 1975<sup>9</sup> and was revised in 1980, 1982 and 1987. In 1990, with the adoption of a representative democracy and the rule of law, a new Constitution was adopted (on September 20th, 1990<sup>10</sup>). In force, this last Constitution was revised in 2003<sup>11</sup>. The Constitutional Law No. 1/2003, amended the original text of the 1990 Constitution in four main areas: *i) rearrangement of presidential power and the other organs of sovereignty*<sup>12</sup>; *ii) the creation of a State Council*; *iii) regulation of the Santomean Constitutional Court*; and *iv) introduction of a system of judicial review of constitutionality, and the technique applied for the elaboration of the constitutional drafting was heavily influenced by the Portuguese constitution of 1976, both in terms of the legal systematization adopted and the legal institutions which were used*. Following the Portuguese constitution closely, the semi-presidential system was adopted as the system of government. In our view, regarding the guarantee and revision of the Constitution, a complex judicial review system of constitutionality and legality was introduced for a State with the characteristics of DRSTP.

### III. THE CONSTITUTIONAL COURT

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

upper position in the Judiciary Pyramid regarding constitutional matters (Articles 131-134 of the Constitution). It is responsible for the administration of justice in legal and constitutional matters, in terms of the Constitution and the law. The SCC also validates the final election results (Article 133 of the Constitution). It is comprised of 5 judges, 3 from the judiciary and 2 amongst Lawyers of merit. The SCC judges are nominated by the President of the National Assembly (PAN) and elected by the members of the National Assembly for five-year terms which can be renewed once.

Before January 2018, when the autonomous SCC was established, the SCJ with five judges also ruled on constitutional issues (Articles 156 and 157 of the Constitution). Thus, the structure of courts under the Santomean Constitution includes: *i) the Constitutional Court*; *ii) the Supreme Court of Justice*, *ii) courts with general jurisdiction*, which includes the Court of First Instance, the Regional Court and the District Courts<sup>13</sup>; *iii) the Court of Auditors*; *iv) the Military Tribunals*, which have jurisdiction in relation to the “judgment of essentially military crimes defined by law”; and *v) “arbitration courts”*<sup>14</sup>.

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

### IV. MAJOR CONSTITUCIONAL DEVELOPMENTS

At the political and social levels, the last few years have been marked by a series of epi-

sodes related to the constitutional rights that have contributed to some instability in the country. The Santomean Constitution has not been revised since 2003 due to the lack of parliamentary consensus in nineteen years. Therefore, because some inherent events are recent, we take as examples of this: *i) The autonomy and installation of the Santomean Constitutional Court*; *ii) Dismissal of the Supreme Court of Justice Counselor Judges*; *iii) The election of the legislature of October 7th, 2018*; *iv) Covid-19 Pandemic: From the State of Emergency of March 17th, 2020 to the State of Public Disaster*, and *v) The presidential election of July 18th, 2021 which last up to September 5th, 2021*.

#### *i. The autonomy and installation of the Santomean Constitutional Court*

The provision of autonomy of the SCC is embedded in article 156 of the Constitution, whereas it’s established that “[until] the Constitutional Court is legally established, responsibility for the administration of justice in the area of constitutional-law nature matters shall rest with the Supreme Court of Justice”<sup>15</sup>. However, with the approval and entry into force of the *Constitutional Court Organic Law* (CCOL)<sup>16</sup>, one of its articles would come to be very contested, the voting process for the election of the judges to the SCC in two rounds, which allows the judges to be elected (in second round) by an absolute majority instead of a qualified majority of 2/3 (Article 12 of the CCOL). It was with this absolute majority, to the detriment of the qualified majority, that the first five judges of the SCC were elected in 2018. According to Amaro Couto, former member of the Permanent Commission of the biggest political Party of the opposition (MLSTP) and, currently, judge of the SCC, “[a] public institution, particularly of this nature such as the Constitutional Court, cannot emerge from an environment of conflict. To function with serenity, it needs consensus” and it is this consensus that was so lacking in the autonomy and election of judges. Perhaps this is the reason for some instability within the Court, as although, until now, it has been the majority that elects the judges, which has been causing some instability in the SCC and allowing some political interference.

Created on December 26th, 2017, the first judges of the autonomous SCC are Mr. José Bandeira, president, Mr. Carlos Stock, Mrs. Kótia Menezes, Mr. Fábio Santos and Mr. Jonas Gentil who took office on January 26th, 2018. With great tension, these new judges would decide the legislative elections of the same year and, because of the most controversial case in the country, the *Rosema Case*, the judges were dismissed in the week following that election.

## ii. Dismissal of the Supreme Court of Justice Counselor Judges

Regarding the dismissal of the SCJ Judges, the National Assembly, in a parliamentary session on 4<sup>th</sup> May 2018, would approve a *Resolution*<sup>17</sup> that would dismiss the three judges of the SCJ, including the president of the Court. The judges in question, were Mr. Silva Cravid, president of the SCJ and the *Superior Council of Judicial Magistrates* (SCJM), and the Counselors Judges Mr. Frederico da Gloria and Mrs. Alice Vera Cruz, all of whom decided in a ruling on the return of *Cervejeira Rosema* to the Angolan businessman Mello Xavier (*Rosema Case, Judgment No. 11/2018, Abril 24th, 2018*). With 31 votes in favor and 6 against, the document (“Resolution”) was approved after a heated debate between the parliamentary bench of the ADI (Independent Democratic Action) party in power and the bench of the PCD (Democratic Convergence Party), the opposition that was against the dismissal of the judges for considering the project *unconstitutional*. Only three Members from the National Assembly’s second largest Party, the MLSTP-PSD, were present at this parliamentary session<sup>18</sup>. On the same day, the president of the SCJ stated that he “will not comply in any way” with the Resolution passed by Parliament. The SCJM stated in a statement to the press that it also “will not accept such a resolution as it unlawful”. Against such arguments, resorting to the malfeasance of the dismissed judges, the usurpation of power, the inability of the SCJM to make decisions, particularly when corruption acts are involved and the overlapping of particular interests with those of general interests, the Constitutional Government, in a communication dated May 8th, invited three retired judges (Mr. J. D’Alva

Teixeira, Mr. Flaviano Costa and Mr. Fortunato Pires) to occupy the functions of the dismissed judges to which they refused. In the same way, the *National Lawyers Association (NLA) Chairwoman*<sup>19</sup>, Mrs. Célia Posser, stated that the compulsory dismissal of the magistrates of the SCJ “hurts the democratic rule of law”, as this could only “be done after a disciplinary process”. With the same understanding, the political parties (with and without a parliamentary seat) and the majority part of Civil Society, with the exception of the political party in power (ADI), positioned themselves alongside the courts. However, the Parliament opened a competition for the admission of new Counselor Judges to the SCJ and in July of the same year four new Councilor Judges were appointed, with Mr. Roberto Raposo being elected president of the SCJ. This new composition would only last six months. With a new government, as a result of the legislative election of October 7th, 2018 (named, “New Majority”), these new SCJ judges would be exonerated (which also happened with the five Judges of the SCC, also due to the *Rosema Case*) on December 28th, 2018, thus reinstating the three exonerated SCJ judges to resume the exercise of their functions, including one of the SCJ judges, Mr. Silvestre Leite, who asked for his resignation in solidarity with his peers.

## iii. The legislative election of the October 7th, 2018

Parliamentary, municipal, and regional elections (“General Elections”) were held in DRSTP on October 7<sup>th</sup>, 2018. The 55 Members of the National Assembly are elected by closed list based on proportional representation in seven multi-member constituencies. These elections were contested by nine political forces (ADI; MLSTP/PSD; tripartite alliance composed of PCD-MDFM-UDD; MSD/PV; PFP; PTOS and MCISTP<sup>20</sup>). The main parties, ADI (center-right), in government, presented Mr. Patrice Trovoada as a candidate for prime minister; while the MLSTP (center-left), the historical party presented Mr. Jorge Bom Jesus as candidate for prime minister and, the coalition, led by PCD (center-right<sup>21</sup>), presented Mr. Arlindo Ramos. Unlike previous elections in the multi-party era, results were not announced on elec-

tion night for the two largest constituencies, Água Grande and Mé-Zóchi, containing a total of 26 seats. Results from the five smaller constituencies gave a total 29 seats (ADI-14; MLSTP/PSD-12; PCD-MDFM-UDD-1 and MCISTP-2). On election night the Secretary General of the ADI, Mr. Levy Nazaré, announced the party had achieved 26 seats and would continue to govern with support from the 2 seats of the MCISTP, whereas MLSTP/PSD had only achieved 23 seats, but this announcement was made before all votes had been counted. The final result was 25 seats to the ADI, 23 to the MLSTP-PSD, 5 to the PCD-MDFM-UDD coalition and 2 to the MCISTP. At a joint press conference, the leaders of MLSTP/PSD and the PCD-MDFM-UDD coalition announced a pre-election agreement to govern together having Mr. Jorge Bom Jesus as Prime Minister, but ADI argued that the country had minority governments before and that the biggest party with the largest vote should form the government. Therefore, the ADI asked for the verification of the more than 2000 blank and void votes, hoping to gain an extra seat and obtain a majority together with MCISTP. This unleashed riots in parts of the country as opposition supporters feared the government would rig the election. On 12th October, the police announced that there would be a 72 hour ban on demonstrations after the SCC declares the final results. The opposition claimed that this was illegal, based on the lack of intervention by other bodies in this process (Government and Parliament), and that they would not comply with the polices’ unconstitutional measure if the final results were different from those released earlier by the electoral commission. The President of the Republic, Mr. Evaristo Carvalho, announced that he would follow the Constitution and authorize the party with the most seats to form the new government, indicating that Mr. Patrice Trovoada could continue as Prime Minister despite the ADI losing their majority. Among many factors, this would not happen, in the expectation that it would be a government that would last three months, since the General State Budget would not pass the parliament. In fact, on 30<sup>th</sup> November, the PR indicated Mr. Jorge Bom Jesus as Prime Minister. The new government was sworn in on 3rd December only to rule up to 2022,

servicing four years for the second time in the democratic country's history, being second to ADI government. Note that, in terms of the "Competences [of the PR] in relation to other institutions", it follows from the Fundamental Law that "the President of the Republic [must to] appoint the Prime Minister, after consulting with the political parties, with the consent of the National Assembly and taking the election results into account" (Article 81). In these terms, albeit being ADI the party with the most votes and, despite having a relative majority and the agreement of incidence and/or coalition of other competing parties, we are of the opinion that the PR should have appointed the prime minister of the winning Party (ADI) hoping that this parliamentary agreement would result in the resignation of the winning government (Articles 116 and 117), that is, the non-approval of the government program. Which in practice, cannot be guaranteed that it would happen or not.

#### iv. The Covid-19 Pandemic: From the State of Emergency of March 17, 2020 to the State of Public Disaster<sup>22</sup>.

The State of Emergency (SE) in DRSTP began on 17<sup>th</sup> March 2020, pursuant to Presidential Decree, PD No. 3/20, of March 17<sup>th</sup>, 2020. Extended five times – the first under PD No. 4/20, of 2<sup>nd</sup> April 2020, the second under PD No. 06/20, of 20<sup>th</sup> April 2020, the third under PD No. 8/20, of 4<sup>th</sup> May 2020, the fourth under PD No. 9/20, of 18<sup>th</sup> May 2020, and the fifth under PD No. 11/20, of 1<sup>st</sup> June 2020.

Considering the *public health emergency* caused by COVID-19 and the need to take the necessary action towards the prevention and fight against the spread of this pandemic, the Government had enacted a set of measures aimed at the implementation of the recommendations issued by the *World Health Organization* ("WHO"). Therefore, in order to protect the community, the *State of Public Health Emergency* was enacted, having approved measures by the Government to contain the spread of the disease<sup>23</sup>.

Since some of these measures entail the suspension of rights, freedoms and guarantees protected by the Constitution of the DRSTP, notably the freedom of movement, right to work, employees' rights, private property,

and initiative, the Santomean PR, declared for the first time in the history of the Santomean State – *the state of public health emergency in all national territory on 17<sup>th</sup> March 2020 (PD No. 3/2020)*. After hearing the Government and obtaining the parliamentary authorization, the PR is entitled to declare a SE, which determines or allows for the determination of partial suspension of citizens' rights, freedoms and guarantees based on the occurrence (or threat) of a public disaster. The SE was only regulated by the Government, through Decree-Law no. 6/2020, of 6<sup>th</sup> May ("DL No. 6/20") amended by DL No. 10/2020, of 16<sup>th</sup> May, and DL No. 7/2020, of 7<sup>th</sup> May ("DL No. 7/20"). Below you will find an overview of the essential issues that arise from this regime as well as an explanation on how they have been implemented in the declaration. The SE legal framework is laid down in Articles 19, 80, 97, 155 of the Constitution of the DRSTP, and in articles 176 to 179 of the *Rules of Procedure of the National Assembly*.

After that, the Government declared the State of Public Disaster (SPD) on the heels of the SE, under *Council of Ministers Resolution No. 23/20, of 15<sup>th</sup> June 2020*. The situation of public disaster is foreseen in the *Civil Defense and Firefighting Act*, enacted by Law No. 4/16, of 23<sup>rd</sup> June 2016. The SPD can only be declared if a serious accident, act of God, or public disaster occurs or is threatened, that requires taking measures to prevent such occurrence or to resume normal living conditions in the affected areas. The specific measures were taken in connection with the declaration of a SPD of 15<sup>th</sup> June 2020 and Law No. 4/16, of 23<sup>rd</sup> June 2016, as warranted by the evolution of the epidemiological situation. Our observations regarding each particular aspect of the declaration notwithstanding, the framework attached to the above Resolution establishes, among other things, an obligation of COVID-19 patients to remain in isolation at home and under active surveillance. There is also a civic duty to stay at home, all citizens being advised to stay in their homes and refrain from moving in public areas and roads and similar, except to work or to attend to any urgent and pressing situations. At the end of 2021, not only due to the pandemic but also because of the torrential rains that shook the country, the Government would again decree the State of Calamity.

#### v. The presidential election of July 18<sup>th</sup>, 2021 and of September 5<sup>th</sup>, 2021

The PR is "elected by universal, free, direct and secret suffrage" under Article 78/1. The presidential candidates, in accordance with Article 78/2, must fulfill five requirements: i) be citizens of the DRSTP; ii) be children of a Santomean mother or father; iii) be more than 35 years of age; iv) not possess another nationality; and v) have resided continuously in STP in the "three years immediately preceding the date of the candidature". The election of the PR, for five years, requires a majority of votes cast, but there may be a second round of elections if this majority is not achieved by any of the candidates. The PR may not serve more than two consecutive terms (Article 79/1 and 3).

In this context, at the political and social levels, 2021 was marked by the announcement of the presidential election by outgoing President, Mr. Evaristo Carvalho for 18<sup>th</sup> July, 2021<sup>24</sup>. Before that, doctrinal and constitutional discussions became evident in the country and purpose of the revision of the electoral law in the year of the elections. Considering that the previous electoral law (Law No. 11/90, of November 26<sup>th</sup>, of 1990) dates from 30 years ago, the parliament decided to carry out a profound revision of this legal instrument, and the new law would enter into force in the election year. This fact aroused some controversy, mainly due to the points that were intended to change, for example, *Plurinationality*; *Passive Electoral Capacity*; *Right of Citizens' Voting Groups to Propose Candidatures*; *Principle of Legal Certainty*; *Concept of the Permanent Residence*; *Principle of Annuality or Electoral Stability*. As the new law would come into force very close to the presidential elections (Law No. 06/2021, of 15<sup>th</sup> February), in a Portuguese-speaking comparative analysis based on the *Principle of Annuality or Stability of the Electoral Law*, Jonas Gentil considers that this principle should translate into the "holding of elections by the law in force (not by the law eventually passed)"<sup>25</sup>, which is to say that this new law should never have been passed. Following closely the fundamental Brazilian legislation, the author understands that the "law that changes the electoral process will enter into force on the

date of its publication, not applying to elections that take place within one year of the date of validity, that is to say: more than one year (365 + 1)”, this option configures a *wall of democracy*, a requirement of predetermination of the rules of the electoral dispute game a year in advance to avoid casuists and surprises, in the name of stability<sup>26</sup>. In the same way we can see in Constitution of Cape Verde (Article 97).

This development would culminate in the historic holding of the elections, with nineteen candidates for PR, on July 18th, 2021. As no presidential candidate received a majority of the vote, a second round was originally scheduled to be held on 8<sup>th</sup> August 2021. However, following an objection to the first-round result the second round was postponed to 29<sup>th</sup> August 2021, and later postponed again to 5<sup>th</sup> September 2021<sup>27</sup>.

For the first round, the campaign took place in the two weeks prior to election day. Most of the candidates denounced corruption in the country. On 12<sup>th</sup> July’s national independence holiday speech, outgoing president Mr. Evaristo Carvalho “denounced the practice of “*Banho*”, a regular and well-known practice for buying votes, as exploitation of the poverty of citizens.

The second round was delayed while the SCC considered a petition filed by the third voted candidate, Mr. Delfim Neves, alleging fraud in the first round, which was ultimately rejected. So, the campaign for the second round began on 26<sup>th</sup> August and lasted ten days or more<sup>28</sup>. In the end, the second round was won by Mr. Carlos Vila Nova of the ADI, who received 57.6% of the vote, defeating Mr. Posser da Costa of the MLSTP-PSD. Due to the late holding of the second round, another constitutional problem emerged, that is, the question of the end of the mandate of the outgoing PR (to know if the PR would continue beyond the 5 years established in the Fundamental Law). The Constitution of the Republic establishes that the “elected President of the Republic [shall be sworn] before the National Assembly on the last day [in the specific case it would be September 3rd] of the term of the outgoing President or, in the case of an election resulting from the position having been vacated, on the eighth day following publication of the election results” (Article 78/3).

This doubt led the outgoing President of the DRSTP and the Government to request legal opinions on the subject matter. Two legal opinions from distinguished Portuguese Full Law Professors were issued, Mr. Vital Moreira and Mr. Jorge Bacelar Gouveia, respectively. It resulted from these that, despite the constitutional timeframe of 5 years, this fact does not imply the immediate end of the functions of the PR without the winner of the elections, in this case, Mr. Carlos Vila Nova, taking office. In fact, according to the opinions mentioned above (arguments with which we share), it would actually happen on October 2nd, 2021, and the winner being the fifth PR of São Tomé and Príncipe.

## V. CONSTITUTIONAL CASES AND PRECEDENTS

### 1. Historical cases and Major Decisions

The Constitution of the Republic Santo-mean establishes a catalog set of rights and guarantees, *verbi gratia*, providing the basic principles for structuring Criminal Law and Criminal Procedural Law<sup>29</sup>; regulates the requirements to be elected president of the republic; electoral litigation and other subjects matter, according to the respect of fundamental rights; human rights, and many other internal, regional and international principles, norms and treaties upheld by it.

Judgment, 6/2006, of 13<sup>th</sup> July 2006 - Election of the President of the Republic.

To be elected to the office as DRSTP President, according to DRSTP Constitution, a person has, between others, to have been residing continuously in the country in the “three years immediately preceding the date of the candidature”. About this subject matter, the SCC, in Judgment 6/2006, of 13<sup>th</sup> July 2006 interpreted this requirement as follows: “The [Law] says nothing about what constitutes permanent resident, despite pointing to common sense fact that someone who for whatever reason leaves the country for a considerable period of time (years) cannot be considered to be a permanent resident. However, what the law does not prohibit it permits, which assertion constitutes one of the golden rules of law”<sup>30</sup>. About this subject matter and

on the path of understanding Jonas Gentil, the *Parliamentary Note of December 4th, 2021*, came to clarify that “Permanent Residence is considered a stable, habitual, continuous and lasting stay in S. Tome e Príncipe, with installation of the home, logistically and economically organized for the center of own life and the family unit”.

### 2. Judgment, 26/2009, of 23rd July 2009 - Presumption of Innocence

In this case, which had as a background, the presumption of innocence of the accused until finally convicted by a court, the Attorney-General of the RDSTP defended in Opinion dated April 1th, 2009, that “it does not seem possible to understand that the segment of the rule of Article 172 of the Criminal Procedure Code, which allows that preventive arrest with formal charges can be extended for one year, and in more complex cases, in theory could extend up to sixteen months until the start of the trial at first instance, devotes a period whose duration is presented as manifestly excessive and unreasonable, and cannot be compatible with the constitutional principle of presumption of innocence”. In this case, the SCC decided in full agreement that the article in question was reasonable and takes into account new types of emerging crime and transnational crime, when the criteria contains elements linked to various countries.

### 3. Judgment, 8/2020, of 1 June 2020 – “solidarity tax” for the resilience fund

In the context of the pandemic, during the State of Emergency, some measures that affect fundamental rights were adopted by the Santomean Government. One of these measures, provided for in Law No. 4/2020, of 21st April – Law on extraordinary budgetary measures, comes to create the “solidarity tax” for the resilience fund, withdrawing 5%, 8% and 10%, directly from the salaries of civil servants and the private sector during a period of six months. This measure led the *Prosecutor’s Office* to request the *abstract inspection of the constitutionality and legality* of the article 2 of this Law for allegedly violating the Constitution, v.g., “the constitutional principle of irreducibility of remuneration

ation, salary intangibility and the principle of equality” (Articles. 15; 43; 98 and 100). In this Judgment, the SCC considered that in the context of the pandemic in the period of the declaration of the State of Emergency, the *solidarity tax* was “motivated for reasons of public interest, and in the case of a temporary measure” it does not violate any principles of constitutional law, therefore, there were no elements to declare the norm unconstitutional<sup>31</sup>.

#### 4. Judgment, 10/2021, of 2nd August 2021 - The Presidential Electoral Litigation

In the context of the presidential election of July 18th, 2021 conflict and because of the request for a recount of votes by the third candidate, Mr. Delfim Neves, the SCC issued *three* decisions on the same subject matter. The first two of which were more conflicting due to the lack of unanimity within the Court. The first *decision*, the Judgment, 9 [1]/2021, of 23rd July 2021, signed by only three judges, without the signature of the President of the SCC and one other Judge, was considered null and void by a class of Santomean jurists<sup>32</sup>. In this Judgment, the three judges of the Court *decided*, against the opinion of the two (minority), in favor of *recounting the votes*<sup>33</sup>. The second *decision*, the Judgment, 9 [2]/2021, of 23rd July 2021<sup>34</sup>, signed by only two judges (President and another Judge), without the signature of the majority judges of the SCC (the judges who signed the first decision), was also considered void and legally non-existent by a class of Santomean jurists, despite the President of SCC having invoked the casting vote to form majority. We do not share this argument because it contradicts the provision established between articles 33 and 35 of the CCOL. In general, this Law establishes that the SCC “works in plenary sessions” (Article 33/1). The plenary meaning, with the presence of all its members. The SCC “can only function when the majority of its members in full term are present, including the President or Vice-President” (Article 34). The article 35 establishes that deliberations “are taken by consensus”, and in the absence of consensus or by decision of the President of the SCC, the “deliberations are taken by the plurality

of votes of the members present”. The article continues, in this case, that each judge has one vote and the President, or Vice-President, when he/she replaces him/her, has a casting vote. Finally, the article establishes that the judges of the SCC “have the right to cast a losing vote”, which did not happen either in this or in the previous Judgment. In this case, the two judges of the SCC *decided*, against the opinion of the three (majority), in favor of recounting the votes.

The third *decision*, in an especially political rather than constitutional maneuver, the PR summons the 5 judges of the SCC, the Prime Minister, the President of the STJ/SCJM, the Attorney General of the Republic, some civil society personalities, with the exception of the President of the National Assembly, Mr. Delfim Neves (for being the presidential candidate who introduced the feature for the recount of votes) for a discussion on the controversy and/or crisis in the Court concerning the recount (or not) of the votes, the first two Judgments were contradictory to each other<sup>35</sup>. After that, in the Judgment, 9[2]/2021, of 23rd July 2021, signed by only two judges (President, Mr. Pascoal Daio and another judge, Mr. Hilário Garrido), without the signature and the declaration of defeated vote of the majority judges of the SCC, it was also considered null and void, despite the President having invoked the casting vote. This argument we do not share because, according to the above understanding, which applies, *mutatis mutandis*, the *plenary* of the works with the presence of all its members, with decisions taken by simple majority. After all this conflicting process, the SCC came to *decide* not to recount the votes, with a declaration of an outspoken vote by the judges involved in the second decision. In their defeated votes the judges maintained their position by recounting the votes, which, in our view, seems unorthodox insofar as it does not follow the principles of an electoral doctrine. That is, for there to be a recount, it is necessary to have a prior complaint or protest in the act in which it takes place and not at a later stage. However, regarding the non-existence and/or nullity of the previous Judgments, it is this last Judgment (Judgment, 10/2021, of 2nd August 2021) that comes to say that “the two (2) Judgments numbered with n. 9/2021 are without effect” and decid-

ed not to recount the votes. In consequence, the SCC, after the second round of the presidential elections on 5<sup>th</sup> September, declared that the candidate Mr. Carlos Vila Nova is the elected PR of DRSTP with 57.6% of the votes, against a total of the 42.4% obtained by Mr. Guilherme Posser da Costa.

## VI. LOOKING AHEAD TO 2022

In 2022, multiple scenarios are open, though. Even though since the outbreak of the pandemic (Covid-19) to the financial, social and political crisis and the discussions on justice reform, including legal and constitutional, that the country has been going through in recent years, it is expected that political parties recognize this need for amendments and taking a position, however, it is doubtful whether there is the degree of consensus desired for its effective implementation. In addition, major legislation was already announced, but we know therefore that the political polarization does not facilitate this reform, above all, the constitutional reform long time announced. What also remains open is how the tension between the executive and the judiciary shall be played out, as the implementation of the Memorandum and some Judgment of the SCC continues and so does litigation against governmental measures, above all, the unfolding of the *Rosema* process (which we hope to be able to consider in the 2022 report), probably the most mediatic and problematic Santomean case. Lastly, with the probable commercial oil discovery this year in DRSTP and as it is an electoral year, *General Elections*, is not our wish, but we believe that some conflict between the political parties is foreseen.

## VII. FURTHER READING

Bastos, F. Loureiro, “Introduction to the Constitution of the Republic of São Tomé and Príncipe”, Oxford Constitutions of the World e Oxford Constitutions Online, Oxford University Press, 2014.

Pillay, Kevashinee and Dias, Nélia Daniel, “São Tomé and Príncipe: Legal System and Research”, 2018.

Gentil, Jonas e Ceita, J. Jhúnior G., *Constituição da República de São Tomé e Príncipe e Legislação Fundamental*, iDILP, 2018.

Gentil, Jonas, “O Direito Internacional Público na Ordem Jurídica São-Tomense”, *in* O Direito Internacional Público nos Direitos de Língua Portuguesa, J. Bacelar Gouveia e F. Pereira Coutinho (Coord.), Cedis, 2018, pp. 297-343.

Gentil, Jonas, “A Revisão da Lei Eleitoral e o Princípio da Estabilidade Eleitoral em São Tomé e Príncipe”, *in* ResearchGate, 2020.

Bacelar Gouveia, Jorge e Gentil, Jonas, “O Estado de Excepção na República Democrática de São Tomé e Príncipe”, Working Paper, CEDIS, 2020.

Monteiro, Manuel; Couto, Amaro; Pavia, J. Francisco; Coelho, Teresa Leal e Soares André, “Eleições Presidenciais na República Democrática de São Tomé e Príncipe (18 de julho e 5 de setembro de 2021)”, *in* POLIS, Vol. 2 N. 4, 2021, 185-194.

Note di chiusura

1 The country is still classified as free by the Freedom House Report 2021. See available at <https://freedomhouse.org/country/sao-tome-and-principe/freedom-world/2021> [accessed 17.02.2022].

2 *Vide*, Bacelar Gouveia, Jorge e Gentil, Jonas, 'O Estado de Excepção na República Democrática de São Tomé e Príncipe', Working Paper, CEDIS, 2020 and Gentil, Jonas, 'A Revisão da Lei Eleitoral e o Princípio da Estabilidade Eleitoral em São Tomé e Príncipe', in ResearchGate, 2020.

3 The DRSTP is a founding member of the CPLC (1996), an international organization that unites the states that have adopted Portuguese as their official language.

4 See this data in NIS, <https://www.inec.st/> [accessed on 08.09.2021] and 'São Tomé e Príncipe no CIA World Factbook', Central Intelligence Agency (CIA), March, 2019. Twenty years ago, in 2001, according to the data of the third general population census (2012), DRSTP had 137,599 inhabitants. See Bastos, F. Loureiro, 'Introduction to the Constitution of the Republic of São Tomé and Príncipe', Oxford Constitutions of the World e Oxford Constitutions Online, Oxford University Press, 2014.

5 See Gentil, Jonas, 'O Direito Internacional Público na Ordem Jurídica São-Tomense', in J. Bacelar Gouveia e F. Pereira Coutinho (Coord.), *O Direito Internacional Público nos Direitos de Língua Portuguesa*, (Cedis, 2018 pp. 297-343).

6 See Pillay, Kevashinee and D. Dias, Nélia 'São Tomé and Príncipe: Legal System and Research', (2018) HGLSP, NYUSL < [https://www.nyulawglobal.org/globalex/Sao\\_Tome\\_Principe1.html](https://www.nyulawglobal.org/globalex/Sao_Tome_Principe1.html) > [accessed on 15 November 2021].

7 See Jonas Gentil and J. Jhúnior G. Ceita, *Constituição da República de São Tomé e Príncipe e Legislação Fundamental* (iDILP, 2018) and Jorge Bacelar Gouveia, 'O referendo sobre os poderes presidenciais e a Constituição de São Tomé e Príncipe de 1990', in Jorge Bacelar Gouveia, *Direito Constitucional de Língua Portuguesa. Caminhos de um constitucionalismo singular* (Almedina – FDUNL, 2006, pp. 307 to 324).

8 The DRSTP had seventeenth governments during the application of the Constitution of the 1975. Only the last one Governments managed to fulfill their mandate, this can be justified by the parliamentary majority for the or the recent pandemic. The organization of political power is based on the "principles of separation and interdependence" of sovereign bodies, pursuant to Article 69/1 and Article 154/f. The organs of sovereignty, under Article 68, are the President of the Republic (Articles 77 to 87), the National Assembly (Articles 92 to 107), the Government (Articles 108 to 119), and the Courts (Articles 120 to 134).

9 See text in the Official Journal [OJ], of December 15, 1975. Prior to the 1975 Constitution the Basic Law adopted on 12 July 1975, published in OJ No. 1, July 17, 1975 was in force

10 See Law No. 7/90, published in the OJ of September 20, 1990.

11 See Law No. 1/2003 (Law of Constitutional Revision), published in the OJ of January 29, 2003.

12 Discussions on constitutional matters in DRSTP have focused primarily on the issue of the system of government and the distribution of powers between the President and the Government. A recurring theme has been the replacement of the semi-presidential system, adopted in the 1990 Constitution, for a presidential system, despite the strengthening of presidential powers not normally accompanied by the provision of oversight mech-

anisms at the level of the representative body. The attraction of a presidential system is explained by Gerhard Seibert, in 'Instabilidade política e revisão constitucional: semipresidencialismo em São Tomé e Príncipe', in Marina Costa Lobo and Octávio Amorim Neto (org.), *O semipresidencialismo nos países de língua portuguesa*, ( 2009, Lisboa, Imprensa de Ciências Sociais, 2009). Gerhard Seibert considers that "In this context the configuration of political power introduced in 1990 was also a significant rupture with the past".

13 See Law No. 7/2010 (Basic Law of the Judiciary), published in the OJ of August 6, 2010, provides, in article 15/1, for the existence only of "courts of first instance and the Supreme Court".

14 The Basic Law of the Judiciary provides, in Article 57, for the possibility of creating the following specialized courts.

15 See 'São Tomé and Príncipe's Constitution of 1975 with Amendments through 2003', Oxford University Press (Constitut Project), August 26, 2021.

16 See Law No. 19/2017, of December 26.

17 See Resolution No. 73/X/8.º/2018, in *Parlament OJ of the May 4, 2018*.

18 See <<https://www.stp-press.st/2018/05/04/parlamento-sao-tomense-acaba-exonerar-tres-juizes-do-supremo-tribunal-justica/>> [accessed on 18.02.2022] and <<https://www.dw.com/pt-002/s%3%A3o-tom%3%A9-e-pr%3%ADncipe-patrice-trovoada-defende-exonera%3%A7%3%A3o-de-ju%3%ADzes-do-supremo/a-43676331> > [accessed on 18.02.2022].

19 In other words, it means "the President of the Santomean Bar Association".

20The Caué-based Movement of Independent Citizens of São Tomé and Príncipe (MCISTP) contested the election. Today, we believe that this party should not run in the legislative elections, because it did not run at the national level, but only for the district of Caué, due to the national character and scope of political parties. See article 3º of the Law No. 11/2021 of February 15 (Law on Political Parties).

21 The PCD-GR is a political party in DRSTP. It was founded on November 4, 1990 by MLSTP dissidents, independents, and young professionals. Leonel Mário D'Alva was the first party leader. The single-party period of STP lasted from the country's independence in 1975 to 1991, when the dominant party, MLSTP-PSD, lost in the first multiparty elections to the PCD-GR on January 20, 1991. Daniel Daio was the first prime minister on democracy for PCD-GR.

22 See <<https://www.vda.pt/pt/publicacoes/insights/estado-de-emergencia-e-de-calamidade-publica/22205/>> [accessed on 07.02.2022].

23 See RDSTP, *Quadro de Gestão Ambiental e Social - Projecto de Emergência em Resposta ao COVID-19 - Atualização dos Instrumentos Ambientais e Sociais*, Ministério de Saúde, 9 de Junho de 2021.

24 See <<https://www.angop.ao/noticias/africa/presidente-sao-tomense-marca-eleicoes-presidenciais-para-18-de-julho/>> [accessed on 14.02.2022]. See also, Manuel Monteiro, Amaro Couto at. al., 'Eleições Presidenciais na República Democrática de São Tomé e Príncipe (18 de julho e 5 de setembro de 2021)', in POLIS, (2021, Vol. 2 N. 4).

25 Gentil, Jonas, 'A Revisão...', op. cit., and Miranda, Jorge, *Direito Eleitoral*, 2018: pp. 94-95.

26 Gentil, Jonas, 'A Revisão...', op. cit..

27 See Monteiro, Manuel; Couto, Amaro at. al., 'Eleições Presidenciais...', op. cit..

28 On the first day of the campaign, Minister of Health Edgar Neves warned of the exponential in-

crease in the number of cases of COVID-19 and that a third wave of the pandemic was beginning in the country.

29 The *Code of Criminal Procedure* currently in force in São Tomé and Príncipe, approved by Law No. 5/2010, published in the OJ of August 10, 2010 (which reprinted the text previously approved by Law No. 19/2009, published on December 31, 2009 with corrections), replaced the *Portuguese Code of Criminal Procedure* of 1929.

30 See Bastos, F. Loureiro, "Introduction...", op. cit., and Gentil, Jonas, "A Revisão...", op. cit.

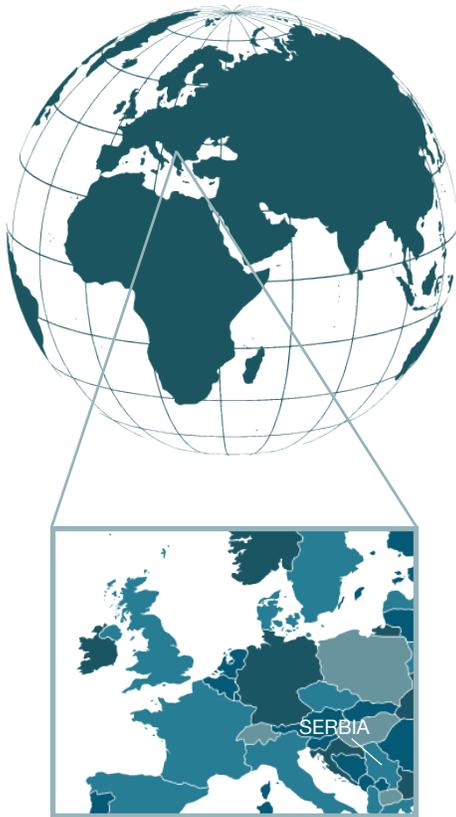
31 On the salary readjustment, outside this context, see Gentil, Jonas e Semedo, Carlos, "Análise Crítica ao Novo Estatuto Remuneratório da Função Pública", 2021.

32 By the way, Jhúnior G. Ceita said that "This document itself, entitled Judgment of the Constitutional Court 9/2021, is not a judgment, because it is wounded of inexistence, because it was not taken in the plenary of the Court". The jurist also considered that "because it is not a judgment, it has no legal-executive force". See <<https://www.noticiasaminuto.com/mundo/1804364/sao-tome-juizes-consideram-nulo-acordao-que-ordena-recontagem-de-votos>> [accessed on 23.02.2022].

33 On the recent decision to recount the votes in Portugal (european immigration circle), see <<https://www.dn.pt/politica/tc-determina-repeticao-da-votacao-no-circulo-da-europa-14592153.html?fbclid=IwAR1mQYH4xfUieCYiEHZn-flDY-saKQLPm5XxQ-pfuiKh5nOSMpn6C-xdT-vbQ>> [accessed on 18.03.2022] and <<https://www.publico.pt/2022/02/15/politica/noticia/tribunal-constitucional-decide-preciso-repetir-eleicoes-141-mesas-europa-nova-ar-governo-so-daqui-mes-1995617>> [accessed on 18.03.2022].

34 See July 26 Letter from the three judges sent to PR in <<https://www.jornaldeangola.ao/ao/noticias/juizes-do-constitucional-contra-recontagem-dos-votos-eleitorais/>> [accessed on 23.02.2022] and <<https://www.telanon.info/politica/eleicoes-presidenciais/2021/07/26/34850/crise-no-tribunal-constitucional-juizes-pedem-a-intervencao-do-presidente-da-republica/>> [accessed on 22. 02. 2022].

35 See <<https://www.rfi.fr/pt/s%3%A3o-tom%3%A9-e-pr%3%ADncipe/20210726-ju%3%ADzes-denunciam-funcionamento-anormal-do-tribunal-constitucional-s%3%A3o-tomense>> [accessed on 17.02.2022].



# Serbia

Attila Nagy

Law Lecturer and PhD Researcher

University of Jena, Jena Centre for Reconciliation Studies

## I. INTRODUCTION

The last few months of 2021 were very turbulent in Serbia as the Government has envisaged a rapid change of the Constitution with a referendum happening in January 2022. The Constitution of Serbia, from 2006, has been often seen through the lenses of its Preamble which describes the undividable unity and belonging of Kosovo to Serbia. Since no law of Serbia is applicable, or better to say enforceable, on the territory of Kosovo, the declarative nature of the Serbia's constitutional Preamble therefore serves as the last legal argument of the Serbian Sovereignty over Kosovo. As many ordinary citizens are unclear why the Constitution is not applicable and how this loophole can be filled, the government has offered a partial solution and change of the constitution, at least for now. The Constitution will be changed in as far as the judiciary is concerned in order to enhance its independence (sic). Therefore, the change of the constitution, although awaited in some form, has arrived but with a completely different agenda. Many citizens have been confused by the Referendum and it can be seen in the low turnout rate of only about a third of the citizens participating in the voting. One of the biggest challenges of The Serbian Constitution is that it can't hold the rule of law requirements as the *de lege lata* does not correspond to the *de lege ferenda*. It is hard to foresee whether, and when, the change in the Serbian Constitution regarding the issue of Kosovo will occur, but we are sure that the EU and some stakeholders in the International Community are pushing towards this change. It is also hard to 'sweep under the carpet' after all the inapplicability of The Serbian Constitution and Laws in

Kosovo and the inability of its institutions to act on this territory.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The first amendment to the Serbian Constitution of 2006 did not come as a surprise, although the scope of the amendment is somewhat shortened. Accordingly one of the biggest challenges of the Constitution and the constitutionality, after all, is the definition of the status of Kosovo, or as the Serbian constitution quotes it, Autonomous Province of Kosovo and Metohija. The changes in the constitution have been also approved by The Council of Europe and its Venice Commission. "The initiative of the Serbian authorities to amend the 2006 Constitution in order to bring it into in line with European and international standards – albeit only on the part of the judiciary – is to be welcomed."<sup>1</sup> Both by the local and EU stakeholders this interference into the Constitution is seen as a possible introduction of other changes, again when we say change everyone is thinking about the status of Kosovo. Although the change regarding Kosovo status has not yet been foreseen, the system has been now established and checked accordingly, the mechanism for a constitutional change has been established. A new Law<sup>2</sup> regarding the system of referendum has been voted in the parliament which makes it possible to introduce changes without the participation of the majority of citizens in future referendums. The government claims that the change in the law and the new amendment are meant to serve higher legal, political and economy related interests in the sense of the future EU membership.

“The Constitution is being changed in the field of justice in order to harmonize Serbian legislation with the European one in the process of Serbia’s accession to the EU, and the changes refer to the manner of electing judges and prosecutors in order to reduce the influence of politics in that process.”<sup>33</sup> As the government states the highest priority was to depoliticize the judiciary whereas the government, or as some would better state The President, Aleksandar Vucic, has established full control over almost all the institutions which should otherwise be independent from political influence. This was not hard once the governing party in Serbia successfully secured a majority in the parliament repeatedly. “In the context of the current Serbian political landscape – with a one-party majority in the National Assembly and the absence of the parliamentary opposition – there is a strong need to adopt an inclusive approach that should aim to reach as broad a legitimacy for the constitutional reform as possible among all institutional actors and all political forces in Serbia.”<sup>34</sup> The role opposition has in Serbia is as complex as it is obvious that the EU would have the same requests towards them once in power. This lowers the space of political manipulation for them as the present government tends to completely and fully comply with various demands coming from the EU and USA as well. The sudden, out of the blue, change in the constitution can be observed through the lenses of the coming elections in Serbia where the governing party and the President will tend to gain even more power and secure an even broader control over institutions which should be otherwise independent. The one decade-long timeframe on power of the Srpska Napredna Stranka has not lost on popularity even when they supported The Brussels<sup>5</sup> and The Washington<sup>6</sup> Agreements with Kosovo, which have both envisaged a lower level of control over the territory of Kosovo by Serbia, which is again contrary to the Constitutional requirements. Therefore, the present system has been established with an aim of a possible future of constitutional changes for what the political climate is also getting more ready and welcoming. Ultimately, when we look at the last level of the Constitutional hierarchy, The Constitutional Court of Serbia, we can notice that it has not interfered much with the case of Kosovo recently. It is more of a moral re-

quirement of judges at The Serbian Constitutional Court to act and protect the Constitution, at least until there is something left to do while many Constitutional competences have been transferred from Serbia to Kosovo with The Brussels Agreement. At the moment it looks like everyone is in favor of constitutional changes, but it is interesting to see how institutions, especially the independent ones such as The Constitutional Court, are ready to ignore the inapplicability of the Constitution in many spheres of life from which the most obvious one is the territory of Kosovo. Accordingly, we are posing a valid question of what is the Serbian judiciary overall ready and capable of doing? “For the judicial reform to succeed in bringing the Serbian judiciary in line with European and international standards, organic laws will need to be reformed that regulate very essential details such as eligibility criteria for judicial office and invest in practice. The current constitutional reform is a necessary and important first step in the process, but does not constitute the completion of this process.”<sup>37</sup> As the first step is done we are facing the question whether the Serbian Constitution will ever be up to date with the real life situation in Kosovo, especially keeping in mind the decades long unchanged situations in other similar post-conflict countries, globally. Therefore, the exclusion of the Parliament to decide on the appointment of judges and prosecutors and the transfer of such important rights to specialized councils undermines the core of the separation of powers in Serbia.

### III. CONSTITUTIONAL CASES

#### 1. The Validity and Applicability of Post-Conflict Constitutionalism

When we approach the idea with its whole complexity of the Serbian Constitutionality we need to look back to the soul and core of every constitution: why is it made? Is a Constitution made for the benefit of people, if yes, why does it tend to ignore it in so many cases and in the end what can they do to change a situation and also stay in the constitutional frame of liberties? As we look at Serbia and its complex relationship with Kosovo together with the imminent crisis in Ukraine where people in this case have not

much to say or decide at all. Will Ukraine get the same destiny as Serbia and have amputated parts inside its Constitutional borders? Therefore there is a need to research the Serbian Constitutionality in a broader sense and with it, try to understand the future potentials of the constitutional science. In doing so, firstly, we will research the Preamble of The Serbian Constitution which states: “Considering also that the Province of Kosovo and Metohija is an integral part of the territory of Serbia...”<sup>38</sup> With this declaration it is clear what the idea and the core of the Constitution is, to defend Kosovo as part of Serbia, but this *de jure* conclusion does not comply with the *de facto* situation in Kosovo. Whether it will stay so or change in the near future, the Serbian constitutional science does not provide an answer, only the political standpoint of the government is available after the first amendment has been accepted. “Kosovo remains in the preamble of the Constitution of Serbia, said today the Minister of Justice Maja Popović”<sup>39</sup> It looks that this present solution of partially amending the Constitution pleases the local political elites as much as the international ones. “Head of the EU Delegation to Serbia Emanuel Giaufret welcomed the completion of this important step in the reform of the Constitution, which is in line with Serbia’s strategic choice of joining the EU.”<sup>40</sup> Both are happy that there is a change and that the ‘nut has been cracked’ with an option of future changes, while the Serbian government hopes that there will be no changes in the future, and the EU sees this as a way on which Serbia should be pushed forward in the process of Constitutional amendments. Certainly, the legal basis has been established but the political moment has not arrived yet. The whole process of changing the Constitution is meant to put forward Serbia’s EU path which ultimately poses the question of whether and how it can join the EU keeping in mind that EU itself has a status neutral position towards Kosovo independence. Officially, EU is neutral, but its member states apart from 5 are very much keen to support independent Kosovo, as a middle solution the proxy in the form of EULEX (European Union Rule of Law Mission in Kosovo) has been made to help strengthen the rule of law in Kosovo. EULEX is interestingly dealing with supporting the most vital state func-

tions such as the judiciary, law enforcement and the police service, such authorities were the main conclusions in the Brussels Agreement where Serbia has given up on them. In this sense it is hard to define who is legally taking over the state authorities of Serbia in Kosovo from the standpoint of the Serbian Constitution. Further to the EULEX mission, which has inherited the UN mission in Kosovo, we are faced with the problem of foreign intervention into sovereign states. Sovereignty is the most vital and precious achievement of EU democracies overall, so it is hard to explain to what extent and how long such an interference is possible. In connection to the Russian invasion in Ukraine, we also have a similar problem of explaining it since according to the Russian standpoint it is necessary and vital while Ukraine sees it as an interference into its sovereignty. The cases of Kosovo and Ukraine are very similar but also treated completely different from the same stakeholders which again extends the ambiguity and inapplicability of international law. The pressure on Serbia's sovereignty on one side is not compatible with the support on Ukraine's sovereignty on the other. "Serbia's government has given no official reaction to a warning by Germany that Belgrade must recognize Kosovo's independence as a condition of joining the European Union."<sup>11</sup> It is possible that in the future the whole political set up in Serbia will be made aiming at the crossroads of joining EU or keeping Kosovo, at least on paper. In such circumstances the citizens would vote and most likely choose EU integrations which actually offer them some benefits contrary to the hanging amputation of its southern province, Kosovo.

## 2. Sovereignty over and in Kosovo

As the present constitutional referendum has been organized quickly without prior discussion about priorities, so is the case that citizens of Serbia will once have to face a question about either EU or Kosovo. In the present trends today, of prices of energy and food rising up, in the future it would be easy to convince people about pretty much any change in the scenario where they are faced with a shortage of any kind. The practice of fast and quick decisions is getting a momentum in politics today, not just on the local level but on

the international level even more. "The Venice Commission regrets that the revision of the law on referendums started only when a constitutional referendum was imminent."<sup>12</sup> It is not the case that the recent constitutional change was imminent, necessary or a priority of any kind in this election year of 2022. The fact is, that the system of constitutional amendments has been started and that it has been tested in some sense on a matter which remained unclear to the majority of citizens. The argument of the government, that they want to get more independent judiciary, poses the question whether that same judiciary was not independent before and what has it done wrong, will anyone try to fix such presumable prior mistakes if any, after all. The government itself has no problems with the judiciary whatsoever, they are happy with its functioning overall. At this point, it is necessary to look at the standpoint of the opposition which is very weak in the parliamentary sense but even more active in its role outside of it. The case of the Serbian State Prosecutor Zagorka Dolovac has been in focus for many years. The government has preached her as a success story while the opposition could not reach and question her at many instances. "The opposition has often described her as 'an invisible woman, who doesn't interfere with her job.'<sup>13</sup> Such an accusation is coming as a very hard hit on the idea of an independent, open, and responsive judiciary. Another paradox in Serbia is the fact that you can ask a state institution about certain facts and easily be redirected to another one, thus going round and round, while it became a practice that the President is perfectly informed about everything and even foresees what the next step of the government will be, very often. A very recent problem where the government was questioned and the final answer came from the President was the case of Rio Tinto<sup>14</sup> mining company which has had to give up its mining business in Jadar, Western Serbia. Apart from the property issues which were very problematic regarding the expropriation practices, it also became evident that people are keen to protect nature from pollution. When put in front of two options, one being development and the other nature, people have supported nature with many road blockades Serbia wide. When we talk about property, it is necessary

to mention here another case from a 'neighboring' jurisdiction in Kosovo. "The EU is concerned by a continued lack of implementation of the 20 May 2016 Constitutional Court ruling on the land dispute case in Decan/e."<sup>15</sup> Namely, it became evident that there are no real enforcement mechanisms in Kosovo which could implement such a decision of the Kosovo Constitutional Court, although Kosovo institutions but also EULEX would be able to help in such a case. So it came out that the highest court instance in Kosovo does not really have a backing in the ruling structures and the government, thus leaving a small disagreement between various institutions in Kosovo. This is unfortunately not a case in Serbia where the Constitutional court miraculously follows the government agenda and keeps quiet about many government related issues from which the most notable one is the case of the status of Kosovo. While to some extent EU supports and affirms such a behavior, the Serbian Government has also received some negative comments regarding The Constitutional Court from the Venice Commission recently. "The revised text has failed to take into account the Commission's 'regret' that this opportunity for constitutional revision has not been seized to introduce: (a) the need for a qualified majority vote in the National Assembly for the election of constitutional court judges..."<sup>16</sup> While having a majority in the Parliament and also a President from the same party it is hard to expect that such a combination would be able to produce an independent Constitutional Court, since these two bodies are electing 2/3 of the total number of Constitutional Court Judges, 10 judges out of 15 in total. Therefore it is hard to expect any sudden changes in the overall already present and active constitutional policies of the government, apart from possible administrative changes just as it was the case with the recent amendments regulating the Serbian judiciary system. This standpoint is regarding the local political forces which do not exclude a foreign request and intervention in which case, we are of the opinion, the government would smoothly comply. "President Aleksandar Vucic's comment this week that the country does not have the courage to change its constitution has revived speculation about alleged unofficial requests from EU states for Belgrade

to drop its constitutional preamble which defines Kosovo as part of Serbia.”<sup>17</sup> As we have pointed it out earlier and considering the overall situation it is overtly visible that the Serbian Government under the leadership of President Aleksandar Vucic is ready to go an extra mile and sign various agreements that are outside of the scope of their mandate or constitutional frame. It is to be seen how the Parliament, and especially the Constitutional Court, will deal with the achievements stemming out of The Brussels and Washington Agreements, which are to be a very hybrid form of a Constitutional pressure on both Serbia but Kosovo as well. Overall, the research of these complex relationships would be a very valuable case study for understanding how post-conflict Constitutionalism is developing in the 21<sup>st</sup> century.

issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure on 24 November 2021, endorsed by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021) CDL-AD(2021)048-e. Council of Europe, Venice Commission. [https://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD\(2021\)048-e](https://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD(2021)048-e)

Attila Nagy, The Brussels and The Washington Agreements in Kosovo in the Framework of EU policies, *Regional Law Review* 2021, 131-143 UDK: 341.24 (497.115) DOI: [https://doi.org/10.18485/iup\\_rlr.2021.2.ch8](https://doi.org/10.18485/iup_rlr.2021.2.ch8)

#### IV. LOOKING AHEAD

The biggest challenge of The Serbian Constitutionalism is the status of Kosovo and its potential recognition in the future. Even if the Serbian Government would recognize Kosovo to a certain extent, what it actually does with The Brussels and Washington agreements, remains an issue of how to transfer this reality into the Constitution. Many parts of the Constitution are not applicable on the territory of Kosovo and most importantly there is no special law regulating Kosovo as The Serbian Constitution Art.182 par.2 prescribes it. Without prejudicing the future solutions we can only make a parallel comparison of the achievements in Autonomous Province of Vojvodina, where for example there are two flags of this province, one that the EU likes, and the other resembling the Serbian Autonomy on this territory. It can be expected that at least the status neutral Kosovo symbols such as the flag and its anthem could be accepted in the future by Serbia and its Constitution.

#### V. FURTHER READING

Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary,

- 1 Council of Europe, Venice Commission, 'Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021)' (CDL-AD(2021)032-e)
- 2 Law on the referendum and the people's initiative, Inofficially consolidated text <<https://www.rik.parlament.gov.rs/extfile/en/1242/Law%20on%20the%20Referendum%20and%20the%20Peoples%20Initiative%20-%20INOFFICIAL-LY%20CONSOLIDATED%20TEXT.pdf>> accessed 22.02.2022
- 3 The Government of the Republic of Serbia, 'Prime Minister calls on citizens to go to referendum' < <https://www.srbija.gov.rs/vest/en/183598/prime-minister-calls-on-citizens-to-go-to-referendum.php> > accessed 22.02.2022
- 4 Council of Europe, Venice Commission, 'Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021)' (CDL-AD(2021)032-e)
- 5 Brussels Agreement of 2013, First Agreement of Principles Governing the Normalization of Relations <<https://www.srbija.gov.rs/cinjenje/en/120394>> accessed 22.02.2022
- 6 Washington Agreement, Economic Normalisation Between Kosovo and Serbia < [https://kryeministri.rks-gov.net/wp-content/uploads/2020/10/Implementation-Plan-for-the-Washington-Agreement\\_19102020.pdf](https://kryeministri.rks-gov.net/wp-content/uploads/2020/10/Implementation-Plan-for-the-Washington-Agreement_19102020.pdf)> accessed 22.02.2022
- 7 Council of Europe, Venice Commission, 'Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021)' (CDL-AD(2021)032-e)
- 8 Constitution of Serbia, as of 8 November 2006 <[http://www.parlament.gov.rs/upload/documents/Constitution\\_%20of\\_Serbia\\_pdf.pdf](http://www.parlament.gov.rs/upload/documents/Constitution_%20of_Serbia_pdf.pdf)> accessed 22.02.2022
- 9 B92, "'Kosovo remains in the preamble" VIDEO' < [https://www.b92.net/eng/news/politics.php?nav\\_id=110992](https://www.b92.net/eng/news/politics.php?nav_id=110992)> accessed 22.02.2022
- 10 The Government of the Republic of Serbia, 'Serbian citizens understood importance of changes leading to more independent judiciary' < <https://www.srbija.gov.rs/vest/en/183814/serbian-citizens-understood-importance-of-changes-leading-to-more-independent-judiciary.php>> accessed 22.02.2022
- 11 Radio Free Europe/Radio Liberty, 'Serbia Silent About Recognition Of Kosovo' < <https://www.rferl.org/a/serbia-must-recognize-kosovo-to-join-eu-german-foreign-minister-gabriel-says/29040748.html>> accessed 22.02.2022
- 12 Council of Europe, Venice Commission, 'Serbia - Urgent opinion on the draft law on the referendum and the people's initiative, Issued pursuant to Article 14a of the Venice Commission's Rules of Procedure, on 24 September 2021, Endorsed by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021)' (CDL-AD(2021)033-e)
- 13 N1, 'Serbia's public prosecutor: Another six-year mandate for "invisible woman"' <<https://rs.n1info.com/english/news/serbias-public-prosecutor-another-six-year-mandate-for-invisible-woman/>> accessed 22.02.2022
- 14 Radio Free Europe/Radio Liberty, Serbian Lawmakers Pass Law Removing Turnout Threshold In Referendums <<https://www.rferl.org/a/serbia-referendum-law-/31579860.html>> accessed 22.02.2022
- 15 European Union Office in Kosovo , European Union Special Representative in Kosovo, 'EU is concerned by a lack of implementation of Constitutional Court ruling on the land dispute case in Decan/e' < [https://eeas.europa.eu/delegations/kosovo/24839/eu-concerned-lack-implementation-constitutional-court-ruling-land-dispute-case-decane\\_en](https://eeas.europa.eu/delegations/kosovo/24839/eu-concerned-lack-implementation-constitutional-court-ruling-land-dispute-case-decane_en)> accessed 22.02.2022
- 16 Council of Europe, Venice Commission, 'Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 24 November 2021, endorsed by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021)' (CDL-AD(2021)048-e)
- 17 Balkan Insight, 'Serbia's Vucic Sparks Intrigue over Constitution Changes' < <https://balkaninsight.com/2017/08/11/vucic-raises-questions-on-serbian-constitutional-amendments-08-10-2017/>> accessed 22.02.2022



# Slovakia

Tomáš Lalík  
Associate Professor  
Comenius University Bratislava

Kamil Baranik  
Associate Professor  
University of Matej Bel

Šimon Drugda  
PhD Candidate  
University of Copenhagen

## I. INTRODUCTION

Constitutional development in Slovakia in 2021 continued to be affected by the global pandemic, which resulted in another lockdown and restrictions on the rights and liberties of citizens.<sup>1</sup> The Slovak government declared a new state of emergency at the end of November 2021, combined with a two-week lockdown.<sup>2</sup> Compounding the struggle against the pandemic were domestic variables that made the response to the pandemic as well as political decision-making at large more costly. Local factors that have continued to affect constitutional development in Slovakia include corruption and the fight against it, polarization of politics and distrust towards the government.<sup>3</sup> The two latter variables specifically make it difficult for any government to implement large-scale reforms as this context inevitably lead to contestation and coalition in-fighting.

The chaotic and confrontational political style of PM Matovič, whose party emerged as an unlikely victor of the 2020 general election, ultimately led to his demise just one year into his term of office.<sup>4</sup> The government reshuffle resulted in a lower rate of constitutional change, likely due to the cost of managing a change in government, even if continuous. Despite more than a dozen proposals, the Parliament did not pass any direct or indirect constitutional amendment in

2021. Perhaps the most critical amendment proposal that would have resulted in an important shift in constitutional law concerned the ability of the people to decide on shortening the term of office of the Parliament in a referendum.<sup>5</sup> The proposal was filed in response to a Constitutional Court decision on this exact subject, which we review in the following section.

In the section on major constitutional cases and controversies, we review a decision of the Constitutional Court concerning first the prosecution of corruption and detention of high-profile figures and second, the pandemic. We conclude the report with a short note on future development. We await the resolution of two important constitutional cases on unamendability pending before the Constitutional Court. The resolution of these two cases could significantly impact the development of the doctrine of unamendability in the country and broader region.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most important constitutional development in 2021 was the government crisis that led to the resignation of the PM and a government reshuffle. The political situation within a jurisdiction can have a significant impact on the output of the Parliament,

which is likely why we could observe a reduced rate of constitutional change in 2021. Constitutional amendment thresholds generally require a higher degree of consensus, which is more difficult to achieve if the ruling majority is not cohesive.

The coalition crisis originated from a purchase of Sputnik vaccines from Russia by the then PM and Minister of Health, under the understanding these vaccines would be offered to the public for voluntary vaccination.<sup>6</sup> Although the crisis had a longer pedigree, the purchase of the Russian vaccines acted as a trigger and resulted in the call of the junior coalition members for the PM to resign. The junior coalition parties objected to the fact that the PM ordered a shipment of Sputnik V vaccines from Russia, without informing his partners and even though the vaccine was not at the time cleared by the EU drug regulator.<sup>7</sup> PM Igor Matovič and his party Ordinary People and Independent Personalities sought unsuccessfully to diffuse the conflict by sacrificing the Minister of Health, but this did not satisfy the coalition members and resulted in more Cabinet resignations meant to pressure the PM.<sup>8</sup> Under the mounting pressure, and lack of trust in this capacity to compromise and mediate the conflict, PM Matovič finally resigned.<sup>9</sup>

Matovič, who rose to power thanks to a popular anti-corruption campaign, only stayed in office for a year.<sup>10</sup> His confrontational and expressive style of politics led to coalition in-fighting, which ultimately saw Matovič being replaced by the 2nd in command in his party. The new government was appointed to office by the President on 1 April 2021 and later confirmed by the Parliament in a vote of confidence. Since all the parties involved in the crisis expressed their interest in continuing governance under different leadership, the reshuffle did not lead to dramatic changes. This most significant change was the change of roles between the PM and the Minister of Finance. Former deputy PM and the Minister of Finance assumed the role of the PM while Igor Matovič took on the role of the Minister of Finance.<sup>11</sup>

Interestingly, during the crisis, the opposition as well as members of the coalition

suggested either calling a referendum or adopting a constitutional amendment to shorten the parliamentary term, which is a controversial subject in Slovak constitutional politics.<sup>12</sup> We might question if this was a genuine communication or a political strategy, from the junior coalition members, since they eventually decided to stay even after the government reshuffle. However, the opposition eventually collected enough votes to trigger a referendum, which resulted in the case PL. ÚS 7/2021.

The case presented the Court with an unresolved question, whether the people can remove their elected representatives from office ahead of time. The Court's answer was a qualified no. When people resort to direct democracy tools, the Court found, they are not only bound by explicit subject-matter restrictions on the use of referenda but also implicit norms under the doctrine of the material core. The people have a great power to make or unmake constitutional law but cannot breach it in an irregular use of a referendum.

The doctrine of material core, developed in an adjacent line of cases on constitutional unamendability, identifies core principles of the Constitution that cannot be modified by an ordinary constitutional amendment. The Court found that a referendum decision has the legal force of a constitutional act. When the people use their voice in a referendum, they exercise a power that is analogous to lawmaking, with all restrictions that apply to the legislative power. Consequently, when people use referenda, they act as a constituted and not constitutive power, which is why they cannot break the core of the Constitution.

[T]he Constitution characterises [referendum] as an exercise of the legislative state power (one of the types of constituted powers) directly by citizens, in contrast to the exercise of the very same power by their elected representatives – members of Parliament. The essential point is that in both cases, it is the exercise of the constituted power (not the constitutive power), which is a priori limited by constitutional rules (norms). [144]

Applying the doctrine of the material core of the Constitution, the Court found that the challenged referendum contradicts the core principle of the generality of lawmaking, which is a constitutive principle of the rule of law, and the principle of functional separation of powers.

### III. CONSTITUTIONAL CASES

Corruption was the main campaign issue in the run-up to the 2020 general election. The then-opposition accused the government headed by the party SMER-SD of fostering corruption in various forms. The general election resulted in a landslide victory of the opposition united to stop the corruption.<sup>13</sup> Soon afterwards, things began to move, from legislative action to action on the ground against incumbent and former state officials. As a result of criminal investigation, many former public officials have been subject to criminal proceedings, not excluding pre-trial detentions. The high-profile officials detained and prosecuted included the former Special Prosecutor, two former heads of the Police and chief police officers, several judges and other high-rank public officials or cronies of the former government.<sup>14</sup>

In the course of this anti-corruption campaign, the Constitutional Court became the institution to resolve disputes over alleged human rights violations in these proceedings via constitutional complaints. Due to a limited scope, the report provides only a summary of the most prominent cases and violations of human rights found by the Court. The problems identified were three-fold: (i) reasons for imposing detention were vague and abstract, while the courts did not elaborate on alternative measures but imposed detention straight away; (ii) some judges were over-active in imposing detention, trying to match meet public and political demand to punish the corrupt; which consequently (iii) resulted in court opinions that violated the right to be presumed innocent.

In the case of the former Deputy Minister of Finance and his pre-trial detention, the Constitutional Court declared a violation of the

right to liberty. In judgment III. ÚS 581/2021, the Court found that the justification for the pre-trial detention of the Deputy Minister based on the risk of obstruction of justice was abstract and hypothetical. The Supreme Court did not identify specific reasons indicating that the former Deputy Minister would temper the evidence or witnesses. His past function at the Ministry alone was insufficient ground for the risk of obstruction of justice. The Supreme Court also did not consider alternative measures (such as monitoring the former Deputy Minister) instead of detention.

The Constitutional Court identified other abstract and hypothetical reasons for pre-trial detention in judgment III. ÚS 523/2021. The case concerned an oligarch and a business partner of the former government. His pre-trial detention was imposed for alleged fear of escape, supported by the following reasoning: (i) the individual faced a threat of a harsh sentence (10-15 years); (ii) he had ownership of a property in Spain; (iii) solid economic background; (iv) intentional return to Slovakia for his criminal investigation; (v) deterioration of his health in detention. All these grounds were considered by the Constitutional Court as general possibilities and rather irrelevant without any rational basis in evidence. Again, the courts did not elaborate on alternative measures instead of detention.

Another case involving the former Deputy of the Ministry of Justice is symptomatic of how the courts in Slovakia handle pre-trial detention cases in general. As in previous cases, the former Deputy was detained due to a fear of obstruction of justice, but the courts failed to identify any witnesses that the accused could influence. The Constitutional Court in judgment III. ÚS 347/2021 found the breach of the right to liberty, stating that “it is necessary to specify which persons are at risk of being tampered.”

In another case, the CC criticized the Supreme Court that it justified detention “by the very nature of the criminal activity, the manner in which it was committed and the methods used in committing it; a crime was committed in a highly sophisticated, covert manner, in which the accused was to bribe other persons to secure a benefit for the company of which he

was a statutory representative; and there is a fear that the accused could do so in his criminal case.” In judgment I. ÚS 452/2020, the Constitutional Court considered such reasoning general and hypothetical and found a violation of the right to liberty.

Besides the courts that impose detention on remand do not provide specific reasons for such a drastic measure, other problems with high-profile cases have also occurred. In judgment II. ÚS 428/2020, the Constitutional Court had to deal with parallel challenges to the impartiality of a judge sitting at the Supreme Court and dealing with a pre-trial detention case of a former judge at the Bratislava Regional Court. The crux of the case was lodging two parallel impartiality objections for the same reasons – one by the accused and the other by the challenged judge. Upon learning that the accused challenged his impartiality, the judge hastily challenged himself too in a new motion and tried to defend himself by replying to arguments raised by the accused. The Supreme Court dealt only with the objection lodged by the judge and not with the objection raised by the accused. The Senate confirmed the judge’s impartiality, leaving the accused’s challenge unanswered. The Constitutional Court found such procedure improper for two reasons: such a course of action effectively denied the accused the right to know the arguments of the challenged judge, and the accused also lost the possibility to appeal further the decision confirming the impartiality of a judge. That state of affairs was considered by the Court arbitrary.

The same judge was successfully challenged due to his possible bias in the case of the former Special Prosecutor. The judge was the uncle of a prosecutor who pressed charges against the former Special Prosecutor. The judge, however, did not feel obliged to recuse himself from proceeding or reveal the fact before the trial. The CC in the judgment III. ÚS 39/2021 found a breach of impartiality and right to liberty on two accounts: close family ties between the judge and the prosecutor and an interview for a newspaper where the judge praised the work of his nephew while condemning the former Special Prosecutor for his criminal activity.

Other cases raised the alleged violation of the presumption of innocence in courts’ reasoning. For example, some judges reviewing an application for pre-trial detention wanted to match public demand and used improper language when assessing reasons for detention and drafting their opinion. By way of example, in the case of a crony to the former government, the Supreme Court used the following comment: “With regard to evidentiary strength against the accused, his obstructive behaviour is the only way to avoid a long sentence in the event of his release.” The Constitutional Court condemned the comment as breaching the presumption of innocence. Also, it ruled that the respective judges of the Supreme Court would be biased if they were to sit on the case against the applicant in future (II. ÚS 367/2021). In the same judgement, the Constitutional Court established that the work schedule of judges handling the case was wrongly applied, and consequently, a breach of the principle of the lawful judge occurred.

#### *Case law reviewing the constitutionality of the Public Health Office’s Decrees*

The following section examines two cases concerning the government’s response to the Covid19 pandemic. Emergencies create the need and sometimes the opportunity for governments to intervene in the peaceful enjoyment of rights and liberties of rights-holders. In Slovakia, two legal instruments allow the government to restrict human rights in an emergency. First, the delegation clauses in the Slovak Act on the Protection, Promotion and Development of Public Health of 2007 (Act on Public Health) give the Ministry of Health a significant margin of discretion when restricting human rights to protect public health.<sup>15</sup> Second, the Constitutional Act on the State Emergency of 2002 (CASE) authorizes the government in a state of emergency to limit enumerated human rights directly by a decree.<sup>16</sup>

During the COVID pandemic, the Slovak government formally delegated a critical portion of these vital powers to the Public Health Office (PHO) and its head – the Chief Hygienic Officer. The PHO decrees became the most vivid symbol of human rights limitations during the pandemic in Slovakia.

Yet, the delegation of responsibilities was a purely formal measure. The Slovak government remained in firm control of almost all anti-pandemic agendas as it could, via the decision of the Minister of Health, fire the Chief Hygienic Officer at will. Consequently, it seemed that the Chief Hygienic Officer served as an expert rubber-stamper of the governmental political decision-making. The General Prosecutor (GP) and the Public Defender (PD) brought two principal constitutional challenges to some aspects of these statutory delegations to the Constitutional Court of the Slovak Republic.

#### *Decision PL. ÚS 8/2021*

The GP primarily challenged the formal requirements of the PHO decrees. He claimed that their publication in the Government Gazette, rather than in the Collections of Laws, created an unconstitutional unpredictability. According to the GP, the multiplicity of publication sources of generally binding acts negatively affected the rule of law principle, especially the legal maxim of *ignorantia juris non excusat*. The situation was exacerbated by the fact that the Government Gazette was only approachable from the website of the Ministry of Interior. The GP also asserted that the PHO decrees did not belong to the standard hierarchy of legal norms and, consequently, were out of reach of the CC judicial review.

The Constitutional Court held that Art. 123 of the Constitution allows for the statutory delegation of power to issue the generally binding acts to state administration bodies. According to the Court, the Act on Public Health constitutionally empowered the PHO and regional health offices to issue disputed decrees. The decision stated that the publication of generally binding acts in the Collection of Laws was not a constitutional prerequisite for their validity. According to the Constitutional Court, the usefulness of multiple authoritative publication sources was a matter of political choice, not a constitutional issue. It also considered the webpage of the Ministry of Interior generally accessible. Therefore, the Court held that the publication of the challenged decrees did not compromise the principle of the rule of law.

Second, the CC held that even though the legislation did not explicitly denote PHO as a central body of state administration, it was such an institution *de facto* with a territorial scope over the entirety of Slovakia. Therefore, the Court also had the power to review these decrees for conformity with the Constitution.<sup>17</sup> Ultimately, the Court held the PHO decrees based on the Act on Public Health constitutional.

#### *Decision PL. US 4/2021*

The PD challenged the constitutionality of PHO decrees on the grounds of ambiguous formulation of “*other necessary measures protecting the public health by which it may prohibit or prescribe further actions necessary in time and scope*” in the Act on Public Health. According to the PD, such broad statutory delegations could lead to an administrative overreach causing unconstitutionally imposed duties and disproportionate human rights limitations. At the same time, the PD questioned the proportionality of mandatory quarantines at the state medical facilities and the home quarantine imposed on everyone coming to the Slovak territory during the pandemic.

The CC confirmed that the challenged statutory delegation enabling the PHO to issue decrees was too uncertain and vague. It held that due to the unpredictable nature of this delegation, such a statutory provision fails to determine fundamental rights limitations. The challenged provision did not provide public bodies with a sufficient level of legitimacy and, thus, was unconstitutional.

Second, the Court held that the mandatory home quarantine enacted in the Act on Public Health did not deprive an individual of the right to personal liberty under constitutional Art. 17 and Art. 5 of the European Convention on Human Rights. However, the CC pronounced that mandatory isolation outside the home environment, i.e., in a medical facility or another state facility, represented a severe constitutional encroachment to personal liberty. The CC also reflected the lack of appropriate procedural guarantees against the abuse of such quarantines. Therefore, the Constitutional Court declared the challenged

provision on quarantine in the state facilities unconstitutional.

## IV. LOOKING AHEAD

After the reshuffle at the beginning of the year 2021, the government has consolidated. It has half of the term remaining to implement its anti-corruption programme and the intended large-scale political reform. The next general election is scheduled for early 2024. New PM Heger has a more conservative political style, which could contribute to better relations within the government. The next test for the government after the pandemic is the Russian invasion. Slovakia has denounced the aggression, expelled Russian diplomats who have been implicated in espionage,<sup>18</sup> supplied Ukraine with military equipment and received refugees displaced by the invasion Eastern at the border.<sup>19</sup> Although this development occurs outside of the territory of Slovakia, it could have significant ramifications for domestic politics. The government has had a relatively low approval rating due to a lacklustre response to the pandemic. However, more recently, the majority of the public agreed with its position against the Russian invasion of Ukraine.<sup>20</sup> This support could spill over into overall support for the government, especially since the opposition leaders have been more ambivalent about the relationship with Russia.

Finally, as mentioned in the introduction to the report, we are still awaiting the resolution of two important constitutional cases on unamendability pending before the Constitutional Court. As we explained in the last year's report, opposition MPs challenged the constitutional amendment on judicial reform in the Constitutional Court. Specifically, the provision of the amendment taking away the review of constitutional change away from courts as well as related provisions in a follow-up case (which might be merged).<sup>21</sup> Both cases are still pending and have not been yet accepted by the Court. They are important from a domestic and a regional perspective.<sup>22</sup> If the Court accepts the cases, it will implicitly reaffirm its power to judicial review constitutional

change in contradiction with the will of the Parliament and the letter of the law.<sup>23</sup>

## V. FURTHER READING

Marek Domin, “Can People Ask for Early Elections? Slovak Constitutional Court Says No” (*IACL-IADC Blog*, 2 September 2021) <<https://blog-iacl-aidc.org/2021-posts/2021/9/2/can-people-ask-for-early-elections-slovak-constitutional-court-says-no>>

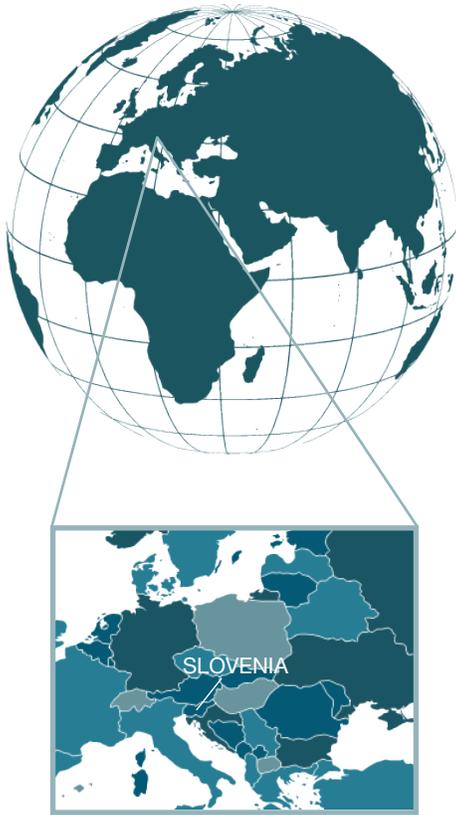
Kamil Baraník, “Slovakia,” in Daniel Moeckli, Anna Forgács and Henri Ibi (eds), *The Legal Limits of Direct Democracy A Comparative Analysis of Referendums and Initiatives across Europe* (Edward Elgar 2021)

Lilla Garayová, “The Supreme Administrative Court of the Slovak Republic – the First Step Towards a Modern Justice System” (2021) 1 *Institutiones Administrationis - Journal of Administrative Sciences* 1

David Kosař and Samuel Spáč, “Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?” (2021) 13 *Hague Journal on the Rule of Law* 1

Tomáš Lalík, “Leaving the Rule of Law Behind: How Slovakia is fighting against COVID-19 without Legality” (*I-CONnect*, 9 December 2021) <<http://www.iconnect-blog.com/2021/12/leaving-the-rule-of-law-behind-how-slovakia-is-fighting-against-covid-19-without-legality/>>

- 1 Simon Drugda, “Softlocking Slovakia: New Pandemic Lockdown and State of Emergency” (*slovakconlaw*, 3 December 2021) <<https://slovakconlaw.blogspot.com/2021/12/httpslovakconlaw.blogspot.com/202112softlocking-slovakia-new-lockdown.html.html>>
- 2 Government Resolution no. 695, on the Declaration of the State of Emergency no. 428/2021 Coll. <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2021/428/20211125>>
- 3 The political division, even animosity, was further highlighted after the invasion of Ukraine by Russia in 2022. See Michal Katuška, “‘Traitor of the country lives here.’ Opposition goads masses against coalition MPs” (*The Slovak Spectator*, 14 February 2021) <<https://spectator.sme.sk/c/22840788/traitor-of-the-country-lives-here-opposition-goads-masses-against-coalition-mps.html>>
- 4 See also Edward Szekeres, “Slovakia in 2021: Do-or-Die Moment for Reformist Government” (*Balkan Insight*, 6 January 2021) <<https://balkaninsight.com/2021/01/06/slovakia-in-2021-do-or-die-moment-for-reformist-government/>>
- 5 Petitions Rvp 2879/2020 17 and Rvp 414/2021, filed respectively on December 2020 and 26 February 2021
- 6 “Slovakia buying 2 million Sputnik vaccines from Russia” (*Reuters*, 1 March 2020) <<https://www.reuters.com/article/health-coronavirus-slovakia-vaccine-idUSL5N2KZ6GJ>>
- 7 “Two ruling Slovak parties demand PM Matovic quit as Sputnik deal shakes coalition” (*Reuters*, 15 March 2021) <<https://www.reuters.com/article/slovakia-government-idINKBN2B723H>>
- 8 Jon Henley and Philip Oltermann, “Slovakia: two more cabinet ministers quit in tensions over Sputnik vaccine” (24 March 2021) <<https://www.theguardian.com/world/2021/mar/24/slovakia-two-more-cabinet-ministers-quit-over-covid-response>>
- 9 Less than ten percent of the vaccines were used. The remainder was sold back to Russia. “Slovakia will sell or donate unused Sputnik V vaccines” (*The Slovak Spectator*, 23 June 2021) <<https://spectator.sme.sk/c/22688529/slovakia-will-sell-or-donate-unused-sputnik-v-vaccines.html>>
- 10 Dariusz Kalan, “The Rise and Fall of Igor Matovic” (*Foreign Policy*, 4 May 2021) <<https://foreignpolicy.com/2021/05/04/slovakia-igor-matovic-resignation-coronavirus-pandemic-corruption/>>
- 11 “Slovak PM Matovic, finance minister Heger set to swap roles” (*Reuters*, 29 March 2021) <<https://www.reuters.com/world/slovak-pm-matovic-resign-tuesday-finance-minister-heger-form-new-cabinet-2021-03-29/>>
- 12 This section is partly based on Simon Drugda, “The People v Their Representatives: The Slovak Constitutional Court Blocks Referendum on Early Election” (*Verfassungsblog*, 14 December 2021) <<https://verfassungsblog.de/the-people-v-their-representatives/>>
- 13 “Slovakia election: seismic shift as public anger ousts dominant Smer-SD party” (*The Guardian*, 1 March 2020) <<https://www.theguardian.com/world/2020/mar/01/slovakia-election-centre-right-olano-wins-poll-on-anti-graft-platform>>
- 14 “Storm transforms into Gale. More judges and an influential businessman detained” (*The Slovak Spectator*, 28 October 2020) <<https://spectator.sme.sk/c/22520635/storm-transforms-into-gale-more-judges-and-an-influential-businessman-detained.html>>; Head of police inspection service detained (*The Slovak Spectator*, 3 June 2021) <<https://spectator.sme.sk/c/22674044/former-head-of-police-inspection-service-detained.html>>; and “Head of police inspection service detained” (*The Slovak Spectator*, 3 June 2021) <<https://spectator.sme.sk/c/22674044/former-head-of-police-inspection-service-detained.html>>
- 15 Act No 355/2007 Coll.
- 16 Constitutional Act No. 227/2002 Coll.
- 17 The CC accepted two substantial challenges to two PHO decrees in July 2021 (PL. ÚS 10/2021 and PL. ÚS 11/2021).
- 18 Michal Hudec, “Slovakia expels 35 Russian diplomats accused of espionage” (*euractiv*, 31 March 2022) <[https://www.euractiv.com/section/politics/short\\_news/slovakia-expels-35-russian-diplomats-accused-of-espionage/](https://www.euractiv.com/section/politics/short_news/slovakia-expels-35-russian-diplomats-accused-of-espionage/)>
- 19 Martina Sekulova, “Slovakia: New measures for the settlement and integration of those fleeing Ukraine” (*European Commission website*, 7 March 2022) <[https://ec.europa.eu/migrant-integration/news/slovakia-new-measures-settlement-and-integration-those-fleeing-ukraine\\_en](https://ec.europa.eu/migrant-integration/news/slovakia-new-measures-settlement-and-integration-those-fleeing-ukraine_en)>
- 20 “People in Slovakia support the state’s response to the war in Ukraine” (*The Slovak Spectator*, 2 March 2022) <<https://spectator.sme.sk/c/22852564/people-in-slovakia-support-the-states-response-to-the-war-in-ukraine.html>>
- 21 Constitutional Act No. 422/2020 Coll. <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/422/20230101.html>>
- 22 No other European court had previously founded the doctrine of unconstitutional constitutional amendment without textual support in the constitution. See Michel Hein, “The Least Dangerous Branch? Constitutional Review of Constitutional Amendments in Europe,” in Martin Belov (ed), *Court, Politics and Constitutional Law: Judicialization of Politics and the Judiciary* (2019) 195
- 23 The resolution of these cases may last longer than expected. The unamendability case PL. ÚS 21/2014, which concerned the judicial review of a Constitutional Act introducing judicial background checks, took five years.



# Slovenia

Matej Avbelj  
Professor of European Law  
Faculty of Government and European Studies, New University, Slovenia

Katarina Vatovec  
Assistant Professor  
Faculty of Government and European Studies, New University, Slovenia

## I. INTRODUCTION

The year 2021 in Slovenia in many ways followed the year 2020.<sup>1</sup> The contagious disease of COVID-19 had a severe impact on everyday life but also on governance and politics in general. It continued to spur many challenges, including ones that are constitutional in nature. The second proclamation of the epidemic, which took place in October 2020,<sup>2</sup> ended eight months later in June 2021. The legislature and the government responded to the rapid spreading of the disease and the exponentially rising number of infected, by quickly adopting legislative and various executive measures which, yet again, constrained several constitutional rights. Numerous measures limiting human rights were imposed and re-imposed. The Slovenian Constitutional Court (hereinafter the CC) continued to be overwhelmed with many constitutional challenges to the adopted legislative and governmental measures. The core of this report will thus be dedicated to the cases related to the COVID-19, but some other cases of structural constitutional importance will be mentioned too.<sup>3</sup>

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

After several candidates for the CC judge had failed to gain enough support in the National Assembly (the Parliament) and, consequently, the term of one judge was prolonged for 16 months, on November 2021 a newly elected judge commenced his duties. The

CC is still facing an increasing workload and the rising numbers of unresolved cases, the oldest being traced back to 2016. That is worrying for a variety of reasons. It could signify that the constitutionally guaranteed right to trial without undue delay (provided for in the first paragraph of Article 23 of the Slovenian Constitution) could be breached, thereby also potentially violating the ECHR. The importance and the role of the CC being the highest body of the judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms<sup>4</sup> could be severely impaired.

To efficiently resolve enormous backlogs calls for the reform of the CC re-appeared. CC judges on several occasions stressed the need to reform the constitutional regulation of the powers of the CC and the scope and manner in which the CC can be accessed.<sup>5</sup> Attempts to reform the CC were presented in 2011, but to no avail.<sup>6</sup> In 2021 the adopted legislative changes – instead of taking away some of the powers of the CC – vested additional powers in the CC. The most recent changes of the Constitutional Court Act obliged the CC to ascertain the existence of legal interest for a review of the constitutionality of a regulation when a petition is filed, and no longer during the decision-making. Another legislative novelty, adopted in 2021 in amended Referendum and Popular Initiative Act, enabled every voter to file a request before the CC, irrespectively of the fact that the Constitutional Court Act determines numerous applicants who enjoy privileged access to the CC. The following are two examples of this trend.

Proceedings for a review of constitutionality in Case No. U-I-480/20 (Decision dated 11 March 2021) were initiated by a request of a voter, who disagreed with the inadmissibility of a referendum on the adopted legislative act determining intervention measures to mitigate the consequences of the COVID-19, in particular a measure as regards the conditions for establishing a higher education institution. The CC held that it is of key importance that the National Assembly and the Government concretize that the order declaring that a referendum is inadmissible and that the challenged concrete measures are urgent. In the case at issue, this requirement was not met. The Government and the National Assembly failed to demonstrate or reasonably substantiate that the COVID-19 epidemic has consequences for the possibility of fulfilling (stricter) conditions to establish a higher education institution and for the related procedures for extending the accreditation of higher education institutions. Therefore, the CC abrogated the challenged provision.

Another example to mention is Case No. U-I-483/20 (Decision dated 1 April 2021), where a voter disagreed with the inadmissibility of a referendum on the adopted legislative act regarding investments in the Slovenian Armed Forces, by alleging that the challenged act is not a law on urgent measures to ensure the defence of the state and security; therefore, a referendum on this act should be admissible. In the case at issue, the CC decided that the National Assembly and the Government reasonably substantiated that investments in the Slovenian Armed Forces are urgently necessary because their equipment and power are such that in the event of a military threat or security crisis they cannot ensure the satisfactory defence capability of the state, and they also cannot fulfil their international obligations to the expected degree. In its assessment, the CC took into consideration that the Slovenian Armed Forces have not attained minimum standards as regards equipment because investments therein have stopped and were rather non-existent in recent years.

In 2021, there were a number of petitions lodged before the CC alleging the inconsistency of the measures, adopted either by

the legislative acts or by the governmental ordinances, for the prevention and control of infectious disease COVID-19 with the Constitution and the Communicable Diseases Act. Many COVID-19 related cases in 2021 followed the same path of reasoning of the majority of the CC judges. This reasoning contravenes the argumentation made by majority in Decision No. U-I-83/20, dated 27 August 2020, on the temporary prohibition of movement outside the municipality of one's residence in times of COVID-19 epidemic. This case was presented in last year's review.<sup>7</sup> This decision of the CC was limited to review the constitutionality of the measure that temporarily prohibited the movement outside the municipality of one's residence, adopted by two governmental ordinances. The CC decided that the challenged measure did not disproportionately interfere with constitutionally guaranteed freedom of movement. However, in several cases dealing with governmental measures in 2021, as it will be shown, the CC changed its approach and primarily focused on the legality of the adopted ordinances. The principle of legality determined by the second paragraph of Article 120 of the Constitution requires that the executive branch of power performs its work on the basis and within the framework of laws. Governing by governmental ordinances while the legislator is unable or unwilling to gain the sufficient support for the adoption of the new (or amending) Communicable Diseases Act turned out to be the main or one of the constitutional reasons for abrogation of challenged ordinances.

### III. CONSTITUTIONAL CASES

1. *Decision No. U-I-246/19, dated 7 January 2021: Protection of Judicial Independence in a Procedure for Ordering a Parliamentary Inquiry*

2. *Decision No. U-I-214/19, Up-1011/19, dated 8 July 2021: Protection of the Independence of the State Prosecutor's Office in a Procedure for Ordering a Parliamentary Inquiry*

These decisions both reviewed the constitutionality of the Parliamentary Inquiries

Act and the Rules on Parliamentary Inquiries. A parliamentary inquiry, guaranteed in Article 93 of the Slovenian Constitution, is a legal mechanism by which the National Assembly exercises its function of political control. In the case at issue, the National Council had requested the National Assembly to establish a parliamentary inquiry regarding judicial proceedings against a politician (a member of the National Council who served as the mayor of a Slovenian city). He and other persons had been investigated and prosecuted for corruption offences in a number of cases. The National Assembly adopted the Act ordering a parliamentary inquiry aimed at investigating possible politically motivated decisions of the state prosecutors and judges involved in the criminal proceedings in respect of the politician.

In proceedings, it was alleged that the Parliamentary Inquiries Act and the Rules on Parliamentary Inquiries failed to regulate an appropriate mechanism by which it would be possible to prevent parliamentary inquiries that unconstitutionally interfere either with the independent performance of the judicial function (Case No. U-I-246/19) or with the autonomy and independence of the performance of the function of the State Prosecutor's Office (Case No. U-I-214/19, Up-1011/19).

With regard to the protection of the independence of judges when deciding on the initiation of a parliamentary inquiry, the CC clarified that within the framework of parliamentary inquiries, the National Assembly may investigate the functioning of the judicial branch of power as a whole as well as trends in the development of the judiciary or historical events that are also the subject of judicial proceedings. However, in conducting parliamentary inquiries into judicial proceedings, the National Assembly may not obstruct or influence in any way the decisions of judges in concrete judicial proceedings. The CC held that ordering a parliamentary inquiry with an aim to scrutinise the correctness of court decisions or to establish the liability of judges for decisions adopted during proceedings is inconsistent with the constitutional principle of the independence of judges.

With regard to the ordering and carrying out parliamentary inquiries that interfere with the State Prosecutor's Office, the CC stressed that the autonomy and independence of state prosecutors follow from the constitutional function of criminal prosecution and prohibit political meddling in the performance of the function of the State Prosecutor's Office in concrete cases. As the CC established, the Constitution does not prohibit any parliamentary inquiry that refers to the performance of the function of the State Prosecutor's Office. However, it is not admissible to influence, by a parliamentary inquiry, the decision of state prosecutors on whether in a certain concrete case they will initiate or discontinue criminal prosecution and how they will handle the criminal prosecution procedure. This is inconsistent with the constitutionally guaranteed independence of state prosecutors.

In both cases, the CC further addressed the procedural protection of judicial independence and the independence of the State Prosecutor's Office in a procedure for ordering a parliamentary inquiry. It established that the legislation does not provide for judicial protection, a legal remedy, or any other effective procedure by which it would be possible to prevent parliamentary inquiries that unconstitutionally interfere with the independence of judges and state prosecutors. According to the CC, the existence of such a procedure is of crucial importance for ensuring the right to an independent and impartial court and for the functioning of a state governed by the rule of law, the protection of human rights, and for independent, impartial, and fair judicial decision-making. Since the legislature failed to regulate the protection of judicial independence and the independence of the State Prosecutor's Office in the framework of the procedure for ordering parliamentary inquiries, the CC held that the challenged Parliamentary Inquiries Act and the Rules on Parliamentary Inquiries are unconstitutional.

### *3. Decision No. U-I-45/16, Up-321/18, Up-1140/18, Up-1244/18, dated 16 September 2021: Right of Access to Public Information*

In the case at issue, the CC had the opportunity to elaborate on the content of the right of access to public information. It adopted

an important position that this right is an integral part of the right to freedom of expression determined in Article 39 of the Constitution. It is within the framework of this constitutional provision that the requirement for access to the public information is protected. The protection of this right is ensured to all beneficiaries without having to demonstrate their legal interests.

The petitioners requested access to information on the performance of all primary and secondary schools in external examinations and in the national exam (called *matura*). They wanted to use this information to rank primary and secondary schools according to their performance in external examinations. They were denied access to the requested information because the challenged provisions of the Primary School Act and the Matura Examination Act prohibited the use of school performance in external examinations for the classification of schools. The CC held that the challenged provisions were not inconsistent with Article 39 of the Constitution. The refusal of access to the information on the performance of primary and secondary schools in external examinations could affect the effective exercise of the right to freedom of expression. However, as it was further explained, the challenged provisions do not prevent access to other information, related to external examinations, which enables public debate on the quality of education.

### *4. Decision No. U-I-79/20, dated 13 May 2021: Restrictions on the Freedom of Movement and the Right of Assembly and Association during the COVID-19 Epidemic*

As has already been mentioned, a number of petitions were lodged before the CC mainly alleging the unconstitutionality of the adopted measures in the fight against the COVID-19 epidemic. In the case at issue, the CC reviewed the challenged provisions of the Communicable Diseases Act, which authorize the Government to prohibit or restrict the movement and gathering of people in order to prevent the introduction or spread of a communicable disease in the state.

The CC carried out the assessment of the challenged statutory provisions from the viewpoint of the second paragraph of Ar-

ticle 32 (which determine that freedom of movement may be limited by law) and the third paragraph of Article 42 of the Constitution (which determine that the right of assembly and association may be limited by law) in conjunction with the principle of legality determined by the second paragraph of Article 120 of the Constitution (which requires that the executive branch of power performs its work on the basis and within the framework of laws).

The CC held that it is not inconsistent with the Constitution if the legislature exceptionally leaves it to the executive branch of power to prescribe measures by which the freedom of movement and right of assembly and association of an indeterminate number of individuals are directly interfered with in order to prevent the spread of a communicable disease. However, there are certain requirements to fulfil: the law must determine the purpose of these measures, the admissible types, scope, and conditions regarding the restriction of the freedom of movement and of the right of assembly and association, as well as other appropriate safeguards against the arbitrary restriction of human rights and fundamental freedoms.

The CC concluded that the challenged statutory provisions did not fulfil these constitutional requirements, as they allowed the Government: to choose, upon its own discretion, the types, scope, and duration of restrictions, which interfered with the freedom of movement of residents on the territory of Slovenia; to freely assess, in which instances, for how long, and in how extensive an area in the state it would prohibit the gathering of people in public places. The regulation also lacked safeguards that could limit the discretion of the Government, such as the duty to consult or cooperate with experts and to inform the public of the circumstances and opinions of experts that are important for deciding on such measures.

### *5. Decision No. U-I-50/21, dated 17 June 2021: Prohibition of Public Protests and Limitation of the Number of Participants during the COVID-19 epidemic*

In the case at issue, the CC assessed the proportionality of multiple provisions of the

governmental ordinances in the parts, which (first) completely prohibited public protests, and (then) limited public protests to up to ten participants. This was a precedential decision as there had not been any constitutional case law that referred precisely to public protests as a form of the collective expression of opinions on public matters. The CC reviewed the petition as regards the question how and under which conditions it is admissible, during an epidemic, to interfere with the right of peaceful assembly and public meeting, as determined by the first paragraph of Article 42 of the Constitution.

As regards both measures, the CC established that due to their length and effects they severely interfered with the right of peaceful assembly and public meeting. It explained that the two measures were adopted in order to prevent the spread of a communicable disease, which is a constitutionally admissible objective for limiting the human right. According to the CC, when balancing the right to health and life, on the one hand, and the right of peaceful assembly and public meeting, on the other, the two rights are in opposition, and they both enjoy a high level of constitutional protection. However, the CC decided that the measures were not necessary because there existed other measures by which it was possible to prevent the spread of communicable diseases at public protests and which interfered to a lesser extent with the right of peaceful assembly and public meeting, for example, the distribution of face masks and hand sanitizers to protesters, the closing of public spaces and roads to ensure sufficient space for maintaining an appropriate interpersonal distance between protesters, and the issuance of permits for public protests that are in conformity with epidemiological recommendations. The CC thus abrogated the challenged ordinances.

*6. Decision No. U-I-445/20, U-I-473/20, dated 16 September 2021: Temporarily Prohibition of the Gathering of People in Schools and Educational Institutions for Children with Special Needs and the Performance of Educational Work at a Distance*

In these cases, children with special educational needs and disabilities lodged the pe-

titions. They challenged the regulation that (temporarily) prohibited gatherings of people in educational institutions and prescribed temporary distance learning also for the children with special educational needs in times of COVID-19 epidemic.

The CC reviewed several governmental ordinances that adopted and prolonged these measures from the perspective of its conformity with the principle of legality (determined by the second paragraph of Article 120 of the Constitution) and the right of children with special needs (determined by the second paragraph of Article 52 of the Constitution). It established that the challenged ordinances were based on statutory provisions that did not entail a sufficient substantive basis for their adoption. It also held that the challenged ordinances disproportionately interfered with the right of children with special needs. In the assessment of the CC, the negative effects of the general closure of educational institutions for children with special needs on the exercise of the rights of these children to education and work-training were greater than the benefits these measures could have on protection of the health and lives of people who are threatened by the COVID-19.

*7. Partial Decision No. U-I-8/21, dated 16 September 2021: Ordering Distance Learning in Primary Schools and Schools and Institutions for Children with Special Needs*

The petitioners alleged that the challenged statutory provision granted the Minister of Education a blanket authorization to decide on the content, manner, and duration of distance learning. In light of this, the CC reviewed the challenged provision, adopted to mitigate and remedy the consequences of COVID-19, from the perspective of its conformity with the principle of legality. The CC mentioned special circumstances, which required a prompt response. In the assessment of the CC, the legislature exceptionally had the authorization to leave the decision to order a measure that interfered with human rights and fundamental freedoms to the Minister of Education. However, the legislature should have determined in a law with a sufficient precision, the substantive limitations

by which the Minister of Education was bound when adopting such measure.

The CC held that the challenged provision did not meet the mentioned constitutional requirement as the measure of the Minister ordering the performance of educational work at a distance was not substantively determined in the legislative act. The challenged provision did not determine with sufficient precision the criteria or circumstances by which it was possible to order distance learning in primary schools and in schools and institutions for children with special needs. Further, it also did not contain any safeguards by which the legislature would ensure the care of vulnerable groups of children in the event distance learning was carried out. Moreover, the legislature failed to limit the measures in spatial and temporal terms. It did not determine anything with regard to the duty of the Minister to consult with experts nor did it determine the obligation that the public must be appropriately notified of the measures. The CC thus established that the challenged provision is unconstitutional.

*8. Decision No. U-I-210/21, dated 29 November 2021: Requirement of Recovery or Vaccination for Employees in the State Administration*

The Police Union of Slovenia filled a request to review the constitutionality and legality of a provision of a governmental ordinance, which determined that employees in the bodies of the state administration must fulfil the recovered-vaccinated requirement to perform tasks. The Government established that this was a condition under labor law to perform work in the state administration and thus the situation was essentially comparable to situations wherein a vaccination is determined as a condition under labor law to perform various types of work and professions. The legal basis for regulating such a vaccination was a provision of the Communicable Diseases Act, which regulated different types of (mandatory) vaccinations.

At issue in this case was the question of conformity with Constitution of the provision of the governmental ordinance that determined interferences with human rights and fundamental freedoms (e.g. the freedom of

work, security of employment and the general freedom to act) in preventing and managing COVID-19. The CC assessed that the challenged measure, which the Government adopted by the ordinance and which applied to employees of the state administration, was not adopted in conformity with the statutory requirements and therefore was inconsistent with the principle of legality.

#### IV. LOOKING AHEAD

The year 2022 is going to be a year of elections: the parliamentary, presidential and local elections will take place. Often in election time, constitutional challenges arise and have to be resolved quickly. We assume this year's elections will also bring some thorny issues. In addition, there are many cases pending before the CC still dealing with COVID-19 measures. We will present the outcome of these pending cases in the next year's report.

#### V. FURTHER READING

AVBELJ, Matej. Constitutional backsliding in Slovenia?. *Southeast Europe in Focus*. 2021, no. 2, p. 33-39. <https://www.sogde.org/de/publikationen/southeast-europe-in-focus/>

BARDUTZKY, Samo. Limits in times of crisis: on limitations of human rights and fundamental freedoms in the Slovenian constitutional order. *Central European journal of comparative law*. 2020, vol. 1, no. 2, str. 9-31. ISSN 2732-1460. <https://ojs3.mtak.hu/index.php/cejcl/article/view/5021/3971>, DOI: 10.47078/2020.2.9-31

BARDUTZKY, Samo; ZAGORC, Saša. Slovenia: Second Wave of Challenges to Constitutionalism, <https://verfassungsblog.de/slovenia-second-wave-of-challenges-to-constitutionalism/>

1 See Matej Avbelj, Katarina Vatovec, 'Slovenia', in Richard Albert, et al. (Eds.), *The I·CONnect-Clough Center 2020 Global Review of Constitutional Law*, 2021, pp. 274–278.

2 Order on the declaration of the contagious disease COVID-19 epidemic in the territory of the Republic of Slovenia (Official Gazette RS 146/20).

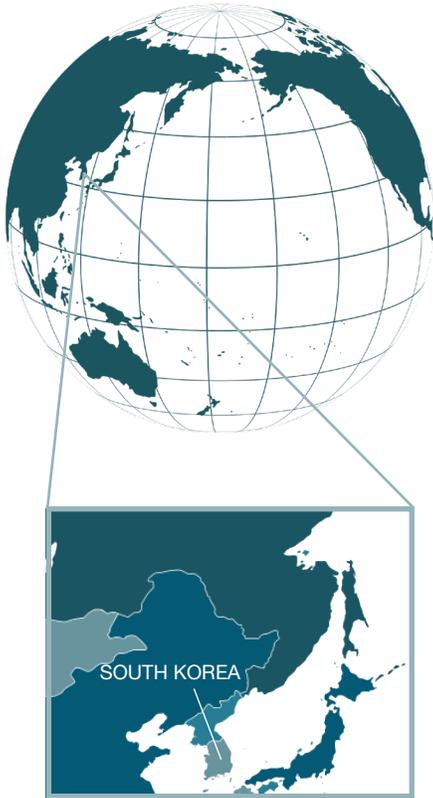
3 All decisions indicated in this article are available at <<https://www.us-rs.si/>>. See also the CC's Overview of the Work for 2021 <<https://www.us-rs.si/publications/?lang=en>>.

4 See the first paragraph of Article 1 of Constitutional Court Act.

5 See the foreword of the president of the CC in the CC's Overview of the Work for 2021, pp. 8–9.

6 For more see Igor Kaučič, et al. (Eds.). *Ustavna reforma ustavnega sodstva : zbornik gradiv : 2008–2011*. Ljubljana: Pravna fakulteta, Ministrstvo za pravosodje, 2011.

7 See Matej Avbelj, Katarina Vatovec, 'Slovenia', in Richard Albert, et al. (Eds.), *The I·CONnect-Clough Center 2020 Global Review of Constitutional Law*, 2021, pp. 275–276.



# South Korea

Il-Young Jung  
Assistant Professor  
University of Ulsan

## I. INTRODUCTION

2021 was an eventful year for South Korea. On the very first day, abortion was fully decriminalized after the legislature failed to enact a new law within the deadline set by the Korean Constitutional Court (KCC). With the spread of Delta and Omicron variants, the number of confirmed patients reached its record high. A judge was impeached for the first time in the nation's history. A national by-election was held for local government officials, including the mayor of the capital city Seoul. Two former presidents, Chun Doo-hwan and Roh Tae-woo died within a month of each other. Both were key figures in the military coup of 1979 and responsible for the bloody suppression of Gwangju Democratization Movement a year later. The massacre resulted in more than 200 deaths and countless number of casualties. With their passing, all the presidents who presided in the latter half of the 20<sup>th</sup> century are now gone, an era in Korean history marked with unrelenting struggle against successive authoritarian regimes. Former president Park Geun-hye, the daughter of another military dictator Park Chung-hee, was released from prison on December 31st after being tried and sentenced following her impeachment for corruption in 2017.

It was also a busy year for the KCC. The court was established in 1988 following Korea's democratization and is now one of the most trusted public institutions of the people. More than 2,800 cases were filed in 2021 alone, and among them 19 were decided either as unconstitutional or non-conforming to the constitution. The former declares the official act void, while the latter gives

deference to the political branches to revise whatever is necessary following the court's decision, lest an unacceptable legal vacuum be created from immediate nullification. The cases decided this year included politically controversial ones as well, but the court's rulings mostly avoided making abrupt changes to the status quo.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### Decriminalization of Abortion

Before the landmark KCC decision of 2019,<sup>1</sup> South Korea had one of the strictest regulations on abortion. Article 269 of the Korean Criminal Code placed a ban on all abortions, except for few narrow exceptions allowed under the Mother and Child Health Act of 1973. Abortion was allowed when there was danger to the mother's health or if the pregnancy was from rape or incest, but not for socio-economic reasons. Such uniform ban was once challenged in 2010,<sup>2</sup> but the court decided then that although Article 269 was a restriction of the mother's right of self-determination, the fetus's right to life outweighed the former during all stages of the pregnancy. The dissenters disagreed and argued for more leniency, mentioning the *Roe v. Wade's* trimester system as a possible alternative. In 2019, the second challenge to Article 269, the KCC reversed its position and decided that the blanket ban was unconstitutional and that it was a violation of the proportionality rule. Although the legitimacy of legislative purposes and the appropriateness of means was valid, it did not pass the least restrictive means

and balance of interest test. The law did not lose its effect immediately, from the concern that it could make abortions throughout the entire pregnancy unpunishable. The time limit for the new legislation was December 31<sup>st</sup> of 2020. But mainly due to political reasons, the government was not able to pass a new bill before the deadline. As a result, on January 1st of 2021, parts of Article 269 which punished the mother for self-induced abortion and the medical doctor for performing operations based on such request became null and void, decriminalizing all abortions.

### Covid 19 Developments

As with other parts of the world, COVID-19 continued to cast a long shadow in every aspect of life. South Korea has seen several spikes over the years, reaching its apex in December of 2020 when there were more than 1,000 new confirmed cases daily. Yet, in comparison both the number of cases and deaths per capita were significantly lower than many other countries, allowing optimistic forecast for South Korea by early 2021. Concerned with the economic damage and accumulated fatigue of the people, the government carefully began to loosen its regulations, preparing for the so-called 'Living with COVID' by trying to balance the need to normalize and the risk of further spreading the virus. The new plan was the Step-by-Step Recovery Procedure released in October, in which the first step included vaccine pass requirements for karaoke, indoor sports, casinos, and other entertainment facilities. But all procedures came to a halt when the Omicron variant started spreading in late November. With rapid increase of confirmed cases, the new emergency policy from December was to expand vaccine passes to other public places as well, including restaurants and libraries. Minors over the age of 11 who were previously exempt were now required vaccinations to use these facilities. The tightening of regulations, however, caused strong backlash from the public, and many lawsuits were filed to challenge these administrative dispositions. On December 17th, the Seoul Administrative Court temporarily suspended the vaccine pass requirement for libraries and other institutions that served educational purposes on the ground that it discriminated

unfairly against the unvaccinated. This was the first time the court gave its opinion on vaccine passes. Because the focus was not on the distinctiveness of educational facilities but on the basic rights of the unvaccinated, chances are high that similar decisions will follow in 2022.

### Political Issues

Regarding political landscape, 2021 can be described as a year of escalating tensions between the conservatives and liberals, heading for a collision in the 20th Presidential Election of March 2022. As a precursor for the coming election, by-elections for local governments were held in April which included the election for the mayor of Seoul and Busan, the largest and the second largest city in South Korea respectively. Approximately 25% of the entire voting population were eligible to vote. The result was a landslide victory for the largest opposition party, the right-wing People Power Party (PPP). The ruling party, the center-left Democratic Party of Korea (DPK), lost in almost all places including both cities mentioned above. This was a huge comeback for the PPP ever since former President Park Geun-hye, who was also the head of the New Frontier Party, a predecessor of the PPP, was impeached in 2017 by the KCC on corruption charges. The political momentum of the by-election was carried on to the primaries during the latter part of 2021 for the upcoming presidential election. The selected nominee for the DPK was Lee Jae-myung, a civil-rights attorney from a humble background who later became a prominent politician rising to the rank of the Governor of Gyeonggi Province. For the PPP, the winner of the primary election was Yoon Suk-yeol, an elite prosecutor who served as the Prosecutor General under the current Moon Jae-in government, but then broke off from the DPK after his stand-off against the Minister of Justice involving investigations that targeted key members of the ruling party. The coming election is also important from a constitutional perspective. Yoon's campaign promise is based on many conservative agendas, such as increasing labor market flexibility, lowering taxes for high-end homeowners, further investment in nuclear energy, and abolishing the Ministry

of Gender Equality and Family. The last has been especially controversial as the ministry has been the one of the focal points of gender conflict in recent years, with many males in the younger generation believing that they are now victims of reverse discrimination. Depending on who becomes the president in 2022, the future government policy of South Korea may head in very different directions.

## III. CONSTITUTIONAL CASES

### 1. *2016 Hun-Ma 1034, September 9, 2021: Duty of the Government Regarding Truth and Reconciliation Procedures*

In September of 1972, a 10-year-old daughter of a local police officer in the city of Chuncheon was raped and murdered. The news shocked the nation and the then President Park Jung-hee, an authoritarian leader who ascended to his position through a military coup, was greatly angered as the victim was a family member of the police force. He ordered the Minister of Internal Affairs to reprimand the culprit within 10 days, and the Minister in turn warned the officers in charge of the investigation that if the culprit was not found within the time limit, there will be severe consequences. The police arrested a suspect, Jung Won-sub, only two days after the body was found. Based on weak circumstantial evidence, Jung was tortured until he made a confession, key witnesses were coerced, and fake evidence was planted to prove his guilt. He was then sentenced to life, only to be released 15 years later after a time reduction for good behavior. Pleading his innocence, Jung asked for a retrial after his release with little success. It was only in 2005, when the Truth and Reconciliation Commission, an independent government body for investigating human rights violations that occurred before the democratization of Korea, started its own inquest that a serious reexamination of the case began. In 2011, based on the findings and recommendations of the Commission, the Supreme Court finally confirmed Jung's innocence after a lengthy trial. After receiving modest compensations for criminal indemnity, Jung then filed a civil lawsuit against the government for damages. He had won in the district court, but before a decision could be reached in the high

court, the Supreme Court suddenly changed its interpretation on the statute of limitations regarding wrongful convictions during past authoritarian regimes.<sup>3</sup> Jung's case was dismissed since his claim was filed 10 days after the statute of limitations passed, according to the new standards. In December of 2016, he filed a constitutional complaint arguing that it was unconstitutional for the state to have neglected taking appropriate measures to restore the damage and honor of the victims and their families as prescribed by Article 34 of the Truth and Reconciliation Commission Act. When Jung died in March of 2021, the surviving families took over the lawsuit.

The KCC consists of nine members. But because Justice Lee Suk-tae recused himself due to potential conflict with his past involvements with the case, eight Justices presided over the hearings. In a unanimous opinion, the Court declared the trial proceedings closed regarding the part seeking to confirm the unconstitutionality of the state's inaction in taking appropriate measures to restore the honor of the victim and to solicit reconciliation with the perpetrators, since the petitioner died, and the claim was of such character that could not be passed on to the heirs. The Court also unanimously dismissed the part seeking to confirm the unconstitutionality of the state's inaction for not providing monetary compensation to the victims and their families after the original case was dismissed for exceeding the statute of limitations. Neither the Act, nor the constitution, could be interpreted to bind the government in such a way. Regarding the request for confirming the unconstitutionality of the inactions of the state for not taking appropriate measures to restore the honor of the victims' families, opinions were divided 6 to 2, with the majority deciding to dismiss the case while the dissents affirmed its unconstitutionality. Regarding the inaction of the state for not actively recommending reconciliation between the victims' families and the perpetrators of the false convictions, the opinions were evenly divided between dismissal and affirmation of its unconstitutionality. The KCC declared that if neither of the opinions reached majority, on one side arguing that the request should be adjudicated on its merits and on the other saying that it should be dismissed

for lack of grounds, a final decision should be made to dismiss it. As a result, all the claims made by Jung and his family were dismissed by the Court.

## 2. 2018 Hun-Ba 524, November 25, 2021: Admissibility of Recorded Statements by Underage Victims of Sexual Violence

Article 30 paragraph 1 of the Act on Special Cases Concerning the Punishment of Sexual Crimes states that when the victim of a sexual crime is a minor, the statements made by the victim and the process of the investigation shall be video recorded. Paragraph 6 in turn states that such recording may be admitted as evidence only when it is duly authenticated on a preparatory hearing date or a hearing date by the victim himself/herself, a person in a relationship of trust with the victim who was present during the investigative process, or an intermediary. The petitioner of this constitutional complaint case was convicted for sexually assaulting a minor under 13 years old multiple times. The court of first instance and the court of appeal both found him guilty and ruled 6 years of imprisonment. In both trials, the petitioner objected to the video recording that contained the statement of the victim being admitted as evidence, but the judges overruled the objections based on testimonies of other witnesses in trusting relationships with the victim. Cross-examination of the victim was not allowed. The petitioner asked for the KCC to invalidate paragraph 6 as unconstitutional for his rights as a criminal defendant to cross-examine the key witness has been violated by the said law.

The KCC applied a proportionality test to decide the constitutionality of paragraph 6. Regarding the legitimacy of legislative purposes and appropriateness of means, the court affirmed them both, as extra protection was required for minors in such cases. However, regarding the test of least restrictive means the court stated that when restricting the fundamental rights of criminal defendants, all venues must be explored to provide the accused with ample chance to cross-examine the witness while also preventing secondary harm to underage victims of sexual violence. This is because due to the nature of sexual violence crimes involving minors,

the video recorded statement of victims is often the core evidence of the case and the need to cross-examine are vital for the defendant. Yet, paragraph 6 does not provide any such means that allows a chance to point out distortions or errors within the evidence. As a result, paragraph 6 of Article 30 does not pass the least restrictive means test and was therefore declared unconstitutional. Some possible alternatives suggested by the majority opinion included non-disclosure hearings and other institutional protections to prevent leakage of personal information, removing the defendant temporarily from the court room when the minor gives his or her statement, hearing the statement remotely through a video broadcast, or making sure someone who the victim can trust be present when the statement is given, etc. Three Justices of the dissenting opinion disagreed with the holding by arguing that the criminal defendant's right to cross-examine is not a fundamental right, and that the legislature should have broad deference on deciding what the best method is for achieving a fair trial.

## 2. 2020 Hun-Ma 264, January 28, 2021: Corruption Investigation Office for High-ranking Officials

The Corruption Investigation Office for High-Ranking Officials (CIO) is an independent institution that operates on its own without any interference from all three branches of the government. Its purpose, as the name suggests, is to investigate (and also prosecute if the allegation involves judges, prosecutors, or high-ranking police officers) corruption crimes of high-ranking officials and their direct family members. The CIO was established in January of 2021, through the Act On The Establishment And Operation Of The Corruption Investigation Office For High-ranking Officials which passed the National Assembly in July of 2020. Considering that the discretionary power to lead an investigation and convict criminal cases lies almost entirely within the prosecutors under the Korean legal system, the CIO was viewed by many as a check against the Prosecutors' Office, with critics claiming that this was nothing more than a way to 'tame' prosecutors to do the current regime's bidding. The establishment of the CIO was rife with

political conflicts between the ruling party and its oppositions throughout the entire process. One such opposition, the United Future Party, filed a constitutional complaint claiming that the CIO Establishment Act was unconstitutional and asked that it be nullified. The majority of five Justices dismissed all other parts of the case except for Article 2, Article 3 paragraph 1, and Article 8 paragraph 4 of the said Act, as the rest of the law did not infringe any fundamental rights of the petitioners. Article 2 defines the term ‘high-ranking official’, which includes the president, members of the National Assembly, and almost all members of the judicial branch and other high-ranking government officials. Article 3 paragraph 1 declares the independence of the CIO, and Article 8 paragraph 4 dictates that a CIO prosecutor can also perform the duties of an ordinary prosecutor. The argument by the petitioners was that the former two articles were a violation of the separation of power principles and an unfair discrimination against high-ranking officials such as themselves, while the latter was a violation of habeas corpus, for under the present constitution a warrant could only be issued by a judge upon the request of a prosecutor defined under the Prosecutor’s Office Act, and not the CIO Establishment Act.

Regarding the first point, the majority opinion stated that although the CIO serves an executive function and the President has the power to appoint its head, the constitution does not mandate every central administrative agency to be established in the form of a ‘ministry’ under the supervision of the Prime Minister. As autonomy and political neutrality is vital for the CIO to function properly, its independent status does not violate the separation of power principles, which does not mean strict mechanical division between branches, but checks and balances through functional cooperation. On the second point, all members subject to investigation by the CIO are in a position that requires high level of integrity following the special nature of their work. Therefore, there is a legitimate basis for treating the said officials and their direct family members differently from the rest and thus is not an unconstitutional discrimination based on social status. Finally, the reason the constitution gives sole author-

ity to the prosecutor to apply for a warrant is to prevent possible human rights violations through excessive requests by other investigative agencies and to make sure such request goes through a prosecutor, who as a legal expert, can act as the guardian of fundamental rights. This means if such goals can be achieved, there is no reason to limit who can apply for a warrant to the narrow boundaries of the Prosecutor’s Office Act. As a CIO prosecutor is also selected from those who have practiced law for a considerable period, Article 8 paragraph 4 does not violate the constitution. One dissenting opinion viewed that the case should be dismissed on all claims as there is no imminent harm present by the Act itself. Three dissenters argued that there were other parts of the Act that needs to be judged upon the merits, and two among them opined that the Act encroached upon the independence of the judiciary and was also an unconstitutional discrimination against the subjects of CIO investigations.

#### 4. *2021 Hun-Na 1, October 28, 2021: Impeachment of a Judge*

Lim Seong-geun, a senior judge at Busan High Court at the time, became the first judge to be tried for impeachment in South Korean constitutional history when the National Assembly passed a bill of impeachment against him in February of 2021. After starting his judicial career in 1988, Lim climbed up the bureaucratic ladder going through all the posts reserved for elite judges. But when investigations began on a political scandal involving the previous Chief Justice of the Korean Supreme Court, Yang Sung-tae, who is currently on trial for interfering with judicial independence and selling out the court for political bargaining, Lim was pointed out as one of the key figures involved. Acting as Yang’s lieutenant, Lim is known to have influenced other judges to come out with decisions that would be favorable to the then conservative government, especially during Park Geun-hye’s presidency. On the first instance of Lim’s trial, under charge of abuse of authority according to Article 123 of the Criminal Code, the court acknowledged that Lim’s actions were indeed a violation of the constitution, but ruled that Lim was not guilty.

This was because to abuse authority, one must have legitimate authority in the first place. Because Lim did not have formal authority to intervene with decisions of other judges, he cannot be punished under Article 123. The leading party, Democratic Party of Korea, took notice of the court’s mentioning of the unconstitutionality of Lim’s involvement and decided to go forward with an impeachment bill after gaining sufficient seats to push it through from the 21<sup>st</sup> General Election of 2020. As Lim was to retire in March of 2021, it was argued that the bill needs to pass before he leaves office.

The decision came out in October of 2021. The core question was whether it was possible to impeach someone who already left office at the time of the ruling. As many observers expected, the KCC dismissed the case from lack of standing. The majority opinion of five Justices stated that the purpose of an impeachment trial is to ensure the normative force of the constitution by declaring dismissal from public office when the request from the legislature is found to be justified. If the person already left his office, as in this case, there is no direct measure that can result from the impeachment and therefore no point in judging on the merits. The court does not give judgments, added the opinion, for the sole purpose of confirming whether the grounds for impeachment were valid or not. Dissenting opinion signed by three Justices took the opposite view. The dissent emphasized that this was the first ever impeachment trial of a judge, in which a gross violation of independence of the judiciary led to the legislative resolution of impeachment. Thus, there is significant legal interest of constitutional clarification involved that legitimizes adjudicating upon the merits even if Lim is no longer holding his position. The dissent found Lim guilty on all grounds and confirmed the unconstitutionality of his actions.

## IV. LOOKING AHEAD

As the presidential election looms closer, 2022 will be a decisive moment for the future of South Korea. True, even if the conservative candidate Yoon becomes the president, it will still be difficult to see rapid changes happening anytime soon since the National Assembly is

still held by a DPK majority. But after former president Park's impeachment in 2017, President Moon's government enjoyed high popularity during most of his term which allowed him to implement many liberal policies over the years. Depending on who becomes his successor, the trend may continue or swerve to a totally different direction. Regarding the courts, there are many vital constitutional issues to be decided in 2022. These include questions about vaccine mandates/passes, and the criminal trial of ex-Chief Justice Yang. It will be worth observing whether the judiciary will shift from its usual position by become a catalyst of change or, like 2021, remain a stabilizing force amidst increasing political turbulence.

1 2017 Hun-Ba 127, April 11, 2019

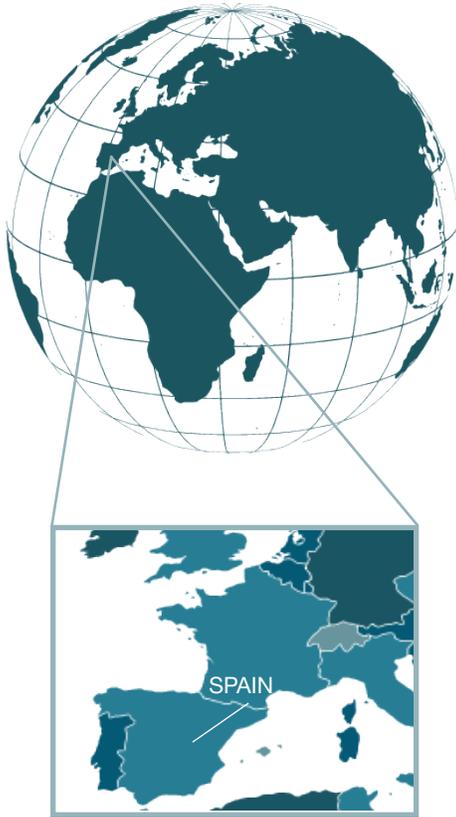
2 2010 Hun-Ba 402, August 8, 2012

3 This change was eventually declared unconstitutional by the KCC in 2018 (2014 Hun-Ba 148-162-219-466, 2015 Hun-Ba 50-440 consol., August 30, 2018)

## V. FURTHER READING

Arrington CL and Goedde P, *Rights Claiming in South Korea* (1<sup>st</sup> edn, Cambridge University Press 2021)

Kim C-H, *The New Dynamics of Democracy in South Korea* (1st edn, Taylor and Francis 2021)



# Spain

María Luisa Balaguer (Judge of the Constitutional Court)

Enrique Guillén (University of Granada)

Argelia Queralt (University of Barcelona and legal adviser at Constitutional Court)

Fernando Reviriego Picón (Uned University)

Camino Vidal (University of Burgos)

Leonardo Álvarez (University of Oviedo)

## I. INTRODUCTION

During 2021, the Spanish Congress appointed four new Constitutional Court justices (two men and two women). This was the thirteenth renewal of the Court, a renewal that had been blocked for two years by the lack of consensus between the political parties that had to select the justices. The issue of renovation of judicial bodies is a problem that is not limited to the Constitutional Court, but also affects the governing body of the judiciary (the General Council of the Judiciary). In the end, the necessary agreements were reached with regards to the Constitutional Court, although not without argument, particularly in terms of the suitability of one of the candidates, whose impartiality was questioned in the parliamentary hearing. Nonetheless, given the new doctrine derived from a resolution made by the Court in December, it will be difficult to exclude justices for a lack of impartiality attributed to positions in academic publications or opinion pieces prior to their appointment. Appeals have been lodged with the ECtHR and the ECJ by independence movement leaders who felt they were affected by this change in criteria.

Following its renewal, the Court chose a new president and vice-president, beginning a session in which it is hoped that the Court will address some of the appeals that have been waiting for the longest time to be heard:

in particular, the appeal related to the 2010 law about termination of pregnancies.

In 2021, the Court handed down 192 judgments: 32 in proceedings related to the constitutionality of a law (some referring to territorial questions); 156 in proceedings related to the protection of fundamental rights; and 4 in proceedings related to resolving conflicts between the state and autonomous communities. In addition to the judgments related to the state of emergency related to the COVID-19 pandemic, the Court has ruled in cases that were widely anticipated, such as in relation to the constitutionality of life imprisonment (reviewable permanent imprisonment), and has continued to deal with conflicts from the backdrop of the secession process in Catalonia. In particular, the rulings about the first two of those issues demonstrate varying interpretations of fundamental constitutional concepts, which led to especially cutting dissenting opinions.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Judgment 148/2021, on 14 July 2021, was in response to the appeal raised by deputies in the Vox parliamentary group in Congress against the declaration of a state of alarm, approved by Royal Decree 463/2020, 14 March, in response to the COVID-19 health

crisis. The Royal Decree imposed confinement to the home via a general prohibition on movement on public roads or in public spaces, except in certain specific circumstances. The appellants believed this to be unconstitutional, as it was a violation of the right to free movement, which was no longer possible once the state of alarm had been declared. As the Constitutional Court recognized, the Constitution notes three exceptional states: a) the state of alarm; b) the state of exception; and c) the state of siege (martial law). The Constitution only allows the *suspension* of certain fundamental rights when states of exception or siege are declared. When a state of alarm is declared, only a *limitation* of fundamental rights is possible. In organic law 4/1981, which covers exceptional states, it is expressly stated that when a state of alarm is declared, it is possible “to limit the movement of people or vehicles at certain times and in certain places, or to subject them to compliance with certain requirements”. The Court declared Royal Decree 463/2020 unconstitutional, understanding it as suspending the right to free movement. The Court’s reasons for understanding it as a suspension of the right to free movement is that the prohibition of movement was the general rule rather than an exception. This meant a restriction of the right that was so strict it could not be considered a mere limitation.

Judgment 183/2021, 27 October 2021, was in response to the appeal raised by members of the Vox parliamentary group in Congress against the declaration of the state of alarm via Royal Decree 926/2020, 25 October, to contain the spread of the disease caused by SARS-CoV-2. That decree imposed a limitation on people’s movement at night, prohibiting movement by roads or in public spaces between 11 pm and 6 am, except for certain activities.

The appellants again believed that the restriction on movement in Royal Decree 926/2020 was a suspension of the fundamental right to free movement. In contrast to their previous judgment, the Constitutional Court stated that the prohibition of movement on public roads and in public spaces at night was not a suspension of the right to free movement but rather a limitation, and because of that, this restriction was constitutional.

In arriving at this conclusion, the Constitutional Court understood that, quantitatively, the restriction on movement only covered 7 hours of the day, and qualitatively only affected night-time movement. Therefore, the general rule was one of movement being possible, and prohibition was the exception. Hence, Royal Decree 926/2020, declaring the state of alarm in accordance with the Constitution, was a limitation and not a suspension of the right to free movement.

The appellants also believed that the extension Congress granted to Royal Decree 926/2020, 25 October, declaring the state of alarm, was also unconstitutional. According to that extension, the royal decree would be in force for six months, from 9 November 2020 to 9 May 2021. The Constitutional Court ruled that extension unconstitutional for two reasons.

Royal Decree 926/2020, which declared the state of alarm, delegated certain powers to the presidents of the autonomous communities, the decision about application, modification, or suspension of the specific means aimed at containing the COVID-19 pandemic. According to the Constitutional Court, the 6-month extension of the state of alarm by Congress infringed the Constitution, firstly because it extended the measures against the pandemic without knowing whether they would ultimately be applied, as that decision had been delegated to other authorities. Secondly, the 6-month extension also damaged the function the Constitution ascribed to Congress, as such a long extension period prevented periodic reconsideration of the need to maintain the state of alarm, but also the exercise of periodic political control of the government that the Constitution ascribes to Congress.

### III. CONSTITUTIONAL CASES

*Other judgments related to the government’s pandemic response.* STC 168/2021; STC 110/2021

As indicated in the section on major constitutional developments, case-law in 2021 was characterized by the Court declaring

the unconstitutionality of two pieces of legislation that the Spanish government used to declare states of alarm.

However, other constitutional bodies also agreed measures that restricted fundamental rights, which were challenged in the Constitutional Court. Judgment STC 168/2021, 5 October, in response to an appeal for the protection of fundamental rights (*amparo*) challenging a decision of the Bureau of Congress (the governing body of the lower chamber in the Spanish Parliament), which agreed to suspend parliamentary activity due to the pandemic.

In this case, deputies from the Vox parliamentary party in Congress challenged an agreement of the Bureau in which it was decided not to process parliamentary business for a (non-determined) period of time due to Covid-19. The decision was aimed at protecting parliamentarians and staff in Congress. The Court admitted the appeal and annulled the Bureau’s decision, on the understanding that congressional activity could not be interrupted while the state of alarm was ongoing, and that the exercise of the right to political participation must be ensured, even more strongly than in ordinary situations, as it is the Parliament that monitors the actions of the executive during that pandemic.

The Court stated that the suspension of parliamentary time limits prevented congressional deputies from raising parliamentary business to control the actions of the government and was an unjustified limit to the free exercise of parliamentary faculties, essential for the proper political representation of citizens. The judgment had three dissenting opinions, who noted that the Bureau’s agreement conformed to the principle of proportionality, as the measure was appropriate and necessary in order to protect the health of members of Parliament and staff.

It is also worth noting judgment STC 110/2021, which accepted an appeal of unconstitutionality raised by Vox against Decree-Law 8/2020, 17 March, on urgent extraordinary measures to deal with the economic and social impact of Covid-19. This legislation included in its text a mod-

ification of a governmental organization, the Government's Delegate Commission for Intelligence Matters. The Court ruled that this body had no relation to the management of the pandemic, and therefore did not see the connection between the emergency justifying the decree-law and the specific modification contained in it. The court annulled that section of the legislation. There was one dissenting opinion.

#### *Equality STC 1/2021; 51/2021*

Many judgments in the past year have addressed the right to equality (art. 14 CE). Judgment STC 1/2021 rejected the *amparo* appeal presented following the denial of a widowhood pension due to the lack of marriage recognized by the Spanish legal system. The appellant alleged discrimination after they were denied a pension following the death of their partner, with whom they had spent many years living together, and whom they had married according to Roma tradition, even though they did not register the marriage or register as a common-law couple. The argumentation in the Court addressed *Muñoz Díaz v. Spain 49151/07 ECHR 2009 in detail, which was invoked in the appeal, ultimately ruling that the facts of the cases were not the same, meaning that the ECHR case-law was not to be applied. The judgment had one dissenting opinion.* Judgment STC 51/2021 granted the *amparo* request raised by a lawyer in the judicial administration who had been diagnosed with Asperger's syndrome, and had not been granted the modifications requested in their job due to their disability. They had been punished, without consideration of the disability, for "repeated non-compliance with functions inherent to the job or tasks they had been charged with". The tribunal ruled that there had been a violation of the rights to equality and non-discrimination due to disability, to due process, the presumption of innocence, and legal punishment. The Court highlighted the prejudice and discrimination perennially experienced by those suffering from mental disability, whether psychiatric, intellectual, or cognitive, which means significant obstacles when it comes to reporting on specific disability in the workplace.

#### *Indirect sex discrimination. STC 199/2021*

Judgment STC 199/2021, 31 May, included a gender perspective in a matter of balancing work and family life in the face of a reorganization of business hours. These changes went against what the worker had agreed with the company. The Court ruled that there had been an indirect violation of the fundamental right to not be discriminated against by reason of sex.

#### *The right to education and creation of centres of education SSTC 2/2021; 6/2021; 19/2021; 42/2021*

Judgments STC 2, 6, 19 and 42/2021 were in response to an *amparo* request raised by a private university challenging the law which limited grants to students in public universities. The Court ruled that this limitation violated the fundamental right to equality (art. 14 CE) in relation to the fundamental right to create centres of education (art. 27 CE). The Court highlighted that all universities, including private ones, provide a public service of higher education. All of the judgments had dissenting opinions.

#### *Citizen Security Act. STC 13/2021*

Judgment STC 13/2021 was in response to an appeal for a ruling of unconstitutionality raised by the Catalan Parliament against various articles in Organic Law 4/2015, 30 March, on the protection of citizen security. The ruling arrived two months after judgment STC 172/2020 in response to an appeal lodged by more than fifty members of Congress against the same law, which we covered in the 2020 report. The appeal was rejected, and the Court declared that the object of the appeal had already been addressed by the 2020 judgment; various of the challenged articles were ruled constitutional by the Court as long as they were interpreted in the way indicated in the judgment.

#### *Decree-laws and housing. STC 16/2021*

Judgment STC 16/2021 partially accepted an appeal for a ruling of unconstitutionality raised against a decree-law approved by the Generalitat of Catalonia to improve

access to housing. Based on the fact that decree-laws cannot be used to regulate the general content of the right to own housing, the Court declared the unconstitutionality and nullification of parts of the law regulating non-compliance with social housing requirements for property owners, coercive fines, and the requirement to relinquish property at certain times or to certain people, as well as the obligation for owners to offer social housing in certain circumstances (before starting legal eviction processes, mortgaging, or other similar actions). Along with the subject matter, the judgment is of interest as it addresses the process of harmonization of decree-laws and the point from which their time limits begin.

#### *Presumption of innocence and pre-trial detention SSTC 41/2021; 83/2021; 98/2021; 114/2021; 127/2021; 128/2021; 141/2021*

Judgments STC 41, 83, 98, 114, 127, 128, and 141/2021 accepted the requests for *amparo* raised against the refusal of compensation claims for state liability due to the time the appellants spent in pre-trial detention (in some cases up to four years), after which they were found not guilty or proceedings were halted or dismissed. The refusal to award compensation was by application of the provisions in an article in the Organic Law on Judicial Power which was declared unconstitutional and nullified by judgment STC 85/2019. The Court ruled that the appellants' right to equality (art. 14 CE) and the right to the presumption of innocence (art. 24.2 CE) had been violated.

#### *Language rules. STC 75/2021.*

Judgment STC 75/2021 rejected a claim of unconstitutionality raised against the amendment of the rules for the Parliament of Asturias which would allow members or speakers in the chamber to use Spanish or Asturian, although the latter is not officially recognized as an official language in the Statutes of Autonomy. The Court noted in its ruling that there is a wide margin of protection for the different languages regardless of their recognition as co-official. The judgment had dissenting and concurring opinions.

### *The right to stand for election. STC 76/2021*

Judgment STC 76/2021 rejected an *amparo* appeal raised by two candidates in an autonomous community election who were excluded as they did not meet the criteria of being eligible to vote as they had not registered on the electoral roll within the required timeframe (two months before the date of the election—this concerned an anticipated dissolution in a truly complex political context). The judgment, which needed the casting vote of the president to be decided, included various dissenting opinions and provoked thought about the electoral roll and its regulation.

### *The fundamental rights of the leaders of the Catalan secessionists STC 91/2021; 106/2021; STC 121/2021; STC 122/2021; 184/2021*

Various judgments were handed down this year related to the particular case of those accused of rebellion, sedition, misuse of public funds, and disobedience as a result of the attempt to proclaim Catalan independence from Spain in 2017. The case ended with the Criminal Chamber of the Supreme Court handing down prison sentences to most of the accused. With regards to those convicted of sedition, the Constitutional Court rejected appeals for *amparo* (from the President of the Parliament and members of the government of the autonomous community, along with members of civil society at the time), ruling that there had not been the alleged violations of rights (due process of law, right to liberty, freedom of expression, political participation, among others). There were dissenting opinions in all of the judgments.

### *The right to assemble and to protest. STC 133/2021*

Judgment STC 133/2021 was in response to a request for *amparo* raised by five people against a ruling from the Supreme Court which convicted them of crimes against institutions of the state. The Constitutional Court accepted that the appellants had called for and participated in an assembly in the grounds of the Catalan Parliament in order to impede the debate and approval of the annual budget of

the Generalitat. The judgment determined that in this case there was not a legitimate exercise of fundamental rights to free expression, assembly, and protest, or to political participation in light of the various circumstances and the context surrounding the protest. The judgment had three dissenting opinions, one of which was signed by two justices.

### *Non-nationals. STC 151/2021*

In judgment STC 151/2021, 13 September, the Court granted *amparo* protection to a foreign citizen, with temporary residence, who had been served with an expulsion order after having been convicted of robbery with violence.

The appeal was granted due to a violation of the right to effective legal protection. The Court ruled that neither the administration, nor the courts can agree on measures of expulsion from the country without prior assessment of the personal and family circumstances of the person being expelled, which means an evaluation of proportionality (omitted in this case); the courts did not consider that the foreign citizen was 20 years old, and had spent more than seven years living and studying in Spain with his parents (legally resident and working in Spain). Nor did the courts consider that expulsion to the country of origin would cause irreparable harm, as the young person had no family to take them in, as their roots were all in Spain where they had lived since they were 12. The Court stated that the law courts had violated the appellant's right to effective legal protection by not providing a justified ruling which considered the personal circumstances of the appellant before handing down the expulsion order, applying the case-law from STC 131/2016, 18 July.

### *Data protection. STC 160/2021*

In judgment STC 160/2021, 4 October, the Court addressed the content of the fundamental right to data protection, protected by art. 18.4 CE. In this case, there was an *amparo* request from a commercial advisor in a telephone company who was fired for various work-related infractions that were proved by recordings the company had made from various telephone conversations between the employee and clients. The ap-

pellant claimed a violation of the right to protection of personal data by the company using the recordings to prove wrongdoing. The Court did not accept the *amparo* request, ruling that the employee's privacy had not been violated, nor had their right to personal data protection, as the recordings were used habitually in order to improve the quality of the service, and both the appellant, and the clients were aware that their conversations were being recorded.

## IV. LOOKING AHEAD

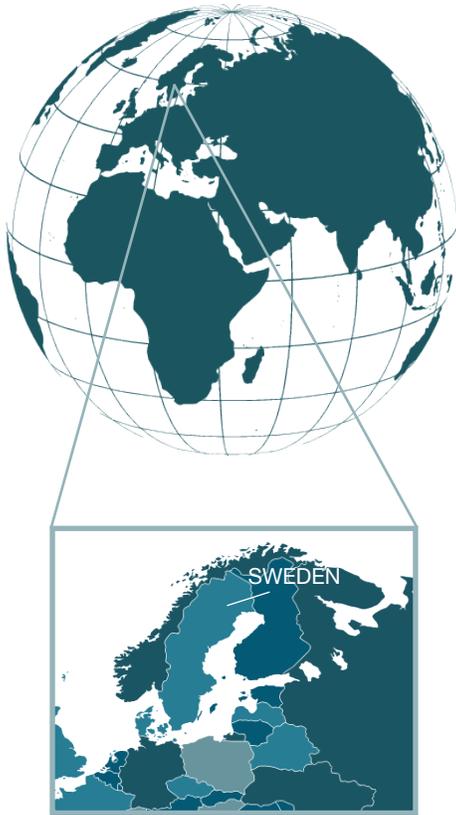
Two justices nominated by the government will be named to the Court in 2022, along with two more nominated by the General Council of the Judiciary. The appointment of the four should, in principle, already be underway, as the Constitution states that the renewal must be done by thirds every three years. It is difficult to venture whether the renewal will happen though, as the GCJ, under caretaker leadership for the last three years, does not have the ability to propose justices as a result of Organic Law 4/2021. That law, which is being appealed in the CC and awaits judgment, is the key to determining the immediate direction of the Court, which has to address the resolution of appeals against the abortion act, the education act, and the law dealing with euthanasia.

## V. FURTHER READING

Garrido López, Carlos, *Excepcionalidad y derecho. El estado de alarma en España*, (Fundación Manuel Gimenez Abad 2021).  
Garrido López, Carlos, *Decisiones excepcionales y garantía jurisdiccional de la Constitución* (Marcial Pons 2021).

Vidal Fueyo, Camino, "Límites a la libertad deambulatoria en el estado de alarma o suspensión de la libertad de circulación en el estado de excepción" (2021) 54 *Revista Jurídica de Castilla y León* 11.

Gómez Orfanel, Germán, "Excepción, necesidad y Constitución" (2021) 48 *Revista Teoría y Realidad Constitucional* 193.



# Sweden

Anni Carlsson  
Doctoral Candidate  
Uppsala University

## I. INTRODUCTION

2021 turned out to be an unusually eventful year in the Swedish parliament. In June, the Prime Minister Stefan Löfven (Social Democratic Party) lost, as the first prime minister in Swedish history, a vote of no confidence in the parliament. This led to him resigning – only to make a comeback as a prime minister about a week later. After a couple of months, it was time for Löfven to resign again, which led to another historical turn of events: Sweden getting its first female prime minister Magdalena Andersson (Social Democratic Party). Andersson's first stint as the country's prime minister lasted, however, only a couple of hours, as she chose to resign later on the very same day she was elected, following the Swedish Green Party's decision to leave the coalition government they formed with the Social Democrats. Andersson made a comeback only a couple of days later and became the head of a Social Democratic single-party government.

During 2021, a bill proposing constitutional amendments with regard to possibilities to prohibit and criminalize terrorist organizations was presented to the parliament. Moreover, the governmental Corona commission presented two reports on the Swedish COVID-19 strategy, with some scathing conclusions.<sup>1</sup>

As to the year's yield of constitutional case law, the Swedish supreme courts decided interesting cases i.a., with regard to judicial review and freedom of expression. Moreover, the Grand Chamber of the European Court of Human Rights (ECtHR) found Sweden's signal intelligence legislation to be in violation of Art. 8 European Convention on Human Rights (ECHR).

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

2021 was a tumultuous year in the Swedish parliament. In June 2021, Prime Minister Stefan Löfven from the Social Democratic Party lost a vote of no confidence in the parliament. The background to the vote was the Swedish Left Party's decision to withdraw its support from the Löfven-led minority government consisting of the Social Democrats and the Swedish Green Party due to the government's plans to slope rent control for new rental apartments. It was, however, the Sweden Democrats Party that formally called for the vote of no confidence. According to the Swedish constitution, a declaration of no confidence against a minister is taken up for consideration in the parliament if at least one tenth of the members of the parliament (35 MPs) call for it. In order for a declaration of no confidence to pass, more than half of the members of the parliament (at least 175) must vote for it (Instrument of Government (IG, *regeringsformen*) Ch. 13 § 4). 36 MPs from the Sweden Democrats called for the declaration of no confidence against Löfven. 181 of all the MPs voted for the declaration to pass.

Having lost the vote, the Swedish constitution offered Löfven two options: he could either choose to resign together with his entire government or order an extraordinary parliamentary election within a week from the declaration of no confidence (IG Ch. 6 § 7). Löfven chose the first alternative and announced his resignation one week after the declaration was passed. Yet only a little more than a week after his resignation, the parliament voted Löfven back as the prime minister, bringing

him and his minority government back to power. As the Swedish constitution is based on the principle of negative parliamentarism, it is enough that the majority of the parliament (175 MPs) does not vote against the proposed prime minister (IG Ch. 6 § 4).

The swift political plot twists in the Swedish parliament did not end there. In August, Löfven announced that he would resign as the Social Democrats' chairman. At the party congress held in November 2021, the Minister of Finance Magdalena Andersson was elected as the new party chairwoman. Following this change in the party leadership, the parliament voted at the end of November for Andersson as the new prime minister. She became, hereby, the first woman in the history of Sweden to hold the position.

Andersson's first spell as the prime minister lasted, however, only seven hours and she did not even officially have time to assume the position. After the parliament had voted for Andersson as the prime minister, it proceeded to vote on the coming year's budget. The budget proposition presented by the government lost the vote to the budget proposition put forth by three opposition parties: the Moderate Party, the Sweden Democrats and the Christian Democrats. Following the vote, the Green Party announced that it would leave the government, as it did not want to govern with a budget negotiated by the Sweden Democrats. After the Green Party's announcement, Andersson declared she was going to resign. According to her, it constituted a constitutional convention that a coalition government should resign in case one party chooses to leave the government. Only four days later, Andersson was once again elected as the prime minister by the parliament and became the leader of a Social Democratic single-party government.

During 2021, the government further put forth bills proposing a number of constitutional amendments. In November 2021, a bill amending the provision in IG Ch. 2 § 24 regulating the possibilities to restrict the freedom of association was presented. The amendment would make it possible to adopt legislation limiting the freedom of association with regard to organizations engaged in or supporting terrorism. Hereby, it would, for example, become possible to enact legislation criminalizing participation in terrorist organi-

zations or prohibiting them altogether.<sup>2</sup> Additional amendments have been proposed as regards the provision in IG Ch. 7 § 7, which requires that all government decisions that are dispatched – such as regulations or proposals to the parliament – must be signed with pen on paper by the prime minister or some other minister in order to become effective. The amendment would open for confirming government decisions in other ways than a physical signature, provided that a high level of security requirements is met. The amendment aims at making the provision technologically neutral and enabling the handling of government decisions digitally.<sup>3</sup> The Parliament will vote on the bills during 2022.

Concerning the COVID-19 pandemic, the temporary Pandemic Act entered into force in January 2021. The Act expands the government's authority to adopt provisions in order to prevent the spreading of the virus. Provisions entailing i.a., a complete prohibition of public gatherings or a total close-down of places for cultural activities and commerce must, however, be submitted to the parliament for examination. In October 2021, the Corona commission published its evaluation of the measures taken by the government, public authorities, regions, and municipalities in order to limit the spread of the virus and the effects of its spreading. In the report, the commission found serious shortcomings with regards to the Swedish response to the pandemic, as well as Sweden's general pandemic preparedness. The commission concluded that the Swedish strategy for combatting COVID-19 was, above all, based on voluntary measures and personal responsibility, instead of more invasive interventions on part of the state. As the commission succinctly summarized it in its report, Sweden's measures against COVID-19 could be described as "voluntary, less intrusive and late".<sup>4</sup> The commission is set to present its final report in 2022.

### III. CONSTITUTIONAL CASES

#### 1. *NJA 2021 s. 147: Judicial Review*

Following the COVID-19 pandemic, the Swedish government adopted a decree temporarily imposing stricter regulations on

gambling. A Maltese gambling company sued the Swedish state and demanded that the court prohibit the state from applying the decree against the company, as well as claiming damages. According to the company, the decree constituted an unlawful infringement with its right to provide services in accordance with Art. 56 Treaty on the Functioning of the European Union (TFEU). The company demanded that the court issue an interim order immediately prohibiting the Gambling Authority or other Swedish authorities from applying the decree against the company. Both the District Court and the Court of Appeal dismissed the company's demand on interim order, as trying it would amount to abstract judicial review. The question before the Supreme Court was whether the company's demand of an interim order should be taken up by courts.

The Supreme Court maintained that the Swedish legal system does not allow for abstract judicial review. The constitutional provision regulating judicial review in the Instrument of Government (IG Ch. 11 § 14) makes it possible to review whether a legal norm conflicts with a higher norm and, if that is the case, refrain from applying it, only when the question of eventual norm conflict arises in a concrete case. In contrast, the Swedish law does not allow for bringing an action before a court demanding that a statutory regulation should be declared invalid or not applied against the claimant. The Supreme Court found that the company's demand of interim order prohibiting the application of the regulation against the company amounted to abstract judicial review. As engaging in abstract judicial review was neither possible within the framework of the Swedish law nor required by the EU law, the company's appeal was dismissed.

It is worth noting that although the Swedish courts and administrative agencies cannot engage in abstract judicial review, it is part of the Swedish legislative process by means of the review of legislative proposals by the Council of Legislation (*lagrådet*). The Council of Legislation, which consists of current and former judges from the Supreme Court and the Supreme Administrative Court, carries out what can be called an abstract judicial review of certain legislative proposals before a government bill is put forth.

## 2. NJA 2021 s. 215: Freedom of Expression

The case dealt with a rap song by a Swedish rapper uploaded to Spotify. The song was called “Then she shall be shot” (“*Då ska hon skjutas*”) and that phrase also constituted the song’s refrain, sung to the melody of a popular birthday song. In one verse, the name of a specific police officer was mentioned and the officer was called “an ugly fish” (“*en ful fisk*”), followed by the line “and then all small fish will suffer” (“*och då ska alla små fiskar få lida*”). The song was uploaded about a month after the same police officer had been in charge of a police action that had taken place at a concert organized by the rapper. After the concert, the officer had publicly criticized the concert venue for booking such events. The rapper was prosecuted for a threat against a public official. The prosecutor claimed that by uploading the song, the rapper’s aim had been, through a threat of violence, to avenge the police officer her actions in connection to the concert. The rapper was acquitted in the District Court but convicted in the Court of Appeal. The main issue in the Supreme Court was how the free speech interests should be taken into account in a prosecution for a threat against a public official.

The Supreme Court asserted that in case a criminal provision can entail a restriction of freedom of expression, the free speech guarantees in the Instrument of Government and Art. 10 ECHR must be considered. When balancing the free speech interest against the interest of combating attacks on public officials, the former needs to be given a great latitude. In the cultural context, there must be scope for lyrics and music to be provocative and unpleasant. The limits for free speech are, however, exceeded when the expression amounts to a threat of violence. While this also applies to expressive activities in political and cultural contexts, the free speech interests at hand can entail that a verbatim threat of violence can be deemed as permissible.

The Court concluded that although the song contained what, based on wording, could be regarded as threats, it did not amount to a serious threat of violence with regard to its context and form. The Court pointed out i.a., that the song was uploaded as a reaction to the police officer’s statements in the media,

as well as to the fact that the tone in rap music generally can be tough. Moreover, the Court noted that the words in the relevant part of the song were ambiguous, a part of a provocative polemic and could be perceived as metaphorical. The Supreme Court accordingly acquitted the rapper.

Two justices dissented and regarded the lyrics of the song as amounting to a threat of violence not protected as free speech, with the aim of avenging the police officer for actions carried out in the exercise of public authority.

## 3. NJA 2021 s. 368: Right to Bodily Integrity

The background to the case was another case from 1998, where the defendant was acquitted of a murder. After a DNA-analysis managed to secure a searchable DNA-profile from the victim’s clothes, the prosecutor re-opened the preliminary investigation in order to determine whether it would be possible to petition for a new trial against the previously acquitted defendant. The main question in the Supreme Court was whether it was possible for the court to order the previously acquitted person to submit to a body search in the form of a saliva test in order to carry out a DNA-analysis of the test.

The Supreme Court asserted that according to the Instrument of Government (IG) Ch. 2 § 6, everyone is protected against public authorities for bodily violations and body searches. Restrictions of these rights are only permissible in law and must meet the requirements for rights restrictions set out in IG Ch. 2 §§ 20-24. Taking different kinds of tests is regarded as a bodily violation under the IG, while taking and examining samples from the human body is a form of body search, which is a coercive measure regulated in the Swedish Code of Judicial Procedure (*rättegångsbalken*). It follows from the principle of legality that provisions regulating coercive measures must be interpreted in accordance with their wording. In particular, there is a reason to interpret such provisions restrictively when they limit constitutionally protected rights.

The Supreme Court concluded that there was no clear legal basis in the Code of Judicial Procedure for applying the rules on body search during a re-opened preliminary investigation in the context of a re-trial. According to the Court, applying the rules would con-

flict both with the IG:s requirements of legal basis for coercive measures, as well as the restrictive application of restrictions of the protection against bodily violations in such situations. The prosecutor’s request to order the previously acquitted defendant to submit to a saliva test was accordingly rejected.

This case is an example of the increased importance the Swedish courts have given to the national constitutional rights catalogue in IG during the last decade.

## 4. NJA 2021 s. 498: Freedom of Expression

A day after the terror attack against a mosque in Christchurch, New Zealand in 2019, a website operated by a Neo-Nazi organization published as a part of an article about the attack the video the perpetrator had filmed during the attack. The video showed the attacker driving to the mosque, shooting several people and then driving away from the scene of crime. The organization’s website was protected under the Fundamental Law on Freedom of Expression (FLFE, *ytrandefrihetsgrundlagen*), which provides an extra strong protection for expressive activities covered by it. The editor of the website was prosecuted in accordance with the FLFE for an unlawful depiction of violence for publishing the video. The editor was convicted in the District Court, but acquitted in the Court of Appeal. The main issues before the Supreme Court were whether publishing the video amounted to an unlawful depiction of violence and whether the publication in that case had been justifiable.

According to the Supreme Court, it was unlikely that the violence depicted in the video would have been regarded as constituting an unlawful depiction of violence in case it had featured in a fictional film. However, as the video depicted real-life violence, the Court found that it amounted to an unlawful depiction of violence in accordance with the relevant criminal provision.

As regards the justifiability of the publication, the Court noted that the video had been published as a part of an article about the terror attack, which was a highly topical news item. The article was also clearly written as a news report, although it appeared as somewhat tendentious. The Court thus

concluded the video had been published as a part of news reporting. The Court found it irrelevant that, apart from news articles, the website also contained articles focused on opinion-forming, as well as other materials. Neither could knowledge about the opinions of those operating the website nor the fact that the violence depicted in the film was not clearly condemned in the article be accorded importance. The Court further emphasized that the news value of the video at the time of the publication was considerable. Although it was a question of a long and horrendous depiction of real-life violence, the killing was not depicted in great detail. All in all, the Court held that the nature of the violence depicted in the video was not enough to override the interest of news reporting. As the publication thus had been justifiable, the editor was acquitted from the charges.

Two justices dissented and held that the editor should have been convicted. The dissenters maintained that the publication crossed the line for the types of portrayals of violence that can be justifiable as a part of news reporting. They emphasized i.a., that it was a question of a close depiction of real-life violence showing people getting killed. According to the dissenters, the great news interest was not enough to justify the publication of the entire film.

##### 5. HFD 2021 ref. 43: Freedoms of Opinion

The case concerned a member of a Neo-Nazi organization whose gun licence was revoked by the police. The police maintained that he was unsuitable under the Swedish Offensive Weapons Act (*vapenlagen*) to hold a gun licence, because he was an active member of a militant far-right Nazi organization known for its violent image and history of crimes of violence. The police argued that it could not be ruled out that the licensee's guns could be used for criminal purposes. Both the Administrative Court and the Administrative Court of Appeal upheld the police's decision. The licensee appealed to the Supreme Administrative Court, where the issue at focus was whether the gun licence could be revoked on the grounds of the appellant's engagement in a violent extremist organization.

The Supreme Administrative Court asserted

that the Instrument of Government Ch. 2 § 1 guarantees everyone the right to freedom of expression, freedom of demonstration and freedom of association. These freedoms entail a right to express one's opinions, participate in demonstrations and be a member in organizations without interference or reprisals. The Court maintained that this meant that a gun licence could not be revoked solely on the basis of an individual's opinions, membership in a political organization or participation in assemblies and demonstrations organized by such an organization. In order for the appellant to be regarded as unsuitable to possess a gun, it must be shown that he does not fulfil the requirements of law-abidingness, judgment and reliability applicable to those holding a gun licence. The Court noted that it had not been claimed that the appellant himself would have committed crimes or risked abusing his guns. Moreover, the Court pointed out that there were no concrete circumstances suggesting that his involvement in the extremist context would entail a risk of him losing control over his guns and that the guns would be abused by someone else. The Court accordingly held that there was no basis for revoking the gun licence and upheld the appeal.

Two justices dissented and wanted to reject the appeal. They agreed with the majority that it was not possible to revoke the appellant's licence on the grounds that he would have shown himself to be unsuitable to possess a gun. However, the dissidents maintained that a gun licence could also be revoked in case there was a reasonable ground for it and a revocation was not possible on other grounds in the Offensive Weapons Act. According to them, it should be possible to revoke a licence when the licensee is part of an environment where there should be no guns, e.g., involving persons with heavy criminal backgrounds or persons adhering to violent extremism. Like the police, the dissenting justices regarded the organization the appellant was active in as such a high-risk environment. They accordingly held that there were reasonable grounds for revoking the appellant's gun licence. Neither did they regard the revocation as amounting to a violation of the appellant's constitutional rights.

##### 6. European Court of Human Rights [GC]: Case of *Centrum för rättvisa v. Sweden* (Application no. 35252/08)

The applicant in this case decided by the Grand Chamber of the ECtHR was the Swedish human rights organization *Centrum för rättvisa*. The organization claimed that the Swedish law on signals intelligence violated the right to respect for private life and correspondence protected by Art. 8 ECHR. In 2018, the Chamber of the Court had unanimously held that there had been no violation of Art. 8.

It was undisputed before the Grand Chamber that the relevant signal intelligence activities had a basis in the domestic law and that the signal intelligence legislation pursued legitimate aims in the interest of national security. As to the quality of the law, the Court maintained that the main features of the bulk interception regime met the requirements imposed by the ECHR in this regard. The Court found that the operation of the Swedish signal intelligence regime stayed within the boundaries of what is "necessary in a democratic society".

The Court, however, identified three shortcomings in the Swedish bulk interception system. Firstly, the regime lacked a clear rule for destroying intercepted material not containing personal data. Secondly, there was no requirement in the signals intelligence legislation to consider the privacy interests of individuals when deciding to transmit intelligence material to foreign partners. Thirdly, the bulk interception regime lacked an effective *ex post facto* review. As the existing safeguards in the regime did not sufficiently compensate for these shortcomings, the Court concluded that the bulk interception regime fell outside the scope of Sweden's margin of appreciation. The Court especially emphasized the considerable potential for abuse that existed and risked negatively affecting the privacy rights of individuals. In conclusion, the Court held that the Swedish bulk interception regime as a whole did not contain sufficient "end to end" safeguards in order to provide adequate and effective guarantees against arbitrariness and risk of abuse. The Court thus found a violation of Art. 8.

In November 2021, the Swedish parliament adopted a bill expanding the scope of the signal intelligence legislation criticized by

the ECtHR. The new legislation, which entered into force in January 2022, makes it i.a. possible for foreign security services to get direct access to personal data processed by the Swedish Armed Forces and the national Swedish authority for signals intelligence (*Försvarets radioanstalt*, FRA). FRA will further have the right to gather signals intelligence even when there are no threats directed towards Sweden or Swedish interests involved.<sup>5</sup> The new legislation has met criticism both for its content and for the fact that it, instead of rectifying the shortcomings identified by the ECtHR, expands the existing legislation. The government has maintained that it will no later than in 2025 set up an inquiry reviewing i.a. the need to take further legislative measures following the ECtHR's judgement.

1 <https://coronakommissionen.com/>.

2 Prop. 2021/22:42.

3 Prop. 2021/22:40

4 SOU 2021:89. Quote from the English summary.

5 Prop. 2020/21:224.

#### IV. LOOKING AHEAD

2022 will be an election year in Sweden, with parliamentary, regional, and municipal elections taking place in September. It remains to be seen whether the results will give rise to as complex negotiations between parties around the government formation as was the case after the 2018-year's elections. That there are political tensions at work was demonstrated by the historical declaration of no confidence against the Prime Minister Löfven in 2021.

The Corona commission will present its final report in 2022. It will be seen whether any major constitutional issues emerge as central among the commission's findings.



# Switzerland

Johannes Reich

Professor of Public Law, Environmental Law, and Energy Law

University of Zurich

ORCID iD: <https://orcid.org/0000-0001-6283-0112>

## I. DIRECT DEMOCRACY – REALM, LIMITS, AND LEGITIMIZING CAPACITY

1. Federal Supreme Court: Switzerland's Gallic village held by the indomitable political parties

In a series of referenda held in 2021, Swiss citizens extended civil marital status to male-male and female-female couples (*same-sex marriage*; see para. I/2 below), *banned wearing face coverings* in public (see para. I/1 below), and approved government measures to curb the spread of the coronavirus disease 2019 (COVID-19) not once, but twice. Rallies against the measures subsided after the second referendum of 28 November 2021, bearing witness to the *legitimizing capacity of direct democracy*. Direct democracy is pervasive in Switzerland.<sup>1</sup> *In 2021 this was, inter alia*, exemplified by a popular initiative seeking to amend the Swiss Federal Constitution<sup>2</sup> with a clause barring the Federation from purchasing ‘combat aircraft of the type F-35’.<sup>3</sup> Alluding to the introduction to each of the ‘Adventures of Asterix’, a French comic book series, one would be forgiven to suspect that the Swiss political landscape is ‘entirely occupied’ by direct democracy – only to conclude: ‘Well, not entirely...’.<sup>4</sup> Direct democracy may have swept through the Swiss political system like a tidal wave since the late 19<sup>th</sup> century, but the federal judiciary has remained in the firm grip of the political parties. It is virtually impossible to be elected judge at the Federal Supreme Court as a candidate unaffiliated with one of the political parties represented in Federal Parliament. Swiss citizens, on 28 November

2021, nevertheless *rejected* a constitutional amendment that sought to distance the Court from the realm of party politics. The Federal Supreme Court thus continues to bear resemblance to the ‘one small village of indomitable Gauls’ that ‘still holds out against the invaders’<sup>5</sup> (see para. I/3 below).

2. ‘Institutional Agreement EU-Switzerland’: limits of direct democracy in foreign affairs

The limits of the sphere of direct democracy became manifest in other respects: On 26 May 2021 the Federal Council, the executive branch of federal government, decided to walk away from the negotiations on an ‘Institutional Agreement European Union [EU]-Switzerland’.<sup>6</sup> Unilaterally abandoning these talks risks eroding the dense web of bilateral agreements between Switzerland and the EU. Despite these potentially far-reaching ramifications, it was for the Federal Council alone to take this decision, owed to its responsibility for foreign relations<sup>7</sup>. Such resolutions lie beyond the reach of direct democracy since referenda presuppose an enactment by Federal Parliament. Popular initiatives, in contrast, seek to amend the Federal Constitution. While it is conceivable to commit the Federal Council to initiate treaty negotiations by way of a constitutional amendment, the latter cannot prejudge the outcome of negotiations. Popular initiatives are, furthermore, a lengthy undertaking, often requiring more than three years from launch to vote. Popular initiatives are therefore ill-suited to adequately respond to changing dynamics in foreign policy.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. Constitutional ban on wearing face coverings in public

Swiss citizens approved two constitutional amendments at the ballot box in 2021: the popular initiative *‘For strong nursing care (Nursing Initiative)’* aimed at making nursing jobs more attractive, inter alia, by offering higher pay, professional autonomy, and improved training opportunities,<sup>8</sup> and the initiative *‘Yes to the ban on concealing the face’*. According to this constitutional amendment, supported by 51.2 percent of the votes cast, no person ‘may conceal his or her face in public space or in places being accessible to the public or in which services are provided that are ordinarily accessible to everyone’; ‘places of worship’ are exempt.<sup>9</sup> The amendment also prohibits ‘coercing a person to conceal his or her face because of his or her gender.’ The article is, despite its neutral wording, primarily directed at women wearing a niqab or a burqa as it only allows for narrowly tailored exceptions (‘health, safety, climatic conditions, and local customs’) but not religion. The European Court of Human Rights (ECtHR) previously upheld comparable bans on face-veils enacted in France and Belgium.<sup>10</sup>

### 2. Extending civil marital status to same-sex couples through the democratic process

All courts and administrative agencies, including the Federal Supreme Court, are bound to apply federal acts decided by Federal Parliament even in the event that they are found to be unconstitutional.<sup>11</sup> Legislation by Federal Parliament is thus pivotal in defining the realm of constitutional rights such as the ‘[t]he right to marry and to have a family’<sup>12</sup>. The Constitution fails to provide for a textual definition of ‘marriage’. A parliamentary motion entitled *‘marriage for all’* aimed at amending the Civil Code, a federal act, to allow same-sex couples to marry. In the ensuing debate whether ‘marriage for all’ presupposed an amendment to the Federal Constitution the Federal Office of Justice (FOJ), in a legal opinion, stated that the right to marry was, when enacted in

the 19<sup>th</sup> century, primarily intended to bar the subnational units (cantons) to deny persons to marry on the grounds of religion, denomination or poverty. Fundamental redefinitions of marriage such as equal treatment of children born in and out of wedlock or of husband and wife were hence introduced without any amendments to the Constitution. Critics, in contrast, cited statements made in Parliament in the debates on the revised Federal Constitution of 1999, defining marriage as a union of a man and a woman, arguing that such accounts would reflect the relevant meaning of the right to marry.

As federal acts are binding upon courts, such constitutional controversies are ultimately settled by Federal Parliament and, in the event of a referendum launched, by the citizens themselves: On 26 September 2021, 64.1 percent of the votes cast were *in favor* of the amendment to the Federal Civil Code to include ‘marriage for all’. The amendment was approved in all the 26 cantons.<sup>13</sup> The expansion of marriage was thus decided ‘through the democratic process’ by ‘the people’ rather than by the courts – or merely ‘five lawyers’ as it has been polemically put elsewhere.<sup>14</sup>

### 3. Election of judges to the Federal Supreme Court: representative judiciary or patronage system?

The judges of the Federal Supreme Court are elected by the two chambers of Federal Parliament in a joint session for a term of six years.<sup>15</sup> Having the right to vote in federal matters forms the sole requirement to stand for election. Any Swiss citizen ‘over the age of eighteen’ not lacking ‘legal capacity due to mental illness or mental incapacity’<sup>16</sup> may therefore stand for election to the Court. In practice, however, all judges at Switzerland’s highest courts are lawyers. Based on a long-standing political convention, seats at Switzerland’s highest court are allocated according to the principle of ‘*voluntary party proportional representation*’ based on the relative electoral strength of the political parties in federal elections. A party having won, for instance, 13 percent of the votes in the most recent federal elections can claim 5 of the currently 38 seats at the Federal Supreme Court, albeit incumbent judges have thus far never been denied re-election to

adjust for exact representation. As a result, *all members of the Court are members of political parties* or are at least closely affiliated to one. This is despite the task of the ‘Judiciary Committee’, a select committee of 17 members of Federal Parliament, to issue recommendations to Parliament on candidates standing for (re-)election to the Court. These evaluations are based on criteria such as legal training, professional experience, gender, or native language and take place behind closed doors.

Under the presumption that a candidate’s affiliation to one of the eleven political parties currently represented in Federal Parliament forms a valid criterion to assess a judge’s values and personal conviction, the convention of ‘voluntary party proportional representation’ should ideally provide for a (more) *representative judiciary* of the Federal Supreme Court, broadly mirroring the many ideologies and worldviews prevalent among the Swiss population at large. For candidates refusing to be closely associated with a political party, however, it is ‘very difficult, if not impossible’ to be elected judge at the Court no matter how qualified they might be.<sup>17</sup> Some features of the political convention of ‘voluntary party proportional representation’ even resemble a patronage system: Judges at the Court are, depending on the party they are a member of, expected to pay a fixed or proportional part of their salary – usually between 2 and 8 percent of their gross wage amounting to around Swiss Francs 355,000 (EURO 367,000) p.a. – to their party as a so-called ‘salary tax’ or ‘union fee’.<sup>18</sup> The ‘Group of States against Corruption’ (GRECO), a body established by the Council of Europe, rightfully denounced this practice as ‘a form of retrocession that is clearly contrary to the principles of independence and impartiality’ of the judiciary.<sup>19</sup> The political parties themselves defend this practice with reference to the lack of party financing by public funds. In essence, however, the convention of ‘voluntary party proportional representation’ is nothing short of a cartel from which all members benefit beyond the infamous ‘salary tax’ or ‘union fee’: Every single party represented in Parliament, no matter how small it may be, becomes a gatekeeper of the judiciary. Those who wish to maintain their prospects of nomination must

cultivate ties with the party leadership and undertake grassroots work within the party. The popular initiative ‘Designation of federal judges by lot’ (Judiciary Initiative), rejected at the ballot box on 28 November 2021,<sup>20</sup> sought to deprive the political parties of their function as gatekeepers of the judiciary by appointing the judges of the Federal Supreme Court by lot. A panel of independent experts, elected by the Federal Council for a single term of twelve years, would have been entrusted with the task of deciding on the candidates admitted to the draw proceedings. This decision would have been made solely based on objective criteria of professional and personal suitability. The flip side of the coin is that this would have severed the ties between the Court and Parliament, the only federal authority elected by the People.

### III. CONSTITUTIONAL CASES<sup>21</sup>

*A [Caster Semenya] v International Association of Athletics Federation (IAAF) ATF 147 III 49 (Swiss Fed. SCt.): discrimination of intersex people competing in professional sports*

The ‘Court of Arbitration for Sport’ [CAS] is an international body resolving disputes arising in the context of sport by arbitration headquartered in Lausanne, Switzerland. The Federal Supreme Court is entrusted to set aside an international arbitral award on appeal on very narrow grounds only, *inter alia*, due to the incompatibility of the award with the Swiss ‘*ordre public*’ (French; English: ‘public order’).<sup>22</sup>

*Semenya*, a professional South African middle-distance runner, had filed an appeal with the CAS against regulations of the ‘International Association of Athletics Federations’ (IAAF), linking the eligibility to take part in women’s competitions to a certain maximum (natural) testosterone level. *Semenya*, an intersex woman, has genetically elevated testosterone levels exceeding the threshold set by IAAF. CAS held that having separate competitions for men and women was justified due to the difference in performance between men and women that are, according to the CAS, predominantly caused by different

testosterone levels of the two sexes. Linking the right to compete in professional athletics to the testosterone level would, according to the Arbitration Court, hence be necessary on the grounds of fairness and equality of opportunity. The CAS further held this criterion to be proportionate as women with naturally elevated testosterone scores would have the opportunity to lower their testosterone levels by appropriate and safe medication.

*Semenya* filed an appeal against the CAS’s verdict with the *Federal Supreme Court* arguing that the decision by the CAS is incompatible with Switzerland’s ‘*ordre public matériel*’ (French; English: ‘substantive public order’). The Court first held the waiver of the right to appeal contained in the IAAF regulations and invoked against the appellant to be invalid, as the waiver failed to amount to an ‘agreement of the parties’ based on mutual consent as required by relevant Swiss federal law. According to the Court’s case law, an arbitral award is deemed incompatible with the ‘*ordre public matériel*’ should it violate ‘fundamental principles of substantive law’ to such an extent that it can no longer be reconciled with the values underpinning Switzerland’s legal order. These principles include, among others, the principle of *pacta sunt servanda*, the rule of good faith, the prohibition of the abuse of rights, and the prohibition of discrimination. The Federal Supreme Court, however, highlighted that the violation of fundamental rights enshrined in the Federal Constitution, or the European Convention on Human Rights does not, in itself, amount to an incompatibility with the ‘*ordre public matériel*’ as fundamental rights in general and the prohibition of discrimination in particular exert only limited horizontal effects between private subjects, if any. The Court acknowledged not only that the relationship between a professional athlete and an international sports federation ‘bear certain similarities to that between an individual and the State’ due to its ‘highly hierarchical structure’, but also that the eligibility requirements set forth by the IAAF were ‘prima facie discriminatory’. Ultimately siding with the CAS, the Court nevertheless stated that such differentiation can reasonably be deemed a *suitable, necessary, and proportionate* measure to ensure fair competition and thus failed to amount

to a breach of Switzerland’s ‘*ordre public matériel*’. Given the narrow grounds on which the Federal Supreme Court is entitled to set aside an international arbitral award, the Court therefore dismissed *Semenya*’s appeal and upheld the CAS’s decision. *Semenya* subsequently filed an application with the ECtHR.<sup>23</sup>

*2. A [Jean-Luc Addor] v Public Prosecution Service of the Canton of Valais 6B\_644/2020 (Swiss Fed. SCt.): Freedom of expression and hate speech by a Member of Federal Parliament*

On 22 August 2014, a shooting took place in a mosque in the Swiss city of St Gall (St. Gallen) in which a 51-year-old man was killed. The website of a free Swiss daily newspaper ran an article on the incident with the headline ‘Mosque shooting leaves one dead’, written in bold type and accompanied by a photograph showing the mosque’s empty prayer room. The caption to the picture stated that, according to a witness, 300 people were in the mosque at the time. *Jean-Luc Addor*, a member of Federal Parliament since 2015 and an experienced lawyer, shared the article on ‘Twitter’ with the following comment in French: ‘*On en redemande!*’ (English: ‘We want more of this!’). *Addor* also posted the same comment on ‘Facebook’, sharing a link to the article in question. Thirteen minutes later, *Addor* posted a message on the same social networks asking whether his ‘irony’ was ‘being understood’. Approached by a journalist two days later, *Addor* stated in an e-mail that the terms used by him ‘should not be taken at face value (or literally)’, insisted that he ‘never intended to call for anything’ and described his comment as ‘a moody reaction to a disturbing event’.

The District Court of Sion nevertheless found *Addor* guilty of discrimination and incitement to hatred under article 261bis of the Swiss Federal Criminal Code, according to which ‘any person who publicly incites hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin, religion, or sexual orientation ... shall be liable to a custodial sentence not exceeding three years or to a fine.’ The court of appeal of the Canton of Valais dismissed *Addor*’s appeal.

The Federal Supreme Court, on *Addor's* further appeal, stressed that the article of the Criminal Code on discrimination and incitement to hatred should be interpreted 'in the light of freedom of expression'. The Court highlighted that it was essential in a democracy that not only opinions disliked by a majority but even statements that would offend many people could be expressed freely. Statements made in a political debate should, according to the Court, 'not be interpreted in a strictly literal manner as simplifications and exaggerations are common in such a context'. Still, the Court found that, as confirmed by most of the comments made by readers to *Addor's* posting, the 'average uninformed reader', understood the post '*On en redemande!*' in a literal sense 'as a call for a repetition of a fatal exchange of gunfire that had taken place ... in a mosque between followers of the Islamic religion.' Such statements went, the Court found, far beyond criticism that in a democracy sometimes would be required to 'be levelled at certain population groups'. With regard to his subjective motives, the Court further pointed to the fact that *Addor* deliberately chose to express himself in vague yet brutal terms which, taken literally, amounted to 'a call to repeat a murder committed in a mosque'. Given the wording used by *Addor*, he, according to the Court, at least consciously accepted the risk to be understood in a literal sense thus inciting hatred 'against members of the Muslim community' as a religious group. Against this backdrop, the Court upheld *Addor's* conviction and dismissed his appeal.

### 3. *A v Municipality of Auenstein and Others* ATF 147 I 346 (Swiss Fed. SCT.): 'smart meters' and the right to privacy

Water supply is a task carried out by the more than 2,000 municipalities of Switzerland. The Local Council of the Municipality of Auenstein (Canton of Aargau) decided to convert all of the water meters that were installed in private household from conventional models to electronically readable and radio-controlled devices. Conventional devices were metered by an employee of the municipality to determine the amount of the water consumed in the respective household. Electronic meters, in contrast, would

measure, among other things, the hourly water consumption as well as the maximum and minimum flow rate per hour. The device would not only store the data locally for 252 days but transmit them in encrypted form by radio every 30 to 45 seconds. The data could be received by a password-protected readout device of the water supplier from a certain distance (walk-by, drive-by). In the municipality in question, this was done only once a year for billing purposes, transmitting the current meter reading only, without the hourly values of the last 252 days. 'A', a resident of Auenstein, petitioned the Local Council to limit the functions of the electronic meter to the previous model. The Local Council dismissed the petition but granted 'A' the option to restrict certain functions of the new device at his own expense. 'A's' appeal against this decision was rejected by the Administrative Court of the Canton of Aargau.

On further appeal, the Federal Supreme Court held that data on water consumption were 'personal data' at least to the extent as such data would allow others to draw conclusions from them as to daily routine of the residents of said building or flat. Such data would thus fall under the fundamental right to privacy in general and the *constitutional right to be protected against the misuse of personal data* in particular. The Court determined that a legal basis allowing the Municipality both to store the data for 252 days and to transmit data every 30 seconds was lacking. The Court, however, acknowledged that radio transmission would lead to higher operational efficiency and was therefore in the *public interest* as municipal staff would no longer have to access each building to read the meter. Regarding whether such data collection was *proportionate*, the Court noted that the measure was *suitable* to achieve the intended purpose (billing). According to the Court, the *necessity* to collect a wide array of data was lacking as merely the value on the day of the (annual) meter reading (as opposed to both the hourly water consumption of the last 252 days and the emittance of such the data every 30 seconds) was required for billing purposes. The undisputed fact that all data were well protected, and misuse could virtually be ruled out, did, in the eyes of the Court, not eliminate the lack

of necessity. To rule otherwise would, according to the Court, render the principle of necessity as an element of proportionality irrelevant should an entity be able to prove that the collected data were securely stored. Such a result would, however, go against the principles of data avoidance and data economy. These principles are, as the Court rightly pointed out, in the interest of the citizens as 'non-existent data cannot be misused.' The Court thus upheld the appeal in part and remitted the case back to the Local Council for reassessment in light of the Court's findings.

## IV. LOOKING AHEAD

Switzerland's fragile relations with the European Union (see para. I/2 above) will remain at the top of the political agenda in 2022. Not only is it still unclear whether the Federal Council will succeed in 'revitalizing' the relations between Switzerland and the EU and 'stabilizing bilateral cooperation' but Swiss citizens will be called upon deciding on Switzerland's financial and personnel support to '*Frontex*', the European Border and Coast Guard Agency, in a *referendum* on 15 May 2022. Based on the 'Schengen Association Agreement' of 2008,<sup>24</sup> Federal Parliament decided to fund 4.5 percent of *Frontex's* overall budget for the period of 2021–2027. The feature of Swiss constitutional law to frame questions that are in many other jurisdictions traditionally decided by constitutional courts as matters for Parliament and then, in case of a referendum, for citizens to ultimately decide as described in para. II/2 above regarding the referendum on 'marriage for all', will resurface again. With respect to *organ donation*, Swiss citizens will be called to decide whether the current opt-in system (organ donors are those who have explicitly declared their willingness to donate their organs) will be replaced by an opt-out system (organ donors are those who have not expressed their opposition to donating their organs), thus calibrating the *constitutional right to physical integrity after death*.<sup>25</sup>

1 Johannes Reich, 'An Interactional Model of Direct Democracy: Lessons from the Swiss Experience' (2008) 13–21, SSRN <<http://dx.doi.org/10.2139/ssrn.1154019>>.

2 Swiss Federal Constitution [Federal Constitution], 18 April 1999 <<https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>> (non-official English translation).

3 See Federal Chancellery, 'Initiative populaire fédérale 'Contre le F-35 (stop F-35)'' <<https://www.bk.admin.ch/ch/f/pore/vi/vis517.html>>.

4 E.g. René Goscinny & Albert Uderzo, *Asterix in Switzerland* (first published 1973, Orion 2014) 4.

5 *Ibid.*

6 See Johannes Reich, 'Switzerland' in Richard Albert et al. (eds), *2018 Global Review of Constitutional Law* (2019) 298–302, 302.

7 Federal Constitution (n. 2), article 184(1).

8 Federal Constitution (n. 2), articles 117c & 197(12).

9 Federal Constitution (n. 2), article 10a.

10 See *SAS v France* App No 43835/11 (ECtHR, 1 July 2014), *Dakir v Belgium* App No 4619/12 (ECtHR, 11 July 2017).

11 Federal Constitution (n. 2), article 190; in more detail Johannes Reich, 'Verhältnis von Demokratie und Rechtsstaatlichkeit' ['The Relation between Democracy and the Rule of Law'] in Oliver Diggelmann et al. (eds), *Droit constitutionnel suisse. Volume 1* (Schulthess 2020) 333–55 <<https://doi.org/10.5167/uzh-184637>>.

12 Federal Constitution (n. 2), article 14.

13 See Federal Chancellery, 'Votation No 647' <<https://www.bk.admin.ch/ch/f/pore/va/20210926/det647.html>>.

14 See *Obergefell v. Hodges*, 576 US Supreme Ct 644, 686–8 (2015) (Roberts, C. J., dissenting).

15 See Federal Constitution (n. 2), articles 168(1), 157(1a) and 145.

16 See Federal Constitution (n. 2), articles 143 and 136(1).

17 Group of States against Corruption [GRECO] 'Fourth Evaluation Round: Evaluation Report Switzerland' (2016) 28/n. 99.

18 *Ibid.* 30/n. 109.

19 *Ibid.* 29/n. 100.

20 See Federal Chancellery, 'Votation Populaire du 28.11.2021' <<https://www.bk.admin.ch/ch/f/pore/va/20211128/index.html>>.

21 Judgments of the Swiss Federal Supreme Court are available at <<https://www.bger.ch>>.

22 Federal Act on Private International Law, 18 December 1987, No 291, articles 191 & 190(2e). <[https://www.fedlex.admin.ch/eli/cc/1988/1776\\_1776\\_1776/en](https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en)> (non-official English translation).

23 *Semenya v Switzerland* App No 10934/21 (ECtHR, communicated case, 3 May 2021).

24 On the 'Schengen Association Agreement' see Johannes Reich, 'Switzerland' in Richard Albert et al. (eds), *2019 Global Review of Constitutional Law* (2020) 333–7, at 333–4.

25 See Federal Constitution (n. 2), article 10(2) (right to 'physical integrity'); see also *W v Administrative Court of the Canton of Geneva and Others* ATF 129 I 302, 309 (Swiss Fed. SCt.) (according to which this right 'extends beyond death and allows every person to determine in advance the fate of his or her remains, and to protect against any unlawful intervention, whether it be organ removal or autopsy').



# Taiwan

Jau-Yuan Hwang  
Justice, Constitutional Court, Taiwan

Ming-Sung Kuo  
Reader in Law, University of Warwick, UK

Hui-Wen Chen  
Research Assistant, University of Warwick, UK

## I. INTRODUCTION

Taiwan carried its stellar performance in responding to the Covid-19 pandemic over into 2021, to manage through a sudden outbreak with limited restrictive measures and speedy vaccination enabled by foreign emergency donations of vaccines. The outbreak did not prompt the government into extraconstitutional action but still impacted constitutional development in Taiwan. It caused a delay on the balloting of referenda that had been in the making in 2020. Yet, constitutional seeds for the way that these referenda were defeated and other constitutional development in the form of popular mobilization had been sown before 2021. And experiences of political mobilization in the populist form in 2021 will inevitably foreshadow the future of referendum and stir a debate on institutional channels of popular mobilization.

Another slow-moving constitutional development in 2021 is the continuing reform on the master-text constitution. As reported last year, constitutional reform only came up the political agenda following President Tsai Ing-Wen's landslide election victory in 2020 that delivered her another four-year term. Having seen little progress in 2021, constitutional reform will eventually culminate in a make-or-break moment in 2022.

Paralleling constitutional development from without, the Taiwan Constitutional Court (TCC) sits on the cusp of transformative change in 2021. Anticipating the coming

into effect of the 2019 Constitutional Court Procedure Act in January 2022, the TCC has not only instituted preparatory work to ensure a smooth transition to new procedures but also tried with new practice in its continuing rendering of judicial interpretations in 2021. The year 2021 is one of transition during which constitutional developments within and without the judicial forum have continued with what had already been developing in the previous years while casting a long shadow on what to come next.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. Constitutional Amendment

As we reported in the 2020 Year in Review, following President Tasi Ing-Wen's pronouncement on constitutional reform in her second inaugural speech on May 20, 2020, the Legislative Yuan (the parliament) only established an all-party ad hoc Constitutional Amendment Committee (CAC) on October 6, 2020.<sup>1</sup> Afterwards, constitutional reform still failed to gather pace. It took over seven months for the CAC to hold its first meeting on May 18, 2021, just two days before the anniversary of President Tsai's pronouncement on constitutional reform - in the event the first meeting was also the last meeting that the CAC ever held in 2021.

According to Additional Article 12 of the 1947 Republic of China Constitution, Tai-

wan's working constitution, a bill of constitutional amendment can only be introduced by Legislators (MPs). Yet, neither the CAC nor the Legislative Yuan is the only forum where proposals for constitutional reform germinate. The CAC has acted proactively to solicit draft bills of constitutional amendment from civil society. At the end of 2021, 75 bills have been submitted to the CAC. As the number of the bills of constitutional amendment received by the CAC suggests, opinions on what reforms are required of the 1947 Constitution are diverse, ranging from the lowering of the voting age from 20 to 18 and the creation of National Human Rights Commission to the enshrinement of children's rights and the protection of animal welfare. Even so, constitutional reform has so far failed to generate a broad public debate beyond the activist groups that stand behind the 75 bills of constitutional amendment. Notably, 16 out of the 75 bills are concerned with the lowering of the voting age – the less controversial item on the constitutional reform agenda than longstanding but politically charged issues such as defining state territory and removing textual intimations of pursuing political union with China from the 1947 Constitution.

## 2. Politics of Referendum and Recall Elections

As presidential and parliamentary elections were just held in January 2020 and local elections will not take place until December 2022, the year 2021 would be a year free of election campaign and citizen mobilization, only if there is no other type of election in Taiwan. Yet, as we suggested last year, the stage had already been set for another wave of political mobilization as several citizen-initiated proposals for referenda were in the making while one had already crossed the low threshold introduced in the 2019 Referendum (Amendment) Act.

There were four citizen-initiated proposals for referenda that satisfied the statutory requirements and were put to the vote. As a sequel to the 2018 referendum on a citizen-initiated proposal that successfully removed a statutory directive on moving towards a “nuclear-free homeland,” the first proposal

was aimed at the government's continuing phaseout of all nuclear power plants and had already received approval from the Central Election Commission in December 2019. The government would be thereby required to complete and start a nuclear power plant that was nearing completion when it was mothballed in 2014 by the then KMT government under the pressure of anti-nuclear movement. The second proposal concerned food safety as well as foreign affairs. If approved, it would reimpose the ban on the import of pork containing leanness-enhancing additives – which was only lifted in January 1, 2021 with an eye to unlocking negotiations with the United States on a bilateral free trade agreement – and complicate Taiwan's relationship with the United States. The third proposal was intended to undo the DPP-driven amendment of the Referendum Act in 2019, which was reported in the 2019 Year-in Review.<sup>2</sup> Initiated by environmentalists, the fourth proposal would stop the construction of an LNG terminal located on an ecologically sensitive coastal zone and thus cause disruption to the government's policy towards clean energy.

The election day for these four referendum proposals was originally set for August 28, 2021. Due to the Covid outbreak in the second quarter of 2021 and the attendant restriction measures, the balloting was postponed pursuant to the Referendum Act and did not take place until December 18, 2021. Concerned about key government policies being undone or thwarted, President Tsai and her DPP government campaigned vigorously against all the four proposals. As a result, all the proposals were defeated in the face of the fierce government campaign, while none of the referenda passed the ballot threshold for validity due to low voter turnout. Notably, the third proposal was intended to address voter apathy as anticipated in the off-season of periodic elections by undoing the amendment of the Referendum Act in June 2019. Introduced in the wake of the DPP's crushing losses in the local elections in December 2018 when referenda on 10 citizen-initiated proposals were held in parallel, the amendment aimed to stop the abuse of referendum. By keeping referendum and regular elections apart, the amendment seems to end the idea

of enhancing democratic engagement with referendum in Taiwan's transition to democracy as suggested by the results of the 2021 referenda. Whether this is true requires further investigation.

Apart from the referenda, three recall elections backed by the main opposition party KMT were held in January, February, and October 2021, respectively. The first two concerned two city councilors in two cities and the results differed: the first recall succeeded in deposing a DPP city councilor in January whereas a city member of a small party who was regarded as allied with the DPP survived the recall election in February. In contrast, the third concerned a Legislator of another DPP-allied small party and resulted in the first removal of a Legislator by recall. Notably, all the three recall elections targeted the DPP or its allies and all were supported by the KMT, suggesting the lowered threshold for triggering a recall election introduced in the amendment of the Election and Recall Concerning Public Offices Act in 2016 being used to enable “revenge recall.”

## 3. Stage-Setting for the Constitutional Court Procedure Act

As we reported before, to bring about a full-scale reform on constitutional review in Taiwan, a new Constitutional Court Procedure Act (CCPA) was enacted and gazetted on January 4, 2019.<sup>3</sup> As it is scheduled to come into effect on January 4, 2022, the Judicial Yuan, the umbrella constitutional organ of judicial administration, has endeavored to lay the groundwork for the new Taiwan Constitutional Court (TCC) in 2021. The groundwork laid by the Judicial Yuan comprises three dimensions: rule and statute harmonization, public communication, and institutional support.

In terms of rule and statute harmonization, the Judicial Yuan has promulgated 11 rules and regulations as required by CCPA in June and July, including the Rules of the Constitutional Court that are necessary to operationalize the new edition of constitutional review as envisaged in CCPA. Moreover, in correspondence with the rescission of the TCC's jurisdiction over petitions for

uniform interpretation by government bodies, the Judicial Yuan has pushed through the amendment of the Court Organization Act that provides for, inter alia, resolving jurisdictional conflict between courts of different judicial systems.<sup>4</sup>

In terms of public communication, the Judicial Yuan has revamped the TCC's website to enhance public access and understanding of the new edition of constitutional review.<sup>5</sup> Furthermore, the TCC has published a list of all the admitted cases pending before the TCC and the attendant pleadings and legal briefs on November 13, 2021, prefiguring how the TCC would make constitutional review more transparent to the public in practice under CCPA.

As regards institutional support, the Judicial Yuan has not only installed a new electronic filing system but it has also started to recruit additional judicial clerks attached to each Justice. Before the CCPA taking effect, every Justice can employ one judicial clerk. As per the 2019 Judicial Yuan Organization (Amendment) Act, the number of judicial clerks that each justice may employ rises to four. In addition, the Judicial Yuan has lent further support to the TCC by recruiting research judges seconded from other courts in accordance with the said Organization Act and the Rules of the Constitutional Court.

It is also worth mentioning that the TCC has gradually adjusted its internal procedures under the old Constitutional Interpretation Procedure Act (CIPA) to prepare itself for the CCPA-induced new edition of constitutional review. One of the major procedural changes introduced by CCPA is the appointment and naming of an author-judge for each court decision, modeled after Anglo-American judicial practice.<sup>6</sup> Thus, trying with this new practice of opinion writing, the TCC assigned a Justice to author the majority opinion in the case that would eventually lead to the last interpretation rendered under the old CIPA. Yet, given that the Justices still had to vote on the holding and the reasoning separately, the then JY Interpretation No. 813<sup>7</sup> is more of an expression of collective voice than a reflection of Anglo-American judicial practice.

### III. CONSTITUTIONAL CASES

In 2021, the TCC received a record-breaking 747 new petitions, as compared to the 634 new cases in 2020. Of them, 694 petitions (92.9%) were filed for constitutional interpretations, and the remaining 53 petitions (7.1%) were for uniform interpretation of laws and regulations. Among these 747 new petitions, 708 (94.8%) were filed by individuals and only 39 by public authorities (34 by the courts and 5 by other governmental agencies). Out of the 747 new petitions of 2021 and 643 pending petitions as of the end of 2020, the TCC disposed a total of 1,003 cases, by rendering 14 Interpretations (Nos. 800 to 813), consolidating additional 57 cases to the said 14 Interpretations, and dismissing 932 petitions (including one withdrawn).<sup>8</sup> All 14 Interpretations involved constitutional controversies. Among these 14 constitutional interpretations, four Interpretations (Nos. 802, 804, 809 and 813) upheld the constitutionality of the challenged laws on their entirety. Three (Nos. 803, 806 and 810) declared the laws in dispute constitutional in part and unconstitutional in part, while the remaining seven Interpretations declared the challenged laws unconstitutional (Nos. 800, 801, 805, 807, 808, 811 and 812). The TCC held oral arguments on No. 803 and No. 812, respectively.

The 14 Interpretations touched upon several constitutional subjects, including bodily freedom (Nos. 801 and 812), freedom of speech (No. 896), equality (Nos. 804, 807 and 810), due process (Nos. 800 and 805), right to work (Nos. 802, 806, 807 and 809), property rights (Nos. 802, 804, 808, 811 and 813), and the rights of the indigenous peoples (Nos. 803 and 810).

The TCC had made only one decision on the issues involving the rights of the indigenous peoples before 2021. In 2021, the TCC rendered two decisions thereon. Interpretation No. 803 examined the constitutionality of law regulating the hunting rights of the indigenous peoples in Taiwan. Interpretation No. 810 reviewed the constitutionality of affirmative action (employment quota) for the indigenous peoples provided for in the

Government Procurement Act. Besides, the TCC also addressed three more issues for the first time in history, *i.e.*, prohibition of night work of the female workers (No. 807), busking license (No. 806), and ban on commercial brokerage of transnational marriage (No. 802). In December, Interpretation No. 812 reviewed the constitutionality of compulsory labor of convicted criminals and reversed the TCC's previous decisions on similar issues. In the following, we will discuss the abovementioned six Interpretations in more details.

#### 1. Interpretation No. 803: Hunting Rights of the Indigenous Peoples

Interpretation No. 803 could be considered *the* leading decision of 2021. It addressed several important issues involving the hunting rights of the indigenous peoples, which were never decided by the TCC before. In this Interpretation, the TCC upheld a gun law allowing, and also restricting, the indigenous people to use their self-made hunting guns and ammunition only, with criminal punishments on those violators. Meanwhile, the TCC demanded the competent authorities to review and revise the administrative regulations governing the specifications of gun in order to provide safer guns for the indigenous hunters. On the issues involving wildlife conservation, the TCC upheld the legal requirement of prior permission before hunting as well as the criminal punishments for hunting animals classified in the category of protected species, while allowing the hunting of general wildlife not classified as protected species, for self-consumption. In sum, the TCC upheld the overall regulatory framework and most restrictions on the hunting right of the indigenous people, while delivering several petty favors as little comfort. Not surprisingly, the community of the indigenous peoples were disappointed and saddened by Interpretation No. 803.

Despite the above conservative decision, there was a silver lining around the dark cloud. In Interpretation No. 803, the TCC, for the first time in history, recognized the cultural rights of the individual indigenous people as an unwritten constitutional right, which encompassed the hunting rights. Though the TCC stopped short of recognizing such right as a

group right for the indigenous peoples, a careful reading of Interpretation No. 803 would suggest that the TCC did not foreclose such recognition in the future. Besides, the TCC also indicated the competent authorities may adopt more diverse and flexible measures to regulate the hunting of wildlife by the indigenous people, such as self-management programs by each tribe in place of the said prior permission mechanism.

A final remark is noteworthy. Two weeks after the announcement of Interpretation No. 803, President Tsai pardoned one of the two indigenous petitioners, both of whom were sentenced for possession of a non-self-made hunting gun and hunting of wildlife of protected species. The other indigenous hunter received a sentence of six-month imprisonment, which was commuted to a fine on a daily rate of NTD1,000 (about USD 35), and he had already paid the fine. However, if the existing regulations and criminal punishments remain unchanged, a second petition regarding the same issues might knock at the door of the TCC again in the future.

## 2. Interpretation No. 810: Affirmative Action for the Indigenous Peoples

In 2001, indigenous peoples' Employment Rights Protection Act was promulgated. Its Section 12, Paragraph 1 provided that "Companies winning bids according to the Government Procurement Act with more than one hundred staff shall hire indigenous people during the term of contract performance, with the total number of indigenous people accounting for no less than one percent (1%) of the total number of staff thereof." Paragraph 3 of the same Section further provided that "In the event that the winning bidder fails to hire enough indigenous people based on the standard stipulated in Section 1, it shall make cash payment to the employment fund of the Aboriginal Comprehensive Development Fund." In 2014, the TCC issued interpretation No. 719 and held both provisions constitutional, while suggesting in its *Obiter dicta* that "If the amount of the fee paid in substitute exceeds that of the government procurement, there should be an appropriate mitigating mechanism by which the amount can be adjusted."

In 2015, a panel of three judges from Taipei High administrative Court filed a petition to the TCC and challenged the calculation formula as provided for in Section 24, Paragraph 2 of the said Act, which stipulated that "The fee mentioned in the previous section and Paragraph 3 of Section 12 shall be calculated based on the monthly salary multiplied by the difference in the number of people." Without expressly reversing Interpretation No. 719, the TCC declared unconstitutional the said calculation formula, and demanded the competent authorities to revise the law accordingly within two years after the announcement of Interpretation No. 810. The main and sole rationale for striking down the said provision was that it would result in disproportionate adverse impact on those companies winning bids, if the amount of the fee paid in substitute exceeded that of the government procurement.

## 3. Interpretation No. 807: Prohibition of Night Shift Work by Women

Since its promulgation in 1984, Section 49 of Taiwan's Labor Standards Act has expressly prohibited the night shift work for women, unless agreed by individual female worker or by the labor union/labor-management conferences and permitted by the competent authorities. The employers also have to provide the necessary safety, health and transportation facilities. In 2020, a panel of three judges from Taipei High Administrative Court petitioned to the TCC for declaring the said provision unconstitutional.

In interpretation No. 807, the TCC found the said provision unconstitutional and declared it null and void immediately. The TCC considered the gender-based distinction a semi-suspicious classification and applied the standard of intermediate scrutiny. The TCC confirmed the purpose of the said provision constitutional, as it aimed at protecting health and safety of women workers. However, the TCC found the means employed by the said provision unconstitutional on the ground that its protective measures amounted to a restriction on the right of women workers to choose night shift works. Such measures

did not bear substantial relations to its self-claimed protective purpose, in that this gender classification was under-inclusive for ignoring safety and health of male workers while carrying the effect of reproducing the stereotypes against women regarding their roles in the family and society.

## 4. Interpretation No. 802: Ban on Commercial Brokerage of Transnational Marriages

There were about 600,000 foreign couples in Taiwan as of 2021. More than 90% of them came from China and Southeast Asia. Over the last two decades, the number of transnational marriages has steadily increased by roughly 20,000 couples each year. However, advertisements for commercially arranged "foreign brides" were once widespread in practice. In December 2007, Immigration Act was amended to ban for-profit transactional marriage brokerage, among others. Section 58, Paragraph 2 of Immigration Act provided that "Transnational marriage agencies shall not demand remunerations or contractual remunerations." The violator shall be fined between NT\$200,000 and NT\$1,000,000 (NT\$30 = USD 1) under Section 76, Sub-paragraph 2 of the same Act. Both provisions took effect on August 1, 2008.

In 2014, a district court judge petitioned to the TCC, arguing that the said both provisions were unconstitutional as they infringed upon the right to work and freedom of contract, as well as the right to equal protection. In Interpretation No. 802, the TCC declared both provisions constitutional. In its reasoning, the TCC applied the deferential standard of rationality review to examine the restrictions on the said three types of rights. Against the backdrop of numerous commercially arranged transnational marriages in practice, the TCC confirmed the purposes of de-commercializing transnational marriages, preventing the objectification of women, and reducing the risks of human trafficking as legitimate government purposes. Further, the TCC held that the means of banning the for-profit brokers of transnational marriage was rationally related to the pursuit of the said purposes.

## 5. Interpretation No. 806: Busking License, Right to Work, and Freedom of Expression

This is the first TCC decision on the busking license. In 2005, Taipei City government enacted a local ordinance that required each busker to apply for a busking license before performance. As of the end of 2020, more than half of the cities or counties of Taiwan have issued similar local ordinances. In order to obtain the license, the applicants must present an on-spot performance before a group of examiners, who determined whether or not the performers were qualified. It was reported that pass rate for this license exam had been lower than 20% between 2005 and 2021. A busker failed the test and sued the Taipei City Government. After exhaustion of the ordinary remedies, he petitioned to the TCC in 2016 and argued that the said exam for busking license was unconstitutional.

Though the Taipei City Government abolished the said license exam requirement and adopted the registration system in March 2021, the TCC still pronounced its Interpretation No. 806 in the end of July 2021. In this decision, the TCC found the said local ordinance unconstitutional for violating the principle of statutory reservation and infringing upon the right to work and freedom of (artistic) expression. The TCC considered that this license exam was a restriction on the qualifications of buskers, and then applied the standard of intermediate scrutiny to review the constitutionality of the said local ordinance. The TCC further held this its main purpose was to provide a better quality of street performance for the citizens, which was a legitimate government interest. However, the TCC ruled that such purpose did not amount to an important government interest and then failed the test of intermediate scrutiny.

On the review of freedom of speech, the TCC considered that the evaluation of the performance quality of applicants was a content-based restriction on the artistic speech, which shall be subject to the most examining standard of strict scrutiny. Given the diverse tastes and preferences for artistic performance and the market mechanism for the street performance, the TCC held that the

government shall not bother to control the quality of street performance, nor shall it determine who was a qualified or good enough busker on behalf of the citizens. The TCC thus found the legislative purpose of the said local ordinance unconstitutional.

It is noteworthy that the TCC found the purpose of the said local ordinance unconstitutional for its restrictions on both the right to work and the freedom of expression. The TCC reached its conclusion after the purpose scrutiny and did not go on to review the constitutionality of the means employed by the said local ordinance. Compared to most of its decisions, this Interpretation No. 806 undoubtedly stood out as a rare case of such an approach.

## 6. Interpretation No. 812: Compulsory Labor before or after Serving Sentences

Three criminal laws provided that the convicts thereof, *i.e.*, habitual criminals under Criminal Code, burglar and fence criminals, and initiators or directors of organized crimes, shall be committed to a labor establishment to perform compulsory labor for a maximum period of three years, either before or after the execution of their sentences. During the last decade, the total number of the said penal laborers nationwide in a given year has been fluctuating between 100 and 500 persons. Though considered unconstitutional by most criminal law scholars in Taiwan, such rehabilitative programs had been implemented for more than seventy years until the announcement of Interpretation No. 812 on December 10, 2021.

As the said compulsory labor programs deprived personal liberty (including bodily integrity, security and movement) of those convicts, the TCC adopted the standard of strict scrutiny to examine their constitutionality. Though the TCC confirmed the purposes of reducing recidivism and maintaining public security as constitutional, it nevertheless found the means employed unconstitutional. The TCC held that the infringement on the personal liberty as a result of such pre- or post-sentence rehabilitative programs in practice was indistinguishable from the execution of sentence. Above all,

the convicts' formal sentences were not necessarily commuted even after their serving the said pre-imprisonment rehabilitative programs. Nor were the post-imprisonment programs necessarily to be waived after the execution of sentences. As nearly all prisoners have been required to perform penal labor while serving their sentences, the said programs may as well be replaced by such prison labor programs. Accordingly, the TCC held unconstitutional the said programs for their imposition of severe and disproportionate punishment on those convicts, and shall be null and void immediately after the announcement of Interpretation No. 812.

## IV. LOOKING AHEAD

Considering the year 2021 as one of transition, it would be hard-pressed not to see constitutional developments within and without the judicial forum carry over into 2022. From within the TCC, the first-year full implementation of CCPA will be formative of the TCC's practice in constitutional review for the years to come, thereby having a long-lasting influence on constitutional jurisprudence. In contrast, outside the judicial forum, the moment of truth will present itself to constitutional reform. Against the backdrop of the defeated referendum in 2021, constitutional reform is destined to pick up pace to enable a parallel referendum on constitutional amendment alongside the local elections scheduled for 2022, provided that it musters support from at least three quarters of the total members of the Legislative Yuan.

## V. FURTHER READING

Jau-Yuan Hwang, "Taiwan" in Luís Roberto Barroso and Richard Albert (eds), *The 2020 International Review of Constitutional Reform* (The Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism 2021).

Chien-Chih Lin, "Global Constitutionalism in Taiwan" (2021) 10 *Global Constitutionalism* 275.

Jiunn-Rong Yeh, “Beyond Unconstitutionality: The Public Oversight of Constitutional Revision in Taiwan” in Rehan Abeyratne and Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021).

1 See Jau-Yuan Hwang, Ming-Sung Kuo and Hui-Wen Chen, “2020 Global Review of Constitutional Law: Taiwan” in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *The I•CONnect-Clough Center 2020 Global Review of Constitutional Law (I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston Collage, 2021)* 229, 299-300.

2 See Jau-Yuan Hwang, Ming-Sung Kuo and Hui-Wen Chen, “2019 Global Review of Constitutional Law: Taiwan” in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *The I•CONnect-Clough Center 2019 Global Review of Constitutional Law (I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston Collage, 2020)* 338, 339-340.

3 The English translation of the CCPA is available at <https://law.judicial.gov.tw/LAWENG/FLAW/dat02.aspx?lsid=FL000849>. For the introduction of the CCPA, see Ming-Sung Kuo and Hui-Wen Chen, “Constitutional Review 3.0 in Taiwan: A Very Short Introduction of Taiwan’s New Constitutional Court Procedure Act” (*Int’l J. Const. L. Blog*, 7 January 2022) <http://www.iconnectblog.com/2022/01/constitutional-review-3-0-in-taiwan-a-very-short-introduction-of-taiwans-new-constitutional-court-procedure-act/> accessed 1 March 2022.

4 The Court Organization (Amendment) Act 2021 was gazetted on December 8, 2021.

5 The new TCC website is available at <https://cons.judicial.gov.tw/index.aspx>.

6 See Article 33, Paragraph 2 of CCPA; Article 41 of the Rules of Constitutional Court.

7 JY Interpretation No. 813 is issued on December 24, 2021.

8 See Statistics of New and Terminated Cases of the TCC in 2021 (in Mandarin), available at <https://cons.judicial.gov.tw/docdata.aspx?fid=5223> (accessed February 5, 2022).



# Thailand

Khemthong Tonsakulrungruang

Lecturer

Faculty of Political Science, Chulalongkorn University

## I. INTRODUCTION

The debate about the monarchy and democracy showed no sign of conclusion. King Vajiralongkorn kept violating the constitutional limit by asserting his power over public administration.<sup>1</sup> He was also believed to direct the judiciary to crush democratic protest.

The above protest declined markedly, chiefly due to police violence and a worsening COVID-19 situation. Police used lethal force indiscriminately against not only protesters but also bystanders. Human rights watchdogs proved futile at stopping such brutality. Protesters thus moved the battlefield into the Legislature where they advocated their demands, of constitutional amendment and monarchical reform, through the parliamentary process. Unfortunately, the government categorically blocked these campaigns.

The government successfully amended the 2017 Constitution to restore the 1997 electoral system, which favored Prayuth's Phalang Pracha Rath Party (PPRP) but this amendment will not defuse the current crisis.

Freedom of expression was under an immense threat. Thousands were charged with thought crimes. The government was contemplating laws monitoring journalists' reporting and cracking down NGOs.<sup>2</sup> Both bills would effectively silence dissenting voices.

The most worrying development was the government's abuse of the Court of Justice to punish protest leaders through strategic lawsuits.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year 2021 was eventful. This section will focus on only three main developments; of the constitutional amendment, judicial independence, and lese majeste.

### (1) Constitutional amendment

The 2017 Constitution was unpopular because it introduced a hybrid regime where junta-sympathisers in the senate and watchdog agencies maintained a control over a weak parliament.<sup>3</sup> Its Mixed-Member Apportionment (MMA) electoral system helped secure Prayuth's victory to transform himself from a junta leader to an elected PM in 2019.<sup>4</sup> Therefore, many people demanded an amendment or a more participatory constitutional drafting convention (CDC). The government initially considered a new CDC but, in early February 2021, as the protest lost steam, the Constitutional Court struck down the CDC as unconstitutional. A major amendment that led to a new charter required a referendum, ruled the Court.<sup>5</sup> The government took an opportunity to introduce a less comprehensive change: a new electoral system.

The controversial 2017 MMA was designed to create a fractious House. Using only one ballot to determine seats for both constituency as well as a national party list, MMA penalized a popular party by deducing a party list seat from that won in a constituency.<sup>6</sup> The design favoured smaller parties e.g. Prayuth's PPRP. However, his government was always chaotic as coalition parties constantly demanded ransom in exchange for loyalty.

The 2021 amendment reintroduced the 1997 Mixed-Member Proportional (MMP) system with 400 constituency MPs and 100 party list MPs. The two categories were calculated through separate ballots.<sup>7</sup> An increase of constituency MPs from 350 to 400 favored large parties with strong local bases. This amendment is the latest development in Thailand's oscillation between the dream of a diverse House and the need for stable politics and strong leadership. The dream was driven by anti-democratic fear of corrupt politicians without the sense of political reality.

A more cynical motive was the desire to defeat the emerging maverick Move Forward Party. Move Forward is a mid-size party, a similar profile to PPRP but with an anti-dictatorship agenda. It openly supported the 2019-2020 protest and advocated for a monarchical reform. It thus became increasingly popular among youths, making it a top priority to be removed. According to the amendment rule, the Constitution would need bipartisan consensus to be amended. Under heavily polarized politics, that requirement would almost be impossible. However, Pheu Thai (PT), the largest opposition party, lent PPRP its support in a move to defeat its contender Move Forward.

## (2) Judicial Independence

The government terrorized the 2019-2020 protest by arresting nearing 2,000, leaders as well as supporters, charging them with high treason and lese majeste.<sup>8</sup> Many were subject to unwarranted search and arrest, lawful detention, and torture. Citing COVID-19, prisons deprived them of an access to legal counsel or a visit from relatives.<sup>9</sup> Most worryingly, the judiciary appeared indifferent to ongoing injustice. Defendants had their bails denied, leaving them to suffer inhumane prison standards.<sup>10</sup> Pre-trial detention is known to be an effective technique to punish dissents of the Thai state.

The government did not bribe or threaten the judiciary to cooperate with the regime. The likely explanation is that the court and the military are working in unison to uphold the sacred status of the monarchy.<sup>11</sup> This is evident when a judge personally scolded defendants as disloyal or unpatriotic. But the ill-treatment is more systematic than a few

rogue judges. Court executives directly intervened in a case, supervising incumbent judges to deny defendants bail.<sup>12</sup> This intervention triggered unprecedented protests in front of the court building to which the court reacted by ruthlessly punishing protesters with contempt of court charges.<sup>13</sup>

Abusive judiciary marks a serious decline of constitutional democracy. The judiciary used to pride itself for independence and impartiality. But the above phenomenon compromised public trust in the institution.

## (3) Lese majeste reform

Another agenda of the 2019-2020 protest was a reform, or even revocation, of lese majeste offence. Unlike previous campaigns that generated little attention, lese majeste was no longer a taboo. The public openly discussed about the law's abusive nature. But while the protesters insisted that a reform was not an abolition of the monarchy, many royalists believed so.

The reform campaign was open for online petition which gathered more than 240,000 signatures.<sup>14</sup> Unfortunately, when Move Forward proposed the reform bill, the government argued that the lese majeste reform bill violated the inviolable status of the king, as guaranteed in Section 6 of the Constitution. The government refused to accept the bill into the House's consideration despite the people's call.<sup>15</sup>

Prayuth once announced in 2020 that Vajiralongkorn ordered a hiatus of draconian lese majeste.<sup>16</sup> He backtracked a few months later amidst the growing protest, implying Vajiralongkorn's consent to invoke the law again. Police, as well as right-wing vigilantes, filed thousands of lese majeste against hundreds of democratic sympathizers.<sup>17</sup>

## III. CONSTITUTIONAL CASES

### 1. Const. Ct. 19/2564 (2021): Militant democracy

This is the most controversial decision of 2021. It clarified what constituted an act of 'overthrowing the democratic regime of the government with the king as Head of State.'

More importantly, it confirmed what the democratic regime of the government with the king as Head of State' meant. It defined the role and function of the monarchy in democracy, a hotly contested topic. Finally, it reflected the Constitutional Court's understanding of what was a permissible mean of political expression. Politically, it determined the fate of the youth's anti-government protest. This was also an example of how a court borrowed and abused concepts such as militant democracy and an inquisitorial system to undermine the rule of law and democracy.

The case concerned a protest on 3 August 2020 at Thammasat University. That particular evening proved a watershed moment.<sup>18</sup> Prior to that date, protests were all about Prayuth Chan-ocha's failures. But on 3 August, protest leaders spoke openly about what they perceived as the root of all problems: the undemocratic King Vajiralongkorn, allegedly Prayuth's mastermind. They made the 10-point demand for a monarchical reform; (1) to abolish the inviolability clause in Section 6 of the Constitution, the king can be challenged in a court, (2) to abolish Section 112, lese majeste law, of the Criminal Code, and pardon those who were convicted under this offence, (3) to impose a stricter control over the management of crown properties, which amassed at billions USD, (4) to adjust the lavish budget for the king to suit the stagnant economic situation, (5) to abolish the king's own office where he had a total control over, (6) to prohibit all donation to the royal purse, which should be more transparent, (7) to prohibit the king from making a political speech without prior approval from the government, (8) to prohibit propaganda campaign praising the monarchy, (9) to investigate murder cases that might be linked to anti-royalist activities, and (10) to forbid the king from endorsing a coup in the future.

The 10-point demand was a direct reaction to Vajiralongkorn's expansion of influence since his ascension in 2016. He transferred government-owned Crown Property Bureau into his personal coffer, making him the richest monarch in the world. He was said to have a private army. Moreover, he was accused of domineering Thai politics, e.g. ordering the constitutional amendment, changing the oath

for the cabinet, and proposing new laws that empowered his rule. The 10-point demand wanted to impose accountability over the king's finance and personnel as well as cease the tradition of state-funded propaganda and a coup endorsement. The protest leaders insisted that the demand was to reform and modernize the monarchy so it could co-exist with democracy. However, for royalists, a reform that removes the king's demi-god status amounted to a revolution. One royalist then filed a petition to the Constitutional Court.

The case was procedurally flawed. According to Section 49 of the Constitution, no one shall exercise their rights to overthrow the democratic government with the king as Head of State; A person who witnesses an overthrow of a government may ask the Constitutional Court to issue an order to cease such act. Since the protest took place on 3 August 2020, the case was already moot as the Court could not retroactively order a cease.

Furthermore, the Constitutional Court circumvented a trial despite the defendants' objection. The Court claimed that, under the inquisitorial system, it may skip a trial if there were sufficient evidences. This understanding of an inquisitorial was wrong. Instead of leveling the playing field, the Constitutional Court abused its inquisitorial power to deprive the defendants from the rights to be heard.

The key question was whether a demand for a monarchical reform was an act of overthrowing the democratic regime with King as Head of State. The case addressed the question of what was the identity of Thailand's democracy with the king as the head of state. Could the monarchy be amended at all?

The Constitutional Court referred to the concept of militant democracy, that no one shall exercise constitutional rights to jeopardize the democratic regime. The court then focused on the constitutional status of the monarchy. The constitutional court described the monarchy as the essential part of Thai nation. Since time immemorial, monarchies had ruled the country and have been the center of love and respect of all Thais. Even after the 1932 democratic revolution that ended the absolute monarchy, the monarchy still

remained the core institution that shall never be weakened, devalued, or sabotaged.

According to the Constitutional Court, the call for reform was undemocratic because protesters were occupied with liberty but failed to respect equality and fraternity. They failed to respect the wishes of those who held different opinion. In many subsequent protests, the king was mocked, and the national flag was defaced. Moreover, the Constitutional Court believed that protesters intended to organize themselves into a violent movement, which, in the foreseeable future, would successfully overthrow the monarchy. On facts, the Court's description of the protest movement was inaccurate. An accusation of protesters forming a secret violent organization or being masterminded was common among the anti-democratic misinformation network. The Constitutional Court held an extremely narrow interpretation of freedom of expression. Any harsh words, mockeries, or inappropriate remarks were deemed an abuse of freedom.

The Constitutional Court also offered a rigid, and highly contested, interpretation of the role and function of the monarchy in constitutional democracy. It simply assumed that the monarchy was well loved and, therefore, above any criticism. The Court even elevated the king above democracy. Even a slightest change to the king's financial or cultural status was prohibited. The Constitutional Court ignored the fact that King Vajiralongkorn had changed many laws in his favor so his status quo was not of an ancient construct.

Although the Constitutional Court was unable to order protesters to cease the 3 August protest, the decision had serious implication on, first, the ongoing lese majeste charges against several hundred protesters, and second, any campaign for the monarchical reform in the future. Thais can still discuss about the monarchy but they could not stage a protest or advocate for the 10 demands.

On the grand scheme, this is the latest in a series of the decisions that erode Thailand's democracy while paving the way to neo-absolute monarchy.<sup>19</sup> Observers of Thai politics agreed that, since 2006, Thailand was battling between liberal democracy and roy-

alism. The military staged two coups that weakened constitutional democracy in 2006 and 2014. The Constitutional Court consistently delivered decisions in favor of the latter.<sup>20</sup> It endorsed the lese majeste law and dissolved a progressive party.<sup>21</sup> It allowed the government not to take an oath of allegiance to the Constitution.<sup>22</sup> These cases confirmed an allegation that the Court had become part of the royalist elite network that had been obstructing Thailand's democratization.<sup>23</sup>

In an aftermath, small protests broke out. The Constitutional Court's website was hacked and changed to kangaroo court.<sup>24</sup> So far, the website has yet been retrieved.

## 2. Constitutional Court Decision 20/2564 (2021): Same Sex marriage

Section 1448 of the Civil and Commercial Code understood a marriage as a union only between a natural man and a natural woman. One LGBT couple challenged such understanding after being denied a marriage certificate.

The question is whether Section 1448 violated Section 25, 26, and 27 paragraph one of the 2017 Constitution. Section 25 guaranteed all Thais of rights and liberties. Section 26 allowed a law to limit an exercise of rights only if it was in accordance to the principle of proportionality. Section 27 paragraph one confirmed equality before the law. But the 2017 Constitution did not explicitly recognize the rights of LGBT. Section 27 paragraph two only guaranteed equality between men and women. Paragraph three prohibited discrimination based on sex but not gender. Drafters of the 2017 Constitution had considered adding gender or sexual orientation but dropped it at the last minute.<sup>25</sup>

According to the Constitutional Court, the most important question was the telos of a marriage. The Constitutional Court perceived a family was the basic component of one's society which was meant to produce a new generation of members. As the goal of a family is reproduction, a marriage can only be between two natural sexes of man and woman, who biologically can give birth to a child.

The Constitutional Court warned that an exercise of liberty shall not violate culture, tradition, social values, and moral of that society. Law is to make peace, not to cause division in a community. Thai tradition accepts only a marriage between a man and a woman who are biologically capable of reproduce and forge familial bonding among relatives. This bonding, the Constitutional Court concluded, was too delicate that an LGBT couple could not build.

The Constitutional Court did not reject the possibility of accepting some forms of recognition for LGBT's union. The state could always create another category of a union apart from marriage. The Constitutional Court acknowledged the ongoing debate on the civil union bill in the House of Representatives.

On the equality claim, the Constitutional Court opined that LGBT was different enough from straight men and women to deserve a different treatment, including an absence of rights to marriage. Adding insult to injury, the Court was worried that same-sex marriage would lead to more budget on welfare as there would be more couples.

While the outcome may be understandable; that the Constitutional Court deferred to the Parliament's decision since it was the representative of the people, its reasoning sparked anger. The Constitutional Court was not homophobic, at least not outright but it adopted a strictly binary view. It claimed that this binary understanding was natural. Hence, it was implying that LGBT may be anomaly. Moreover, its interpretation of the purpose of a marriage was shockingly narrow as a family was simply a mean of reproduction. This decision came as a huge setback as LGBT would be subject to continuing discrimination.<sup>26</sup> The best outcome would be a civil partnership but never a marriage. The decision came as a surprise. Despite controversies in megapolitical cases, the Constitutional Court kept a good record of advancing social and cultural rights e.g. gender equality and abortion. The current panel, installed in late 2019, proved to be more conservative than their predecessors.

### 3. Constitutional Court Decision no. 6/2564 (2021): MP eligibility

This decision is the final episode of the saga of Thammanat Prompao, the controversial deputy prime minister.

Obsessed with 'clean' politics, the 2017 Constitution added stringent requirements for an MP candidate, including Section 98 (10) which prohibited a person who had been convicted by a final judgement of the court for committing e.g. malfeasance in public office or judicial office, corruption, public fraud, production, importation, export, or selling of narcotic drugs, running a gambling ring, running human trafficking ring, or money laundering. Once convicted, that person would be permanently banned from an MP office.

In 2019, Prayuth Chan-ocha appointed Thammanat Prompao to the cabinet. Thammanat was his henchman who kept other MPs in check and administer Prayuth's coffer. His importance could not be overstated. Soon, his dark past emerged that he, then an army officer, had been convicted of smuggling heroin into Australia, where he spent four years in prison.<sup>27</sup> Later, he was implicated in a murder case before joining the lottery oligarchy that brought him much wealth and political connection. He also claimed to be close to Vajiralongkorn. Thammanat's appointment generated condemnation in Thailand and made a headline in Australia. Move Forward Party challenged Thammanat's eligibility.

Thammanat's main defence was that Section 98 (6) was meant only a decision of Thai court. Thammanat insisted that his crime was being an accomplice of drug trafficking but not a trafficker himself. Thai criminal law recognized no such offence so his crime should not have a binding effect on Thai judicial system.

The Constitutional Court agreed. First, the Court blamed the opposition's inability to obtain an actual court decision from Australia. It went on to absolve Thammanat. The Court interpreted a final judgment as only a judgment of the Thai judiciary. The main reason was because Thailand was a sovereign state with its own intact judicial power. Each country has its own criminal law, with differing standard

and details. Adopting a court decision of a foreign court would result in discrepancy and undermine Thailand's sovereignty.

The Constitutional Court was criticized for such nationalistic interpretation of law while ignoring the purpose of Section 98 (6). This is in contrast to a few previous cases where the court was willing to broaden its reading of Section 98 to a ridiculous effect.<sup>28</sup>

## IV. LOOKING AHEAD

The major issue in 2022 is the PM's term limit.<sup>29</sup> Previously, a PM has a term of four years with a chance of re-election but no more than two consecutive terms. But the 2017 Constitution imposed a stricter term limit of no more than eight years in total regardless of terms.<sup>30</sup> The purpose of such limit is to prevent a prime minister from turning into a tyrant. Prayuth had been a prime minister since 2014, first, from 2014 to 2019 as a junta leader, and second, from 2019 onwards, as an elected prime minister. His eighth year is in August 2022. He argued that his premiership under the military rule was a different kind of PM to a democratic one. The Constitutional Court had to rule on this question and observers are keen to learn how the Court would reason Prayuth's stay.

There is speculation about Prayuth prematurely ending his government. The Parliament is considering organic bills on the new electoral system. Prayuth insisted that he would not follow a tradition that the government must dissolve the House once the bill passes. Still, lately, Prayuth has lost almost all his political allies. A question remains what will happen if Prayuth decides to dissolve the House because the 2021 Amendment contains no transitional provision. Which electoral system should the EC follow, the new system with no details, or the old system which is replaced? If the EC should follow the new system, how?

The debate about the monarchy and democracy continues, at least outside the parliament. The Legislature refuses to acknowledge the debate. But when the people's representatives do not represent the peo-

ple's interest, the Parliament is soon likely to meet a legitimacy crisis, which will jeopardize Thailand's long-term chance of democratization.

1 '112 ฉบับ ที่ไม่มี 'ผู้รับสนองพระบรมราชโองการ': ดึงปลดทหาร-ข้าราชการในพระองค์ สมณศักดิ์พระ จิตการทรัพย์สิน จนถึงการเมือง' *Prachatai* (22 September 2021) <<https://prachatai.com/journal/2021/09/95103>> accessed 15 March 2022.

2 Tommy Walker, 'Thai Journalists on Challenges of Covering Protest Movement' *Press Freedom* (6 October 2021) <<https://www.voanews.com/a/thai-journalists-on-challenges-of-covering-protest-movement/6259955.html>> accessed 15 March 2022; Mongkol Bangprapa, 'NGO bill rings rights alarm bells- Hinders freedom of speech, critics say' *Bangkok Post* (6 January 2022) <<https://www.bangkokpost.com/thailand/general/2242751/ngo-bill-rings-rights-alarm-bells>> accessed 15 March 2022.

3 Eugénie Mériau, 'Thailand in 2018' [2019] *Southeast Asian Affairs* <<https://www.jstor.org/stable/26939702>> accessed 15 March 2022.

4 See Khemthong Tonsakulrungruang, 'Thailand', in Richard Albert et al. (eds), 2019 *Global Review of Constitutional Law* (IConnect-Clough Center)

5 Const. Ct. Decision 4/2564 (2021).

6 Khemthong, 2019 *Global Review* 345.

7 Sebastian Strangio, 'With Eye to Next Election, Thai Government Tweaks Voting Rules' *The Diplomat* (13 September 2021) <<https://thediplomat.com/2021/09/with-eye-to-next-election-thai-government-tweaks-election-rules/>> accessed 15 March 2022.

8 'กฎหมายใหม่ 65: สถิติคดีทางการเมืองรวมอย่างน้อย 1,027 คดี ผู้ถูกกล่าวหาไม่น้อยกว่า 1,787 ราย' (TLHR, 6 March 2022) <<https://tlhr2014.com/archives/41025>> accessed 15 March 2022.

9 Khemthong Tonsakulrungruang, 'Weaponising COVID-19' *New Mandala* (1 September 2021) <<https://www.newmandala.org/weaponising-covid-19/>> accessed 15 March 2022.

10 Martin Petty, 'Thai court denies bail for activists on hunger strike over royal insults' *Reuters (London)*, 29 April 2021) <<https://www.reuters.com/world/asia-pacific/thai-court-denies-bail-activists-hunger-strike-over-royal-insults-2021-04-29/>> accessed 15 March 2022.

11 Yoshinori Nishizaki, 'Embedded in a patrimonial culture: the politicized judiciary and an undisciplined reformist party in Thailand' (2021) 53 *Critical Asian Studies* 310.

12 *Prachatai* (Bangkok, 2 May 2021) <[https://twitter.com/prachatai\\_en/status/1388768947118370819](https://twitter.com/prachatai_en/status/1388768947118370819)> accessed 15 March 2022.

13 'Student activists sentenced to jail for contempt of court' *Prachatai* (Bangkok, 4 November 2021) <<https://prachatai.com/english/node/9535>> accessed 15 March 2022.

14 The People's Party for the Repeal of 112 (คณะราษฎรยกเลิก 112), (5 November 2021) <<https://www.no112.org/>> accessed 15 March 2022.

15 "ก้าวไกลโวยสภฯ ตีตกร่างแก้ ม.112 ยันไม่ขัด รธน.ต้นเข้าสภฯใหม่ เน้นโรโฆษาคดีการเมือง", *Voice online* (3 November 2021) <<https://voicetv.co.th/read/cERwz3aV>> accessed 15 March 2022.

16 Erich Parpart and Cod Satrusayang, 'Prayut said HM King told him not to use lese majeste laws against civilians; opposition calls for its abolishing' *The Enquirer* (Bangkok, 15 June 2020) <<https://www.thaienquirer.com/14457/prayut-said-hm-king-told-him-not-to-use-lese-majeste-laws-against-civilians-opposition-calls-for-its-abolishing/>> accessed 15 March 2022.

17 'The number of prosecutions under "Lèse Majesté" in 2020 – 2022' (TLHR, 6 March 2022)

<<https://tlhr2014.com/en/archives/24103>> accessed 15 March 2022.

18 Hathairat Phaholtap and David Streckfuss, 'The ten demands that shook Thailand' *New Mandala* (2 September 2020) <<https://www.newmandala.org/the-ten-demands-that-shook-thailand/>> accessed 15 March 2022.

19 Kasian Tejapira, 'สาธารณรัฐจำลองกับเสมือนล้มบูรณาญาสิทธิ' *Prachatai* (Bangkok, 24 June 2021) <<https://prachatai.com/journal/2021/06/93654>> accessed 15 March 2022; Kritsada Supawan-tanakul, 'วาระต้น ภาควิชา: ประชาธิปไตยจะทดแทน ชันมีพระมหากษัตริย์ทรงเป็นประมุขจะขยายพื้นที่' *Prachatai* (Bangkok, 14 December 2021) <<https://prachatai.com/journal/2021/12/96391>> accessed 15 March 2022.

20 Khemthong Tonsakulrungruang, 'Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict' [2017] 26 *Washington International Law Journal* 2.

21 Const. Ct. Decision 28 - 29/2555 [2012]; Const. Ct. 5/2563 [2020].

22 Const. Ct. Decision Tor 37/2562 [2019].

23 Eugenie Merieau, 'Thailand's Deep State, Royal Power and the Constitutional Court (1997–2015)' [2016] 46 *Journal of Contemporary Asia* 3.

24 'Constitutional Court website renamed 'Kangaroo Court'' *Prachatai* (Bangkok, 13 November 2021) <<https://prachatai.com/english/node/9552>> accessed 15 March 2022.

25 Khemthong Tonsakulrungruang, 'Constitutional protection of sexual minorities - will Thailand join the club?' (*Constitution Net*, 26 March 2015) <<https://constitutionnet.org/news/constitutional-protection-sexual-minorities-will-thailand-join-club>> accessed 15 March 2022.

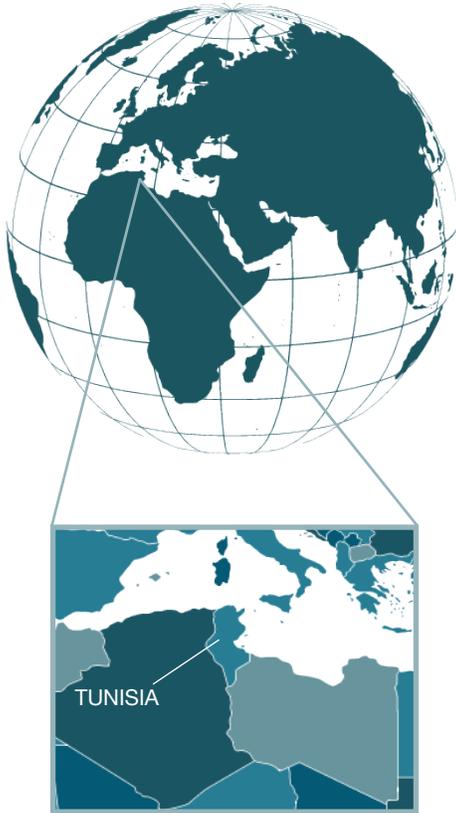
26 'Constitutional Court's full verdict enrages LGBT community, rights defenders' *Thai PBS* (Bangkok, 3 December 2021) <<https://www.thaipbsworld.com/constitutional-courts-full-verdict-enrages-lgbt-community-rights-defenders/>> accessed 15 March 2022.

27 Khemthong, 2019 *Global Review* 346.

28 Id. 348.

29 Mongkol Bangprapa, 'Controversy over Prayut's term limit as PM' *Bangkok Post* (Bangkok, 30 September 2021) <<https://www.bangkokpost.com/thailand/politics/2189783/controversy-over-prayuts-term-limit-as-pm>> accessed 15 March 2022.

30 2017 Constitution, Sec 158 para 4.



# Tunisia

Aymen Briki  
Research Fellow

Max Planck Foundation for International Peace and the Rule of Law, Heidelberg, Germany

Wissal Ben Mahfoudh

Ph.D. candidate in Public Law at the Faculty of Law, Sfax University, Tunisia

## I. INTRODUCTION

In 2021 Tunisia was the star of autocratization in the world. We labeled 2020 as the year of constitutional failures. As in a troublesome year for the entire planet with the outbreak of the COVID-19 pandemic, Tunisia started the year struggling to form a government and ended it with a new government formation process. So, if we qualify 2021 in Tunisia, it will be the year of consolidation of democratic backsliding as the country's infant democracy surfed the wave of autocratization. After years of surfing the waves of political failure, the country turned to an electoral autocracy.<sup>1</sup>

Once again, the Tunisian ruling class showed their inability to build consensus and long-last settlements. They usually resort to the Tunisian politico-constitutional custom of misinterpreting the constitution and the legal texts. The country started the year with a show of political stubbornness and a circus of a la carte constitutional interpretation. Only to end it without a constitution, embarking on a new constitutional making process.

The year started with shows of populism in the parliament; an incompetent government enrolled the country in the list of countries with the highest COVID-19 death toll in the world and ended with the country enrolled in the list of top autocratizers in the world.

In short, if the constitutional year 2021 in Tunisia has a name, it will be “deconstitutionalization.”

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The deconstitutionalization year starts with a government reshuffle to dismiss some ministers close to the president of the Republic, and the latter refused it. On January 27th, the parliament unconstitutionally approved the reshuffle, resulting in a crisis of political obstinacy between the three heads of the state's political branches. The “three presidents” continued their constitutional interpretation warfare<sup>2</sup> until the “state of exception” declaration later in 2021.

In this so-called “Constitutional Oath crisis,”<sup>3</sup> following the reshuffle, the president refused to invite some new government members to take oath as the last procedural requirement they need to assume office, disclosing that they have corruption suspicions.<sup>4</sup> This political obstinacy struggle was accompanied by a deteriorated public health and economic situation that pushed the people and the youth to take to the street. The government put severe restrictions on the right of assembly, exercising furious repression to the young activist manifestation. The human rights watchdogs reported thousands of arrests as well as cases of torture and mistreatment of people in custody.<sup>5</sup>

In the early days of the constitutional oath crisis, parliamentarians and allies of the Head of Ennahda party and the chairman of the parliament called to the president's impeachment.<sup>6</sup> Starting from this moment, each of the heads of executive and Legislative branches will engage in a revisionist approach towards

the other. By the end of March 2021, the butle about the constitutional court starts, the parliament adopted an amendment to the law establishing the Constitutional Court to ease the voting procedures for the Court's members elected by the parliament.<sup>7</sup> The president of the Republic rejected the bill providing absurd and poor legal reasoning. He proclaimed that the constitutional deadline for establishing the constitutional court had expired and that the step was politically motivated. From a political standpoint, his fear was legitimate, knowing the importance of the constitutional court in his potential impeachment process and the history of acrobatic constitutional interpretation.

In response to this rejection, the Assembly of People's Representatives passed the law at the second reading with a reinforced majority of 141 votes. This led over 30 deputies to challenge the bill's constitutionality after the second reading<sup>8</sup>. The president faced the parliament's keenness with an unprecedented claim in the country's constitutional history as he claimed that his role of commander-in-chief of the armed forces extended to being the commander of all forces, including civilian forces, namely the police.<sup>9</sup> Moreover, he unconstitutionally refused to sign the law project to be published in the official gazette, even after being sent from the provisional body of the control of draft laws following their incapability to decide on the matter of the draft law's constitutionality.<sup>10</sup> In conjunction with this show of obstinacy and twisted constitutional interpretations, the people were squeezed between the COVID-19 pandemic and the economic grievances. The ruling class's mismanagement, corruption, and kleptocratic practices led to high unemployment and an obscene death toll. Simultaneously, the escalation of torture<sup>11</sup> in detention centers and during protests and systematic impunity resulted in widespread discontent and pushed young people to take to the street. Amid this chaos, Ennahda party leaders' calls to their supporters to take the streets if the government did not grant them reparations by July 25th, several young people and activists started calling to counter this move and take to the streets and protest the ruling class mismanagement of the country.<sup>12</sup> On the same day,

The president used the discontentedness of the people to impose a *de facto* state of exception on the country,<sup>13</sup> invoking Article 80 of the constitution. Despite this invocation, most of the measures he took were extraconstitutional, as the Article does not allow him to dismiss the Prime minister or freeze the parliament as stipulated in the Presidential Decree No. 2021-80 of July 29, 2021, on the suspension of the powers of the Assembly of People's Representatives.

On 22 September, the President issued Presidential Decree n° 2021-117 of September 22, 2021, concerning exceptional measures. Even though the decree was titled "Concerning the Exceptional Measures," It was a decree that set a new constitutional order centered around the President, "The sovereign of Exception," according to the imported emergency framework.<sup>14</sup> In its first title, decree 2021-117 suspended the parliament's powers without specifying any duration or scope of this suspension, lifted the immunity of its members, and cut all their benefits and bonuses. The second title usurped all the legislative power and granted it to the President. Article 5 enumerated the fields of the legislation cited in article 65 of the constitution and stated that it remains the field of Decree-Laws. Thus, all legislation will take the form of Decree-Laws issued by the president, in addition to the normal decrees taken within the President's traditional regulatory powers. Article 7 of the same title grants immunity against judicial review to the presidential decree-Laws.

In title IV of the decree, article 20 states that the preamble of the constitution, its first and second chapters, including chapter II of rights and freedoms, and all constitutional provisions that are not in conflict with the provisions of this Presidential Decree shall continue to be applied.

However, Article 21 ordered the dissolution of the Provisional Instance for the Control of Constitutionality of draft Laws.<sup>15</sup> Without entering details of the grave consequences of this decree on the Tunisian polity, we can say that through decree n° 117, the country is once again in a legitimacy dilemma.<sup>16</sup>

The President tried to overcome this by embarking on what seemed like a legitimization

process. On September 29<sup>th</sup> he appointed the first female prime minister in the Arab speaking region;<sup>17</sup> even though she held minimal authority, her cabinet was appointed on the 11th of October, that included nine women as ministers<sup>18</sup>. On October 22, the President issued the Decree-Law No. 2021-1 of October 22, 2021, on the vaccine pass concerning the "SARS-CoV-2" virus. The decree-law unreasonably limited the freedom of movement of unvaccinated people or those who failed to issue one and violated the principle of proportionality enshrined in article 49 of the constitution<sup>19</sup>. The disproportionate decree-Law was eliminated by some courts later.<sup>20</sup> On December 13th, the President announced a digital consultation to draw up the outline of the following political regime and a road map that includes Parliamentary elections that may take place on December 17, 2022.<sup>21</sup>

### III. CONSTITUTIONAL CASES

#### 1. Members of the constituent Assembly Vs the President of the republic: Case N° 4106638, Stay of Execution, High Administrative court:

On July 25<sup>th</sup> 2021, Tunisian President Kais Saied declared a state of exception and several other measures. These exceptional measures targeted mainly the Assembly of the People's Representatives, which was suspended, and whose members were stripped of their parliamentary immunity.

The applicants are former deputies of the national constituent assembly who have challenged the presidential decree before the administrative court. The applicants aim to suspend the implementation of Presidential Decree No. 2021-80 of July 29, 2021, on the suspension of the powers of the Assembly of People's Representatives.

The Presidency of the Republic argued that the decision was an "act of government" and not an administrative decision. The "Act of government" theory is nothing but a mere importation of the French doctrine "La théorie des actes de gouvernement" to the Tunisia context. The modern doctrine argues that this theory is based on the will of the Administrative Judge to not come into conflict with the political authorities of the State during

the exercise of their important competence in the same fashion as the “Political Question Doctrine” in the American constitutional law. This doctrine represents a moment of weakness of the French Council of State, the founder of this theory, in an attempt to protect its existence and competence from the government’s reaction. This theory is still operative to date in Tunisia, even though the justifications for its survival vanished. It has been sternly criticized because it violates the Principle of Legality and democratic principles. However, it is still effective, and the judiciary refuses to review executive decisions considered as act of government.

In this case, the Tunisian administrative court considered that The Presidential Decree No. 2021-80 of July 29, 2021, ordered the suspension of the parliament’s powers and lifted its members’ immunity is an act of government that cannot be challenged because of its political nature. The court considered that the decree falls within the competencies of the President, who is exercising his constitutional powers. Therefore, the presidential decree is an act of government, and the court cannot order the stay of its execution.

## 2. Constitutional challenge: Members of the Parliament challenging the constitutionality of the amendments of the Law n° 2015-50 concerning the Constitutional Court.

Decision N° 2021-1, The Provisional Instance for the Control of Constitutionality of draft Laws.

A group of deputies of the Assembly of People’s Representatives challenged the constitutionality of the draft organic law amending and supplementing organic law no. 2015-50 of December 3, 2015, concerning the Constitutional Court.

This case raises several substantive issues, including whether it is possible to challenge the constitutionality of a draft law after the second reading or not? The applicants consider that the legislator does not distinguish between the first and second reading of draft laws. Therefore, it is possible to challenge the constitutionality of a draft law before the instance at any stage. The instance exercises an ex-ante review, which means that as long as a law project is not promulgated by the President yet, its constitutionality may be challenged at any time, as it is an absolute

right recognized by the Constitution.

The parliamentarians also claim a violation of procedural due process in legislative drafting, as the draft law subject of their challenge was not transmitted to the competent parliamentary committee, “Committee of General Legislation,” after rejection by the President and before its resubmission to the plenary session for a second reading. The applicants considered that this constitutes a manifest violation of the substantive constitutional procedures for the approval of draft organic laws. They invoked what constitutes a violation of substantive formalities, namely the lack of numbering of the draft organic law, which is the subject of this appeal.

Moreover, the applicants assert that the ultimate aim of setting up the Constitutional Court does not consist solely of accelerating its establishment but aims at a much more distant end, linked to the best possible choice, according to the criteria of competence and independence, impartiality and integrity.

The applicants also considered that the draft law disregards the principle of equal opportunities between men and women, enshrined in Article 46 of the Constitution, and the state’s commitment to achieving parity in the composition of the members of the Constitutional Court.

However, the Government presents the following considerations.

It considers that the action brought against the draft organic law amending and supplementing Organic Law No. 2015-50 relating to the Constitutional Court is inadmissible in form, based on Article 81 of the Constitution. The challenged draft law was adopted by the majority required by the last paragraph of Article 81 of the Constitution. After the President’s rejection, the draft was adopted without amendment. Therefore, there is no need to challenge its constitutionality. Significantly, the legal deadlines to challenge the draft constitutionality should be counted from March 24, 2021, the date of the first adoption vote.

Moreover, contrary to the applicants’ allegations, the draft has gone through the preliminary stages of examination and analysis in a parliamentary committee; furthermore, the last paragraph of Article 81 does not require the resubmission of draft organic laws to the committees. The purpose of transmitting

drafts to the committees is to study their impact and develop reports on the subject.

The Government argues that contrary to the applicants’ allegations, the majority of three-fifths remains, in any event, a reinforced majority and that satisfaction of the criterion of competence depends less on the relative voting methods choice of candidates (quorum) than on the detailed examination of the candidates, adding that each candidate who fulfills the required conditions necessarily meets the competence requirement. According to the observations in response, the quorum required for the candidates’ vote reflects only the consensus of the Assembly of People’s Representatives on this matter and not the competence of the candidates.

On another note, the Government considers that parity between men and women in the Membership of the Court is not required in Article 46 of the Constitution or Organic Law No. 2015-50. Considering the equality in choosing the members of the Constitutional Court, the Government refuted the applicants’ arguments. The use of a three-fifths majority as an alternative to the two-thirds majority that cannot be obtained does not undermine the credibility and independence of the Constitutional Court. It does not affect its members’ competence, independence, and integrity, just as it does not affect candidates’ chances in terms of gender, competence, or independence.

Because of the failure to obtain the absolute majority needed to pronounce on the challenge, the Provisional Instance decided to resend the draft law to the President of the Republic.

## IV. LOOKING AHEAD

After securing its control over the legislative powers in 2021, the executive authority in Tunisia will dissolve the High Council of Judiciary and appoint a provisional council through Decree-Law No. 2022-11 of February 12, 2022, on the creation of the Provisional Superior Council of the Judiciary. Despite the High Judicial council’s ineffectiveness, commentators still consider its dissolution during the state of exception as a violation principle of independence of the judiciary and even the right to a fair trial.

## V. FURTHER READING

Aymen Briki, Tunisia: Crafting a Consensus Democracy in a Dissensus Environment, The International Association of Constitutional Law Blog, 06 August 2021. Available from: <https://blog-iacl-aicd.org/spotlight-on-africa/2021/8/6/tunisia-crafting-a-consensus-democracy-in-a-dissensus-environment>.

Aymen Briki, Saied Grab of Power Between Popular Sovereignty and Constitutional Legitimacy: A Déjà-vu Tunisian Legitimization Dilemma, Harvard Journal of Middle Eastern Politics and Policy. 05 September 2021. Available From: <https://jmepp.hkspublications.org/2021/09/05/saied-grab-of-power-between-popular-sovereignty-and-constitutional-legitimacy-a-deja-vu-tunisian-legitimization-dilemma/>.

Vanessa A. Boese, Nazifa Alizada, Martin Lundstedt, Kelly Morrison, Natalia Natsika, Yuko Sato, Hugo Tai, and Staffan I. Lindberg. 2022. Autocratization Changing Nature? Democracy Report 2022. Varieties of Democracy Institute (V-Dem). Available from: [https://v-dem.net/media/publications/dr\\_2022.pdf](https://v-dem.net/media/publications/dr_2022.pdf).

1 Vanessa A. Boese, Nazifa Alizada, Martin Lundstedt, Kelly Morrison, Natalia Natsika, Yuko Sato, Hugo Tai, and Staffan I. Lindberg. 2022. Autocratization Changing Nature? Democracy Report 2022. Varieties of Democracy Institute (V-Dem). Available from: [https://v-dem.net/media/publications/dr\\_2022.pdf](https://v-dem.net/media/publications/dr_2022.pdf). [Last accessed on 23 Mar 2022].

2 Aymen Briki, Tunisia: Crafting a Consensus Democracy in a Dissensus Environment, The International Association of Constitutional Law Blog, 06 August 2021. Available from: <https://blog-iacl-aicd.org/spotlight-on-africa/2021/8/6/tunisia-crafting-a-consensus-democracy-in-a-dissensus-environment> [Last accessed on 23 Mar 2022].

3 شيشي مالم ديموكراشي ليدت يلع أومي 40، فسوي مدأ 2021. سرام 10، دي دجل ال بربع ل "لوح الب ذمزا موي جولورخ أمت". <https://bit.ly/3qu03Hg>. [Last accessed on 23.03.2022].

4 سيق ضرفي اذامل تا صا صرخت ال اعزات، بربع TRT قلاكوو حاتم. 2021. يرفيف 03. هم ام اني ميل ددجل ال اعزول اءاد ادي عس يلع: <https://bit.ly/3lyL6Kk>. موي جولورخ أمت. 23.03.2022.

5 Amma Guellai, A return to the police state in Tunisia? Nawaat, 09 February 2021. Available from: <https://nawaat.org/2021/02/09/a-return-to-the-police-state-in-tunisia/> [Last accessed on 25 Mar 2022].

6 سيئرل لزعب بالاطي س سنوت ينام لرب، طس وأل قرشل ال يلع: <https://bit.ly/3qB5ynN>. موي جولورخ أمت. 23.03.2022.

7 La Presse.tn, Le parlement adopte les amendements apportés à la loi organique relative à la cour constitutionnelle, 25 Mars 2021, Available from: <https://lapresse.tn/92066/le-parlement-adopte-les-amendements-apportes-a-la-loi-organique-relative-a-la-cour-constitutionnelle/> [Last accessed on 27 Mar 2022].

8 Agence Anadolu, Tunisie: l'ARP adopte en deuxième lecture l'amendement de la loi sur la Cour constitutionnelle, 04 Mai 2021, Available from: <https://www.aa.com.tr/fr/afrique/tunisie-larp-adopte-en-deuxieme-lecture-l-amendement-de-la-loi-sur-la-cour-constitutionnelle/2229534> [Last accessed on 27 Mar 2022].

9 لمشت هتاي حال الص لوقي سنوت سيئر، قرام قراط عم فالخلل دي عصت يف يل خادل نم ال تاوق قداي يلع: <https://www.reuters.com/article/tunisia-president-ea2-idARAKBN2C50KU>. موي جولورخ أمت. 23.03.2022.

10 سيئرل "مسح" حجرت تناقوت، طس وأل قرشل ال حاتم. 2021. ناوج 04، قيروت سدل ام كحم ال نوناق يس نوتل يلع: <https://bit.ly/3lVrC2H>. موي جولورخ أمت. 23.03.2022.

11 قيرولل قيرطولا قيرطولا امع بتاك، يصال ال ام طافا نم قنسل هذد دعاصت بي ذعتل: جابصل ال بي ذعتل نم ام 08، جابصل ال، باق ال نم تال فالل دح عضو انصقنيو جولورخ أمت. <https://bit.ly/36KqzFV>. يلع حاتم. 2021. موي 23.03.2022.

12 جابصل، فوختمو ديؤم نيبي ذيل يوج 25، نام حدرحس ال يلع: <https://bit.ly/3J0n23g>. موي جولورخ أمت. 23.03.2022.

13 Aymen Briki, Saied Grab of Power Between Popular Sovereignty and Constitutional Legitimacy: A Déjà-vu Tunisian Legitimization Dilemma, Harvard Journal of Middle Eastern Politics and Policy. 05 September 2021. Available From: <https://jmepp.hkspublications.org/2021/09/05/saied-grab-of-power-between-popular-sovereignty-and-constitutional-legitimacy-a-deja-vu-tunisian-legitimization-dilemma/>. [Last accessed on 27 Mar 2022].

14 Aymen Briki, Inherited Confusion: COVID-19, Tunisian Democracy, and the Adoption of the French Doctrine, Verfassungsblog, 18 Jun 2020. Available From: <https://verfassungsblog.de/inher->

ited-confusion/. [Last accessed on 27 Mar 2022].  
15 Daniel Brumberg, Arab center Washington DC, Saied's New Decree Deepens Tunisia's Crisis, 07 of October 2021. Available from: <https://arabcenter-dc.org/resource/saieds-new-decree-deepens-tunisia-crisis/> [Last accessed on 27 Mar 2022].

16 Aymen Briki, Saied Grab of Power Between Popular Sovereignty and Constitutional Legitimacy: A Déjà-vu Tunisian Legitimization Dilemma, Harvard Journal of Middle Eastern Politics and Policy. 05 September 2021. Available From: <https://jmepp.hkspublications.org/2021/09/05/saied-grab-of-power-between-popular-sovereignty-and-constitutional-legitimacy-a-deja-vu-tunisian-legitimization-dilemma/>. [Last accessed on 27 Mar 2022].

17 France24, Tunisia's president names Bouden first woman PM. 29 of September 2021. Available from: <https://www.france24.com/en/live-news/20210929-tunisia-president-tasks-first-woman-pm-najla-boudin-ramdan-with-forming-government> [Last accessed on 27 Mar 2022].

18 Agence Anadolu, New Tunisian government sworn in. 11 of October 2021. Available from: <https://www.aa.com.tr/en/africa/new-tunisian-government-sworn-in/2388732> [Last accessed on 27 Mar 2022].

19 Amnesty, Tunisia: Authorities must halt implementation of overly restrictive vaccine pass, 21 of December 2021. Available From: <https://www.amnesty.org/en/latest/news/2021/12/tunisia-must-halt-covid-vaccine-pass/>. [Last accessed on 27 Mar 2022].

20 رصت ريت سننم لاب يرا دل ام كحم ال، يواطو عل انيساي 2022. سرام 25، قيرطولا سنوت، جي قيرطولا زاوج قلعتم ال موي جولورخ أمت. <https://bit.ly/3iSs8E8>. يلع حاتم. 23.03.2022.

21 قيرطولا دي عس سيق سيئرل انال ع، مسرله، نارطم داؤف 24. 14 سنارف؟ قيرطولا اهت مزا نم سنوت ج اخل قيرط يلع: <https://bit.ly/3J02AQf>. يلع حاتم. 2021. ربي ميسد موي جولورخ أمت. 23.03.2022.



# Turkey

Serkan Köybaşı  
Assistant Professor  
Bahçeşehir University, Istanbul

Emre Turkut  
Postdoctoral Researcher  
Centre for Fundamental Rights  
Hertie School, Berlin

## I. INTRODUCTION

The year 2021 started with a glimmer of hope that we would all return to ‘normal’ after the turbulent year of the pandemic. Much like anyone in the world, Turkish citizens too anticipated that 2021 would be the year of vaccines, but little we did know that it was also going to be the year of COVID-19 variants. The Turkish executive (President and his team) continued taking coercive measures to contain the spread of these new variants, often to the detriment of the rule of law and human rights. 2021 was also a year filled with judicial reform, political turmoil and extreme weather events such as wildfires in Turkey. In what follows, this report focuses on some of the major constitutional developments that took place in Turkey in 2021. It then discusses a string of cases the Turkish Constitutional Court (TCC) had delivered over the past year. It finally looks ahead to several important issues that will happen in 2022 (and beyond).

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The attempt for the closure of the Kurdish movement’s biggest party  
In the aftermath of the June 2015 elections, which saw President Erdogan’s Justice and Development Party (AKP) losing its absolute majority in the Turkish Parliament first time since 2002 and the Peoples’ Democratic Party (HDP) becoming the first Kurdish par-

ty that passed the 10% electoral threshold, the AKP Government ended peace talks and seriously undermined available avenues for Kurdish political participation at the national level by rounding up thousands of HDP officials, including its former co-chair Selahattin Demirtas, removing elected Kurdish co-mayors and municipal officials and replacing them with centrally appointed trustees. In 2021, the Turkish Government’s brazen efforts to hobble the HDP reached another stage: an indictment for the HDP’s closure was prepared and filed with the TCC. Following the cue of the leader of the far-right Nationalist Movement Party–AKP’s small coalition partner, on 2 March 2021, the Prosecutor General of the Turkish Supreme Court of Appeals opened up investigations into the HDP and filed an indictment with the TCC to have the party banned as well as seeking to seize all party assets and to prohibit over 650 HDP officials from engaging in political activities for five years. The Prosecutor General argued in essence that the HDP became a centre for the acts against the indivisibility of the state with its territory and nation as per Articles 68 and 69 of the Turkish Constitution.

On 31 March 2021, the TCC unanimously rejected the application due to procedural flaws that conflict with the legal requirements required by the Turkish Penal Code.<sup>1</sup> The TCC highlighted that the Prosecutor General specified neither which acts of the accused persons created the need for the closure nor what the positions of these persons in the party were. The TCC judges

also noticed that even some of the names of the accused were written differently in different parts of the indictment. As expected, a severe and undue backlash against the TCC ensued. The MHP leader, Devlet Bahçeli, strongly and openly attacked the decision and threatened the existence and legitimacy of the TCC by demanding that the ‘TCC be closed, not just the HDP’.<sup>2</sup> On 6 June 2021, the Prosecutor General’s office announced that it had filed a further motion to ban the party and that the TCC accepted the revised 843-page-long indictment. At the time of writing, the application is pending before the TCC.

Turkey has a long history of party closures. The TCC has repeatedly outlawed dozens of pro-Kurdish and Islamic political parties either based on alleged threats to national unity or based on alleged anti-secular activities, respectively, thus assertively setting the bounds of permissible political participation. However, the recent HDP dissolution case emerges as a particularly striking example of how the Turkish judiciary became a mere rubber stamp of the Turkish Government (and its ally, MHP) in more recent years. In the post-June 2015 election period, the reformist and visionary side of the Kurdish political movement, the HDP, is severely damaged, and if the HDP is banned, this will run severe risks of escalating violence in Turkey.

## 1. Council of Europe’s Infringement Procedure in respect of Turkey

As noted in last year’s report, Turkey’s relations with the Council of Europe (CoE) have been rocky for the past half-decade, especially after the 2016 attempted coup. In December 2021, the tense relations took another turn: In response to the non-implementation of a European Court of Human Rights (ECtHR) judgment regarding the imprisonment of a prominent civil society leader and philanthropist, Osman Kavala, the CoE Committee of Ministers triggered the infringement procedure in respect of Turkey and referred the issue back to the ECtHR on 2 February 2022.<sup>3</sup> Kavala was first detained on 17 October 2017, some four years after the Gezi Park protests<sup>4</sup>,

which he was accused of having organised and financed in 2013 and later indicted on the same charge. It was already evident from the domestic proceedings that the elements adduced grounding the initial detention order and subsequent extension orders lack any meaningful evidentiary basis linking Kavala to any of the alleged offences. Since then, Kavala submitted numerous applications for his release – including an individual application before the TCC, but none of them has been successful.<sup>5</sup>

On 10 December 2019, the ECtHR delivered its much-awaited decision in which it found several violations: under Article 5(1) of the European Convention on Human Rights (ECHR or Convention) on the lack of reasonable suspicion; under Article 5(4) on the lack of a speedy judicial review; and under Article 18 on the prohibition of restrictions of rights for ulterior purposes, in conjunction with Article 5(1). The ECtHR, having regard to its findings of several violations, and according to Article 46(1) ECHR, called on the Turkish authorities to take every measure to put an end to Kavala’s detention and secure his immediate release.<sup>6</sup> Despite this clear and strong message, the Turkish domestic courts refused to release Kavala in several hearings held since the Strasbourg judgment.

Yet, in a rather surprising turn of events, on 18 February 2020, Kavala was cleared of all charges over the Gezi Park events on the ground that there was not enough evidence against him.<sup>7</sup> However, just hours after his acquittal, he was re-arrested on new charges in relation to the 15 July attempted coup.<sup>8</sup> Ultimately, the Turkish Government claims that Kavala has been released pursuant to the ECtHR’s decision, thus implying full implementation of the original judgment and that he was detained for another case. Without attributing any legal meaning to these domestic ‘manoeuvres’,<sup>9</sup> the CoE Committee of Ministers decided to launch the infringement procedure – a new referral mechanism introduced via Protocol No.14 in 2010<sup>10</sup>, for the second time in history – the first being in respect of Azerbaijan due to its refusal to imple-

ment the *Ilgar Mammadov* case. Whether this procedure will have any prospect of success remains to be seen, but it will undoubtedly represent a significant milestone in Turkey’s future commitment to the CoE.

## 2. Judicial Reform: Turkey’s Human Rights Action Plan

Increasingly squeezed by economic and political problems, President Erdogan announced the long-awaited Human Rights Action Plan on 2 March 2022 - with a front cover caption of “Free Individual, Strong Society: A More Democratic Turkey”.<sup>11</sup> The President unveiled the plan as responding to the ‘expectations of the nation’ highlighting its two-year-long preparation based on a participatory process among relevant stakeholders, including ministries and public institutions, members of the parliament, high courts, academia, business and civil society organizations.<sup>12</sup> The Action Plan, initially drafted by the Turkish Ministry of Justice, has in its entirety seven sections with nine key targets, 63 objectives and 393 activities to be followed by all state organs and expected to be achieved over the next two years.

The Action Plan’s key targets cover a wide number of problematic areas spanning from Turkey’s EU accession to the field of pre-trial detention, from blocking websites to domestic violence. Taken at face value, they display a commitment to build a more robust human rights protection system in Turkey. However, this toothless plan primarily seeks to address practice-related issues and fails to address the root causes of the multilayered and systemic problems of Turkey’s human rights landscape.<sup>13</sup> As an illustration, the Plan does not spell out any concrete steps to ensure the full independence of the judiciary, including by removing the undue political control of the executive, which has emerged as the most fundamental problem of Turkey’s human rights landscape in the past decade. Similarly, it does not include any meaningful plan to address the severe problem of the wanton use of Turkey’s broad anti-terrorism arsenal for politically motivated prosecutions of political opponents, human

rights defenders and journalists, despite the ECtHR's repeated warnings.<sup>14</sup> In short, it is likely that the plan will not go beyond being a plan of precatory promises, as it does not address any significant and structural issues emanating from the total disintegration of the rule of law, human rights and judiciary in Turkey.

### 3. Turkey's Withdrawal from Istanbul Convention

Paradoxically enough, with ink barely dry on the Action Plan, President Erdogan issued a presidential decision on 20 March 2021, officially withdrawing Turkey from the CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence, known as the Istanbul Convention.<sup>15</sup> Turkey's withdrawal from the Istanbul Convention raised reasonable doubts as to whether a Presidential decision could be the legal basis to terminate an international agreement. Suffice to note that the Turkish Constitution does not give the President any explicit authority to withdraw from international agreements. Under Article 90 of the Turkish Constitution, such agreements have the force of law after being duly incorporated into Turkish domestic law – a ratification process requiring the Turkish Parliament to adopt a statutory law approving the ratification. In the absence of any other constitutional provisions regulating the termination of international agreements in the Turkish domestic fora, many experts argued that this could only have been done through the adoption of a further statutory law by the Parliament – withdrawing Turkey from the Istanbul Convention-, as per the doctrine of 'parallelism of competence'.<sup>16</sup> On 29 June 2021, The Council of State of Turkey (TCS) – the supreme administrative court, issued a decision by a vote of three to two, rejecting an order of stay of execution of the presidential decision officially withdrawing Turkey from the Istanbul Convention. Most recently, in January 2022, the Prosecutor of the TCS presented an opinion that the said presidential decision is not constitutional and thus should be revoked. The TCS is expected to issue a full judgment later in 2022.

## III. CONSTITUTIONAL CASES

### 1. The supervision of the state-run news agency by the executive

In 2018, President Erdogan promulgated a presidential decree restructuring the organization of the state-run media outlet, Anadolu Agency and giving the Directorate of Communication – an office of the President of Turkey, far-reaching powers to supervise its activities, budget, organization and human resources management. The research shows that since the AKP came to power in 2002, the Anadolu Agency failed to present 'a democratically balanced coverage' – often giving skewed coverage to oppositional voices and providing ardently pro-government points of view.<sup>17</sup> The Anadolu Agency has recently been the centre of widespread criticism for its partisan coverage in the Istanbul municipal elections, during which it stopped publicizing polling results when it became clear that President Erdogan's candidate, Binali Yildirim, would lose the election to the opposition candidate, Ekrem Imamoglu. Be that as it may, the TCC found that vast powers granted to the Directorate of Communication to supervise the Anadolu Agency strongly conflict with the 'impartial and autonomous' nature of the Agency, which would likely lead to prejudice the impartiality of its broadcasts and other reporting activities. As such, the TCC found the first paragraph of the presidential decree unconstitutional and annulled it.<sup>18</sup>

### 2. A series of unconstitutional acts involving a member of the parliament

Ömer Faruk Gergerlioğlu is an HDP member of the Turkish Parliament. Prior to his election, he served as the president of a highly regarded human rights association in Turkey, MAZLUMDER, for two years. He also served as the spokesperson of a local peace platform in Kocaeli province during the peace process between the Turkish government and the Kurdistan Workers' Party in the late 2000s and early 2010s. After he retweeted an article related to this peace process published on an online news site, T24, a prosecution on Gergerlioğlu had begun.

Eventually, he was sentenced to two years and six months of imprisonment for making propaganda of a terrorist organisation. During the appeal process, he was elected a member of the Turkish Parliament.

In Turkey, parliamentarians have immunity (inviolability) for crimes allegedly committed before and after the election (thus, they cannot be detained, interrogated, arrested and tried) as per Article 83 of the Turkish Constitution. But this type of immunity is only temporary, and prosecutions can proceed after the end of the mandate of the member of the Parliament. Article 83/2 of the Constitution also provides for two exceptions: a) the member of the Parliament is caught committing a crime in *flagrante delicto*; b) for the crimes covered by Article 14 of the Constitution, with the condition that the investigation has been initiated before the election of the member of the Parliament concerned. Based on the latter exception, the appeal court upheld Gergerlioğlu's original sentence. After this decision was read in the Parliament –a formal requirement–, Gergerlioğlu was stripped of his immunity from prosecution and his parliamentarian status was automatically terminated. Arguing that the whole legal process was politically motivated, he decided, as a protest, to stay in the Parliament building and not surrender. He was forcefully arrested in the HDP's group chamber at 6.30 AM, in pajamas and slippers just before the morning prayers, and put in jail.

In his individual application, the TCC decided that the reference to Article 14 made in Article 83/2 of the Constitution –the exception to parliamentary immunity– creates an unforeseeable situation for members of the Parliament and can be exploited in bad faith. The TCC remarked that in the case at hand, Gergerlioğlu shared on his Twitter page a news piece originally published by a webpage that contains an announcement made by the PKK – a criminal terrorist organization in Turkey, and the first instance court did not take into account whether that created an immediate and imminent threat and failed to assess whether that threats justified lifting the immunity of a parliamentarian. As a result, the TCC concluded that his right to free election and freedom of expression had been

violated and ordered his immediate release.<sup>19</sup> However, the lower court did not abide by the TCC's decision noting that it had to wait until it received the written judgment before deciding whether to release Gergerlioglu. Expectedly this created a public outcry. Thousands of people, mostly HDP supporters, started a "justice watch" in front of the prison until his release. The police dispersed protesters by force on the fifth day and arrested tens of people. Gergerlioglu was finally released seven days after the TCC's decision. A week after, on 16 July 2021, he regained his parliamentary status.

### 3. The Unforeseeable Provision of the Turkish Penal Code

In the individual application of Hamit Yakut<sup>20</sup>, the TCC declared Article 220/6 of the Turkish Penal Code regulating the offence of 'committing a crime on behalf of a terrorist organisation without being a member of the relevant organisation' unpredictable. Yakut was arrested with some others while making a press release in front of the Peace and Democracy Party building, the biggest Kurdish political party at the material time, in Diyarbakir. He was taken into custody due to the incident breaking out for committing an offence on behalf of a terrorist organisation without being a member of it. He was released after three days. The 6th Chamber of the Diyarbakir Assize Court sentenced him to three years and nine months of imprisonment for the imputed offence. The court also sentenced the applicant to six months of imprisonment for participating in an illegal demonstration and refusing to disperse despite the officers' warnings; however, it suspended the pronouncement of that part of the sentence.

In a pilot judgment, the TCC remarked that individuals are being subjected to heavy sentences under the said offence, even when they have remotest relation and connection to a terrorist organisation. In cases where the said offence is related to the exercise of fundamental rights, as in the present case, a strong deterrent effect is created on fundamental rights due to the broad interpretation of the phrase 'on behalf of the organisation'. Therefore, the TCC concluded that the wording of the relevant provision is so broad that

it failed to offer sufficient protection against arbitrary interferences by public authorities. Thus, in the case of *Yakut*, the interference arising from the said provision was not prescribed by the law, which caused a violation of his right to hold meetings and demonstrations. The TCC's *Yakut* decision follows two important decisions, namely *Imret v. Turkey (No. 2)*<sup>21</sup> and *Işıkırık v. Turkey*<sup>22</sup>, in which the ECtHR condemned Article 220/6-7 of the Turkish Criminal Code (imputing respectively, membership of an illegal organization to the mere fact of a person having acted 'on behalf of' that organization or for having 'aided an illegal organization knowingly and willingly' respectively) found that they were not 'foreseeable' in their application since they did not afford the applicants legal protection against arbitrary interference with their rights to freedom of assembly and association under Article 11 of the ECHR.

### 4. The Rejection of Trans Woman's Request for a Name Change

The applicant, H.K., requested a name change under Article 40 of the Turkish Civil Code, regulating sex change, due to the fact that she is a trans woman. A first instance civil court in Ankara rejected this request on the ground that H.K. had not undergone gender reassignment, and recognizing her to have a right to assume a female name could be confusing to society. In the individual application of H.K., the TCC found the Ankara court's pointing to the Civil Code to justify its decision to prevent D. from changing her name was unconstitutional, which amounted to a deprivation of one of the fundamental aspects of personhood, a name. Eventually, the TCC concluded that this infringes the positive obligations of the state concerning protecting the right to respect for private life.<sup>23</sup>

### 5. The Retrospective Application of the Principle Nullum Crimen, Nulla Poena Sine Lege

In Adnan Şen's individual application<sup>24</sup>, the TCC dealt with the retrospective application of the principle *nullum crimen, nulla poena sine lege*. The applicant, holding office as a chief of police, was dismissed from public office pursuant to a decree-law issued during the state of emergency declared after

the July 2016 attempted coup. An investigation was initiated against him for his alleged connection to the Fethullahist Terrorist Organisation (FETO), which is believed to be behind the putsch. The indictment contended that the applicant had been using the ByLock communication application, which was not illegal prior to the attempted coup. Still, it was understood that the FETO members have exclusively used it to communicate. At the end of the proceedings, the applicant was sentenced to seven years and six months of imprisonment due to his membership in the said organisation. The applicant argued that the *nullum crimen, nulla poena sine lege* principle, as set forth in Article 38 of the Constitution, had been violated as the interpretation by judicial bodies of the criminal act of membership of a terrorist organization had lacked foreseeability and that certain acts, which indeed did not constitute an offence at the time, had also been relied on for his conviction.

In the TCC's view, the applicant's conviction was not due to his alleged use of ByLock but his membership in an organization. Even though the lower court regarded his use of the ByLock application as evidence confirming his membership of the said organisation, the TCC highlighted that this interpretation did not extend the scope of the imputed offence in a way that would conflict with the *nullum crimen, nulla poena sine lege* principle. The TCC also noted the lower court acted in a foreseeable manner in elucidating the particular circumstances of the imputed act and paid due diligence in ascertaining the nature of the criminal act. As a result, the TCC did not find any violation in the case.

## LOOKING AHEAD

The year 2021 was a tumultuous year for Turkey. Over the past year, Turkey's drastic pandemic measures adopted without any parliamentary oversight continued to affect Turkish citizens on a large scale. In the last year's report, we anticipated that in 2021 Turkish courts would likely be (over)burdened with applications to rule on the measures taken to address the pandemic.

Yet, the reality turned out to be the opposite. The Turkish courts simply refused to function as *fora* of legal accountability for both pandemic policies implemented by Turkey's strong executive and their vast human rights implications by displaying notable signs of judicial restraint and enhanced deference. The HDP party closure case and the CoE's infringement procedure in respect of Turkey will have significant implications in terms of the state of democracy, human rights and the rule of law in the country in 2022 and beyond, and put the already tense relations between Turkey and CoE to yet another test.

## FURTHER READING

Ayşegül Kula, "An Unconstitutional Setback -Turkey's Withdrawal from the Istanbul Convention" *Verfassungsblog*, 24 December 2021 <<https://verfassungsblog.de/erdogan-istanbul-convention/>>

Hasan Aydın and Köksal Avincan, 'Am I a terrorist or an educator?' Turkish asylum seekers narratives on education rights violations after a crackdown following the 2016 failed coup attempt in Turkey' (2021) *Globalisation, Societies and Education*, 1-24.

Başak Çalı and Emre Turkut, "Turkey: Pandemic Governance and Executive Aggrandisement" in J. Grogan and A. Donald (eds.), *The Routledge Handbook on Law and the COVID-19 Pandemic* (Routledge, 2022) 248-258.

- 1 TCC, 31 March 2021, Nos. E: 2021/1, K: 2021/1.
- 2 BBC, "Anayasa Mahkemesi, HDP iddianamesini eksik bularak Yargıtay Cumhuriyet Başsavcılığına iade etti", online, last visited on 18 February 2022.
- 3 CoE Committee of Ministers, Interim Resolution CM/ResDH(2022)21, Execution of the judgment of the European Court of Human Rights *Kavala* against Turkey, 2 February 2022.
- 4 On the Gezi park protests, Alev Yaman, 'The Gezi Park Protests: The Impact on Freedom of Expression in Turkey', PEN International, 28 May 2014.
- 5 TCC, *Osman Kavala* App. No. 2018/1073.
- 6 ECtHR, *Osman Kavala*, App. No. 28749/18, para. 240.
- 7 'Osman Kavala: Turkey 're-arrests' activist hours after acquittal', BBC, 18 February 2019
- 8 'A Hint of Freedom for a Turkish Activist. Then Back to Jail' *The New York Times*, 18 February 2020
- 9 Başak Çalı, 'Byzantine Manoeuvres: Turkey's responses to bad faith judgments of the ECtHR', *Verfassungsblog*, 19 February 2020
- 10 See Article 46(4) ECHR.
- 11 For the original document in Turkish, see: <https://rayp.adalet.gov.tr/resimler/1/dosya/in-san-haklari-ep02-03-202115-14.pdf>
- 12 President Erdogan's address on the occasion of the announcement of the Action plan, <https://www.tccb.gov.tr/assets/dosya/2021-03-02-in-sanhaklari-en.pdf>
- 13 For an analysis on the Action plan, see Alican Uludag, 'What Would The Human Rights Action Plan Do?' *Heinrich Böll Stiftung Report*, 14 April 2021
- 14 See i.a. ECtHR, *Selahattin Demirtaş v Turkey (No 2)* App. No.14305/17 (ECtHR Grand Chamber, 22 December 2020) para. 278.
- 15 Presidential Decision No.3718, 20 March 2021
- 16 ICJ, Turkey's withdrawal from Istanbul Convention a setback for women and girls' human rights, 1 July 2021
- 17 Dağhan Irak, "Reading political clientelism and concentration through new media: The case of Anadolu Agency" (2015) *Yeni Medya Çalışmaları*, 13-30.
- 18 TCC, 30 December 2021, Nos. E: 2019/71, K: 2020/82.
- 19 TCC, 1 July 2021, App No. 2019/10634.
- 20 TCC, 10 June 2021, App No. 2014/6548.
- 21 ECtHR, 10 July 2018, App No. 57316/10, para 55.
- 22 ECtHR, 14 November 2017, App No. 41226/09, para 41.
- 23 TCC, 17 June 2021, App No. 2019/42944.
- 24 TCC, 15 April 2021, App No. 2018/8903.



# Ukraine

Oleksandr Marusiak,  
Dr. jur., Expert in Constitutional Law, Centre of Policy and Legal Reform  
Associate Professor, European University  
Guest Lecturer, Ukrainian Catholic University

## I. INTRODUCTION

2021 continued most of previous constitutional achievements and controversies. On the one hand, no active constitutional process occurred within Verkhovna Rada of Ukraine (Parliament), despite the fact that 237 People's Deputies/Member of Parliament (MPs) registered one constitutional amendment draft. On the other hand, a political confrontation between the presidential administration and the Constitutional Court of Ukraine (CCU) lasted throughout the year, balancing between various degrees of escalation and inaction.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### *1. Continuation of political confrontation between the President and the Constitutional Court of Ukraine*

Starting after the CCU's Decision No. 13-r/2020 of 27 October 2020 in e-declarations case<sup>1</sup>, the political confrontation between President Zelenskyy and CCU impulsively continued through 2021.

On 26 February 2021, the President issued a second decree (*Decree No. 79/2021*) to suspend Oleksandr Tupytsky, the Head of the CCU, from his office for a period of one month since 28 February (the previous suspension for two months has been issued by *Decree No. 607/2020* on 29 December 2020). Despite the fact, the suspension has no legal background (i.e., President lacks such power), the officers of the Department

of State Protection of Ukraine (a body responsible for providing security of governmental facilities and top officers in Ukraine) denied the Head of the CCU physical access to the CCU facilities. The CCU authorized the Deputy Head of the CCU to serve as an Acting Head pro tempore.

On 27 March, President issued a much more controversial decree (*Decree No. 124/2021*), which under the pretext of national security supremacy, cancelled the decrees of previous President Yanukovich on appointing Oleksandr Tupytsky (*Decree No. 256* of 14 May 2013) and Oleksandr Kasminin (*Decree No. 513* of 17 September 2013) as judges of the CCU. According to the 2016 version of Constitution, appointing authority (President, Parliament, Congress of Judges) has the power neither to dismiss nor to cancel a legitimate appointment of the judge of the CCU. Article 149-1 of the Constitution clearly specifies an exhaustive list of cases when the authority of a judge of the CCU can be terminated, including the grounds and procedure for dismissal of a judge. A judge of the CCU can be dismissed only by the CCU itself by at least 12 votes of judges in favor. Also, the inauguration of the CCU starts with taking the oath on the special plenary session of the CCU, but not with the issue of an appointing act. Since none of the constitutional cases/grounds did actually take place in reference to Tupytsky and Kasminin, presidential *Decree No. 124/2021* obviously lacked legitimacy. Both judges appealed to the Administrative Court of Cassation within the Supreme Court to declare presidential *Decree No. 124/2021* null and void (*cases No. 9901/96/21, No. 9901/97/21*). On July 14, the Administrative

Court of Cassation (within Supreme Court) declared President's *Decree No. 124/2021* in part of Tupytsky actual dismissal illegal, and the case is currently being appealed to the Grand Chamber of the Supreme Court. Separately, 49 MPs applied to the CCU a constitutional petition to recognize presidential decrees *No. 607/2020*, *No. 79/2021*, *No. 124/2021* as unconstitutional. As of the time this text has been written, all these cases are still under review by the CCU and the Grand Chamber of the Supreme Court.

On 17 August, President issued *Decree No. 365/2021* launching a competitive process to select two new judges of the CCU (instead of de jure and de facto incumbent Tupytsky and Kasminin) under the presidential quota. Also, President established a competition commission of seven members comprising national and international experts (including Bohdan A. Futey, a Senior Judge of the United States Court of Federal Claims, a well-known and respected Ukrainian American). International experts claimed that the selection process cannot be legitimate without the actual opened vacancies in the CCU under the constitutional requirements, but the presidential administration assured the commission that it is a selection in advance and President will not use his appointing powers in respect of the CCU at least before May 2022<sup>2</sup>. In November, a competition commission presented to the President a list of candidates for the CCU judge offices. However, on 26 November, President issues two decrees on appointing new judges of the CCU (*Decree No. 596/2021*, *Decree No. 597/2021*), provoking a public resonance. Many civil society organizations called on the CCU not to bring the newly appointed judges to the oath until vacancies legally appear under the presidential quota. According to Article 17(2) of the Constitutional Court of Ukraine Law, a special plenary session of the CCU for the inauguration of the appointed judge shall be convened by the Head of the CCU or by a judge of the CCU acting as a Head, no later than the fifth working day following the appointment of the judge. On 30 November, the CCU adopted *Resolution No. 11-p/2021* refusing to convene a special plenary session to inaugurate new judges<sup>3</sup>.

Parliament in 2021 tried to play an active part in the President-CCU conflict. On 21 December 2020 and on 6 January 2021, MPs submitted two draft laws—*No. 4533* (main) and *No. 4533-1* (alternative)—on the constitutional procedure to optimize technical and procedural issues of reviewing cases by the CCU. On 26 January, both draft laws were sent to the Council of Europe's Venice Commission by the Speaker of Parliament to receive an advisory opinion (see, Further Reading). *Draft Law No. 4533* was adopted in the repeated first reading on 15 April (the original first reading on 28 January failed). However, neither of the draft laws solved a crucial challenge with the CCU—establishing for competitive purposes a screening body, with international members, for candidates for the office of judge of the CCU to ensure the adequate moral and professional qualities of future judges<sup>4</sup>. Sadly, in 2021 there was no progress in the implementation of this issue.

At the beginning of 2021, there were three vacancies in the CCU (two by the Parliament's quota, one from the Congress of Judge's quota). On 18 February, without providing a proper competitive process, Parliament made one appointment. A new judge of the CCU was inaugurated at the special plenary session of the CCU on 24 February. To sum up, by the end of 2021, there are still two actual vacancies in the CCU, and two judges appointed by President Zelensky beyond his quota were not inaugurated in 2021.

## *2. Constitutional Amendment Draft Law on Director of National Anti-Corruption Bureau of Ukraine (NABU) & Director of the State Bureau of Investigation (SBI); Implementation of the 2020 CCU decisions; New Challenges with Director of the SBI Appointing*

In 2021, a new constitutional amendment process has started. On 22 February, 237 MPs (out of 423 current MPs) submitted to Parliament the Draft Law No. 5133 '*On Introducing the Amendments to Articles 85 and 106 of the Constitution of Ukraine (Concerning the Procedure for Appointment and Dismissal of the Director of the National Anti-Corruption Bureau of Ukraine and the Director of the State Bureau of Investigation)*'. This draft law explicitly proposed

to vest new appointing powers to the President: appointment (on a competitive basis) and dismissal of the Director of NABU and the Director of the SBI with the mandatory consent of the Verkhovna Rada. Such an initiative was intended to constitutionalize the existing appointing & dismissing practice of the top officials of NABU and the SBI by the President and to implement both decisions of CCU in the 2020 cases on Director NABU<sup>5</sup>. Since CCU declared as unconstitutional the President's Decree on appointing the Director of NABU (*Decision No. 9-r/2020* of 28 August 2020) and relevant provisions of the National Anti-Corruption Bureau Law on the ground of which the President issued such a decree (*Decision No. 11-r/2020* of 16 September 2020), the Parliament had two remedial options: either to implement both decisions of the CCU and to amend ordinary legislation at least on NABU (a relevantly easy procedure) or to amend the Constitution itself (far more complicated procedure). Surprisingly, MPs choose the harder option first.

*Draft Law No. 5133* submitted by MPs in 2021 was quite similar to the *Draft Law No. 1014* submitted by the President in 2019 (one<sup>6</sup> of the seven constitutional amendment draft laws submitted by the President on 29 August 2019). Because of a negative opinion of the CCU (*Opinion No. 7-v/2019* of 16 December 2019), the Draft Law of 2019 was never under Parliament's review. The Draft Law of 2021 presented an updated appointing paradigm, which includes competitive and parliamentary elements. Firstly, both directors shall be appointed on a competitive basis. Secondly, the Verkhovna Rada shall give consent to the President either to appoint or to dismiss these officials. On 16 March, *Draft Law No. 5133* was included in the parliamentary agenda and sent to the CCU to receive an opinion on the basis of Article 159 of the Constitution of Ukraine ('*A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution*'). However, the CCU, neither

in 2021 nor up to the time this chapter has been written<sup>7</sup>, provided an opinion on *Draft Law No. 5133*. Hence, the constitutional amendment process has been paused.

Later, MPs finally choose an easier and more successful option to deal situation with NABU. On 19 October 2021, Parliament by 304 votes of MP adopted *Law No. 1810-IX*, bringing the NABU status in line with the Constitution. *Law No. 1810-IX* (1) partly implemented decisions of the CCU *No. 9-r/2020 & No. 11-r/2020*, (2) defined the legal status of NABU within the constitutional frame (as a central governmental body with a special status), (3) established the procedure of appointing (on a competitive basis) and dismissal of Director NABU by the Cabinet of Ministers of Ukraine. However, Parliament did not adopt the same remedial amendments towards the SBI. The State Investigation Bureau Law is still unamended, and de-facto contradicts the Constitution. Also, there are three cases (including, one constitutional complaint from the previous Director of the SBI) under the review of the CCU on exactly the same subject as the 2020 NABU cases. Moreover, on 31 December 2021, President issues *Decree No. 691/2021* appointing a new Director of the SBI beyond relevant constitutional powers (*ultra vires*). Besides, there is still no legitimately appointed Director of NABU after CCU's *Decision No. 9-r/2020* of 28 August 2020.

### 3. National Referendum Law & Local Referendum Draft Law

On 26 January 2021, Parliament adopted *All-Ukrainian Referendum Law* (Law No. 1135-IX) implemented relevant provisions of Constitution on a national referendum<sup>8</sup>. According to Article 3(1) of *Law No. 1135-IX*, the subject for the national referendum can be (1) adoption of the law, previously approved by the Parliament, amending Chapter I — ‘*General Principles*’, Chapter III — ‘*Elections. Referendum*’, and Chapter XIII — ‘*Introducing Amendments to the Constitution of Ukraine*’ of the Constitution of Ukraine; (2) adoption of the law, previously approved by the Parliament, ratifying international treaties concerning changes of the territory of Ukraine; (3) abrogation of enacted and valid law or its

certain clauses; (4) resolving issues of nationwide significance. Referendums on subjects #1, #2, and #3 are final and binding; but on subject #4 of consultative nature (Parliament or other relevant body must implement its decision through enacting a piece of legislation, but it is still a political decision). Referendum on subject #1 is appointed by the President, on subject #2 – by Parliament, on subjects #3 and #4 is declared by President upon popular initiative (no less than 3 million signatures of voters collected in at least two-thirds of the oblasts/regions, with no less than 100,000 signatures in each, needed).

Since *All-Ukrainian Referendum Law* covered only national referendums, the need for local referendum regulation became first in order. That is why, on 19 May 2021, 112 MPs registered in Parliament the *Draft Law No. 5512* on local referendum. Between June and October 2021, 96 regional consultations with civil society organizations and other stakeholders took place to present and discuss this draft law. On 22 October 2021, the Speaker of the Verkhovna Rada requested the European Commission for Democracy through Law of the Council of Europe (Venice Commission) to provide a legal opinion on the draft law. In February 2022, the opinion of the Venice Commission (jointly prepared with the OSCE Office for Democratic Institutions and Human Rights) was released. The *Draft Law No. 5512* is expected to be reviewed and adopted in the first reading in 2022.

## III. CONSTITUTIONAL CASES

In 2021, the CCU delivered only 10 decisions<sup>9</sup>: 3 decisions of the Grand Chamber on constitutional petitions of members of Parliament and 7 decisions on constitutional complaints of individuals and legal persons (by the Grand Chamber of the CCU—1; by the First Senate of the CCU—0; by the Second Senate of the CCU—6). No opinions on the constitutional amendment draft laws have been adopted.

### 1. Decision No. 1-r/2021 of 14 July 2021 (Grand Chamber): The Ukrainian Language Case

The CCU declared *Ensuring the Functioning of the Ukrainian as the State Language Law*

(Law No. 2704-VIII of 25 April 2019) as **constitutional**. This is already the third resonance language case in Ukraine: the CCU dealt with the Ukrainian language issue before in 1999 (*Decision No. 10-rp/99*) and 2018 (*Decision No. 2-r/2018*). The language issue has always been a political controversy in Ukraine. Since the *Law No. 2704-VIII* referred only to the Ukrainian language as a state one, it provided detailed and extensive protection and guarantees to it in public life. This law applies neither to the sphere of private communication, nor the performance of religious rites. Besides, the law foreseen the adoption of a separate piece of legislation concerning the rights of indigenous peoples and national minorities regulated (sadly, Parliament still adopted no such a law since 2019). Using manipulative argumentation, pro-Russian political actors (i.e., 51 MPs) applied to the CCU to recognize this law as discriminatory toward Russian-speaking Ukrainians and minorities, and hence unconstitutional. However, the CCU denied their argumentation and stated on the contrary (I quote), ‘[t]he Ukrainian language is an indispensable condition (*conditio sine qua non*) of the Ukrainian statehood and Unity’. On the one hand, this decision cannot be referred to as the best piece of legal writing since too many ideological leanings were used herein, but, on other hand, the court's motivation, and legal argumentation, in general, was solid and reasonable.

### 2. Decision No. 4-r(II)/2021 of 21 July 2021 (Second Senate): The Dismissal (by a Law) Case

Upon the constitutional complaint of individual, Bohdan Bivalkevych, the Second Senate of the CCU declared Section 8 of Chapter XI (‘Final and Transitional Provisions’) of the *National Police of Ukraine Law* (Law No. 580-VIII of 2 July 2015) as **unconstitutional**. The disputed clause provided that from the date of publication of *Law No. 580-VIII*, all *militiia*<sup>10</sup> officers and other employees of the Ministry of Internal Affairs of Ukraine are considered as being warned about their possible future dismissal due to staff reductions. Bivalkevych was a colonel *militiia* holding a position at the MIA. During the police reform of 2015, he

was dismissed from *militiia* without an individual warning according to that clause of the *Law No. 580-VIII*. He filed a lawsuit to the administrative court claiming that such dismissal was unconstitutional and unlawful. In 2018, the inferior court partially satisfied his claims, but the appeal court of appeals reviewed the case and denied all claims. The court of cassation (Supreme Court) stated that the dismissal of Bivalkevych was announced by *Law No. 580-VIII* itself, which did not require additional individual announcements. In 2020, Bivalkevych submitted a constitutional complaint to the CCU, claiming unconstitutionality of the *Law No. 580-VIII* implemented in a court's final ruling. The CCU stated that Parliament, by adopting normative legal instruments (laws), cannot dismiss an individual employee or certain categories of employees and notify them of possible future dismissal. Dismissal is possible under an individual act, but not under general law, adopted by Parliament since the Constitution exclusively stipulates cases when the Parliament is authorized to appoint and dismiss individuals by individual acts. The CCU, declaring this piece of legislation unconstitutional by decision, did not extend its legal effect beyond the case to avoid questioning the legitimacy of police formation itself.

This case is quite important since it lays the foundation for the future CCU's practice in similar yet more politically sensitive dismissal (by a law) case. For example, on 3 December 2019, Parliament amended the *State Bureau of Investigation Law* by adopting the *Law No. 305-IX*, which automatically dismissed Roman Truba, the incumbent Director of the SBI, from his post. In 2021, Truba submitted a constitutional complaint to the CCU, claiming unconstitutionality of the *Law No. 305-IX*, which is currently under the review of the First Senate of the CCU.

### 3. Decision No. 3-т/2021 of 21 December 2021 (Grand Chamber): The Broadcasting Case

The CCU declared certain provisions of *Television and Radio Broadcasting Law* (Law No. 3759-XII of 21 December 1993, amended) and of *Cinematography Law* (of 13 January 1998 No. 9/98-VR, amended) as

**constitutional.** In this case, 47 MPs disputed the ban for Ukrainian TV and radio organizations to use and broadcast films, TV programs, in which (1) any individual included in the *List of Persons Threatening Ukraine's National Security* has been engaged as director, producer, actor, author of either script, texts, dialogues, or soundtracks; (2) elements of positive promotion or propaganda of the aggressor state<sup>11</sup> bodies or their actions included; (3) positive image of either aggressor state bodies or Soviet security officials shown; (4) justification or recognition of Ukraine's territory occupation as a legal one presented; (5) no elements of positive promotion or propaganda of the aggressor state included, but a media product has been produced by an individual or legal entity of the aggressor state and demonstrated after 1 January 2014. The CCU ruled that all above-mentioned law restrictions of constitutional rights to information, freedom of thought, speech and freedom of creativity are proportional and acceptable since public interest and national security issues prevail. As Ukraine is forced to fight for its sovereignty, independence, and territorial integrity, it can undoubtedly enact such measures against Russia's aggressive informational policy towards the nation.

In a Separate Opinion, CCU's judge Oleh Pervomaiskyi noted that the decision contains a summary of all law prohibitions as a single subject of constitutional review, without taking into account the differentiation of proportionality between different bans, which is the best approach, because (I quote), '*After all, in a New Year's or Christmas children's or adult comedy, it does not matter who actually plays "evil wolf" or other villain, because the main reason is the lack of propaganda and misinformation elements threatening the national security and other constitutional values*'.

## IV. LOOKING AHEAD

New vacancies openings in the CCU, probably, bring *détente* into the President-CCU confrontation. In 2022, two vacancies on the President's quota (finally, the President will be able to make a legal appointment to

the CCU) and one vacancy on Congress of Judges' quota will be available. If we also count the existing two vacancies in the CCU (one seat from Parliament and one – again from the Congress of Judges), theoretically 5 (of 18) judges of the CCU might be appointed in the next year, thus sufficiently modifying the present composition of the Court. Unfortunately, quite doubtful that due to political reasons, the introduction of a real competitive process of the CCU judges' selection takes place in 2022.

## V. FURTHER READING

English Summaries of the Constitutional Court of Ukraine Decisions in 2021 (available online), <<http://ccu.gov.ua/en/docs/3434>> accessed 16 February 2022.

Venice Commission, OSCE/ODIHR, Joint Opinion on the Draft Law 'On political parties', approved by the Council of Democratic Elections at its 71st meeting (18 March 2021) and adopted by the Venice Commission at its 126th Plenary Session (19-20 March 2021), CDL-AD(2021)003.

Venice Commission, Opinion on the Draft Law No. 4533 'On Constitutional Procedure' and on alternative Draft Law No. 4533-1 'On the procedure for consideration of cases and execution of judgements of the Constitutional Court', adopted by the Venice Commission at its 126th Plenary Session (19-20 March 2021), CDL-AD(2021)006.

Venice Commission, OSCE/ODIHR, Urgent Joint Opinion on the draft law 'On local referendum', issued by the Venice Commission on 10 February 2022, CDL-PI(2022)001-e.

1 *The 2020 Global Review of Constitutional Law*, p. 322.

2 The 9-year constitutional term of Tupytsky and Kasminin as the CCU judges *ipso facto ends on 15 May 2022 and on 19 September 2022 respectively*.

3 CCU obliged the acting Head of the CCU to convene the special plenary sessions of the CCU to take the oath of CCU judges appointed by the decrees No. 596/2021&No. 597/2021, *ONLY AFTER termination of office or dismissal judges of the CCU, appointed by the President within 2013-2018 under Article 149-1 of the Constitution*.

4 See also, Venice Commission, 'Urgent Opinion on the Reform of the Constitutional Court', endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11-12 December 2020), CDL-AD(2020)039.

5 *The 2020 Global Review of Constitutional Law*, pp. 321-322.

6 *Ibid.*, pp. 320-321.

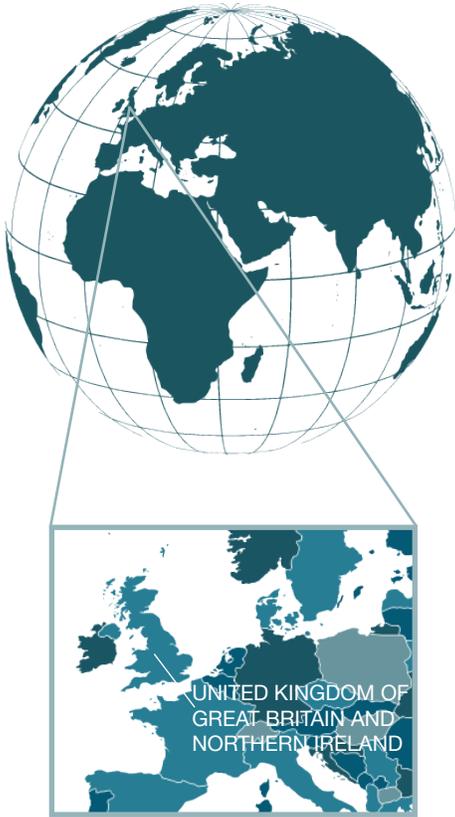
7 I cannot remember any episodes in the past the CCU sabotaged delivering an opinion on a constitutional amendment draft law for so long. For example, according to Article 75(3)(1) of the *Constitutional Court of Ukraine Law* (Law No. 2136-VIII of 13 July 2017), *the term of providing an opinion on such issue shall not exceed 30 calendar days*. Undoubtedly, political conflict with President affected the working capacities of CCU, but still there are no excuses for judges for reviewing cases beyond reasonable timeframe.

8 For more information, check also, *The 2020 Global Review of Constitutional Law*, p. 321.

9 In 2020, the CCU delivered 21 decisions.

10 An official term for the post-soviet pre-police bodies in Ukraine, sounding almost homonymous (but with no equivalent meaning) to English term 'militia'.

11 In 2015, Parliament of Ukraine officially declared the Russian Federation as an aggressor state.



# United Kingdom of Great Britain and Northern Ireland

Dr Chris Monaghan  
Principal Lecturer in Law  
University of Worcester, UK

## I. INTRODUCTION

2021 has been a busy year in United Kingdom regarding Constitutional Law and general constitutional developments. The government has continued with its intentions to reform the Human Rights Act 1998 and administrative law, with a focus on judicial review. Established as a consequence of the Conservative Party's manifesto for the 2019 general election, the Independent Human Rights Act Review and the Independent Review of Administrative Law have both submitted their reports in 2021. What will happen in terms of actual reform remains to be seen, but those who have followed the criticism of the courts and the Human Rights Act 1998 by supporters of the governing party will not be surprised.

In May 2021 the Dissolution and Calling of Parliament Bill was introduced to the House of Commons to reverse a constitutional innovation introduced after the formation of the first coalition government since the Second World War in 2010, which was the Fixed-term Parliaments Act 2011. The Dissolution and Calling of Parliament Bill will, if it becomes law, repeal the Fixed-term Parliaments Act 2011 and restore the prerogative power to dissolve Parliament to the Prime Minister's discretion as to the timing of general elections. This is a significant development, especially at a time when there are concerns about the growth of executive power.

There have been a number of key constitutional cases in 2021, with the most high-profile (and controversial) being that of Shamima Begum, who as a child left the United

Kingdom to go and live with the so-called Islamic State and her legal fight to be able to return to the United Kingdom after having her British nationality removed.

The end of 2021 arguably did not cover the Conservative government in a positive light, as two scandals stood out and did much to damage executive and Parliament relations. The first was the Owen Paterson MP scandal.<sup>1</sup> Paterson, a conservative politician, was paid £500,000 to lobby ministers and the House of Commons Standards Committee recommended that Paterson should be suspended as a MP for 30 sitting days. As a matter of a constitutional practice, this should have been adopted. However, in November 2021 government supported Paterson and announced that it supported reform of the standards system. This proved to be incredibly controversial and led to a humiliating U-turn by the government and Paterson's resignation as an MP.

The second of these was party-gate and the revelations in late November and early December 2021 that the Prime Minister had attended parties at Downing Street during a time when Covid-19 restrictions were in place across England.<sup>2</sup> The Prime Minister told the House of Commons on 8 December that, 'I have been repeatedly assured that there were no parties, and that no covid rules were broken. That was what I have been repeatedly assured'. With new evidence emerging about parties and the Prime Minister's involvement, this has raised constitutional issues of what should be the consequences of intentionally misleading the House of Commons.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Three key constitutional developments have been selected for 2021. In many ways these are works in progress and signal the future development of the United Kingdom's constitutional settlement. These developments are all on-going, in the sense that two of these were reviews of contentious area of Public Law (which are human rights and judicial review) and the eventual outcome remains to be seen, whilst the third, relating to how general elections are called, is expected to become law in 2022.

### The report of the Independent Human Rights Act Review

The reform of the Human Rights Act 1998 has long been favored by the Conservative Party. This view has attracted some academic support. Academics Graham Gee and Richard Ekins, writing for the think tank, Policy Exchange, were clear that, '[i]n our view, the HRA should never have been enacted – it threatened to compromise the rule of law, to politicise the courts, and to distort democratic deliberations, and each of these threats has been realized.'<sup>3</sup> Similar views had been expressed somewhat more colourfully by David Davies MP, '[w]e should tear up the Human Rights Act'.<sup>4</sup> The Conservative Party's 2019 general election manifesto stated that, '[w]e will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.'<sup>5</sup> In December 2020 an Independent Human Rights Act Review was launched by the Conservative government. The review was specifically asked to address the relationship between the European Court of Human Rights and domestic courts, the relationship between the three branches of government in the United Kingdom and the extra-territorial application of the 1998 Act. The extra-territorial application of the Act had proved controversial, an example being the protection offered to foreign nationals where their territory was being controlled by British soldiers, and to British soldiers who were killed in active service where it was

alleged a contributing cause was inadequate equipment.

The Independent Human Rights Act Review delivered its report in the Autumn of 2021.<sup>6</sup> The review found that, '[t]he vast majority of submissions received by IHRAR spoke strongly in support of the HRA. They pointed to its impact in improving public administration for individuals, through developing a human rights culture' ([46]). As to the hostility towards the Human Rights Act 1998, the review observed that, 'The fact and persistence of hostility to the HRA is noteworthy. It may be that these views are less widespread than might first appear but are disproportionately fuelled and ventilated by negative media and political coverage' ([48]). This was far from unsurprising given the focus on a few high-profile cases by the media versus the reality of the Human Rights Act 1998 in practice. A consultation paper on the future of the Human Rights Act 1998 (Human Rights Act Reform: A Modern Bill of Rights) was launched in December 2021. The consultation period will close in March 2022. The consultation documents contained proposed draft clauses that will address some of the more controversial elements of the 1998 Act.

### The report of the Independent Review of Administrative Law

The 2019 Conservative Party's general election to manifesto promised a review of administrative law and to prevent judicial review from being abused. In 2020, the Conservative government established the Independent Review of Administrative Law and submitted its report in January 2021.<sup>7</sup> The review was chaired by Lord Faulks QC and it was asked to consider issues such as the need for codification of judicial review, clarification on justiciability and non-justiciability, and whether procedural reforms were needed to judicial review. The report was published in March 2021. The report concluded that it was not in support of the codification of judicial review or the statutory attempt to state what would, or would not, be justiciable. The report also concluded that whilst judicial review could not be abolished, as this would violate the rule of law, Parliament could limit or oust judicial review in certain circumstances. The Independent Review of Administrative Law

observed, 'that the independence of our judiciary and the high reputation in which it is held internationally should cause the government to think long and hard before seeking to curtail its powers. It is inevitable that the relationship between the judiciary, the executive and Parliament will from time to time give rise to tensions. Recent decisions provide a clear illustration of this. On one view, a degree of conflict shows that the checks and balances in our constitution are working well' ([10]-[11]). It was clear that the tensions were a sign that the constitution was working. We can see that the most high-profile constitutional law cases in recent years, *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 and *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 that both resulted in such tensions, were arguably the catalyst for the review.

### The Dissolution and Calling of Parliament Bill

Within the Westminster system in the United Kingdom the former ability of the Prime Minister to request the monarch to dissolve Parliament was an important tool in the government's political toolkit. The Dissolution and Calling of Parliament Bill was introduced to the House of Commons in May 2021 (it is currently making its way through the House of Lords). The Bill is highly significant as if enacted, it would repeal the Fixed-term Parliaments Act 2011, which had been introduced by the then Conservative and Liberal Democrat coalition government to fix the lifetime of a Parliament to five years. This fundamentally changed the system of calling general elections and removed the discretion enjoyed by the Prime Minister to ask the monarch to dissolve Parliament using her prerogative powers. The proposed Dissolution and Calling of Parliament Bill will remove the requirement that the lifetime of a Parliament is fixed for five years and whilst retaining the maximum five-year lifetime for any Parliament, it returns the discretion to the Prime Minister as to when to seek an early general election. It is important to note that despite the 2011 Act early general elections had occurred in 2017 (with the required majority of MPs agree-

ing to the Prime Minister's request) and in 2019 when the government introduced legislation to permit an early general election. The Bill will resolve a key question since the 2011 Act, namely, precisely what happened to the prerogative power to dissolve Parliament. Did it go into abeyance or implicitly abolished? The Dissolution and Calling of Parliament Bill expressly revives the prerogative power and restores the dissolution of Parliament. In light of the Supreme Court's decision in *R (on the application of Miller) v The Prime Minister (No.2)* [2019] UKSC 41 which concerned the five-week prorogation of Parliament in 2019, the Bill calls for the non-justiciability of the prerogative power to dissolve Parliament.

### III. CONSTITUTIONAL CASES

There have been a number of cases of significant constitutional importance in 2021 and several of these will be discussed below.

#### *Her Majesty's Attorney General v Crosland* [2021] UKSC 58

The decision in *Her Majesty's Attorney General v Crosland* [2021] UKSC 58 related to an initial finding of contempt of court, that was reached by a panel of three Justices of the Supreme Court in *Her Majesty's Attorney v Crosland* [2021] UKSC 15. That finding of contempt of court related to the decision of Anthony Crosland, who had been a barrister representing one of the parties, to publish a confidential draft judgment of the Supreme Court. In the present case, Crosland sought to appeal against the finding of contempt. The question for the Supreme Court was whether it could hear an appeal based on a finding reached by a panel of the same court. The majority of the Supreme Court held that section 13 of the Administration of Justice Act 1960 allowed for the possibility of an appeal, where a finding of a smaller panel of Justices would be reconsidered by a larger panel (albeit different Justices). The majority were of the opinion that the original panel was an independent and impartial tribunal for the purposes of Article 6 of the European Convention on Human Rights. The Court rejected any allegation of bias on the part of

the Justices. The case contained a significant dissenting opinion, as Lady Arden argued that section 13 of the Administration of Justice Act 1960 would not permit an appeal in the present case. Lady Arden gave five reasons, but the two which are of wider constitutional interest relate to the fact that the Supreme Court, 'is a single court, not a court composed of divisions or having unlimited jurisdiction. The Justices are of equal standing, and it is not open to some only of the Justices to review the acts of others by way of an appeal' ([17]). Her Ladyship was of the view that this should be distinguished from where the Supreme Court can overrule, or distinguish, a previous decision reached by the Supreme Court in an earlier case, as this concerned the same case. Furthermore, Lady Arden was clear that an appeal must be to a higher authority and not to the same court. Lady Arden's is an interesting dissent and one that raises many constitutional issues which will no doubt in time be referred to again by the Supreme Court.

#### *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56

The decision in *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 concerned the policy of Her Majesty's Passport Office to not allow the appellant to receive a passport that is non-gendered. The policy was that a passport needed to contain a person's gender, either the gender at birth, or in the case of transgender individuals, the gender that was later acquired. What was not permitted was to be non-gendered. The Supreme Court rejected the appellant's argument that the policy breached their rights under Article 8 of the European Convention on Human Rights, which provides for the right for respect of a person's private life. The Supreme Court noted that the European Court of Human Rights had not considered the issue of whether a gender-neutral passport was required under the Convention, but took the view that the Convention as it stood did not require should an option to be included and therefore this should be the position under the Human Rights Act 1998, which gave effect to much of the Convention in domes-

tic law. This subject-matter of this decision will no doubt be considered by the European Court of Human Rights, and this will lead to an impetus to change domestic rules relating to official documentation. However, it was clear the Supreme Court was not going to go beyond the European Court of Human Rights' interpretation of the Convention. The Supreme Court was clear that it was not for the European Court of Human Rights to impose an obligation on the United Kingdom, but the matter was to be determined accordance to the constitution. The Human Rights Act 1998 did not empower the domestic courts to find that there was a breach of the Convention, when the European Court of Human Rights had decided that there was not. Importantly, the United Kingdom, through Parliament, had a right to act independently of the European Convention on Human Rights and decide that there should be non-gendered passports. The Supreme Court's decision and the fact that the judgment was delivered by the President Lord Reed with the unanimous agreement of the panel, is of significance, not least given the reputation of the Supreme Court for activist judgments.

#### *R (on the application of SC, CB and 8 children) v Secretary of State for work and Pensions* [2021] UKSC 26

The Supreme Court's decision in *R (on the application of SC, CB and 8 children) v Secretary of State for work and Pensions* [2021] UKSC 26 upheld the legality of the government's decision to restrict the individual element of the Child Tax Credit to just two children, with parents and guardians in the majority of cases being unable to claim credit for any additional children born after 8 April 2017. The appellants had argued that the restriction on tax credit amounted to a breach of the United Kingdom's obligations under the European Convention on Human Rights. It was argued that the restriction breached the children's' rights under Article 8 (the right of respect for a private and family life) and Article 21 (the right to marry and found a family), as well as amounting to discrimination under Article 14. A number of important constitutional issues were raised and addressed in Lord Reed's judgment (which he delivered on behalf of the

Supreme Court). Lord Reed considered the argument that the restriction on tax credit was incompatible with the United Nations Convention on the Rights of the Child which had been incorporated into domestic law (as is required under the United Kingdom's dualist system). His Lordship stated that, 'it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom' ([77]). Lord Reed was clear that, 'as I have explained, for a United Kingdom court to determine whether this country is in breach of its obligations under an unincorporated international treaty, and to treat that determination as affecting the existence of rights and obligations under our domestic law, contradicts a fundamental principle of our constitutional law' ([91]). Finally, Lord Reed reiterated 'that the Government is separate from Parliament, notwithstanding the many connections between the two institutions... The reasons which the Government gives for promoting legislation cannot therefore be treated as necessarily explaining why Parliament chose to enact it... the will of Parliament finds expression solely in the legislation which it enacts. Parliament does not give reasons for enacting legislation [and]... the decisions which Parliament takes are not necessarily capable of being rationalized in any event' ([166]-[168]). This is a significant judgment as it perhaps demonstrates increased judicial restraint, with a single judgment and no dissent.<sup>8</sup>

*R (on the application of Begum) v Special Immigration Appeals Commission* [2021] UKSC 7

In what proved to be a controversial decision, the Supreme Court's decision in *R (on the application of Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, upheld the decision of the Home Secretary to deprive Shamima Begum of her British citizenship under section 40(5) of the British Nationality Act 1981. As a child Begum had left the United Kingdom to join the so-called Islamic State and had then sought to return home to the United Kingdom. Begum was born in the United Kingdom and had Bangladeshi ancestry. The Court of Appeal had found against the Home Secretary and the

earlier decision of the Special Immigration Appeals Commission. The issue before the Supreme Court was whether, when exercising his statutory powers, the Home Secretary had not complied with his duties under section 6 of the Human Rights Act 1998. As a matter of constitutional importance, Lord Reed (who gave the judgment on behalf of the Supreme Court) made reference to the judgment of Lord Hoffmann in *Home Department v Rehman* [2001] UKHL 47, where Lord Hoffmann had been clear that in deciding whether an individual was a threat to national security, the court should 'in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker' ([49]). Lord Reed had also referred to Lord Slynn in *Rehman*, where Lord Slynn was clear in reaching a decision about whether an individual was a threat, the Home Secretary was 'undoubtedly in the best position to judge what national security requires' ([26]). Lord Reed was critical of the Court of Appeal's decision in *Begum* for four reasons, including that the Court of Appeal had decided to regard its assessment of whether an individual was a threat to national security over that of the Home Secretary, and giving preference to Begum's rights under Article 6 of the European Convention on Human Rights over the risk that she posed to national security ([132]-[136]). I have previously argued that the Supreme Court was correct in emphasizing the need for the courts to show institutional deference, in light of the subject-matter and the information available to the Home Secretary when he had formed his assessment.<sup>9</sup>

## IV. LOOKING AHEAD

2022 raises a number of key issues that will help shape future events and developments. Firstly, given the importance of the Supreme Court, it is notable that two judges have retired, leaving the number of vacancies at three. In terms of gender equality and the fact that for the majority of its lifetime the Supreme Court only had one sole female Justice, Lady Hale, it is disappointing to see that Lady Arden's retirement leaves Lady Rose as the sole female member of the Supreme Court. It is hoped that 2022 sees a move to-

wards more gender balance in the court. Secondly, partygate is not going away and the beginning of 2022 saw more revelations and the possibility that the Prime Minister could be fined for breaching the Covid restrictions. Thirdly, the Nationality and Borders Bill looks set to become law. This controversial Bill has been criticized, inter alia for undermining the 1951 Refugee Convention (by the UNHRC) and by giving the government greater powers to deprive individuals of their citizenship. Fourthly, the controversial Elections Bill looks likely to become law and with it the requirement to show photographic identification when voting. Fifthly, in light of the fact that the United Kingdom is a constitutional monarchy, the scandals surrounding Prince Andrew and now the Prince of Wales (with a police investigation relating to cash for honors), threaten to undermine the institution of the monarchy and its status within the United Kingdom's monarchy.

## V. FURTHER READING

A Horne, 'Has the UK Supreme Court reformed itself?', *Prospect*, 5 August 2021

M. Foran, 'Shamima Begum, the Separation of Powers, and the Common Good', U.K. Const. L. Blog, 17th March 2021 (available at <https://ukconstitutionallaw.org/>)

A McHarg and AL Young 'The Resilience of the (Old) British Constitution', U.K. Const. L. Blog, 8<sup>th</sup> September 2021 (available at <https://ukconstitutionallaw.org/>)

C Monaghan, 'The Court of Appeal ... Appears to Have Overlooked the Limitations to its Competence, Both Institutional and Constitutional, to Decide Questions of National Security': Shamima Begum, the Supreme Court and the Relationship Between the Judiciary and the Executive' (2021) 26(2) *Judicial Review* 134

1 <https://www.psa.ac.uk/psa/news/owen-paterson-scandal-standards-trust-and-democratic-norms>

2 <https://ukconstitutionallaw.org/2022/01/26/chris-monaghan-party-gate-as-a-ground-for-impeachment-perhaps-but-we-need-to-modernise-impeachment-before-it-is-fit-for-purpose/>

3 See <https://policyexchange.org.uk/wp-content/uploads/2018/10/JPP-submission-to-the-JCHR-inquiry-18-September-2018.pdf>.

4 Reported in *The Times*, 22 October 2009

5 Available at: <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>.

6 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040525/ihrar-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf). See also <https://researchbriefings.files.parliament.uk/documents/CBP-9406/CBP-9406.pdf>

7 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/970797/IRAL-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf)

8 For example see A Horne, 'Has the UK Supreme Court reformed itself?', *Prospect*, 5 August 2021, available at: <https://www.prospectmagazine.co.uk/politics/supreme-court-lord-reed-reforming-itself-child-benefit-cap-law>.

9 C Monaghan, 'The Court of Appeal ... Appears to Have Overlooked the Limitations to its Competence, Both Institutional and Constitutional, to Decide Questions of National Security': Shamima Begum, the Supreme Court and the Relationship Between the Judiciary and the Executive' (2021) 26(2) *Judicial Review* 134.



# Uruguay

Eduardo G. Esteva Gallicchio

General Director Uruguayan Center for Documentation and Constitutional Studies; Researcher of the Uruguayan National System of Researchers (Level I) and Former Professor of Constitutional Law University of Montevideo and Catholic University of Uruguay.

## I. INTRODUCTION

In Uruguay, the year 2021 was marked by the beginning of the transition from the “new normality”<sup>1</sup> caused by the Covid-19 pandemic to the gradual reestablishment of normality before March 2020, which was verified in issues such as freedom of assembly and migration.

The main topic of constitutional interest of the year was the announcement by the federation of labor unions called PIT-CNT (Plenario Intersindical de Trabajadores / Convención Nacional de Trabajadores) and by the main opposition political party (Frente Amplio), of the resource, using a referendum, that is, an institute of government or direct democracy, against Act 19.889 2020<sup>2</sup> known as Act of Urgent Consideration (“Ley de Urgente Consideración” or “LUC” for its acronym in Spanish).

This Act, which was the main proposal in legislative matters formulated during the electoral campaign for the 2019 general elections by the elected President of the Republic Luis Lacalle Pou, who assumed on March 1, 2020, was projected and elaborated according to the procedure of urgent consideration, following the provisions of the constitutional reform that came into force in February 1967 (art. 168, ord. 7°, inc. 2°).

Act 19889 was voted by the legislators who are members of the five-party Republican Coalition (Coalición Republicana), but some articles were also voted on by legislators from the Opposition Coalition (Frente Amplio).

The interested parties had a period of one year from the promulgation of the LUC, until July 8, 2021, the day on which the signatures obtained were presented.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The greatest constitutional development referred to the opposition to the “LUC”.

The Electoral Court, the body constitutionally competent to exercise Electoral Justice and to decide, in addition to elections, referendum acts, according to Article 322-C)<sup>3</sup> of the Constitution of the Oriental Republic of Uruguay (hereinafter CROU), verified that the signatures submitted exceeded the percentage required by Article 79, paragraph 2<sup>4</sup> of the CROU, 25% of the total number of registered voters enabled for the vote (natural and legal citizens are counted, but also foreign non-citizen enabled to vote<sup>5</sup>). The Electoral Court proclaimed it on December 8, 2021.

The act of referendum will be held on March 27, 2022, ruled by Circular 112536 of the Electoral Court on December 10, 2021.

On that occasion, with secret and obligatory voting, voters may vote YES (pink ballot) or NO (light blue ballot). Null votes will not be counted; blank votes will count as NO.

A YES vote will mean that the appeal is accepted; a NO vote will mean that the appeal is not accepted.

The decision will be made by the majority of the valid votes cast.

Of the 476 articles that compose the “LUC”, 135 were effectively challenged<sup>7</sup>.

### III. CONSTITUTIONAL CASES

*Definitive judgment, March 16, 2021, 53/2021<sup>8</sup>. IUE 2-8737/2020 –“LUC” – Exception of formal unconstitutionality*

In this case, judged by the Supreme Court of Uruguay (hereinafter, SCJ) the defense of the accused challenged two articles of the “LUC”, and invoked as grounds of formal unconstitutionality, that it would have violated the provisions of the CROU, for not being urgent the points included therein; for not having motivated it; for its character of “law bus” (“Ley Ómnibus”, because the number of dispositions, 476 articles) and for containing, in reality, several laws.

The Constitutional reform of 1967 incorporated into the constitutional text the possibility for the Executive Power, simultaneously with the sending of a bill to the Legislative Power, to declare it of urgent consideration. The processing of the bill, in such a case, is governed by the eight rules established by article 168, ordinal 7<sup>th</sup> of the CROU.

In Uruguay, the SCJ is the only competent body to rule on the constitutionality or unconstitutionality of laws<sup>9</sup>

In the judgment 53/2021, the SCJ unanimously<sup>10</sup> resolved to reject the request, affirming in the opinion:

On the one hand, the CROU does not condition the declaration of a bill as of urgent consideration to the Executive Branch to motivate or accredit the urgency of the projected legal norm; with nuances in the argumentation of Justice Bernadette Minvielle Sánchez, who held that it is not discretionary of the Executive Branch.

On the other hand, the CROU does not condition the approval of bills declared of urgent consideration to be of the same subject matter, with the nuance added by the same judge, that if the bill refers to different subjects, there must be a connection between the subjects.

The decision of the SCJ did not specifically analyze that the petition for a declaration of unconstitutionality is based on the conception of “substantive democracy”, which is in vogue according to some doctrines, seeking to overcome democracy in its traditional conception, based on majorities.

The decisions of the SCJ have, in Uruguay, effect exclusively on the case concrete

(caso concreto); not effect erga omnes. The SCJ reiterated<sup>11</sup> the denial of unconstitutionality on formal grounds of the “LUC” by judgments 244/2021, of July 20, 2021, and 419/2021, of 30-IX-2021. Is a kind of settled law in the Uruguayan sense; not properly *stare decisis*.

In the cases decided, the causes of material unconstitutionality invoked by the interested parties were rejected.

*Definitive judgment of April 27, 2021, 75/2021<sup>12</sup>, IUE: 2-48200/2020 Exception of material unconstitutionality - Amparo action - Access to High-Cost Medicines and Treatments*

In the case, in one Amparo proceeding in which high-cost treatment (Transcatheter Aortic Valve Implantation [TAVI]) were claimed, the defense requested the declaration of unconstitutionality of the legal provisions that, in its concept, limit access for reasons of insufficient budgetary resources of the State, among others.

The focus of the debate was on the interpretation of article 44<sup>13</sup> of the CROU, especially paragraph 2: “All inhabitants must take care of their health, as well as to assist themselves in case of illness. The State shall provide the means of prevention and assistance free of charge only to those who are indigent or lack sufficient resources”.

The decision was issued by a majority of 3 to 2 and is of particular interest for two reasons: One for the solution it adopts in matters of constitutional interpretation. The majority<sup>14</sup> of the five justices were in line with the new constitutionalism conception: the right to health as an absolute right that cannot be limited by law. The minority<sup>15</sup> followed on limitations to the rights, the orientation of classic and modern Uruguayan constitutional doctrine.

Another because the majority adopts a position on the complex issue of the influence of the 21st Century Constitutional Judge in the decision on the availability of budgetary resources before the political, Legislative, and Executive Powers, and the minority is situated in the appreciation within the framework of reasonableness and natural proportionality of the separation of powers.

The majority decision of sentence 75/2021, was reiterated<sup>16</sup> during the year 2021, in a

dozen of opportunities, notwithstanding the cessation on October 27, 2021, due to Judge Luis Tosi Boeri’s seventieth birthday.

### IV. LOOKING AHEAD

In the referendum act of March 27, the Electoral Body will decide whether or not to revoke the “LUC”. If the result is affirmative, it will generate the debate on whether the effect of the decision is *ex nunc* or *ex tunc*.

Given the vacancy of Justice Tosi Boeri in the Supreme Court, according to Article 23617 of the Constitution, the General Assembly of the Legislative Power may expressly designate his replacement by a two-thirds vote of the total of its members within ninety days of the vacancy, which will expire on January 25. In case there is no agreement on a candidate, the oldest member of the Courts of Appeals, who on January 26, 2022, would be Doris Morales Martínez, shall be automatically invested. In such a case, out of five Justices of the SCJ, three will be women.

### V. FURTHER READING

Augusto Durán Martínez et al, ‘¿Hacia una nueva Administración?’, *Estudios de Derecho Administrativo*, 22 (2020)

Augusto Durán Martínez et al, ‘Derecho Administrativo: La emergencia y lo permanente’, *Estudios de Derecho Administrativo*, 23 (2021)

Claudia Arriaga Villamil et al, *Revista de Derecho Constitucional*, 1, (2021)

Eduardo Esteva Gallicchio, ‘El modelo uruguayo ante la pandemia’, in Nuria González Martín (ed) *Covid-19 y su circunstancia. Una visión jurídica plural de la pandemia*, vol V, *Reflexiones comparadas*, IIJ-UNAM, 33, <https://archivos.juridicas.unam.mx/www/bjv/libros/14/6570/6.pdf> accessed 25 February 2022

- 1 See Eduardo Esteva Gallicchio, 'Uruguay', in Diego Valadés and Nuria González (eds), *Emergencia sanitaria por COVID-19-Derecho Constitucional Comparado*, <https://archivos.juridicas.unam.mx/www/bjv/libros/13/6195/3a.pdf> (2020) (accessed February 25, 2022).
- 2 See Act 19.889, July 9, 2020, available at <https://www.impo.com.uy/bases/leyes/19889-2020> (accessed February 25, 2022).
- 3 See CROU article 322-C), available at <https://www.impo.com.uy/bases/constitucion/1967-1967> (accessed February 25, 2022).
- 4 See CROU article 79, second sentence, available idem.
- 5 See CROU article 78, available idem.
- 6 Available at [https://www.google.com/search?q=corte+electoral+circular+11253&rlz=1C1JZAP\\_esUY899UY899&oq=corte+electoral+circular+11253&aqs=chrome..69i57j0i546l2.22015j0j15&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=corte+electoral+circular+11253&rlz=1C1JZAP_esUY899UY899&oq=corte+electoral+circular+11253&aqs=chrome..69i57j0i546l2.22015j0j15&sourceid=chrome&ie=UTF-8) (accessed February 25, 2022).
- 7 See Corte Electoral, decision spread by Circular 11250, available at [https://www.google.com/search?q=uruguay+circular+11250+corte+electoral&rlz=1C1JZAP\\_esUY899UY899&ei=7soaYpORLqPe1sQPuP6b0Ak&ved=0ahUKEwiTwwlaY1Z72AhUjr5UCHTj\\_BpoQ4dUDCA4&oq=uruguay+circular+11250+corte+electoral&gs\\_lcp=C-gdnd3Mtd2l6EAXKBAhBGABKBAhGGABQAF-gAYABoAHAAeACAAQCIAQCSAQCYAQA&sclient=gws-wiz](https://www.google.com/search?q=uruguay+circular+11250+corte+electoral&rlz=1C1JZAP_esUY899UY899&ei=7soaYpORLqPe1sQPuP6b0Ak&ved=0ahUKEwiTwwlaY1Z72AhUjr5UCHTj_BpoQ4dUDCA4&oq=uruguay+circular+11250+corte+electoral&gs_lcp=C-gdnd3Mtd2l6EAXKBAhBGABKBAhGGABQAF-gAYABoAHAAeACAAQCIAQCSAQCYAQA&sclient=gws-wiz) (accessed 25 February 2022).
- 8 SCJ, definitive judgment N° 53/2021, available at <http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSelectiva.seam?cid=508536> (accessed 25 February 2022).
- 9 See CROU, article 159, available idem.
- 10 Gregorio Fregoli Sosa Aguirre (Chief Justice - February 1 2021 / January 31 2022), Elena Martínez Rosso, Bernadette Josefina Minvielle Sánchez, Luis Domingo Tosi Boeri (Redactor) y John Pérez Brignani, Justices.
- 11 See Act General Civil Process Code 15982, 1988, article 519, available at <https://www.impo.com.uy/bases/codigo-general-proceso/15982-1988> (accessed 25 February 2022).
- 12 SCJ, definitive judgment N° 75/2021, available at <http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSelectiva.seam?cid=508536> (accessed 25 February 2022).
- 13 See article 44, available at <https://www.impo.com.uy/bases/constitucion/1967-1967> (accessed 25 February 2022).
- 14 Gregorio Fregoli Sosa Aguirre (Chief Justice - February 1, 2021, / January 31, 2022), Luis Domingo Tosi Boeri and John Pérez Brignani (Redactor), Justices.
- 15 Elena Martínez Rosso and Bernadette Josefina Minvielle Sánchez, Justices discords.
- 16 See Act General Civil Process Code 15982, 1988, article 519, cit.
- 17 See CROU article 236, available idem.



# Uzbekistan

Rustam Atadjanov  
Assistant Professor of Public and International Law  
KIMEP University School of Law

## I. INTRODUCTION

The year 2021 turned out to be a very important year for Uzbekistan from the point of view of constitutional law and practice. It was not because of the fact that 2021 marked the 29<sup>th</sup> anniversary of the adoption of the Constitution. It was due to the adoption of the new Constitutional Law “On Constitutional Court” that expanded the key authority of the Court and for the first time in the history of independent Uzbekistan made it possible to speak of an establishment of what is known as constitutional justice proper. One could say that the acting State programs and ongoing reforms in the sphere of constitutional life previously announced by the current leadership of the country have been at least partially implemented.

Two events need to be described in terms of constitutional developments in 2021. The first one is the expansion of subjects with the right to apply to the Constitutional Court which now includes private citizens and legal persons. The second is the judicial system reform implemented by way of introducing a corresponding amendment to the Constitution. It is also worth mentioning that the practice of the Constitutional Court has understandably hugely increased, now involving thousands of individual complaints and petitions about the alleged violations of constitutional rights.

This contribution discusses these developments in the country as well as the work done by the Constitutional Court in 2021. It provides an overview of the nature of the constitutional amendment on the new judicial sys-

tem and reviews the implications from adding new entities and individuals authorized to ask the Court to scrutinize the constitutionality of the laws. The article expresses the hope that the concept of constitutional justice has received a new impetus in Uzbekistan due to these changes and also briefly talks about the possible immediate future prospects.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

It appears that judging by the developments in the constitutional life of Uzbekistan during 2021 at least part of the announced legal, political, and economic reforms including those in the constitutional and judicial sphere led by the President of the country have definitely been realized or started to be realized. More precisely, those reforms formulated in such programs as the State Program on Implementation of the Strategy of Action on the Five Priority Directions of Development of the Republic of Uzbekistan in 2017-2021, as well as the National Strategy of the Republic of Uzbekistan on Human Rights included points on simplification of the procedure for applying to the Constitutional Court to review the constitutionality of a law, expanding the circle of subjects authorized to apply to the Court with their complaints, and systemic changes in the judicial system. The authorities seem to have moved from mere observations on dormant constitutional justice system in the country, meaning the Court has not been known for its active legislation-related and scrutiny-involving work, towards the actual mending of the situation in this regard.

The first point to note here is the adoption of the new Constitutional Law of the Republic of Uzbekistan “On Constitutional Court” in March 2021 that was signed by the President subsequently in April 2021. Article 4 of the new Law stipulates that “the Constitutional Court also considers complaints from citizens and legal entities whose constitutional rights and freedoms, in their opinion, have been violated by the law applied in a particular case, which is inconsistent with the Constitution of the Republic of Uzbekistan.”<sup>1</sup> This provision is further concretized in article 27 of the same Law which provides that “citizens and legal entities have the right to apply to the Constitutional Court with a complaint about the review of the constitutionality of the law, if the law, in their opinion, violates their constitutional rights and freedoms, does not comply with the Constitution of the Republic of Uzbekistan and has been applied in a specific case, the consideration of which in court has been completed and all other means of judicial protection have been exhausted.”<sup>2</sup> Besides the private individuals and legal persons and in addition to the usual actors, the list of the subjects entitled to submit issues to the Constitutional Court to review the compliance of laws with the Constitution now also includes the following ones: Deputy Commissioner of the Oliy Majlis of the Republic of Uzbekistan for Human Rights (Ombudsman) – Commissioner for Children’s Rights, the Accounting Chamber of the Republic of Uzbekistan (instead of its Chairman only as it had previously been the case), the National Center of the Republic of Uzbekistan for Human Rights, and the Commissioner for the Protection of the Rights and Legitimate Interests of Business Entities under the President of the Republic of Uzbekistan.<sup>3</sup> Interestingly, judges (in the form of a group of no less than three individuals) can no longer petition the Court.

Moreover, the new Law introduces detailed norms regulating the procedural aspects of judicial proceedings at the Constitutional Court, such as the procedure for filing a case, the judicial proceedings *per se* and terms of execution of court decisions. Its articles 29-39 establish the requirements for applying to the Constitutional Court, explain what documents need to be attached to the appeal, deals

with issues of registration of the appeals, clarify the procedure for considering individual appeals, and regulate the organizational form of constitutional proceedings, etc.

The second matter that needs to be mentioned here is the introduction of an important amendment to the Constitution itself regarding the judicial system of Uzbekistan. It was done by way of adopting a Law “On Introducing Amendments to the Constitution of the Republic of Uzbekistan” adopted in February 2021.<sup>4</sup> Aside from technical and terminology related additions (e.g., “legislation” replaced by “laws” and “legislative acts”), the Law reformulated the first part of article 107 of the Constitution. According to this modification, the Supreme Khozyaystvennyi (i.e., “economic” in pro-soviet terminology) Court is removed from the system of courts while new types of courts – economic proper (regional, city, inter-district and district courts) as well as administrative courts (city and inter-district courts), have now been established. Allegedly, this amendment, along with improving the management of the judicial system, will help in achieving organizational, financial, and logistical support for regional and equivalent courts, and will make it possible to prevent citizens from going from court to court and solve their problems in a speedier manner.<sup>5</sup>

### III. CONSTITUTIONAL CASES

Although it is difficult to fully ascertain the exact number of the decisions and resolutions of the Constitutional Court during the reported year (due to the unavailability of a big part of its acts and documents for the general public), there are at least four acts issued in 2021 by the Court that can be briefly noted here. This is excluding the decisions of the Court on individual complaints: their number, according to the Court’s website in English, at the time of drafting this contribution, has reached 2383, with the total amount of applications filed amounting to 4773 complaints; 2390 individual cases are being considered at the moment.<sup>6</sup> What follows is a brief account of the three “general” resolutions and one individual decision of the Constitutional Court.

1. Resolution #2 of 30 April 2021: Program of measures to be carried out by the Constitutional Court in connection with the adoption of the new Constitutional Law “On the Constitutional Court of the Republic of Uzbekistan”<sup>7</sup>

Noting that the adoption of the new Constitutional Law opened a new era in the activities of the Constitutional Court of the Republic of Uzbekistan and that the experience in the field of constitutional proceedings shows that the introduction of the institute of appeal of citizens and legal entities to the Constitutional Court is an important mechanism for the effective protection of human rights and freedoms, the Court decided to approve the program of measures to be taken by the Constitutional Court in connection with the adoption of the Constitutional Law “On the Constitutional Court of the Republic of Uzbekistan” formulated and included in the Annex to this same Resolution.<sup>8</sup> Furthermore, the Court decided to make Mr. A. Rakhimov, Head of the Apparatus of the Court, and Ms. Said-Gaziyeva, Senior Expert, responsible for developing, together with the Ministry of Justice, and submitting for approval a draft Plan and Schedule for conducting a wide dissemination campaign to inform the public about the content and significance of the new Law.

2. Resolution #3 of 30 April 2021: Regarding the Regulations “On the Order of Granting the First Qualification Level to the Judge of the Constitutional Court”

A very technical decision of the Court, it simply – and in general unclear terms, states that the Regulations “On the Order of Granting the First Qualification Level to the Judge of the Constitutional Court” shall be approved in accordance with the Annex. There is no publicized version of that Annex and it is not clear whether these Regulations deal with granting the qualification level to a judge. Apparently, there is a strong need for the Court to work on the improvement of public access to its practice, be it a case-law constitutional review or scrutiny of alleged individual constitutional rights violations, and its official documentation.

### 3. Resolution #4 of 30 April 2021: Regarding granting the Deputy Chair of the Court, Mr. Gafurov, and judge of the Court, Ms. Koshaeva, the first qualification level

Another technical decision on the similar issue just as the Resolution #3 above, this time about granting the first qualification level to two concrete individuals: the Deputy Chair and a Judge of the Court. The Court cites the two legal sources as the basis for its decision: the first is article 10 of the Constitutional Law on Constitutional Court, and the second is, again, the Regulations “On the Order of Granting the First Qualification Level to the Judge of the Constitutional Court”.

### 4. Decision of 2 July 2021: Case on determining the compliance of paragraphs 43 and 47 of the Regulations “On the Procedure for Paying Compensation to Owners of Real Estate Located on a Land Plot” with the Constitution of the Republic of Uzbekistan<sup>9</sup>

This particular decision of the Court is of special significance as it appears to represent the first-ever big and meticulously written case made publically open and accessible after the expansion of the Court’s mandate to include individual petitions for constitutional review. According to the text of the Decision, the parties to this case included the Commissioner of the Oliy Majlis of the Republic of Uzbekistan for Human Rights (Ombudsman) F. Eshmatova, representatives of the Cabinet of Ministers of the Republic of Uzbekistan – Deputy Minister of Justice A. Tashkulov and Deputy Head of the Secretariat of the Cabinet of Ministers Zh. Achilov, Director of the Institute for Problems of Legislation and Parliamentary Studies under the Oliy Majlis of the Republic of Uzbekistan and Member of the Scientific Advisory Board under the Constitutional Court F. Otakhanov, Judge of the Supreme Court of the Republic of Uzbekistan, Member of the Scientific Advisory Board under the Constitutional Court I. Tajiev, and representative of the National Center for Human Rights of the Republic of Uzbekistan O. Sulaimonov. The Court was acting at the request of the Commissioner of the Oliy Majlis of the Republic of Uzbekistan for Human Rights (Ombuds-

man) to determine the constitutionality of paragraphs 43 and 47 of the Regulations “On the Procedure for Paying Compensation to Owners of Real Estate Located on a Land Plot” approved by the Decree #911 of the Cabinet of Ministers of the Republic of Uzbekistan of 16 November 2019 “On Additional Measures to Ensure Guarantees of Property Rights of Individuals and Legal Entities and to Improve the Procedure for Withdrawal and Compensation of Land Plots”. The Decision mentions that the case was considered in an open public session.

The Court noted that according to paragraph 43 of the Regulations, when land plots are withdrawn for state and public needs, compensation is provided by the Council of Ministers of the Republic of Karakalpakstan, Tashkent city, regional or district / city khokimiyats (municipalities) at the expense of appropriate centralized funds and other sources not prohibited by law. When land plots are withdrawn for the implementation of investment projects, compensation is provided at the expense of the investor’s funds and other sources not prohibited by law. Also, in accordance with paragraph 47 of the Regulations, if there is a written consent of 75% of the owners of real estate located on a land plot subject to confiscation (at the conclusion of the Agreement), but the consent of the remaining owners cannot be reached (failure to reach an agreement), the initiator of the claim has the right to appeal. In this case, the amount, types and timing of payment of compensation to dissenting owners will be determined in court.<sup>10</sup>

The Court further highlighted that in accordance with Article 53 of the Constitution of the Republic of Uzbekistan, the owner may be deprived of his property only in cases and in the manner prescribed by law while Article 54 of the Constitution establishes that the owner owns, uses and disposes of property at his own discretion (right to property).<sup>11</sup> The Court then proceeded to analyzing the relevant provisions of the Regulations as well as the pertaining legislation such as the articles of the Land Code, the Urban Code, the Housing Code, the Civil Code, and the Presidential Decree “On Additional Measures to Ensure the Unconditional Provision

of Property Rights of Citizens and Business Entities”. The Court found that in accordance with disputed paragraph 47 of the Regulations in question, the initiator of the claim has the right to appeal if he or she obtains a written consent of 75% of the owners of immovable property located on the confiscated land plot (at the conclusion of the Agreement), but the consent of the remaining owners is impossible (failure to reach an agreement). In this case, the amount, types and timing of payment of compensation to dissenting (not reaching an agreement) owners will be determined in court. However, as the Court stated, the concept of “applying to the court with a claim for forced purchase”, used in paragraph 47 of the Regulations, is not defined in the legislation of the Republic of Uzbekistan. The initiator has the right to apply to the court only with a request to determine in court the amount, types and period of compensation payable to the owner.

Based on its foregoing (and rather detailed) analysis, the Constitutional Court decided that: first, paragraphs 43 and 47 of the disputed Regulations “On the Procedure for Paying Compensation to Owners of Real Estate Located on a Land Plot” shall be considered as constitutional; second, the Ministry of Justice of the Republic of Uzbekistan shall prepare a draft law “On Procedures for the Withdrawal of Land for Public Use in Exchange for Compensation” and shall submit it for public discussion; third, the Cabinet of Ministers of the Republic of Uzbekistan shall revise certain concepts used in the disputed Regulations “On the Procedure for Paying Compensation to Owners of Real Estate Located on a Land Plot”; fourth, the Cabinet of Ministers shall introduce a draft Law to amend article 27 of the Housing Code of the Republic of Uzbekistan, which stipulates that the market value of the right to the land plot is less than the market value of the right to the compensated land plot, and introduce it for the consideration of the Legislative Chamber of the Oliy Majlis [i.e., Parliament] of the Republic of Uzbekistan; fifth, to recommend to the Supreme Court of the Republic of Uzbekistan to adopt a plenary decision providing for the relevant explanations and clarifications for the Uzbekistani courts re-

garding the jurisprudence on the settlement of disputes related to the seizure of land for state and public needs; sixth, to recommend to the Council of Ministers of the Republic of Karakalpakstan, the Khokimiyats of the city of Tashkent, regions, districts / cities to ensure strict compliance with the provisions of the legislation governing the provision of guarantees of property rights of individuals and legal entities as well as the provisions of the Regulations “On the Procedure for Paying Compensation to Owners of Real Estate Located on a Land Plot”; seventh, to publish this Decision in the “Collection of Legislation of the Republic of Uzbekistan”, the National Database of Legislation of the Republic of Uzbekistan and the official website of the Constitutional Court; eighth and last, this Decision is final, it cannot be appealed and will take effect from the date of its official publication.

While not always being clear or fully explicit in its decision, the Constitutional Court displayed its potential and capacity for a much better and more efficient tackling of the constitutional issues under its mandate than it had been the case before for almost thirty years since Uzbekistan gained its independence. Its comprehensive but also meticulous review of a specific legal question clearly provides a glimpse of hope for the new emerging system of constitutional justice in Uzbekistan made possible by the recent reforms. It goes without saying that a lot of work lies ahead for this system if it is to fully achieve the projected aims of those reforms.

## IV. LOOKING AHEAD

There are definitely real prospects for the constitutional legal system of Uzbekistan to improve and occupy a more prominent place in the judicial power and practice, judging by the pace of the announced reforms. Moreover, at the end of 2021, the Head of State announced that changes would be introduced to the Constitution in 2022.<sup>12</sup> Those changes would include, *inter alia*: introduction of the principle “the individual – the society – the State”, priority of individual interests of the people, constitutional consolidation of the role and status of civil society institutions, enshrining

the principle of “New Uzbekistan – a social state” as a constitutional norm, amendments concerning ecological and educational issues, and so on. The next year will show just how exactly the proposed changes would look like.

## V. FURTHER READING

R. Atadjanov, “Building the State of Law (Rechtsstaat) in the Countries of Central Asia: An Unachievable Dream or Realistic Objective?” (2021) 3 (92) *Pravo i gosudarstvo* 52 [Law and State, in English]

I. Tretyak, “The Main Provisions of the Constitutional Conflictology Theory and Its Practical Significance” (2021) 3 (92) *Pravo i gosudarstvo* 71 [Law and State, in Russian]

Online Edition “Gazeta.uz”, “Akmal Saidov – On the Necessity of Constitutional Reform” (2021), Afisha Media LLC [in Russian]

1 Article 4, part 2. A full text of the Constitutional Law in Russian is available at the following link: <https://lex.uz/ru/docs/5391999> .

2 *Ibid.*, article 27, part 2.

3 Previously, only the following actors were entitled to submit issues for the consideration of the Constitutional Court, in accordance with the old Law “On Constitutional Court of the Republic of Uzbekistan” of May 2017: the Chambers of the Oliy Majlis (i.e., Parliament) of the Republic of Uzbekistan; the President of the Republic of Uzbekistan; Cabinet of Ministers of the Republic of Uzbekistan; Commissioner for Human Rights of the Oliy Majlis of the Republic of Uzbekistan (Ombudsman); Jokargy Kenes (Supreme Council) of the Republic of Karakalpakstan; group of deputies - at least one fourth of the total number of deputies of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan; a group of senators - at least one fourth of the total number of members of the Senate of the Oliy Majlis of the Republic of Uzbekistan; Supreme Court of the Republic of Uzbekistan; General Prosecutor of the Republic of Uzbekistan; and Chairman of the Accounting Chamber of the Republic of Uzbekistan. Judges could also submit an application but only as a group of no less than three persons.

4 Full text in Russian is available at <https://lex.uz/docs/5272649> .

5 See the Senate’s remarks on this at the following link: <https://www.gazeta.uz/ru/2021/01/06/constitution/> .

6 All figures are available at <https://www.konstsud.uz/en> . These cases’ texts are not publically accessible.

7 The full text of the Constitutional Court’s Resolution is available only in Uzbek at the following link to its website: <https://www.konstsud.uz/ru/docs/konstitutsiyaviy-sudi-qarorlari> .

8 Unfortunately, the text of the Annex itself has not been made publically available by the Court.

9 Full text of the Decision in Uzbek is available at <http://www.konstsud.uz/ru/docs/konstitutsiyaviy-sudi-qarorlari> .

10 *Ibid.*, at p. 2.

11 Full text of the Constitution in Russian is available at <https://lex.uz/docs/35869> .

12 “The Constitution to be Updated in 2022” published on 27 December 2021 in “Gazeta.uz”, available in Russian at the following link: <https://www.gazeta.uz/ru/2021/12/07/constitution/> .



# Venezuela

Carlos García-Soto  
Professor  
Universidad Monteávila Law School  
Caracas, Venezuela  
cgarcia@uma.edu.ve

Daniela Urosa Maggi  
Adjunct Faculty  
Boston College Law School  
Newton, Massachusetts  
International Allied Professor  
Universidad Católica Andrés Bello  
Caracas, Venezuela  
urosa@bc.edu

Raúl A. Sánchez Urribarrí  
Senior Lecturer in Crime, Justice and Legal Studies  
Department of Social Inquiry  
La Trobe University  
Melbourne, Australia  
r.sanchezu@latrobe.edu.au

## I. INTRODUCTION

In 2021 Venezuela's deep political and governance crisis continued without a suitable constitutional and political solution. On the contrary, it could be said the situation worsened in some respects, given the Maduro's *de facto* consolidation of power and his ability to retain control of the state apparatus, despite a complex humanitarian emergency that drove about six million Venezuelans forced displaced and refugees (the second current worst migrant crisis in the world, behind the Syrian migrant crisis). Moreover, despite a decrease of inflation and reports of rising economic growth, the country remains facing sanctions from the U.S. and dozens of countries whilst refusing to engage in meaningful efforts to facilitate the return to democratic constitutional government and a commitment to the 1999 Constitution and the rule of law.

As we have explained in previous reports, the origin of the ongoing crisis was Nicolás

Maduro's insistence on keeping power for a second term following the 2018 illegal and unfair presidential election. In January 2019, the President of the Parliament (National Assembly), Juan Guaidó, assumed the country's interim presidency based on article 233 of the Venezuelan 1999 Constitution. Both presidencies – Maduro as *de facto* President with internal control of the country and its state institutions, and Guaidó as *de iure* President, with the recognition of dozens of countries but without effective control of Venezuela's institutions – remain in 2021. There are also, in Venezuela, two parallel Parliaments: After the parliamentary elections in 2020 – which the opposition and international allies denounced as fraudulent due to the persistent lack of guarantees to hold free and fair elections – a majority of opposition members in control of the National Assembly elected in 2015 voted to extend their term and claim to continue representing the institution. Thus, in practice and for a second year, Venezuela now has two institutions claiming to represent Venezuelans and seeking to use their

prerogatives. None of them enjoys uniform international recognition – although the ‘officialista’ legislature controlled by Maduro’s United Socialist Party (PSUV) has begun to exercise the Parliament’s prerogatives, which the rest of the Maduro regime recognizes as legitimate. Additionally, the 2017 Constituent Assembly created by the Maduro regime has been shut down following Maduro’s success in the legislative election.

Hence, unfortunately 2021 was, once again, a failed opportunity to give an electoral solution to the Venezuelan political and governance crisis. The 2020 pro-Maduro Parliament appointed new directors of the National Electoral Council (CNE), and regional and local elections took place in November 2021 with the remarkable participation of the Electoral Observation Mission of the European Union and the Carter Center electoral experts’ delegation. This should not be read as a recognition of the democratic qualities of the regime or as formal recognition of Nicolas Maduro as president. Additionally, many irregularities occurred during the election process, confirming the lack of electoral integrity conditions in Venezuela as both election observation missions expressed.

On the other hand, the human rights situation in Venezuela has reached a critical moment. In November 2021, the Prosecutor of the International Criminal Court (ICC), Karim Khan, opened an investigation for crimes against humanity in Venezuela after more than three years of preliminary investigation. Also, in September 2021, the independent international fact-finding mission on the Bolivarian Republic of Venezuela of the Human Rights Council UN published a report highlighting serious concerns for the lack of judicial independence in the country and the impunity for human rights violations and crimes committed in the country<sup>1</sup>. In the same month, the United Nations High Commissioner for Human Rights Geneva reported severe human rights violations in Venezuela<sup>2</sup>. All of these reports help to raise awareness about past and ongoing incidents and patterns of human rights violations and help counter the Maduro regime’s efforts to consolidate their rule and sideline democracy incurring minimal reputation

costs. They also reflect the sustained effort of many people in, and outside Venezuela striving to document and denounce these violations, hoping for a time when perpetrators can be held to account.

This report offers a survey of these developments, including the constitutional dimension of the crisis, and a short summary of Venezuela’s investigation at the ICC. It also discusses key decisions issued by the Venezuelan Supreme Tribunal in the past year – especially the Constitutional Chamber – as part of the country’s turn towards autocracy. Like in our past reports, these developments serve to illustrate the country’s constitutional transformations in its path to become a consolidated authoritarian regime.

## II. VENEZUELA AT THE INTERNATIONAL CRIMINAL COURT

We start by highlighting this remarkable news in terms of International Criminal Law, International Human Rights Law, and constitutional democracy in Venezuela. On November 3, 2021, the Prosecutor of the International Criminal Court (ICC), Karim Khan, announced he would open an investigation for crimes against humanity in Venezuela after more than three years of preliminary investigation.<sup>3</sup> This is the first time that an investigation has been initiated under the Rome Statute to prosecute officials, former officials, civilians, and military personnel not only in Venezuela but also in Latin America.

This investigation for crimes against humanity in Venezuela refers to the complaint filed before the ICC in 2017 to investigate possible crimes against humanity and gross human rights violations that have occurred since April 2017, such as extrajudicial executions, murder, enforced disappearances, mass arbitrary detentions, and tortures. As a result of this claim, the ICC initiated an *ex officio* preliminary examination of Venezuela in February 2018.

As an immediate consequence of the announcement of the opening of the investigation for crimes against humanity in Ven-

ezuela, a Memorandum of Understanding was signed between the ICC Prosecutor’s Office and the Government of Nicolás Maduro, with the commitment to “collaborate independently and impartially, but with full respect for the principle of complementarity, the search for cooperation and mutual assistance” in the ongoing investigations of gross human rights violations.<sup>4</sup> According to this MOU, the Venezuelan government must carry out substantial reforms to the justice system and improve the judicial independence to investigate, under strict due process and impartiality, the reported crimes against humanity, having a potential significant effect on the restoration of the rule of law and constitutional democracy in the country.

We hope that increasing pressure on the government does lead to greater collaboration – there are reports that, at least until the investigation began, the Maduro administration had not been particularly cooperative and had actually engaged in delay tactics to prevent perpetrators from being held to account.<sup>5</sup> This is far from surprising, since the systematic violations against human rights taking place in Venezuela occur in a context of impunity directly connected to a broader ‘grand corruption’ framework, where the failures of the country’s institutions are best explained by the dynamics of kleptocracy that characterize the regime<sup>6</sup>.

## III. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. Nicolás Maduro in de facto control of the National Executive Branch

During 2021, the constitutional crisis continued. On one hand, Nicolás Maduro maintained *de facto* control over the National Executive Branch and its agencies. His continuing control had allowed him to make decisions in the most varied areas of national politics, even when the 2018 presidential election was questioned by the Venezuelan political opposition, a large number of countries, a large part of Venezuela’s civil society and academic community, and despite his persistent lack of popular support. As we ex-

plained in the past, this situation has fuelled the constitutional and institutional crisis in Venezuela. As noted above, several countries in the international community recognized Juan Guaidó as interim President of Venezuela, and several Courts abroad recognize him as the country's presidential authority.

## 2. Guaidó's Interim Presidency and the Opposition-Controlled National Assembly

On the other hand, Juan Guaidó continued to claim the role of Interim President and acting as such, based on article 233 of the Constitution, with the political support of the main political parties of the opposition, the Government of the United States, and several other countries. Whilst Guaidó has lost popularity and his leadership has been embattled due to the lack of success in accomplishing a democratic transition in Venezuela -among other factors- his claim to the presidency and the formal recognition of key Western powers and several other countries around the world remains relevant in a constitutional and political sense. For Venezuela, the normalization of social and political life and the country's economic requires the resolution of this conflict.

The legal framework for the Guaidó interim presidency also rests on legislation and decisions enacted by the opposition-controlled National Assembly, which now exists in parallel to the Maduro-regime controlled parliament. In November 2020 the Opposition-controlled National Assembly reformed some aspects of the main legislation ruling the transition, the *Statute Governing the Transition to Democracy to Re-establish the Validity of the Constitution of the Bolivarian Republic of Venezuela*, which serves as the juridical support of the Interim Government. The reform consisted, among other, in two key aspects: (i) extend for another year of the functioning of the National Assembly through the Delegate Commission and (ii) give the National Assembly additional prerogatives/ measures of control over the foreign assets under management of the interim Government.

During 2021, the Interim Presidency continued to take political and legal actions to preserve the country's foreign assets through the different public companies and entities

under control of the Interim Presidency. Additionally, Guaidó also kept putting pressure on Nicolás Maduro's regime to pursue fair and free elections, but to no avail. Regional and Municipal Elections were conducted in November 2021, counting with the presence of opposition candidates. However, despite limited improvements, the elections in question also suffered from lack of electoral integrity (See 4. Below)

## 3. The pro-Maduro Regime legislature (National Assembly) elected in 2020

On July 2nd, 2020, the National Electoral Council convoked elections of the National Assembly. The election was held between accusations of fraud on December 6th, 2020. Main opposition parties decided not to participate in the election. The results benefited broadly the PSUV, the official party.

The Maduro-Regime National Assembly unanimously approved a "National Legislative Plan", composed of thirty-five (35) projects of legislation. When the "National Legislative Plan" was approved, the President (Speaker) of the National Assembly, Jorge Rodríguez, said other drafts could be incorporated into the original legislative plan. In fact, throughout 2021 a variety of legislative projects were presented to the Parliament for formal consideration and discussion. This included laws that were approved last year, including legislation related with social programs, and the reform of Criminal Law statutes.

Another major institutional consequence is of note: After the National Assembly election on December 6th 2020, the 2017 National Constituent Assembly declared its own dissolution. After three years in functions, the National Constituent Assembly announced the end of its functioning without dictating a new Constitution and thus failing to accomplish its ostensible goal. However, it dictated several "Constitutional Laws", took several important political measures and, more importantly, served as an ultimate institutional threat with full discretion to overhaul or intervene the country's institutional structure and composition. This gave the Maduro regime a very powerful tool

during a time of crisis without being tied to the 1999 Constitution.

Finally, the election of the 2020 pro-Maduro regime National Assembly brought about another institutional consequence: Nicolás Maduro stopped relying on emergency legislation, i.e., the Decrees of Economic Emergency and Health Emergency that were adopted (and extended) from 2016 to 2020 to allow the President extraordinary powers during a time of crisis and regime instability. The last Decrees of Health Emergency and Economic Emergency were dictated in February 2021. This decision had a clear political reason: since a new National Assembly was installed with a majority of the government party, it was no longer politically necessary to sideline its legislative powers in favor of the President.

## 4. The 2021 regional and local elections and the persistent lack of electoral integrity

One of the main symptoms of Venezuela's deficient rule of law is the lack of electoral integrity conditions. This prevents an electoral solution to the political crisis and is far from being solved, as some problems with the electoral system have actually worsened in recent years.

As mentioned above, in November 2021 regional and local elections were held in Venezuela. Three major electoral reforms were introduced in the past year regarding the 2021 election process: First, the appointment of two new directors in the National Electoral Council, the country's main electoral authority. Those new directors are widely considered independent or at least not under the direct political influence of Maduro's regime. Second, the restoration of the political rights of the opposition political party "Mesa de la Unidad Democrática (Unidad)" allowing its participation in regional and local elections. Third, the Government allowed for the presence of an official Electoral Observation Mission of the European Union and a delegation of experts from the Carter Center, which were the first international electoral observation missions allowed in Venezuela in over a decade.

Those reforms certainly improved the electoral integrity perception in Venezuela,

given the higher autonomy of the electoral authority (CNE), more pluralism and political participation of the opposition party and candidates, and more transparency and accountability due to the international electoral observation. However, those changes were not enough to restore the minimum electoral integrity conditions required to guarantee free and fair elections in Venezuela. The final report of the European Union Electoral Observation Mission<sup>7</sup> and the Carter Center Preliminary report<sup>8</sup> highlighted many deficiencies in Venezuela elections, including: (i) absence of the rule of law and separation of powers; (ii) lack of independence, impartiality, and autonomy of the electoral arbitrator; (iii) lack of independence of the electoral justice system; (iv) limits of the right to political association; (v) limits of the right to political participation; (vi) lack of equal condition during the electoral campaign; (vii) limits to the right to freedom of expression; (viii) violation of the right to free vote and prohibition of voter coercion; (ix) lack of respect for electoral results, and (x) limits to the political rights of the indigenous peoples.

The lack of election conditions was reflected in the election results: despite the deep humanitarian and economic crisis and the Maduro regime lack of popular support over the last years, the Maduro regime party won twenty state governorships, while opposition parties won only three. One of these opposition victories – in the State of Barinas – was not recognized, with the Electoral Chamber of the Supreme Tribunal of Justice overruling the election and ordering a new one without proper due process. In the end, the new election led to another opposition victory, but the abuses involved in this episode were a strong reminder of the lack of electoral integrity in the country, and the long way to go to recover the rule of law in electoral oversight in Venezuela.

#### IV. CONSTITUTIONAL CASES

The Venezuelan Supreme Tribunal continues to be a bulwark of authoritarianism. Since its creation by the 1999 Venezuelan Constitution, the Constitutional Chamber of the Supreme Tribunal of Justice has tended to

support the regime's interests and, over time, fulfilled a very important role in the demise of democracy and the emergence of autocratic rule in Venezuela. As has already been pointed out in a range of scholarly works in the past few years, the Supreme Tribunal's Constitutional Chamber has used, misused, and abused its power in many matters. This year the Chamber continued to support the regime in a variety of crucial ways:

The Chamber approved the constitutionality of the Decrees confirming the constitutionality of both the economic emergency Decrees (decisions 001/2021; 018/2021) and the state of alarm Decrees (decisions 002/2021; 006/2021; 034/2021).

After the fraudulent election of the National Assembly in December 2020, the Constitutional Chamber restored the competencies of the National Assembly to this body, with the pro-regime Maduro majority elected in December 2020 (decision 001/2021). As we have explained in previous reports, the Constitutional Chamber annulled every political and legislative decision of the National Assembly elected in December 2015, controlled by the political opposition parties. This abrupt change in the Chamber's approach was obviously in response to the recovery in the control of the National Assembly by the regime ruling party.

In relation to the institutional conflict derived from the elections in the State of Barinas, the Constitutional Chamber issued a decision denying the constitutional review action filed by the opposition candidate Freddy Superlano against the decisions the Electoral Chamber had issued in this regard. This ruling of the Constitutional Chamber ended up leaving in place the irregularities that occurred in that election, pointed out above (decision 732/2021).

In other types of matters, the Constitutional Chamber decided that the Chamber cannot rule in a case that was previously decided by an arbitration tribunal (decision 151/2021). This is an interesting decision that deserves further consideration in the context of the Maduro regime's efforts to stabilize its rule and enhance its institutional legitimacy.

#### V. LOOKING AHEAD

Venezuela should be considered (and analyzed as) an authoritarian regime, given its lack of separation of powers, complete disrespect of checks and balances and overall autocratic governance logic. On one hand Maduro, as *de facto* President, keeps effective control over the Judicial Branch, the Legislative Branch, the Electoral Branch, the Citizens Branch, and the state's bureaucracy. Consequently, there is no independent judicial review system, impartial electoral arbiter, and an overall lack of transparent and rule-abiding government. The Supreme Tribunal of Justice – particularly its Constitutional Chamber – and the National Assembly elected in December 2020 remain key political instruments in charge of supporting the decisions of Maduro's authoritarian regime. Maduro also enjoys the support of the military and of fellow international authoritarian allies, and there are no signs that this will change any time soon.

However, the Maduro regime remains illegitimate to the eyes of a large number of countries, faces a variety of economic sanctions and has proven incapable of overcoming the current humanitarian crisis. Moreover, the interim Presidency of Juan Guaidó and the opposition-controlled National Assembly elected in 2015 remain important actors, especially abroad. Thus, although the Maduro regime will seek to continue consolidating its rule in 2022, the prospects of Venezuela remain uncertain.

The human rights situation is severe. The open investigation by the Prosecutor of the International Criminal Court (ICC), Karim Khan could have a significant effect on the restoration of judicial independence, human rights protection, the rule of law and constitutional democracy in the country. Just at the time of writing, the prosecutor's office of the International Criminal Court announced it would open an office in Venezuela, with the Maduro regime announcing that it would cooperate with it in the future. We will need to continue monitoring how this investigation unfolds in the coming future.

## VI. FURTHER READING

Allan R. Brewer-Carías, “Hechos políticos que fundamentan la decisión de la Asamblea Nacional electa en diciembre de 2015, de decretar su continuidad constitucional a partir del 5 de enero de 2021” [2021] *Revista de Derecho Público* 165-166

Acceso a la Justicia, 2021 Annual Report, “ICC decrees an end to the simulation of justice”, Caracas, January, 2022, <https://accesoalajusticia.org/wp-content/uploads/2022/02/Annual-report-AJ-2021.pdf>

Casal, Jesus Maria. 2021. “The Constitutional Chamber and the Erosion of Democracy in Venezuela.” *Max Planck Institute for Comparative Public Law & International Law (MPIL), Research Paper No. 2021-02*

Rosales, Antulio and Maryhen Jimenez. 2021. “Venezuela: Autocratic Consolidation and Splintered Economic Liberalization.” *Revista de Ciencia Política* 41: 425-447

Sanchez Urribarri, Raul. 2022. “Populism, Constitutional Democracy and High Courts – Lessons from the Venezuelan Case.” In *Anti-Constitutional Populism*, edited by Martin Krygier, Adam Czarnota, Wojciech Sadurski, pp. 185-219

1 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A.HRC.48.69%20EN.pdf>

2 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27444&LangID=E>

3 “Venezuela: ICC Investigation Open. Maduro Atrocities to Receive International Judicial Scrutiny” <https://www.hrw.org/news/2021/11/03/venezuela-icc-investigation-opens#>

4 *Ibid.*

5 See, for example, Cole and Avila Rincón’s short piece on the ‘Venezuelan State Mockery of Justice’ at: <https://blog.associatie.kuleuven.be/tjb/icc-venezuela-case-i-the-venezuelan-states-mockery-of-justice-part-1/>

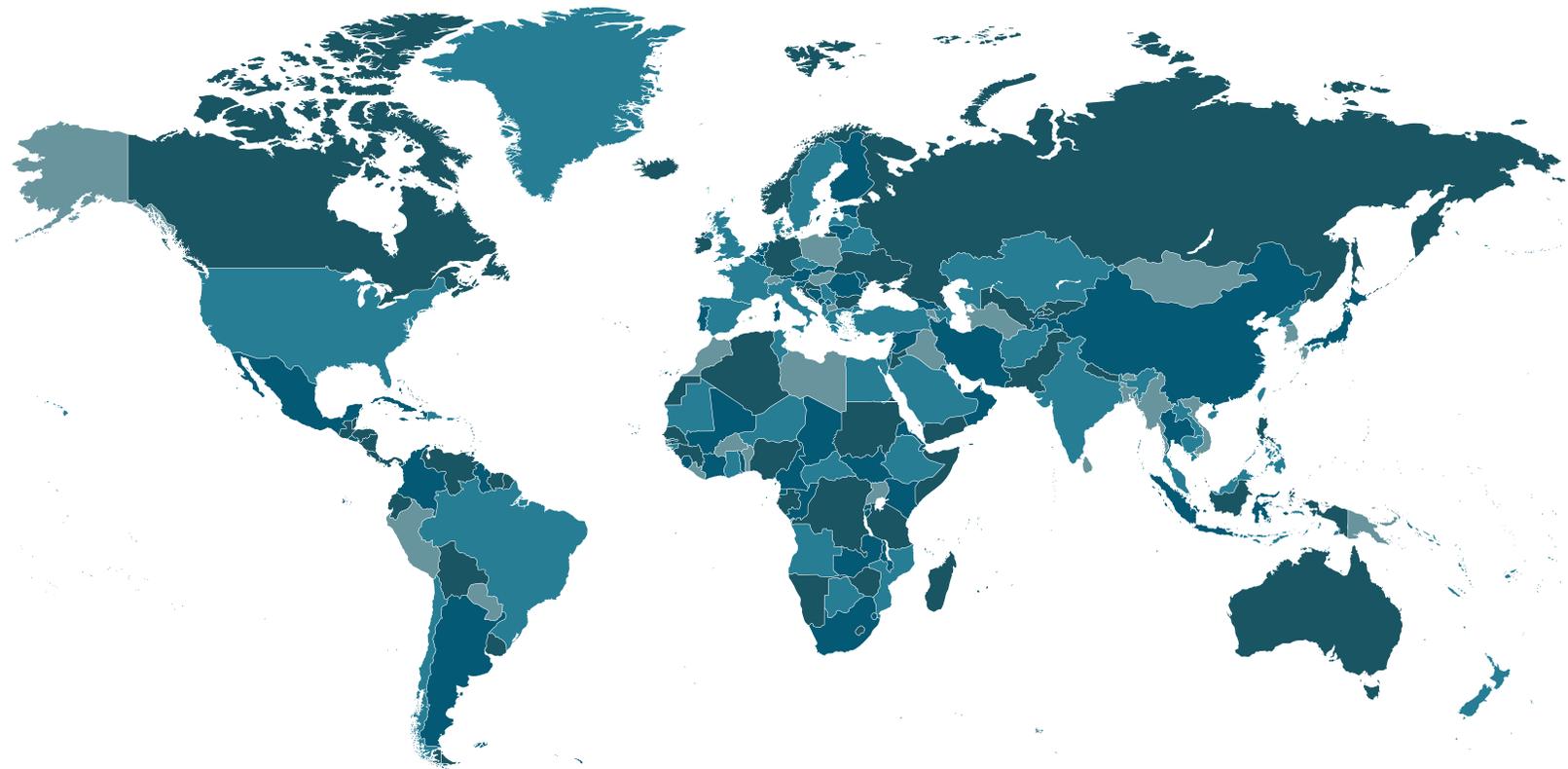
6 On this note, see Roht-Arriaza, Naomi and Santiago Martinez (2019), “Grand Corruption and the International Criminal Court in the ‘Venezuela Situation’”, *Journal of International Criminal Justice* 17(5): 1057-1082.

7 [https://eeas.europa.eu/election-observation-missions/eom-venezuela-2021/111308/informe-final-moe-ue-venezuela-2021\\_es](https://eeas.europa.eu/election-observation-missions/eom-venezuela-2021/111308/informe-final-moe-ue-venezuela-2021_es)

8 [https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/venezuela-preliminary-report-120321.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/venezuela-preliminary-report-120321.pdf)

# SUMMARY

---



## **Afghanistan**

2020 saw the Taliban inking a peace deal with the United States and holding talks with the Afghan Government for the first time. The outcomes of these talks would be vital in shaping not only conditions of peace in the country but also the future of Afghanistan's constitutionalism.

## **Albania**

The majority won the election despite corruption allegations due to the divided, untrustworthy opposition being too weak of an alternative even though the President supported it in non-conformity with his role of embodying unity and neutrality. Questions of democratic legitimation of institutions in a parliamentary system have been raised.

## **Argentina**

In 2021, the Supreme Court delivered a few decisions that seem to show an emerging trend on federalism that, if confirmed, would shift power from the federal to the provincial and municipal levels of government. The latter possibility seems—however—hindered by an apparent lack of congeniality within the Court.

## **Austria**

While the Austrian Constitutional Court decided on numerous appeals against COVID-19 measures and even requested the Federal President to execute an order not complied with by a Federal Minister, the Austrian political landscape was shaken by corruption affairs, ensuing resignations and new appointments of several members of the Federal Government.

## **Bangladesh**

For decades, Bangladesh's constitutional and accountability institutions continued to be marginalized by an assertive executive branch. The Covid-19 pandemic of 2020-21 seemed to aggravate the marginalization irredeemably. Understandably, the legislative and judicial branches of the country failed to raise critical accountability questions to the country's *de facto* authoritarian regime.

## **Belgium**

Following important debates on the relation between the Parliament and the Government in the Belgian parliamentary system, the Pandemic Act of 14 August 2021 introduced a uniform legal framework for administrative police measures in case of an 'epidemic emergency', such as the current COVID-19 pandemic.

## **Bolivia**

Even though, in 2021, Bolivia faced many health and social challenges, like the third wave of Covid-19 infections, an alarming number of cases of femicides, and sexual assaults - these problems were overshadowed by the political and judicial proceedings against people accused of the so-called 2019 coup.

## **Bosnia and Herzegovina**

Bosnia and Herzegovina experienced one of the biggest political crises since the

end of the Bosnian War in 1995. The Serb member of the Presidency intensified rhetoric on the independence of the Republic of Srpska and pushed for its withdrawal from state-level institutions.

## **Brazil**

The year was marked by the Supreme Court's resistance to Bolsonaro in three interconnected fronts: (i) his efforts against vaccination requirements and restrictive measures adopted to fight the covid-19 pandemic; (ii) the spread of disinformation; and (iii) attacks against democratic institutions, especially the Supreme Court itself and the electoral process.

## **Cabo Verde**

Year marked by two successfully organized national elections, CCCV decisions (1) on age limit to access public administration jobs; (2) obligation to comply with provisional measures granted by the Human Rights Committee and with decisions of the ECOWAS Court of Justice. No major constitutional changes noticed – liberal democracy remained stable.

## **Canada**

In a 6.3 majority decision, the Supreme Court upheld the federal 'carbon tax' pursuant to the national concern branch of Parliament's residual and unenumerated power to make laws for the peace, order, and good government of Canada.

## **Cayman Islands**

Three topics dominated the background against which constitutional developments in the Cayman Islands occurred in 2021: first, the aftermath of the 2020 constitutional reform; second, the contentious issue of equal marriage; and third, the continuing COVID-19 restrictions aimed at combating the coronavirus pandemic.

## **Chile**

Chileans elected a fragmented, left-leaning Constitutional Convention currently discussing contents of a constitutional proposal that'll be voted in a 2022 plebiscite. The Constitutional Court has continued its operations, despite the constitution-making debate likely ending in either removing the Court from the system or modifying some of its essential features.

## **Colombia**

During 2021, three major constitutional debates and political concerns were on the Constitutional Court's agenda: democracy and political rights, liberties; equality, and economic and social rights. The report discusses how constitutional case law enforcing those rights shaped the main constitutional developments during 2021 in Colombia.

## **Costa Rica**

In 2021, Costa Rica, the oldest continuous democracy in the Americas, celebrated the bicentennial of its independence. Democratic longevity has been attributed to the constitutional right to education first codified in the 1840s. The pandemic, though, reveals fissures in the current education system that could harm democratic rule.

## **Côte d'Ivoire**

Great expectations existed for the 2020 amendments of the 2016 Ivorian constitution (particularly, Conseil constitutionnel and Ivorian Constitutional Court). Implications of Alassane Ouattara's reelection for a third term (dubbed the first term of the "3rd republic") needs analysis via Ivorian socio-legal context wherein the constitution is hardly considered the fundamental norm.

## **Cuba**

The year 2021 was complex in Cuba. Massive protests were registered in various parts of the

country. This situation had constitutional repercussions, since the government response was based on restricting freedom of demonstration and other human rights. Besides, the legislative schedule continued to be implemented, which involved a procedural reform.

## Cyprus

2021 hasn't been a year of remarkable constitutional developments. Nevertheless, important decisions regarding separation of powers, right to privacy and fair trial, were delivered by the Supreme Court. The Cypriot legal order is on the verge of constitutional reform that will affect, if adopted, the judicial architecture and review of constitutionality.

## Denmark

A historical impeachment trial was the most important development, with a former Danish minister being found guilty and sentenced to two months in prison. Another former minister has essentially been charged with high treason, and a number of other political cases are ongoing.

## Dominican Republic

The global pandemic of Covid-19 hoarded the social, political, economic, and legal debates in the years of 2020-2021. The main constitutional developments in these years are circumscribed to the implementation of the State of Exception and the measures adopted by the State to avoid crowds and contagion of people.

## Ecuador

Ecuador has experienced significant political shifts with unavoidable challenges. The new government has faced, yet unsuccessfully, long-lasting structural problems, such as an economic and penitentiary crisis. The Constitutional Court continues consolidating itself as a stable and independent body through its rulings focused on developing women's and nature's rights.

## Egypt

For the first time since 2017, and among the few times in Egypt's contemporary history, the emergency status was lifted in 2021. However, the legal consequences of this procedure are questionable in the light of the application of a bundle of other exceptional laws.

## El Salvador

There were two momentous events for constitutional democracy in El Salvador: the removal of Justices of the Constitutional Chamber and the Attorney General, and the ruling issued by the newly elected Constitutional Chamber allowing the presidential reelection in El Salvador, despite the fact that this was prohibited by the Constitution.

## Estonia

In matters of constitutional law, 2021 was marked by the ongoing corona pandemic, local elections, the election of a new president and some major court rulings on different topics. Among others, this year also saw the Estonian Supreme Court's first decisions on the legality of corona restrictions.

## France

In 2021, France had to face the ongoing covid crisis. The ad hoc public health state of emergency regime was activated and adapted depending on the circumstances. The Constitutional Council upheld most of its provisions, in spite of their impact on fundamental rights like freedom of movement.

## Georgia

The report provides a brief introduction to the Georgian constitutional system including local elections, EU-mediated agreement, the State Inspector Service, Covid-19 pandemic, appointment of judges in the Supreme Courts, members of the High Council of Justice, legislation changes on the courts and landmark judgments of the Constitutional Court in 2021.

## Germany

Germany's Federal Constitutional Court contributed to climate change jurisprudence with a seminal decision. It added an intertemporal dimension to the Basic Law's conception of fundamental rights, recognizing a right not to be subjected to severe climate protection measures in the future caused by present inaction.

## Ghana

Ghana's first ever hung parliament is teaching itself and the wider polity what a functional opposition's role in a democracy is. Some of the government-opposition interactions have been suboptimal. Still, the reality of a government that cannot assume Parliament's cooperation is a healthy growth for our quest for accountable government.

## Greece

The bicentennial of the Greek Revolution of 1821 and the birth of the Modern Greek State through the enactment of the first Greek Constitutions marked 2021. Throughout the year, constitutional dialogue focused on the measures taken to tackle the second phase of the pandemic, as lockdowns were gradually replaced by measures stemming from the availability of vaccines.

## Honduras

The constitutional debate during 2021 oscillated between the congressional reforms approved to strengthen the prohibition of same-sex marriage and abortion, the approval of an Electoral Law, and the resurgence of the constitutionality of the Employment and Economic Development Zones. All of them await a decision from the Supreme Court.

## Hungary

In Hungary, the special legal order of constitutional State of Danger was in force throughout 2021. Government decrees ruled in many statutory matters. A two-thirds governing majority controlled the

Parliament. The Constitutional Court exercised substantive review only in few cases, there it showed mostly deference to the Government majority.

## India

The Supreme Court took *suo motu* cognizance of the government's response to the second wave of the Covid-19 pandemic. It regularly monitored and oversaw the government's policy on administering vaccines and its pricing, distribution of medical equipment to all states, ex-gratia compensation to the families who lost members to Covid.

## Indonesia

In his second and final five-year terms, President Jokowi is facing some challenges to his legacies. The Constitutional Court has issued a suspension order on Jokowi's ambitious project, the Omnibus Law of Job Creation. The Court will also review the constitutionality of Jokowi's new ambitious project of capital relocation.

## Israel

The most important developments are the establishment of a new rotating government after four rounds of elections in two years, and a series of judicial decisions by the Supreme Court concerning the scope of the Knesset's constituent authority, and various measures dealing with COVID-19 pandemic.

## Italy

The year 2021 has been characterized as – for now – the “peak” in the judicial pandemic curve of COVID-19 related constitutional controversies before the Italian Constitutional Court. In this report, we will summarize these crucial developments, involving a wide range of legal sectors.

## Japan

The prime minister was replaced by Kishida from Suga. Kishida is a liberal within the LDP, and the tension between the Constitu-

tion and the government is less intense than it was during the Abe and Suga administration. The Supreme Court has made several important judgments on the interpretation of the Constitution.

## Jordan

The major constitutional event in Jordan for the year 2021 was the establishment of a Royal Committee to Modernize the Political System. The Committee made recommendations for constitutional amendments with respect to advancing the work of parliament, proposed new bills for political parties and election of members of Parliament, and provided recommendations for revising laws regulating local administration.

## Kazakhstan

The President of Kazakhstan requested the Constitutional Council to review the constitutionality of the law dealing with issues of advocacy and legal assistance. The Council, in a troubling normative resolution, declared the law to be constitutional, hence, affecting the constitutional right of the citizens to obtain effective juridical assistance.

## Kenya

The courts averted largely unwise and politically motivated amendment of the Constitution for procedural reasons. The decision attracted international attention, being based partly on the Basic Structure doctrine, as well as deciding important issues about amending the Constitution, especially the possible role of the President.

## Kosovo

The Constitutional Court's decision declaring the decision of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo unconstitutional is the most important constitutional development that occurred during 2021.

## Liechtenstein

In 2021, when Liechtenstein celebrated the 100th anniversary of its constitution, the State Court had to deal with the constitutionality of the government's corona measures for the first time. It held that the government's measures, which were orientated on Swiss regulations and based on the Customs Union with Switzerland, were in conformity with the law.

## Malaysia

A contentious state of emergency ended through an unprecedented intervention by Malaysia's hereditary monarchs, heralding the collapse of an increasingly unpopular government and the promise of reform as its successor teamed up – in the name of political stability and transformation – with the parliamentary opposition in an equally unprecedented ‘memorandum of understanding’. But will it last?

## Malta

Concern for the political system in Malta, particularly in the context of alleged government corruption and involvement in the assassination of a journalist, has recently motivated constitutional change. With input from the Venice Commission, reforms have generally focused on limiting government power and strengthening checks and balances.

## Mauritius

Declaration of the storage of fingerprints and other personal information under the National Identity Card scheme of Mauritius was being against the right to privacy under the International Covenant on Civil and Political Rights, as well as being arbitrary and unreasonable as per the United Nations Human Rights Committee.

## Mexico

2021 stands out for the Mexican Supreme Court's decision to decriminalize abortion.

This positions the Supreme Court as a progressive human rights court, having dealt with a polarizing issue for any democratic society. 2021 also saw the reform of the Federal Judiciary with regards to anti-corruption measures, gender equality, and the improvement of constitutional justice.

## **Montenegro**

The previous year indeed shows that Montenegrin constitutional and political reality lives up to long-known maxim of Alexis de Tocqueville: “the Constitution is like a river that cools down the political power” as almost every major political conflict is expected to be resolved before Constitutional Court.

## **Myanmar**

In 2021, the military staged a coup in Myanmar. The period of military-state constitutionalism from 2011 to 2021 has ended. The Commander in Chief rules the country by decree. There is no legislature, and the military has coopted all state institutions, including the Constitutional Tribunal, Supreme Court and Election Commission.

## **The Netherlands**

Following the Childcare allowance scandal, Government-Rutte III tendered its resignation on January 15, 2021. On March 17, general elections for the Lower House of Parliament took place. The formation of a new government took 299 days - the longest formation in the Netherlands to date.

## **New Zealand**

Covid-19 restrictions continued to apply throughout 2021, even as vaccination levels increased and new variants emerged. These developments led to a change in New Zealand’s previous elimination strategy, while emerging societal disagreements resulted in growing legal and political challenges to governmental actions.

## **Nigeria**

Electoral integrity and constitutional reform dominated the political calendar in 2021. But a presidential veto frustrated electoral reform while constitutional reform’s glacial pace deferred it to 2022. The output of the Supreme Court is partly constrained by multiple vacant seats on its bench, and judicial performance was uneven overall.

## **North Macedonia**

Following the 2021 local election, when the ruling party (the Social-Democratic Union of Macedonia) was defeated, the Prime Minister and his Government resigned. This led to a serious political crisis in the country concurrent with ongoing challenges related to the pandemic, the economy, and sustaining the rule of law.

## **Islamic Republic of Pakistan**

After a prolonged clash of the military and its affront on the judiciary, particularly Justice Qazi Faez Isa of the Supreme Court of Pakistan, that came to an end in 2021, with Justice Isa and the judiciary standing vindicated after the dismissal of the review petition (last legal order).

## **Palestine**

2021 can be considered a year of political instability in Palestine, especially in terms of the endeavor to rebuild Palestinian democracy. Thus, this year’s report focuses on the call for general elections, executive interference in the judiciary and a constitutional case that paved the way for faster creation of administrative courts.

## **Panama**

The Panamanian constitutional landscape in 2021 was marked by the challenges imposed by the COVID-19 pandemic on fundamental rights; and the public debate around the need for constitutional reform

which ultimately resulted in the failure of popular initiatives promoting a Parallel Constitutional Assembly.

## **Peru**

Political tensions continue to mark the constitutional landscape of Peru. In 2021, the election of a new executive regime ended in conflict with the legislative branch. The Constitutional Court’s work in 2021 has involved solving conflicts between those two powers, i.e., regarding the amendment of the Rules of Procedure of Congress.

## **Portugal**

In Portugal, 2021 was still synonymous with the Covid-19 pandemic. Additionally, the end of the year was marked by political crisis with the Parliaments’ dissolution and the call for elections. The constitutional jurisprudence dealt with interesting subjects, such as the COVID-19 measures, medically assisted death, and the right to privacy.

## **Romania**

In 2021, the jurisprudential differences between the Court of Justice of the European Union and the Romanian Constitutional Court on the application, by the national courts, of the primacy of the EU law took center stage. The controversy originated in the creation, via the 2018 legislative changes, of a special prosecutorial section for investigating offences committed by magistrates.

## **Russia**

The Duma elections held in September confirmed the pro-presidential party’s leadership thus determining the further actions to implement the 2020 constitutional reform. Two drafts were elaborated to strengthen the concept of a “unified system of public power” which will affect the federative character of the Russian state and local autonomy.

## **The Democratic Republic of São Tomé and Príncipe**

We discuss controversial and consequential measures adopted by the government in the context of COVID-19 pandemic in 2020. There were no major constitutional changes or relevant political conflicts, despite the absence of certain legislation. The legislative agenda led to the approval of relevant acts and the Constitutional Court adopted relevant decisions on considering its recent and controversial autonomy process in relation to the Supreme Court of Justice and, consequently, the conflicting about general election process of 2018 and presidential election of 2021.

## **Serbia**

The change in The Serbian Constitution of 2006 has paved the path for possible future changes. The recent change concerns only the election of the judiciary and removes this power from The Parliament transferring it to other specialized bodies. While the transparency will be lower, the Government argues that this way the influence of politics will be lowered.

## **Slovakia**

Constitutional development in Slovakia continued to be affected by the global pandemic, which resulted in another lockdown. The Constitutional Court decided important cases on the constitutionality of an early dissolution of a Parliament via a referendum, prosecution of corruption and detention of high-profile figures and second, the pandemic.

## **Slovenia**

Like in 2020, in 2021 too, the legislature and the government responded to the rapid spreading of the Covid-19 disease and the exponentially rising number of cases, by quickly adopting legislative and executive measures newly constraining several constitutional rights. These cases presented the bulk of the Constitutional Court's 2021 jurisprudence.

## **South Korea**

From the first day of 2021, mothers who seek abortion and the medical doctors who perform the operations are no longer punishable. This may change following new legislations, but the previous system of ban on all abortions with narrow exceptions are gone for good.

## **Spain**

The legal action against the coalition government's pandemic response has been an opportunity for the Constitutional Court to produce a complex doctrine on issues which are extremely important for constitutional law, such as the difference between limiting and suspending rights in exceptional circumstances.

## **Sweden**

2021 was a stormy year to be the prime minister of Sweden. Stefan Löfvén lost a vote of no confidence in the parliament and Magdalena Andersson was elected as the first female PM of Sweden. Andersson ended up resigning the same day, before resuming her post a few days later.

## **Switzerland**

In a series of referenda, Swiss citizens extended civil marital status to male-male and female-female couples (same-sex marriage), banned wearing face coverings in public, approved government measures to curb the spread of COVID-19 twice, and rejected a constitutional amendment seeking to determine the judges of Switzerland's highest court by lot.

## **Taiwan**

2021 is the year of transition. Constitutional developments within and without the judicial forum – from constitutional reform to the phase-in of new procedural rules for constitutional review to experiences with referendum and other institutional channels

of popular mobilization –all suggest that Taiwan's constitutional order is on the cusp of change.

## **Thailand**

The Constitutional Court regarded a street campaign that called for a reform of Thai monarchy unconstitutional, reasoning that it amounted to an overthrow of the democratic regime with the king as the head of state, therefore, the Constitutional Court effectively closed any venue for compromise.

## **Tunisia**

In 2021, Tunisia was the star of autocratization in the world, from one of the quickest democratizing countries to the star of autocracies. If this constitutional year has a name, it will be “deconstitutionalization.”

## **Turkey**

2021 was a year filled with judicial reforms, political turmoil and extreme wildfires in Turkey. Two notable events from 2021, namely the pro-Kurdish party dissolution case and the Council of Europe's infringement procedure will have serious implications in terms of democracy, human rights and rule of law in the country.

## **Ukraine**

Even though 237 MPs registered one constitutional amendment draft, no active constitutional process is observed in Parliament. However, a political confrontation between the President and the Constitutional Court commenced in 2020, balancing between escalation and inaction, continued during the reporting year.

## **United Kingdom of Great Britain and Northern Ireland**

Reform of the Human Rights Act 1998 is on the agenda. The Independent Human Rights

Act Review delivered its report in the Autumn of 2021. A consultation paper on the future of the Human Rights Act 1998 was launched in December 2021 and closes in March 2022.

## **Uruguay**

In Uruguay, the most important constitutional development of 2021, referred to the presentation of the referendum appeal, signed by 25% of the voters, against the main law supported by the Government and the Republican Coalition, known as the Law of Urgent Consideration, “LUC”, Act 19889 2020.

## **Uzbekistan**

The new Law “On Constitutional Court” was adopted as planned. It introduced key changes in the constitutional justice system such as expanding the list of subjects authorized to petition the Court, including private individuals and legal persons. Correspondingly, the Court’s jurisprudence has significantly increased with constitutional justice becoming more efficient.

## **Venezuela**

Venezuela’s constitutional crisis continued: Maduro remained de facto President whilst Guaidó continued as Interim President appointed by the opposition-controlled parliament. A pro-government National Assembly elected in 2020 now functions, and regional/local elections lacking integrity were held in November. The ICC Prosecutor announced an investigation for crimes against humanity in Venezuela.



