The International Review *of* Constitutional Reform

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Foreword

Welcome to the First Edition of The International Review of Constitutional Reform.

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Every year, the constitutions of the world change in many ways both seen and unseen. They are updated informally, for instance by judicial interpretation and political practice, without a corresponding alteration to the codified text of higher law. And they are revised formally, for example by amendment, dismemberment, and replacement. These types of formal changes are generally memorialized in a constitutional text.

In the past, scholars interested in learning about formal constitutional changes in the world had to conduct research into one jurisdiction at a time. They had to mine legislative databases for constitutional amendment proposals, they had review the official records for notices about constitutional amendment promulgations, they moreover had to search through court judgments on the legality of constitutional changes, and they had to read national news media for details about new constitution-making efforts. And this was possible only with multilingual ability.

But no longer. This inaugural edition of The International Review of Constitutional Reform (The "IRCR") is the first scholarly effort to gather jurisdictional reports on all forms of constitutional revision around the world over the past year. Each report explains and contextualizes events in constitutional reform over the previous year in a given jurisdiction. Constitutional reform is defined broadly to include constitutional amendment, constitutional dismemberment, constitutional mutation, constitutional replacement and other events in constitutional reform, including the judicial review of constitutional amendments.

In order to facilitate cross-jurisdictional comparison, all jurisdictional reports follow the same format:

- **"INTRODUCTION,"** which offers a brief overview of the year in constitutional reform;
- **"PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS,"** which examines proposed constitutional reforms and explains the reasons for their failure or success;
- **"THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL,"** which evaluates the proposed reforms and explains whether they were the subject of constitutional review;
- **"LOOKING AHEAD,"** which identifies the big questions that await the jurisdiction in the context of constitutional reform in the year or years ahead; and
- **"FURTHER READING,"** which recommends relevant readings for those interested in learning more about the reforms discussed in the report.

All reports are written by scholars or jurists, or teams of scholars and jurists. And they are all written in the common English language. The final section of the IRCR features a summary of the most important developments in constitutional reform over the past year in each jurisdiction; this section is intended to be an easily-accessible and reading review of the previous year.

The IRCR is a joint initiative of the Program on Constitutional Studies at the University of Texas at Austin in partnership with the International Forum on the Future of Constitutionalism. The Co-Editors of this new resource in the study of constitutions have worked closely with an outstanding team of Associate Editors: Giulia Andrade, Elisa Boaventura, Bruno Cunha, Matheus Depieri, Júlia Frade, and Pedro Martins. We thank each of them for their invaluable contributions to this project. We also thank Simon Renwick for his innovation, precision, and vision in designing this book.

The IRCR aspires to cover the globe. We begin in our inaugural year with dozens of reports—a promising start for our first edition of this new scholarly resource. We hope to continue growing our coverage of the world. We welcome new contributors if your jurisdiction is not yet covered. Please contact us to express your interest in joining us next year.

We hope you enjoy this first edition of the IRCR!

Essays

Constitutional Reform and its Limits

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Under the leadership of Richard Albert, this book brings together an impressive amount of information on constitutional reform on all continents and in dozens of countries. I was very honored to participate, albeit modestly, in this valuable project, which will provide relevant and high-quality research material to constitutional scholars worldwide. In this initial note, I make brief reflections on the central theme discussed in the book.

Constitutions are born with the ambition of permanence. Ideally, they regulate issues that, because of their relevance and transcendence, should be shielded from ordinary politics. The entrenchment in the Constitution of certain fundamental decisions removes them from the influence of casual majorities. Nonetheless, Constitutions are not eternal and cannot intend to be entirely immutable. Some flexibility is imperative for constitutional stability itself, to allow for the correction of possible deficiencies in the original text and their adaptation to new realities. A generation cannot permanently bind the next generations. The dead cannot rule the living[1].

To assure that Constitutions can survive and not lose their relevance, there are formal and informal mechanisms of constitutional change that guarantee the flexibility required to answer to new realities and social demands. Alongside informal changes by means of interpretation (*constitutional mutation*)[2], the constitutional amendments arise as a necessary tool to preserve the durability of Constitutions. Nonetheless, the freedom to amend the constitutional text, although through a more demanding procedure, can also be used as an instrument to radically modify the document or to suppress its essential rules and principles[3]. The amendment power has, therefore, an ambivalent character: at the same time that it guarantees the Constitution's survival, preventing it from becoming obsolete, it can also represent its downfall, because it may allow for structural changes of provisions that give the Constitution its meaning and identity.

The power to reform the constitution should not be the power to deform it, by depriving it of its essential elements. A Constitution must retain the essence of its original identity, the core political decisions and the fundamental values that justified its creation. In some countries, the Constitution's essential core is protected by explicit material limits to the amendment power. These clauses are called the immutable or eternal clauses: they cannot be altered or affected in their essence, not even by a qualified majority. These restrictions on the majority rule can serve multiple functions[4]. One of them is precisely to preserve essential constitutional provisions in light of history, tradition and local culture, especially of those who are more vulnerable to abuse[5].

Nonetheless, there is invariable tension between immutable clauses and democracy, to the extent that those clauses impose a significant limit on political majorities' ability to govern. Because of this counter-majoritarian and potentially anti-democratic trait, the scope and meaning of immutable clauses must be strictly interpreted. Along these lines, the Venice Commission recommends that they be limited to the protection of the basic principles of democratic order and be interpreted and applied strictly and cautiously.

The existence of immutable clauses does not necessarily mean that constitutional amendments will be subject to judicial review. In France, for example, on more than one occasion, the Constitutional Council has declared it has no jurisdiction to rule on the validity of constitutional amendments. In the United States and in some European countries, although judicial review of amendments is admissible, in practice, there are no precedents. In countries like Austria, Bulgaria and the Czech Republic, there have been a few cases, but they are exceptional and quite rare.

In Latin America, circumstances are utterly different[6]. With some frequency, the region's Supreme Courts and Constitutional Courts have recognized their prerogative to review the constitutionality of amendments, invalidating them for formal and substantial reasons. That is to say: they recognized the existence of explicit or implicit substantial limits to the scope of reforms.

The treatment of constitutional reforms varies greatly from country to country. Several intricate questions arise from the discussion on the scope, groundings and limits of constitutional change. The present collection allows the reader to have a panoramic view of the world scene, as well as to deepen her knowledge of the reality of any given jurisdiction. Above all, it is important to preserve the

1 *See* Thomas Paine, Paine, *The rights of man* (1969); Norman Dorsen, Michel Rosenfeld, András Sajó & Susanne Baer, *Comparative constitutionalism* (2003).
2 Bruce Ackerman, *We the people: Foundations* (1995); Bruce Ackerman, *We the people*: transformations (1998); Georg Jellinek, *Reforma y mutación de la Constitución* (1991).
3 Ulrich K. Preuss, "The implications of 'eternity clauses': The German experience", 44 Israel Law Review, 429 (2011).
4 Richard Albert, *Constitutional Handcuffs*, 42 Arizona State Law Journal 663 (2010); Yaniv Roznai. Unconstitutional constitutional amendments (2017).
5 *Id.*
6 *See* Richard Albert, Carlos Bernal e Juliano Zaiden Benvindo, *Constitutional Change and Transformation in Latin America* (Oxford: Hart Publishing, 2019), from whose preface some of the ideas here exposed were collected.

democratic essence of the Constitutions, in a world that has become excessively polarized, and where the threats of populism, extremism and authoritarianism cannot be neglected.

Notes on Constitutional Change in Latin America

The reader who is less familiar with Latin American reality must know that, despite the many common difficulties, it is not an easy task to crosscut the continent's multifarious constitutional experiences to build a unified narrative. Nonetheless, it is possible to find similar experiences in regard to transitions to democracy, constitutional reforms, the possibilities and limits of judicial review of constitutional amendments, and the challenging consolidation of democracy in the region.

Latin American constitutionalism has undergone several phases since the first half of the nineteenth century. Over these 200 years, amidst conservative and liberal governments, some factors have been ubiquitously present, influencing and conforming the continent's multiple constitutional experiences. Among them, we can highlight: *(i) Authoritarianism and institutional instability*, manifested in civilian or military dictatorships, coups d'état and the permanent ghost of military intervention, as well as in hyper-presidentialism; *(ii) Patrimonialism and corruption*, deriving from the poor separation between the public and private spheres—one of the legacies of Iberian colonization, and the antecedent of a culture of private appropriation of the state by extractive elites, of crony capitalism, and of structural and systemic corruption, omnipresent in Latin America; and *(iii) Social inequality*, an indelible mark of Latin American societies, fostered during a long time by measures such as the requirement of minimum income to vote or the ban on the political participation of illiterates.

In their troubled histories, many countries in the region experienced a high rate of demise of their constitutional orders, and currently live under very recent Constitutions. This is the case of the Dominican Republic, which has had 31 Constitutions (setting the world record in the matter), with the current one dating from 2015; of Venezuela, with 26 constitutional texts (the current one dating from 1999); and of Ecuador, with 20 Constitutions (the current one dating from 2008). Brazil followed the Latin American fate and had 8 Constitutions, with its current one dating back to 1988. Colombia was not any different: it has had 9 Constitutions and is currently governed by its 1991 charter. Chile has had 10 different constitutions, and, while its current one dates to 1980, the country has recently embarked on a new constitution-making process, approved by the 2020 constitutional referendum. In all, from independence to today, the Latin American countries edited over 250 Constitutions, in a burst of short-lived texts.

As the reports pertaining to Latin American countries suggest, constitutional change may serve as a necessary tool to preserve constitutions. To survive and not become outdated, they generally establish rules for constitutional amendment, ensuring an institutional pathway for correction of deficiencies and imperfections, adaptation to new realities, and self-governance of new generations. If the necessary constitutional reforms are prohibited or excessively burdensome, the constitution is under threat of being replaced or reduced to a useless text with no influence over reality.

Formal constitutional amendment rules generally require that amendments be approved by qualified majorities, so as to ensure that such changes are supported by a broader consensus. The quorum for approval of amendments varies widely in Latin America. For example, in Mexico, the amendments require the vote of 2/3 of the members of the National Congress, besides the approval by a majority of the State assemblies (art. 135 of Mexican Constitution of 1917). In Peru, the quorum is of absolute majority of members of the National Congress (art. 206 of the 1993 Constitution). In Brazil, constitutional amendment requires 3/5 of the votes of the members of each house of Congress, in two rounds of voting in each of them.

In addition to qualified majority rules, Latin American constitutions also usually provide for *veto powers* in the amendment process, requiring approval from other actors, such as the President, the constitutional court, or the people. The most widespread *veto power* in the region is popular consultation, especially via plebiscite or referendum. The participation of the people in the constitutional amendment process is required in Bolivia, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Panama, Paraguay, Peru, Uruguay and Venezuela. Very few countries leave the amendment power entirely in the hands of the Legislative branch, as is the case in Brazil, El Salvador, Mexico and the Dominican Republic.

Nevertheless, formal amendment rules are not the only factors that impact amendment difficulty. Cultural patterns, and political, economic, or social arrangements may also affect the amendment process. In Brazil, for example, the political system in force—the widely known "coalition presidentialism" -, characterized by the combination of presidentialism with a high level of partisan fragmentation in Congress, requires the President to build a large coalition as a prerequisite for governance. Thus, with support from his coalition, in general, the President can easily pass constitutional amendments. Similarly, as indicated in the report on Colombia, cultural, institutional and political factors (such as the concentration of powers in the hands of the president, and the low level of congressional independence) make the effective rigidity of the Constitution much weaker than its formal rigidity.

Another interesting feature of Latin American constitutionalism is the greater openness to judicial review of constitutional amendments. Even where constitutions did not provide for explicit substantial limits to constitutional amendments—as is the case with 10 of the 20 Latin American countries –, several constitutional courts in the region both affirmed their jurisdiction in the matter and effectively invalidated amendments to the Constitution. This occurred, for example, in Argentina (which imposed that the amendment power should act "within the principles of the Constitution"), Colombia (which held that the amendment power excludes the power to "replace" the constitution), Costa Rica (which protected the "essential core" of the constitution) and Peru (which considered the "legal principles" and "basic democratic values" of the Constitution

as immutable). As noted in the report on Chile, in 2020, the Chilean Court for the first time recognized its power to review constitutional amendments and struck down a constitutional amendment authorizing pension withdrawals.

To conclude, the study of constitutional change in Latin America, from a comparative perspective, offers a unique opportunity to understand the possible correlations between constitutional experiences and replacements, as well as the rates, norms, and cases of constitutional amendment. It is also likely that trends identified in the Latin American experience contribute to a deeper understanding of general factors of constitutional durability and stability.

A Quick Overview of the Constitutional Amendment Power in Brazil

Brazil likely holds the world record for constitutional amendments. In a little over three decades since the Constitution has been in force, over 110 of them have been approved. And several are still pending voting. There are some explanations for this phenomenon.

The main one is the fact that Brazil has an extremely comprehensive Constitution, addressing a large variety of topics and, often, in excessive detail. In addition to the issues that are normally addressed in any democratic constitution—basic organization of Government, Separation of Powers and their respective attributions, and recognition of rights—the Brazilian constitutional text also features chapters and provisions dedicated to the tax system, social security, public servants, public health, government-owned companies, economic regulation, environmental protection, the demarcation of indigenous territory, children and teenagers, education and culture, and several others.

The inevitable consequence of such an analytical text is that a fair amount of the country's ordinary political decisions depends on constitutional reform. In other words, any significant change to the social security system, the tax system, the role of Government in the economy, or the health system, for example, can only be done through constitutional amendments. To counterbalance this fact, the Constitution itself establishes a relatively easy procedure for amendments, only requiring a three-fifths vote, in two rounds, from both the Lower House and the Federal Senate. This represents about 60% of Congress, and contrasts with the much harder procedures adopted in most other countries.

Another singularity is that constitutional amendments, unlike in many other jurisdictions, are subject to judicial review by the Supreme Court. And since they are part of the ordinary political game, it is not uncommon that they be declared partially or totally unconstitutional. The main reason for this is that, in Brazil, there are the so-called irrevocable or immutable constitutional clauses, which identify matters that cannot be amended, such as federalism, separation of powers, fundamental rights, and direct, secret and universal voting.

Countries are very different in their circumstances and in how they adapt to their own realities. Despite its atypical model, the 1988 Constitution and its amendments have been critical for the maintenance of the country's institutional stability, that now lasts more than three decades. It may seem trivial, but it is a historical record for Brazil and, even, for most other Latin American countries.

An important observation before closing this note: matters that are truly constitutional, as previously mentioned—organization of the State, separation of powers, and declaration of rights—have remained stable, with no major changes. In these times of populism, extremism, and authoritarian deviations in various regions of the world, Brazilian institutions have been quite resilient. And, I should add, these have not been easy times. Despite the many upheavals of recent Brazilian history, one could write here, in contrast to the title of the acclaimed book by Steven Levitsky and Daniel Ziblatt, *How Democracies Survive*.

Constitutional Reform Amidst a Global Pandemic

2020 Challenges and Trends

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One of the greatest novels of the twentieth century, "The Plague", by Albert Camus, is reportedly a metaphor for the terror of World War II. Why did he choose the plague as a representation of evil? Probably because the epidemic "touches all areas of society and disrupts city life, [it is] the only one that puts corpses on the street, which changes mentalities to such an extent". Therefore, Camus's metaphor is not dated. What varies in the history of humanity is not the existence or not of the plague, which is known to be cyclical: only its amplitude and circumstances vary. Justifying the ballad of the philosophers, for whom the vocation of any crisis has always been to reveal the weaknesses of a "city" by lifting the veil that covers those weaknesses, the plague puts the Constitutional State radically to a test: its principles, its historical viability, its meaning. Both in romance and in life, then, it is less about the plague itself, and more about how society behaves facing it.

The world faced its first globalized plague in 2020. Aside from the World Wars, the last event of such extensive reach in terms of mortality rates was the Spanish flu between 1918 and 1920, which claimed the lives of about 70 million people. But this last event occurred at a time when the bulk of the world's population lived in the countryside and, except in some Western countries, no one knew what was happening around globe. In today's super-connected world, the effectiveness of the fight against pandemics is only achieved by restricting two of the fundamental pillars of our globalized economy: the free movement of people and the flow of goods. In addition to that, the plague of the present is spreading in a context of economic inequality never seen before. This is the world's scenario in 2020.

As will be further detailed in the reports, many jurisdictions faced issues related to the Covid pandemic: at the same time that it gave rise to several constitutional reforms and amendments to overcome the health, social and economic challenges, the pandemic also slowed the pace of other reforms and amendments that were underway or under consideration. The reports in this book reveal some important trends related to the Covid-19 outbreak.

Under the prism of law many countries tried to impose restrictions of fundamental and constitutional freedoms, especially via decrees, executive orders and other regulatory measures passed by urgent and expedited procedures. In such a scenario, the grammar of epidemiological surveillance comprised, for example, quarantine, limitation or interdiction of travel and movement, intensification of border control or even the closure of borders, restriction or suppression of public meetings and mandatory vaccination.

Other jurisdictions used some sort of "state of exception" doctrine in order to deal with the chaos brought by the pandemic. Such a state of exception is intimately related to emergency powers that are usually foreseen in a constitution. In exceptional times these powers are planned to be used in order to protect fundamental rights, but the Executive branch usually gains more power (ruling by decrees) and makes use of legislative prerogatives risking the control given by the traditional checks and balances mechanism. Therefore, in some countries this exceptional situation was frequently exploited by governments to obtain more power, indicating a possible authoritarian tendency. Although sometimes necessary, these emergency powers can represent a huge danger, especially if they are used frequently as a way of governing in situations that are not exceptional and related to the sanitary crisis.

In this context, some constitutional courts had to focus on their counter-majoritarian role in order to react to Executive and even Legislative overreach, ensuring that the agility and force needed to fight the pandemic did not violate fundamental rights and constitutional guarantees due to the enlarged activity of the legislative and especially the executive power.

Beyond the debate related to the restriction of constitutional rights and the expansion of Executive or Legislative Power, other trends in constitutional reform worth mentioning are the following:

(1) budgetary issues, since, in many countries, a constitutional reform was needed, for instance, to change the limits of public expenditure, to reform oversight mechanisms of public expenditure or to offer some kind of economic relief to the poorer citizens; (2) reforms related to elections and legislative procedures, considering that many countries needed constitutional reforms to postpone the elections or to determine the use of telematic means to carry out legislative sessions; and (3) changes on the legislative agenda in order to address the urgent matters related to the pandemic.

In a nutshell, the pandemic brought a series of risks and challenges to the Constitutional State which can easily be seen in the more than 70 reports shown hereinafter. Bringing together some of the leading constitutional law scholars around the globe, the *International Review of Constitutional Reform* aims to reflect on the constitutional problems and questions that arose during the unusual year of 2020.

We thank the *Program on Constitutional Studies* at the University of Texas at Austin in partnership with the *International Forum on the Future of Constitutionalism*, and notably Justice Luís Roberto Barroso and Professor Richard Albert, not only for the invitation to participate as Associate Editors of the IRCR, but especially for always allowing and pioneering the opening of opportunities for young scholars to participate in the events and great projects they organize.

2020
Country Reports

Albania

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I. INTRODUCTION

Year 2020 was an electoral reform year, which in addition to amendments to the Electoral Code brought amendments to the Constitution[1] of Albania as well. This reform was the result of a consensus among political parties on the eve of the Parliamentary Elections, to be held on April 25, 2021. In general, throughout the democratic transition in Albania, the period before the election year has been a period of electoral reforms. The system of allocation of mandates provided by the 1998 Constitution was a mixed system based on a combination of the proportional system with the majority system. The constitutional reform of 2008 altered this system, sanctioning the regional proportional system with multi-name constituencies in accordance with one of the administrative units of the territorial division of the Republic of Albania.[2] The Constitutional amendment of 2020 presented some changes, which will be addressed below.[3]

In addition, the parliamentary activity during 2020 has undergone some restrictions due to measures taken in order to prevent the spread of COVID-19 pandemic, which have had impact not only on the life of people but also on institutions activity. There were taken restrictive measures however there was no need to amend the Constitution on that regard.

Meanwhile, the implementation of 2016 Justice Reform[4] went slowly forward in 2020. Its focus was particularly to fill the vacancies of the Constitutional Court, in order to become operational after almost three years since its inactivity because of the vetting process.[5]

This paper will focus on some aspects of the constitutional reform on parliamentary elections approved by the Assembly in July 2020.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Following 2019, when the opposition parties decided to boycott the Parliament by relinquishing their mandates, three political poles have been formed in the country, with two oppositions: one seated in the parliament and the other one outside it. While the most part of the members of parliamentary opposition decided to boycott the Assembly in 2019, the rest of them refused to follow them and did not hand over their mandates. Meanwhile, some of the former candidates for MPs who had competed under the lists of the outgoing opposition parties, agreed to fill in the vacant seats in the Parliament. These movements within and outside the Parliament affected not only its composition but also the relations between majority and minority. Hence, in the Parliament, which managed to get 122 members out of the 140 seats, the ruling majority party stands in front of the newly established Parliamentary groups, made of the new MPs joining the Parliament.

The draft of the constitutional amendments on electoral system was submitted to the Assembly of Albania on June 15, 2020. Negotiations between political parties had started earlier, in April of the same year, in a significantly different political environment. On 5 June 2020, the Political Council (composed by one representative from each parliamentary party) reached a breakthrough agreement to gradually introduce a depoliticized electoral administration, in line with OSCE/ODIHR recommendations. The parties also agreed to introduce electronic identification of all the voters (where technically viable), to restructure the Central Election Commission, and for the Electoral College to be comprised of vetted judges. The amendments to the electoral code were adopted by the Parliament on 23 July 2020, in accordance with the 5 June. In addition, the Parliament adopted on 30 July some amendments to the Constitution relating to the electoral system.

The Electoral Reform of 2020 consisted of constitutional and legal amendments which took place in two phases. This report will focus on the material aspect of the constitutional amendments and on its approval procedure by the parliament. As for the content of the constitutional amendments, they aimed to correct the allocation of mandates, in four main aspects:

Regulation on the constitutional level of the competition between the candidates in the proportional system, based on "open lists" instead of "closed lists" as it was foreseen prior the amendment by the Electoral Code. As result, the voters will exercise their right to vote more effectively expressing their preference for specific candidates, in addition to voting for the political party and its list as a whole. One should mention that in reality the amendment guarantees only partially open lists, limiting it at no less than two-thirds of it to be subject of preferential voting.[6]

1 Constitutional amendments approved by Law No. nr.115/2020.
2 Constitutional amendments approved Law No. 9904, of 21.4.2008.
3 Amendments to the Electoral Code, approved by Law No. 101/2020.
4 See for more details: 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
5 See for more details Global Review on Constitutional Law 2020, Albania Country Report (to be published in 2021).
6 Article 64 of the Constitution as amended in 2020.

The amendment abolished the pre-election coalitions of political parties and the possibility to run as such during election, thus allowing only political parties and voters to nominate candidates. The proponents to this provision claimed that it would affect the competition between political parties, as pre-election coalitions were used as a mechanism to reach the electoral threshold of entering in the parliament. As a result it could excessively limit small political parties to represent their voters in the parliament.

The amendment linked the electoral threshold with the possibility to profit from the distribution of mandates after election. The amendment gave the threshold a considerable weight in relation to the mandate's allocation system. Logically all these three aspects are related to one-another and its result depend on their further implementation and harmonization by the Electoral Code[7].

The amendment imposed literally a gender balance on constitutional level. In the past there was foreseen only in the electoral code a gender quota, which has been subsequently improved, increasing the number of women in parliament considerably. One of the reasons for including the gender balance in the constitution was the new formula of election based on open lists, which could negatively affect a balanced gender representation.

Regarding the parliamentary process for approval of the amendments, it was characterized by a short limited time period of consultation sessions with experts and representatives of civil society. As a matter of fact, neither the Constitution nor the Rules of Procedure of the Assembly provide for any specific time limits/deadline with regard to constitutional amendment process. The 2020 amendments were proposed by a group of MPs to the Assembly on 15 June and adopted on 30 July. Thus, the whole procedure lasted only 45 days. Although the report of the Parliamentary Commission clearly presents the entire consultation process and its results which slightly defers from that initially proposed by the group of MPs,[8] it seems to have been a rather hasty procedure, which was also criticized by the Venice Commission and the OSCE/ODIHR in their opinion on the 2020 Electoral Reform[9].

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. SCOPE OF REFORM

In analyzing the scope and results of this amendment, it is important to emphasize that the main purpose of the amendment was to correct the system of allocation of seats, aiming at achieving equal competition in the electoral race. This system would affect and put in test in particular the small parties, which would face the risk of not crossing the electoral threshold. There is a widespread perception that so far, they had managed to survive as Parliamentary parties because of pre-election coalitions, which the amendments under consideration have erased. This correction was formally linked to open lists, aiming to increase voter access to the allocation of mandates in the Assembly. The issue of gender balance came up on the agenda randomly, as behind the curtains discussions drew attention on the issue that this system would undo the successes already achieved so far with the gender quota. On the other hand, the principle of gender balance in the Constitution served to justify the system with partially open (not fully open) lists. That said, Albania can now be ranked among those countries that have provided the principle of balanced gender representation in their Constitution. Even though there was disagreement with this Constitutional reform—especially the opposition parties outside the Parliament—a broad consensus seems to have existed regarding correction of this system, especially by the major parties. But this did not stop the parliament to adopt in October 2020 the Electoral Code in order to bring it in compliance with the constitutional amendments. Right after that an opinion by the Venice Commission was requested, where some changes were recommended.[10]

As for their larger effect one could say that despite the political disagreement the constitutional amendments proposed did not affect the core of the constitution in its democratic system of election. In particular circumstances, the very nature of the electoral system can however be problematic in a specific country. There is no element which would lead to consider that it is the case with the electoral system in place in Albania after the adoption of the amendments under consideration, whose reach is relatively limited. Specific amendments, however, deserve further consideration. In the political party coalitions—which are now joint lists -, one political party has to have the leading role (Article 65 (3) of the Electoral Code). In case the small political parties would prefer to have a co-operation based on parity, such coalitions are not allowed. While there are no international standards pertaining to the modalities of presenting joint candidates' lists, there is a discontent of smaller parties vis-à-vis equality of the coalition partners. The principle of equal suffrage guaranteed by international treaties and standards, such as Article 25 of the ICCPR and the First Protocol to the ECHR, Article 3 does not directly apply to the relations between the coalition partners, unless specific rules discriminating individuals in their right to stand for election are in place. Stating that, it seems that the constitutional amendments approved do not affect any essential part or main pillar of the constitution to that extent to be considered as a transformation. The main reason why the electoral system was included in the text of the constitution was to prevent its frequent changes and reversals. While electoral reforms have been carried out almost every 4 years changing the legal framework (Electoral Code), it could be useful and appropriate not to foresee any regulation on constitutional level in order to prevent any constitutional amendment for the sake of political debate.

7 For more information, please refer to: Report of the Parliamentary Committee on Legal, Public Administration and Human Rights Affairs, of 15 July 2020, available at: https://www.parlament.al/Files/ProjektLigje/20200716145313Raport%20per%20ndryshimet%20Kushtetuese-16-7-2020.pdf

8 See: Report of the Assembly Laws Committee, cited.

9 "*The Venice Commission and ODIHR regret that the procedure for the adoption of the amendments to the Constitution as well as of Law No. 118 was extremely hasty. A wide consultation among the political stakeholders and non-governmental organizations, providing adequate timeframe, should have taken place before the amendment of such fundamental texts*" see: Venice Commission CDL-AD(2020)036, Joint Opinion on the Amendments to the Constitution of 30 July 2020 and to the Electoral Code of 5 October 2020 para. 11.

10 Venice Commission CDL-AD(2020)036, cited, para.16. A. to abolish the possibility for leaders of political parties to compete in several constituencies; B. to respect equal rights for all parties in a coalition to appeal actions and decisions of the coalition; C. to introduce the possibility for individual candidates to submit complaints and appeals against the allocation of seats inside a list; D. to clarify the definition of the threshold for local elections in the sense that it applies at municipality level, if necessary through a by-law; E. to revise Article 67(4) of the Electoral Code in order to reduce the minimum number of candidates to appear on a list.

2. CONSTITUTIONAL CONTROL

The Albanian Constitution provides formal rules in adopting constitutional amendments as a set of guaranties. The details it provides, like specifying the subjects entitled to initiate or propose the constitutional amendments, time periods and quorums necessary for the proposals and, subsequently, following strict procedures until their final approval, underline the difference between an ordinary legal amendment and a constitutional one, which in itself could be considered as a constitutional value and as such should be respected in order to preserve the rule of law.[11] Formal rules for amending the constitution are particularly necessary to channel the popular will into an institutional dialogue, and then transforming it further into constitutional changes. By their very nature, the formal rules for amending the Constitution simultaneously reflect both trust and distrust in political actors: on the one hand they authorize political actors to improve the constitution, while on the other they limit the manner, procedure and timing of their action to that end. Given the essential functions embodied in the formal rules for adopting constitutional amendments, it is to be expected that the constitution itself will provide for them in the most exhaustive manner, and in fact most of them follow this line.[12] Some of them even go further, providing for the mechanism that will exercise control over whether these functions are respected at their core, otherwise the constitutional amendment is invalid. This is precisely the mission of the constitutional court, when it reviews the procedure for the approval of the constitutional amendment by parliament. However, this review cannot remain within some formal procedural boundaries. A constitutional amendment can bring substantial effects to the constitution even when made in accordance with procedural rules to that effect. It can affect the existing legal order and its basic principles by replacing them with new ones, thereby changing the constitutional identity of a country, in full compliance with the procedural rules.

There is no internationally accepted standard of what the best or most effective model is. In some countries the idea of *a posteriori* constitutional control has been rejected based on the fact that the courts, despite their jurisdiction, are also state bodies and as such cannot be over the constitutional legislator or act as being a constitutional power. This discussion also took place during the process of drafting and adopting the 2016 constitutional amendments in Albania. Initially the draft submitted to the Venice Commission foresaw explicitly the ban of the constitutional review of constitutional amendments by the Constitutional Court. But the Venice Commission's position in the Interim Opinion of 21 December 2015[13] saw as necessary at least the possibility of a constitutional review focused on procedural aspects of their adoption, as one of the most widespread models in Europe. According to Venice Commission,

> "...it would be possible to give the Constitutional Court at least the power to verify the procedure in which the constitutional amendments are adopted (as opposed to the substance of the amendments). After all, the Draft Amendments do not touch upon the power of the Constitutional Court to examine the constitutionality of a referendum (see Article 131 (ë) of the current Constitution), including the referendum on changing the Constitution. In any event, when the Constitution is so detailed and encompasses issues which should normally be regulated at the legislative level, the role of the Constitutional Court is already quite limited."[14]

Regardless of the model and scope chosen by the constitution, one thing does not change: the constitutional provisions that give constitutional courts the jurisdiction to control the constitutionality of constitutional amendments are of an exceptional nature and should therefore be interpreted in accordance with the principle *exceptio est strictissimae interpretationis*.[15]

Albania is not one of those countries whose constitutions have provided for a clear unamendability of some constitutional provisions (eternity clause or Ewigkeitsklausel).[16] However, if we interpret Article 3 of the Albanian Constitution which provides for the highest values of the Albanian state, such as the independence and the territorial integrity, human dignity, human rights and freedoms, social justice, constitutional order, pluralism, national identity and national heritage, religious coexistence, as well as coexistence and understanding of Albanians nationals with national minorities, one could say that it could be interpreted in favor of inviolability of these principles by any possible constitutional amendments. So, if the pillars of the democratic state are affected, then its constitution could not stand further, as long as law constitutes the basis and the boundaries of the activity of the state (Article 4), giving also the possibility of direct application of the Constitution, unless it prohibits it itself. In this sense, it can be argued that the constitution has taken care to establish safeguards, which do not necessarily have an explicitly prohibitive nature but could still be effective in preventing the violation of rule of law.

As for the constitutional amendments of 2020, there was no control exercised by the Constitutional Court for two main reasons: first, because of the lack of necessary quorum at the Constitutional Court. At the moment the constitutional amendment was approved, the Court had only 4 members, instead of 9.[17] Therefore any complaint to review the constitutional amendment effectively would have been unsuccessful having in mind that the next election was expected to be held in less than a year. Meanwhile there was no prediction when

11 Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, in: McGill Law Review (2013) pg.225-236.

12 Bjørn Erik Rasch/Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in: 'Democratic Constitutional Design and Public Policy' (2006), pg.319-325.

13 See the Final Opinion of Venice Commission on Draft-Constitution Amendments proposed by Assembly of Albania on Judicial Reform, CDL-AD (2016)009, 11 March 2016.

14 See also the Interim Opinion of Venice Commission on Draft-Constitution Amendments proposed by Ad Hoc Parliamentary Commission on Judicial Reform, CDL-AD (2016)009, 21 December 2015, pg.19-21.

15 Arta Vorpsi, *(Un)Constitutionality of the Constitutional Amendment and its Effect on Parliamentary Discretion*. Published in: Arnold/Daneliene (Editors) *The Concept of Democracy as Development by Constitutional Justice*. Proceeding book of the XXII International Congress on European and Comparative Constitutional Law 4-5 October 2019, Vilnius/Regensburg (2020) p.455.

16 Arta Vorpsi, *Recent Developments in Albanian Constitutional Law, University of Regensburg* (2012), pg.23-24.

17 Arta Vorpsi, *Country Report on Albania published in: 2019 Global Review of Constitutional Law* pg.8-12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736382#:~:text=This%202019%20Global%20Review%20assembles,authored%20by%20judges%20and%20scholars>

the Constitutional Court would have become fully functional.[18] As explained in further reports on the political developments in Albania[19] the parliamentary opposition derived from elections of 2017 handed over all its mandates as protests against the parliamentary majority on irregularities during elections. Therefore, there was no procedural mechanism to initiate a constitutional control since the only possibility was to put the Court in motion through a complaint handed by 1/5 of the members of the parliament. So, due to procedural reasons there was no way to exercise any control on constitutional amendment by the Constitutional Court.

3. THE ROLE OF THE COURT

One could say that the Albanian Constitutional Court's role is a combination of three roles (counter-majoritarian, representative and enlightened), but not equally distributed. The main role is the counter-majoritarian one, which is quite understandable in an unstabilized democracy. The constitutional control in Albania was and still is perceived as a protection mechanism against tyranny of the majority which prevents the distortion of the democratic process and oppression of minorities.[20] One should have in mind that the Albanian Constitutional Court was founded right after the communist regime has fallen (1992). There was an immense need to establish a new democratic state based on rule of law and protection of human rights. Therefore, the most part of its jurisprudence was focused on the state formation elements such as: independence of judiciary, prevalence of the basic law (formal constitution) over ordinary laws, free and democratic elections, separation of powers between state powers, protections of human rights and equality before law. The Albanian Constitutional Court has considered that the *rule of law* is one of the cornerstones of modern constitutional democracy. No one should stand above the law. Other formal elements rule of law includes are the sustainability of the law, its publicity as well as the right to challenge the law before the court. The Court has considered that the rule of law is one of the most fundamental principles in the democratic state and society. As such, it constitutes an independent constitutional norm, therefore its violation constitutes sufficient grounds for declaring a law as unconstitutional.[21] The principle of the rule of law implies the elimination of arbitrariness which shall lead in respecting and guaranteeing human dignity, justice and legal certainty.[22]

As for its representative role in some decisions the Court has found a wide popular support especially in cases related with protection of human rights and non-violation of territorial integrity of the state.[23] The most delicate and also less envisaged role is the enlightened one. As Barroso admits, this is a dangerous capability to be exercised with great parsimony, both for the democratic risk it represents and so that constitutional courts do not become hegemonic bodies.[24] Throughout history some essential advances had to be made, in the name of reason and against common-sense, laws in force and the majoritarian will of society. Therefore, the enlightened role of the court is to impose pluralism and tolerance over prejudice and superstitions, not moral values, but rather to ensure that each person is free to live his/her own life according to his/her convictions, limited only by respect for the convictions of others. On that regard the most important decision of the Albanian Constitutional Court was that of annulment of death penalty not many years after its foundation.[25] This decision is undoubtedly one of the examples of the enlightment role of the Court towards the right to life as the highest value for the state and society.[26] This right is the foundation of all rights and denying it means at the same time to eliminate all other human rights. Human life becomes the most important value protected by the Constitution. This is the purpose of our Constitution, envisaged in its Preamble, as well as in many other provisions. The death penalty is incompatible with the essence of all other rights and freedoms and lies outside the spirit of the Constitution and the ECHR. Negating the right to life constitutes also an inhuman and cruel punishment through the judicial power. Death penalty is not just a restriction, but it is an ultimate and physic elimination of the individual by the state. Those provisions of the Criminal Code that deprive man's life constitute in itself a complete and irreversible elimination of human life and dignity. Analyzing this decision there is also another important issue underlined by the Court, namely the obligation of Albanian legal order to be in conformity with international standards ratified by the national parliament. Since this decision the Court in almost all cases related with human rights and freedoms measured the internal regulations with these standards (mostly with ECtHR's ones) which has given it a wide acceptance by the public.

IV. LOOKING AHEAD

As explained above the constitutional reform of 2020 in Albania was linked with a very sensitive issue for political parties and their representation in parliament. There are controversies about the substantial aspect of the constitutional amendment's effects transposed in the legal provisions of the Electoral Code, which are still waiting to be controlled by the Constitutional Court (not the substantial or the procedural aspects of the constitutional amendment itself). It is doubtful if the Court would give an answer before the parliamentary election of 25 April 2021, even so there will be no time to reflect any changes or improvement valid during these general elections. Even one could consider it as a missing opportunity for the Constitutional Court to exercise its control on the constitutionality of the constitutional amendment (even on its procedural aspects as Article 131 para 2 of the Constitution foresees) which could impact at least the procedure according to which the constitution is being changes, or even further the behavior of political majority to amend the constitution based on political pragmatism.

18 At the time this report was prepared (6 months after the approval of constitutional amendment) the Constitutional Court has 7 judges, elected after 5 months of debatable selection procedure. In order to take a decision in a hearing session the Court needs a quorum of 6 judges and a majority of 5 judges.

19 Supra 17.

20 Luis Roberto Barroso, *Countermajoritarian, representative and enlightened: The roles of Constitutional Courts in Democracies* published by Oxford University Press on behalf of the American Society of Comparative Law, pg.18 (2019).

21 See decision No.34/2005 of the Albanian Constitutional Court.

22 See decision no.16/2015 of Albanian Constitutional Court.

23 See decision no.15/2010 on the constitutionality of the international agreement signed by Republic of Albania and Republic of Greece on Delimitation of Marital Borders, which was found as not in conformity with Albanian's constitutional principles, therefore was not ratified by the parliament. This decision was very welcomed by Albanian people, because that agreement was clearly not based on the principle of equity which disfavor Albanian territory considerably.

24 Barroso, supra pg.25.

25 Decision No.65/1999 of the Albanian Constitutional Court.

26 Arta Vorpsi, *Human Dignity in Albania.* In: Becchi P., Mathis K. (eds) *Handbook of Human Dignity in Europe.* Springer (2019) p. 54, available at: https://doi.org/10.1007/978-3-319-27830-8_1-2

V. FURTHER READING

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I. INTRODUCTION

Constitutional reform issues rarely reached the front pages in Australia in 2020, which is no surprise given the global COVID-19 pandemic. Debates about constitutional change nonetheless continued in the background, and there was progress—although no emerging consensus—on an issue that has dominated reform discussions for the past decade: the constitutional recognition of Aboriginal and Torres Strait Islander peoples.

This report identifies and explains the main constitutional reform proposals put forward in 2020 (Part II). It then offers context and analysis, focusing on the scope of the reforms, questions of constitutional control and the immense difficulty of amending the text of the *Commonwealth Constitution* (hereafter 'Constitution') (Part III). The latter is a prominent theme in Australian constitutional scholarship,[1] which is to be expected given the high threshold set by the Constitution's amendment procedure: a proposed alteration must be approved by absolute majorities of both Houses of the federal (that is, national) Parliament, and then put to a referendum where it must be ratified by a national majority of voters, and a majority of voters in a majority of States (the 'double majority' requirement).[2] But, as will be explored, the nation's constitutional politics intensifies the challenges of achieving constitutional change. The report concludes by considering the challenges that lie ahead for constitutional reform in Australia.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. CONSTITUTIONAL RECOGNITION AND A FIRST NATIONS VOICE

The constitutional reform issue that attracted most attention in 2020 was a proposal to recognize Aboriginal and Torres Strait Islander peoples—also known as First Nations—in the Constitution. Constitutional recognition has been debated in Australia for over a decade, a timeframe punctuated by periodic government commitments to hold a referendum on the issue. However, no such vote has taken place. Most recently, in January 2020, the Minister for Indigenous Affairs, Ken Wyatt, announced a commitment to hold a vote on constitutional recognition by mid-2021 but this was subsequently withdrawn. There are no firm referendum plans on the horizon.

The meaning of 'constitutional recognition' is contested.[3] In the minds of some it indicates minimalist, symbolic change of the kind that might be achieved by the insertion of a constitutional preamble or statement of recognition. The purpose of this would be to address the Constitution's 'silence' on First Nations peoples (the last remaining references were excised at a 1967 referendum) and to provide textual recognition of their history, culture, and status as the first occupants of Australia. For others, recognition denotes reform of a more substantive nature. In the early 2010s, advocates of more robust change focused on proposals to amend or repeal constitutional provisions that give the Commonwealth and States the capacity to enact racially discriminatory laws (sections 51(xxvi) and 25) and to insert a constitutional protection against racial discrimination.[4] The establishment of dedicated seats in Parliament was also contemplated.

Over time, focus shifted to the idea of amending the Constitution to entrench an Indigenous advisory body—or, as it has come to be known, a First Nations Voice.[5] This body's primary function, as initially envisaged, would be to offer advice to Parliament on laws affecting First Nations peoples. It would serve as an institutional response to the 'longstanding problem of Indigenous constitutional powerlessness'; its purpose would be to acknowledge Indigenous voices and make sure that they are heard in the political process.[6] Unlike other proposals for substantive recognition, a Voice would ensure that Indigenous peoples have an opportunity to give input at the 'front end' of the law-making process rather than relying on 'back end' mechanisms like judicial review. And it would have constitutional status: to imbue it with authority and legitimacy, and to help protect

1 Eg, George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).
2 *Commonwealth Constitution* (hereafter 'Constitution'), section 128.
3 Dylan Lino, 'What is Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples?' (2016) 8(24) *Indigenous Law Bulletin* 3.
4 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (June 2015).
5 Eg, Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', *Quarterly Essay No 55* (2014) 66-67; Paul Karp, 'Labor's Patrick Dodson says Indigenous treaty should be an option', The Guardian, 9 May 2016 <https://www.theguardian.com/australia-news/2016/may/09/labors-patrick-dodson-says-indigenous-treaty-should-be-an-option>.
6 Shireen Morris, '"The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability Through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2018) 41 *UNSW Law Journal* 629, 646.

it from being ignored or abolished.[7] Under most proposals, only the existence and core functions of the body would be entrenched; all other details (such as composition, powers, and procedures) would be determined by Parliament and included in legislation. In the words of former Chief Justice of Australia, Murray Gleeson, the Voice would be 'constitutionally entrenched, but legislatively controlled'.[8]

The proposal to establish a First Nations voice in the Constitution is the only constitutional reform option that has achieved anything approaching consensus among Aboriginal and Torres Strait Islander peoples. In May 2017, a national constitutional convention comprising more than 250 Indigenous delegates met to debate the different reform possibilities, and to build on the work of 13 First Nations regional dialogues that had been held in the preceding months.[9] The convention issued the *Uluru Statement from the Heart* which, among other things, acknowledged that First Nations peoples had possessed the Australian continent under their laws and customs for more than 60,000 years, and had never ceded or extinguished their sovereignty. The Statement called for two reforms: 'the establishment of a First Nations Voice enshrined in the Constitution' and the creation of a Makarrata Commission 'to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'.[10]

The Uluru Statement seemed to mark a turning point in the debate over constitutional recognition. But, in the years since, attempts to give effect to it have become 'bogged down in dispute and bureaucratic malaise'.[11] Both a government-appointed Referendum Council and a parliamentary inquiry recognised the Voice as the leading reform proposal and recommended that steps be taken towards achieving it.[12] The federal government, though, initially dismissed the idea out of hand: it characterised the Voice as a 'third chamber of Parliament' and argued that it was incapable of winning acceptance at a referendum.[13] Since then, the government, under Prime Minister Scott Morrison, has signalled that it is more open to the idea, although its position remains opaque. Minister Wyatt surprised many in late 2019 when he signalled his preference for the Voice to be established in legislation rather than in the Constitution, and for it to provide advice to government rather than the Parliament. He also indicated that he favoured holding a referendum on symbolic constitutional recognition despite its rejection at Uluru.[14] The main Opposition party, the Australian Labor Party, remains committed to holding a referendum on a constitutionalised Voice. Public opinion polls indicate that a majority of Australians support both constitutional recognition generally, and the Voice proposal in particular. Polling undertaken since 2017 shows that '70–75% of Australian voters with a committed position on the matter support a First Nations Voice to Parliament'.[15]

Throughout 2020, First Nations leaders, politicians and academics continued work on the design of the Voice. Important questions include whether its membership should be elected or appointed, what laws and policies it could advise on, and whether it would be optional or mandatory for the Parliament (or government) to consult the Voice and/or respond to its advice. A bipartisan 'co-design' process involving both parliamentarians and Indigenous leadership is considering these matters. In January 2021 that process published an interim report which set out a range of detailed options for a *statutory* Voice (constitutional entrenchment being outside its terms of reference). Those options were to be the subject of a brief, 11-week consultation period, at which point a final report would be prepared and delivered to the government.[16]

2. OTHER CONSTITUTIONAL REFORM PROPOSALS

The Joint Standing Committee on Electoral Matters (JSCEM), a standing committee within the federal Parliament, canvassed three constitutional reform proposals as part of its report on the conduct of the 2019 federal election.[17] Significantly, the report showed that there is cross-party support for renewed public discussion on these issues.

First, the JSCEM recommended that the Australian government consider asking it to inquire into the size of the House of Representatives (the lower house in the federal Parliament). The House currently comprises 151 members, leaving each member to represent an average of 108,770 electors. The number of electors for each member has increased by more than 50% since 1984, and far exceeds the averages in other Westminster parliaments such as the United Kingdom (72,423) and Canada (76,745). The Committee noted concerns that Australia's growing population increases the workload of parliamentarians and makes it more difficult for them to service their electorates.

The size of the House of Representatives can be increased without a constitutional amendment. However, any increase must comply with the so-called 'nexus' provision in the Constitution, which mandates that the number of members of the House 'shall be, as nearly as practicable, twice the number of senators'.[18] In other words, any move to significantly expand the House would require a proportional increase in Senate membership. Some view this as undesirable, arguing that there is no compelling reason to expand the upper house and that doing so would bolster minor party representation and make compromise on legislation more difficult. The JSCEM accordingly recommended that consideration be given to a future referendum on breaking the nexus

7 Gabrielle Appleby, 'An Indigenous "Voice" must be enshrined in our Constitution. Here's why', *The Conversation*, 22 January 2021 <https://theconversation.com/an-indigenous-voice-must-be-enshrined-in-our-constitution-heres-why-153635>.

8 Murray Gleeson, *Recognition in Keeping with the Constitution: A Worthwhile Project* (Uphold & Recognise, 2019).

9 Megan Davis, 'The Long Road to Uluru' (2018) 60 *Griffith Review* 13.

10 *Uluru Statement of the Heart* (2017) <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF>.

11 Anne Twomey, 'There are many ways to achieve Indigenous recognition in the constitution—we must find one we can agree on' *The Conversation*, 8 July 2020 <https://theconversation.com/there-are-many-ways-to-achieve-indigenous-recognition-in-the-constitution-we-must-find-one-we-can-agree-on-142163>.

12 Referendum Council, *Final Report of the Referendum Council* (2017) 2; Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (Parliament of Australia, November 2018) [3.152].

13 'Response to Referendum Council's Report on Constitutional Recognition' (26 October 2017) <https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition>.

14 Patricia Karvelas, 'Minister for Indigenous Australians Ken Wyatt calls for constitutional referendum before federal election', *ABC News*, 17 October 2019 <https://www.abc.net.au/news/2019-10-17/ken-wyatt-calls-for-constitutional-referendum-indigenous-voice/11613672>.

15 Francis Markham and Will Sanders, *Support for a Constitutionally Enshrined First Nations Voice to Parliament: Evidence From Opinion Research Since 2017* (Working Paper no. 138/2020, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra).

16 Indigenous Voice Co-Design Process, *Interim Report to the Australian Government* (October 2020).

17 The discussion in this section draws on Joint Standing Committee on Electoral Matters (JSCEM), *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) [8.54]-[8.66].

18 Constitution, section 24.

between the House and the Senate. It would be the second such referendum on this topic: Australians rejected the same measure in 1967, with just 40 per cent of electors voting in favor.

The JSCEM further recommended that it conduct an inquiry on the length of parliamentary terms. Currently, House terms run up to three years and Senate terms are six years in duration. The suggested inquiry would consider 'introducing non-fixed four-year terms' for the House and eight-year terms for the Senate. This would bring the duration of federal parliamentary terms into line with those of the States, although most State terms are fixed and so commence and expire at prescribed times. Any such change would require a constitutional amendment and therefore a referendum. Proposals to increase the length of federal parliamentary terms are a mainstay of Australian constitutional debate but the issue has proceeded to a referendum only once: in 1988, voters rejected the idea of four-year terms for both houses by a margin of 2:1.

Other constitutional reform ideas were discussed from time to time, including a proposal to establish a republic by replacing the Queen with an Australian head of state (the subject of a failed referendum in 1999), and the alteration or repeal of constitutional rules that render certain groups, such as dual citizens, incapable of sitting in Parliament.[19]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. SCOPE OF PROPOSED REFORMS

Each of the reforms canvassed during 2020 are appropriately classified as 'amendments'.[20] From a procedural standpoint, their achievement would require that the Constitution's codified amendment procedure be followed. Taking a more content-based approach, the proposed reforms would alter the Constitution without disrupting or remaking it to the point of 'dismemberment'.[21] Adopting Albert's definition, they are all 'consistent with the existing design, framework, and fundamental presuppositions of the constitution'.[22]

This is not to say that the proposed reforms are unimportant. The creation of an entrenched First Nations Voice could be highly significant in legal, political, and cultural terms. Although relatively modest in its institutional design—its primary function being to offer advice to the legislature rather than to make or veto laws—it constitutes an attempt to recast the relationship between Aboriginal and Torres Strait Islander peoples and the state. Appleby and Synot have commented on its promise 'for meaningful, structural reform to the constitutional hierarchy that will fundamentally change the Indigenous—non-Indigenous relationship'.[23] And Morris views it as a 'way of meaningfully addressing Indigenous constitutional vulnerability, by empowering the First Nations with a voice in their affairs'.[24] Proponents of an entrenched Voice thus seek to initiate meaningful reform of the constitutional system, not engage in mere housekeeping.

2. CONSTITUTIONAL CONTROL

In Australia only the federal Parliament may initiate proposals for constitutional amendment. The government typically takes the lead by setting the agenda, developing a proposal, and ultimately presenting it to the Parliament in the form of a Bill, before working to shepherd that proposal through the Parliament so that it can proceed to a referendum. Objections to the form of a referendum question, or the constitutionality of an alteration Bill, can be made before the courts, but this is rare.[25] It is impossible to know whether any of the amendments discussed in 2020 could eventually find themselves the subject of a court challenge, as they have yet to reach a sufficiently advanced stage.

While the government and the Parliament have the most influence over the form and content of amendment proposals, they are by no means the only actors to contribute to their development. It has long been customary for Australian governments to appoint external bodies, such as expert panels, commissions, and constitutional conventions, to consider and report on ideas for constitutional reform.[26] Parliamentary committees also play a role, sometimes to provide a bridge between those external bodies and the people ultimately responsible for initiating constitutional change. When managed well, this approach can promote community awareness and trust, harness broad expertise, foster public deliberation and help forge consensus. When handled poorly, the use of external bodies can serve as a substitute for action, delaying rather than advancing reform, and can sharpen divisions.

The JSCEM, by recommending that proposals to expand the size of the lower House and to extend parliamentary terms be referred to a parliamentary inquiry, continued in this tradition. Proposals for constitutional recognition, meanwhile, have been considered by multiple bodies. As of February 2020, there had been 'five formal, taxpayer-funded, government-endorsed processes … and eight reports'[27]; we can now add the interim report of the co-design process. It is fair to say that these various processes, taken together, illustrate both the merits and weaknesses described above.

3. CONSTITUTIONAL RIGIDITY AND AUSTRALIA'S AMENDMENT CULTURE

The issue looming over all the amendments discussed in 2020 is the immense difficulty of achieving constitutional change in Australia. Since Federation in 1901, governments have put 44 amendment proposals to a referendum; of these just 8 have been carried. Australians last voted to alter the constitutional text in 1977 and have not voted in a referendum since 1999. The span of two decades since the republic vote is the longest stretch of time without a referendum in the nation's history. It is apparent that governments have become less inclined to invest political capital in attempting constitutional change. If recent history is any guide, the amendments canvassed in 2020 face little chance of being put to a referendum, let alone enacted.

19 Constitution, section 44.
20 See Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP, 2019) 76-78.
21 Ibid 78.
22 Ibid 79.
23 Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48 *Federal Law Review* 529, 542.
24 Morris (n 6) 631.
25 Graeme Orr, *The Law of Politics* (Federation Press, 2019) 299.
26 Anne Twomey, 'Constitutional Conventions, Commissions and other Constitutional Reform Mechanisms' (2008) 19 *Public Law Review* 308.
27 Megan Davis, 'Constitutional recognition for Indigenous Australians must involve structural change, not mere symbolism', *The Conversation*, 18 February 2020 <https://theconversation.com/constitutional-recognition-for-indigenous-australians-must-involve-structural-change-not-mere-symbolism-131751>.

In Donald Lutz's well-known study of constitutional rigidity, Australia's amendment procedure is assessed as one of the most difficult in the world.[28] Its referendum requirement, with its 'double majority' rule, sees it ranked behind only the United States, Switzerland and Venezuela. In this light, it is perhaps not surprising that Australia's constitutional text has undergone such little change since Federation.

However, to understand the absence of constitutional alteration in recent decades we need to look beyond the challenges posed by the amendment procedure and take into consideration Australia's amendment culture. As Albert recognizes, '[t]he difficulty of amendment is a function of more than the formal amendment rules themselves'; it also comes down to the cultures of constitutional politics that 'shape how and when those rules are used, if ever at all'.[29] In some contexts the amendment culture might accelerate constitutional reform but, in others, it can slow or even incapacitate it.[30] In the most extreme cases the combination of amendment rules and constitutional politics can create a stalemate among political actors—a state of 'constructive unamendability'— whereby those who are capable of progressing reform 'have expressed their unwillingness or shown their inability to satisfy the constitution's mandated formal amendment procedures'.[31] The fact that Australians continue to debate the merits of different constitutional change proposals suggests that the point of stalemate has not yet been reached. On the other hand, given that the amendment procedure has fallen into disuse and the constitutional text has remained unchanged for two generations, one wonders whether Australia may be steadily approaching that point.

No single component of amendment culture can account for the current stasis in constitutional reform in Australia, but an important factor is a high sensitivity to referendum 'failure' among political elites. Understandably, the long string of referendum defeats has shaped how politicians view constitutional amendment. Achieving reform is viewed as next to impossible—'one of the labors of Hercules', in the words of a former Prime Minister.[32] Reform attempts are to be undertaken sparingly and handled delicately. The stakes are high, and this places pressure on all involved; indeed, a 'no' vote is viewed as intolerable, potentially derailing reform for a generation.

This sensitivity to failure has been prevalent in the long debate over constitutional recognition. In May 2020, for instance, Minister Wyatt remarked that constitutional recognition was 'too important to rush, and too important to fail'.[33] He cited the defeat of the republic referendum in 1999 and argued that 'we can't afford to have constitutional recognition defeated and off the agenda for another 20 years because we rush this process'. Here Wyatt reinforces the idea that referendums carry tremendously high stakes: a possible 'no' vote is viewed as a tragedy that will be long-lasting, with an expectation that it will be the last word on the issue for decades. Depending on one's viewpoint this cautious approach to amendment is either sensible or timid, but there can be little doubt that it has slowed progress on constitutional recognition.

The flipside of a sensitivity to failure is a conviction among political elites that constitutional amendment should only be attempted if referendum success seems certain. A view has emerged, based on a rigid reading of recent scholarship on constitutional reform,[34] that there exist 'preconditions' for a 'yes' vote.[35] Among the stated conditions are bipartisan support for the proposed reform, popular ownership, and public education. These factors are undeniably important to constitutional reform processes and, by paying heed to them, politicians may succeed in building consensus and fostering community engagement. But there has been an unfortunate tendency among some to treat such factors as immutable criteria and to put off holding a referendum until all are satisfied. Such an approach risks paralysis, delay, and the adoption of minimalist proposals over more ambitious reform.

Constitutional recognition again illustrates this phenomenon. The idea that cross-party consensus must be achieved before the public be invited to vote on the issue is echoed in many official reports. As early as 2012 the Expert Panel declared that a referendum 'should only proceed when it is likely to be supported by all major political parties'; more recently, the Referendum Council provided that 'bipartisanship, indeed multipartisanship … is necessary but not always sufficient for success'.[36] But, after multiple processes and years of debate, the major political parties remain far from a consensus position on the optimal form of recognition to be put to a referendum. This raises a question of whether the insistence on meeting preconditions—including the goal of cross-party agreement—should at some point be abandoned in favor of calling a referendum and allowing the people to have their say.

While Australia's amendment culture has put a brake on constitutional recognition, the drawn-out nature of the debate is also attributable to genuine differences of opinion about which model is preferable. There is disagreement both between and within political parties, and the high levels of public support have not been a sufficient incentive for politicians to bridge those divides and move ahead with reform. Taking a wider view, elite and public opinion is divided on several constitutional reform issues and, going forward, this could be a roadblock to change. Even on matters where elite opinion is relatively united—as might be the case on increasing the size of the House of Representatives without expanding the Senate—it could prove challenging to mobilise the public behind reform.

IV. LOOKING AHEAD

The constitutional recognition of Aboriginal and Torres Strait Islander peoples is likely to dominate constitutional reform discussions in the near term. Debate will intensify over what form the Voice should take and, following the public consultations in early 2021, the federal government will come under increasing pressure to endorse a model. An issue likely to remain at the forefront is whether the Voice should be recognized in the Constitution (as contemplated in the Uluru Statement) or merely in legislation. Supporters of a statutory Voice

28 Donald Lutz, 'Toward a Theory of Constitutional Amendment' (1994) 88 *American Political Science Review* 355.

29 Albert (n 20) 110; see also Tom Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at All?' (2015) 13 *I•CON* 686.

30 Albert (n 20) 110-111.

31 Ibid 158.

32 Robert Menzies, quoted in L F Crisp, *Australian National Government* (Longman Cheshire, 4th ed, 1978) 40.

33 Paul Karp, 'Ken Wyatt concedes referendum on Indigenous recognition unlikely before election', *The Guardian*, 29 May 2020 < https://www.theguardian.com/australia-news/2020/may/29/ken-wyatt-concedes-referendum-on-indigenous-recognition-unlikely-before-election>.

34 Eg, Williams and Hume (n 1) 239-240.

35 Williams and Hume (n 1) 239-240.

36 Expert Panel (n 4) xix; Referendum Council (n 12) 38.

argue that it would have value in itself and could operate as a stepping-stone to entrenchment; opponents fear that legislative action would dampen momentum for constitutional change. Should consensus on either of these matters prove elusive, it is possible that other reform ideas could be suggested as alternative means of giving effect to the Uluru Statement.[37] A separate question is whether the government will seek to hold a referendum on symbolic constitutional recognition. Such a move would be controversial given the rejection of symbolic change by the Indigenous-led regional dialogues and Uluru convention.

More generally, a question arises as to whether Australia can rejuvenate its approach to constitutional change. In recent times there has been no shortage of debate and discussion, but successive governments have shown themselves to be unwilling to prioritize reform, prosecute the case for it and pull the trigger on a referendum. The JSCEM report shows that there is cross-party interest in expanding the size of the House of Representatives and extending parliamentary terms—perhaps this will provide the impetus for a new reform process and an eventual referendum. But whether the issue at hand is constitutional recognition, reform of the Parliament or something else, governments will need to show more leadership—and a greater tolerance for uncertainty—if Australians are to be given the chance of voting in a referendum anytime soon.

V. FURTHER READING

Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48 *Federal Law Review* 529.

Megan Davis, 'The Long Road to Uluru' (2018) 60 *Griffith Review* 13.

Indigenous Voice Co-Design Process, *Interim Report to the Australian Government* (October 2020).

Joint Standing Committee on Electoral Matters (JSCEM), *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020).

Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018).

37 For possibilities see Twomey (n 11).

Austria

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I. INTRODUCTION

2020 marked an important year for the Austrian Constitution which celebrated its 100th birthday on 1st October. This occasion not only saw several official celebratory activities[1] but brought a welcome opportunity for many to reminisce about the state of the Austrian Constitution and its architect, Hans Kelsen. Although 2020 has been largely overshadowed by the global COVID-19 crisis, the state and history of the Austrian Constitution has been the subject of lively discussion in academia.[2]

The response to the Coronavirus pandemic brought many adaptations and implementations of new legislature; most of these did not interfere on a constitutional level. Still, some adaptations to the Austrian Constitution were influenced by the current challenges. The vast majority of proposed constitutional reforms is still pending as deliberations have either not been taken up yet or been adjourned. This overview of proposed amendments in 2020 to the Austrian Constitution—despite including some curiosities—serves to highlight several areas where constitutional reform has been the matter of political and scholarly debate for some time. In addition, it provides insight into realities and particularities of the Austrian legislative process.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The year 2020 saw neither many nor considerably far-reaching successful constitutional reforms in Austria. Remarkably, the COVID-19 response did not significantly affect the Austrian Constitution. Thus, the most relevant result of analysing the constitutional reforms of 2020 is that dramatic amendments did not take place.

The 2nd COVID-19 Act saw a somewhat pandemic related change of Article 69 Austrian Constitution as the government has been enabled to conduct its decision-making process by way of circular resolution or video conference.[3] Besides this came another modification as it now includes the provision that government decisions need to be taken unanimously. Up till then only the minimum attendance quorum (half of the members of government) and not the voting quorum had been explicitly prescribed by the Constitution. State practice has understood the Constitution to implicitly include the requirement of unanimity for the governments' decision-making by referring to a multitude of arguments including historical considerations,[4] which could be seen as the most prominent example of constitutional convention not determined explicitly by the Austrian Constitution.[5] The constitutional amendment of 2020 adds a definite clarification in this matter. Aside from that the possibility to use video conferencing for decision making has been implemented in Article 117 (3) of the Austrian Constitution for municipal councils as well.[6]

By far the largest part of proposed constitutional reforms has not been decided upon yet. A proposed amendment linked to the COVID-19 crisis concerned the option to turn to the Austrian Constitutional Court (ACC) in urgent matters for interim measures.[7] Especially in times of a global health crisis many legislative measures leading to significant restrictions and violations of human and fundamental rights are implemented in a hasty manner. The procedure before the ACC is not cut out to provide swift relief in light of these developments. Decisions are delivered every 3 or 6 months, when many of the COVID-19 measures will no longer be in force. The passed resolution asked the government to draft a proposal for a constitutional amendment establishing the possibility for the ACC to take interim measures in order to avert grave disadvantages.

Aside from that, the parliamentary debate in 2020 once again touched upon a perennial issue of Austrian constitutional reform: The Freedom of Information Act—a proposed constitutional reform which has been discussed for years, but failed time and again. At the heart of this debate lies the fundamental question about how to deal with the access to information from public authorities. Austria provides the worst regulatory framework within the European Union. Two pending

1 See for a list of celebrations, events exhibitions and discussions in light of the 100th anniversary of the Austrian Constitution on the homepage of the Austrian parliament <https:// parlament.gv.at/PAKT/AKT/SCHLTHEM/SCHLAG/J2020/183HundertJahreB-VG> accessed 15 February 2021..

2 See for the symposium on the occassion oft he 100th Annicersary of the Austrian Constitutional Court on the IACL-AIDC Blog <https://blog-iacl-aidc.org/100th-anniversary-of-the-austrian-constitutional-court> accessed 18 February 2021; Thomas Olechowski, *Hans Kelsen: Biographie eines Rechtswissenschaftlers* (Mohr Siebeck; Ciando 2020); Peter Bußjäger, Anna Gamper and Arno Kahl A, *100 Jahre Bundes-Verfassungsgesetz: Verfassung und Verfassungswandel im nationalen und internationalen Kontext* (Verlag Österreich; Schulthess; Nomos 2020); Manfried Welan and Peter Diem, *„Ihr Recht geht vom Volk aus …": 100 Jahre österreichische Bundesverfassung - Staatssymbolik und Staatsziele* (plattform HISTORIA 2020).

3 Federal Law Gazette I No. 16/2020.

4 Wieser, Art 69 B-VG, Kneihs/Lienbacher (eds), *Rill-Schäffer Kommentar Bundesverfassungsrecht* (Verlag Österreich 2012) para 60-63.

5 Veronika Tiefenthaler, *Gewohnheit und Verfassung* (Facultas.wuv; Nomos 2012) 157-162.

6 Federal Law Gazette I No. 24/2020.

7 444/A(E) 27th legislative period; The abbreviation A(E) indicates a motion for a resolution urging the government to take action in a certain matter.

legislative proposals[8] to amend the Constitution in favour of a right to freedom of information were discussed in the constitutional committee to the National Council—but ultimately once again adjourned.[9] The prevailing Austrian approach centres around Article 20 para. 3 Austrian Constitution, enshrining the so called "*Amtsverschwiegenheit*" (official secrecy). This principle compels public authorities to maintain secrecy about everything that has become known to them in their official capacity. This obligation applies if keeping secrecy is required in the interest of maintaining public peace, order and security, national defence, foreign relations, in the economic interest of a corporation under public law, for the preparation of a decision or in the predominant interest of the parties. With first legislatives initiatives being taken in 2014,[10] there has been an ongoing aspiration to pass a Freedom of Information Act abolishing the secrecy approach in favour of implementing a right to freedom of information in the Austrian Constitution.

Another proposed amendment[11] of the Constitution concerned the independence of the judges of the Austrian Constitutional Court (ACC). It demanded Article 147 Austrian Constitution regarding the incompatibility of being a member of the ACC with holding certain political offices to be amended. Currently the Austrian Constitution declares holding a political office incompatible with being a member of the ACC but—except for the president—does not stipulate a waiting period after laying down such a political office before becoming an ACC judge. The amendment proposed calls for the implementation of a general five-year "cooling-off" period for all members as it argues it to be problematic if former members of the legislature went on to decide on the constitutionality of legislative acts previously passed with their involvement. The reason for this proposed constitutional reform was a former vice-chancellor of Austria, becoming a member of the ACC, which is very unusual for Austrian standards (e.g., in contrast to the French model). In addition to this, an amendment of the Constitution in order to substantially limit the possibility for judges of the ACC to simultaneously pursue other professional activities has been called for in parliament.[12] Interestingly, the Austrian Constitution still understands the membership at the ACC as a side job, which creates different problems with regard to incompatibility.[13] Behind this proposed prohibition to pursue other careers besides being a constitutional judge lies the argument that the ability to render objective decisions could be negatively affected by the judges' other obligations, e.g. as practicing lawyers.

A further proposal related to the independence of the judicial branch concerned the organisational integration of the Office of Public Prosecution. One of the opposition parties urged the government to draft a legislative proposal to eliminate the existing authority of the minister of justice—evidently belonging to the executive branch—to give instructions to the Office of Public Prosecution.[14] Instead the creation of a new office of Federal Public Prosecutor—independent and not bound by instructions, accountable only to parliament—was proposed. Recent cases and scandals further pushed the topic;[15] an amendment seems to become politically possible in 2021.

Several bills proposing constitutional amendments were put forward by the Federal Council. One concerned the possibility of raising objections in the legislative process.[16] Criticising that it is only possible to object to a legislative proposal in its entirety, even if it contained provisions on several separate matters, the proposal sought to implement the option to object to parts of a legislative bundle individually. Another legislative proposal called for more federal departments outside of the capital city Vienna and constitutional implementation of a corresponding duty for ministries to conduct an assessment before the establishment of new departments.[17]

Other proposed amendments—either through legislative initiatives or by passing a resolution calling for the government to draft such a bill—concerned the abolition of the mandatory fees for public broadcasting arguing that the "*ORF*" (Austrian Broadcasting Corporation) did not fulfil its core mission under public law;[18] a constitutional right to hard cash;[19] limitation of funding[20] and election campaigning costs[21] for political parties; an obligation only to use official ballots in elections;[22] a competence of the Austrian Ombudsman Board to assess public entities carrying out decentralised tasks[23] as well the procedure for the nomination of its members;[24] creating the possibility to conduct an referendum at municipal level;[25] a right to freedom of opinion online[26] as well as explicitly ensuring that the competence to decide on the lawfulness of an expressed opinion lies with the Courts and not third parties (like call centres).[27] Moreover, the implementation of further constitutional rights of children in realisation of the UN Convention on the Rights of the Child has been proposed, arguing that the later has only been partially and insufficiently implemented up to now.[28]

Deliberations for most of the proposed legislative amendments assigned to the constitutional committee of the National Council have either not yet been taken up or been adjourned. Although, they cannot be classified as "failed" proposals, many of them will not be dealt with within this legislative period due to the lacking political support of the government; they will simply "expire" when the legislative period will come to an end in 2024 at the latest.

A popular petition advocating for the implementation of a constitutional right to climate protection gathered enough signatures to require it to be discussed by parliament.[29] The National Council assigned the petition to the committee on environmental matters but the matter has been adjourned so far.

8 IA 61/A 27th legislative period; IA 453/A 27th legislative period; IA is short for *Initiativantrag* and refers to bills proposed by at least five members of the National council.
9 See the parliamentary communication No. 1293, 25 November 2020 <www.parlament.gv.at/PAKT/PR/JAHR_2020/PK1293/#XXVII_A_00061> accessed 15 February 2021.
10 19/ME 25th legislative period; ME stands for *Ministerialantrag*, a bill coming from the Federal Government drafted by the competent ministry.
11 IA 353/A 27th legislative period.
12 356/A(E) 27th legislative period.
13 Konrad Lachmayer, 'The Austrian Constitutional Court' in András Jakab, Arthur Dyevre and Guilio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017), 75; 86-87.
14 383/A(E) 27th legislative period.
15 Philipp Aichinger, ‚Was ein Bundesstaatsanwalt bringt' (*Die Presse*, 15 February 2021) < www.diepresse.com/5937815> accessed 18 February 2021.
16 51 d.B. 27th legislative period.
17 21 d.B. 27th legislative period.
18 197/A(E) 27th legislative period.
19 IA 175/A 27th legislative period.
20 IA 182/A 27th legislative period.
21 IA 181/A 27th legislative period.
22 IA 246/A 27th legislative period.
23 IA 360/A 27th legislative period.
24 IA 359/A 27th legislative period.
25 1080/A(E) 27th legislative period.
26 476/A(E) 27th legislative period.
27 IA 1179/A 27th legislative period.
28 IA 953/A 27th legislative period.
29 348 d.B. 27th legislative period.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. UNAMENDABLE CONSTITUTIONAL PROVISIONS

Austrian constitutional law is set up as a two-level structure distinguishing between ordinary constitutional law and basic principles of constitutional law.[30] These principles at the highest level of constitutional law include the rule of law, the democratic principle, the republican principle, the federal principle, the liberal principle and the separation of powers. While all changes of constitutional law require heightened attendance and voting quora in the National Council, changes affecting these basic principles additionally require a referendum to be held. None of the proposed or successful reforms constituted such a total revision of the Austrian Constitution. A referendum was not necessary in order to implement them. Hence the constitutional reforms of 2020 constitute amendments of the constitutions rather than dismemberments.[31]

2. LEGISLATIVE OVERSIGHT

The constitutional amendments of 2020 took the same path as regular legislative acts. This includes their assignment to one of the National Council's committees for further discussion according to Article 69 Federal Law on the Rules of Procedure of the Austrian National Council. Such committees are established on different topics at the beginning of each legislative period. For dealing with constitutional matters a specific committee has traditionally been established. The successful amendments to the Austrian constitution described above had been assigned to the committee on budget matters though, as they were part of a bundle of COVID-19 related legislative amendments affecting various laws and topics.

The committees will assess the proposed amendment and potentially suggest changes before the legislative initiative is put to vote in the National Council and subsequently transmitted to the Federal Council. Although members of all the parliamentary parties are part of these committees, the ratio between the parties relates to the seats of the parties in the National Council. Therefore, the coalition of the governing parties usually has a majority in the committees just like in the subsequent vote in the National Council itself.

Frequently, proposals not supported by the governing parties will be discussed regularly in the committees but ultimately keep being adjourned and are never formally dealt with. Legislative proposals left undone at the end of a legislative period "expire" and will not be picked up in the next period—except for those stemming from a popular petition (Article 28 Austrian Constitution). In practice, despite providing the opportunity for in-depth political discourse and review of the proposed amendments ahead of voting in the National Council, the pit stop in the committee effectively proves to be the final stop for many of them. A lot of the currently pending proposals for constitutional amendments will most likely not be further discussed in parliament.

Another form of oversight for proposed constitutional amendments during the legislative process comes through the review process initiated for all bills drafted by the government. In the course of this step, interest groups and organisations as well as the general public can give statements on the proposed new law. In regard to amendments touching on constitutional matters the *Verfassungsdienst* (constitutional service)—a department of the Federal chancellery focused on constitutional issues—will be involved. However, the review process as well as the involvement of the *Verfassungsdienst* are not legally required but have been observed as part of a decade-long state practice.[32] Notwithstanding this lacking legal requirement, the skipping of the review process and especially failing to involve the *Verfassungsdienst* before many of the COVID-19 related laws were passed—often containing considerable infringements of fundamental rights—lead to discussions and calls in parliament for creating the legal foundation to ensure mandatory observance of a review process for all bills—not only those drafted by the government—in the future.[33]

3. INVOLVEMENT OF THE FEDERAL PRESIDENT IN THE CONSTITUTIONAL AMENDMENT PROCEDURE

After passing both chambers of parliament before any legislative act can come into force the Federal President needs to authenticate the enactment of the law. The range of this competence is disputed in legal scholarship with some adhering to the interpretation that the Federal President merely confirms the correct procedure prescribed by the Constitution has been followed[34] and others re-evaluating the provision to further include the competence to reject laws on evident unconstitutionality in relation to the content of the law.[35] Only on one occasion in 2008 has a Federal President denied to authenticate the enactment of a law—on the grounds that it included a retroactive penal provision in clear violation of Article 7 of the European Convention of Human Rights (which has been awarded constitutional rank in Austria).[36] Therefore, while the range of the Federal Presidents' competence might still be a matter of debate, the denial of authentication has not been exercised often in general and in particular not in relation to any amendments made in 2020.

4. CONSTITUTIONAL REVIEW

The constitutionality of all legislative acts can be reviewed by the ACC after they have been implemented. The ACC has assumed the competence to subject even laws at constitutional level to its *ex post* scrutiny finding a violation of such a provision against the higher ranking basic principles of the Austrian Constitution. The ACC initiates the proceedings *ex officio* only in case it would have to apply the relevant law in a

30 Harald Eberhard and Konrad Lachmayer, 'Constitutional Reform 2008 in Austria' (2008) ICL Journal 112, 116.

31 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 76-94.

32 See the Federal Chancelor's answer to a parliamentary inquiry on that matter in June 2020; 1740/AB 27th legislative period.

33 IA 1178/A 27th legislative period.

34 Christoph Bezemek, *Zur Rolle des Bundespräsidenten als Hüter des Gesetzgebungsverfahrens*, Zeitschrift für Verwaltungsrecht [Austrian Journal of Administrative Law] 2015, 150.

35 Heinz Peter Rill, *Die Rolle des Bundespräsidenten als Hüter der Verfassung*, Zeitschrift für Verwaltungsrecht [Austrian Journal of Administrative Law] 2008, 314.

36 Karin Moser, 'Bundespräsident lehnt Gesetz ab' *DER STANDARD* (Vienna, 16th January 2008).

pending proceeding. Other than that, it will only decide upon the constitutionality of a law following a motion by another Court, an individual, the national or a federal government (Article 140 Austrian Constitution). In relation to the legislative steps taken in 2020, certain statutory acts and ordinances have been found to be unconstitutional or unlawful by the ACC.[37] However, none of the constitutional amendments of 2020—which were few and far between anyway—have been subjected to this kind of *ex post* review by the ACC so far.

The Austrian Constitution does not provide for a general *ex ante* constitutional review of legislative acts—including constitutional reforms—by the judiciary or the ACC in particular. The only exception is the possibility to clarify whether an act of legislature falls within the competence of the *Bund* (federation) or the *Länder* (federal states) upon application by the national or a federal state government prior to its implementation (Article 138 Austrian Constitution).

The Austrian Constitutional Court as one of the three supreme courts in Austria—besides the Supreme Administrative Court and the Austrian Supreme Court of Justice (for civil and criminal matters)—can be attributed the role of the guardian of the Austrian Constitution.[38] Its Constitutional mandate is to exclusively review the constitutionality of legislative and administrative acts. In this sense it plays a clear countermajoritan role.[39] However, some decisions indicate that the ACC has taken on a more activist role at times, advancing rights regarding controversial topics like same sex marriage[40] and third gender[41]. While the ACC has overall become more activist in the last 50 years,[42] it has taken on a more restrained approach again in recent years.[43] Nevertheless, the latest decisions in 2020 regarding the COVID-19 measures or the proclamation of the right to self-determined dying in connection to assisted suicide[44], illustrate that the ACC stays true to its course on fundamental rights and does not shy away from taking on a representative or even enlightened role where deemed necessary.

It is worth noting, that the ACC's approach to subject constitutional law to its scrutiny against the higher-ranking fundamental principles of the Austrian Constitution arises from it taking on a representative role in the first place. In the relevant case[45] the legislator apparently intended to exempt a certain area of the legal order completely from the ACCs scrutiny by plainly stating in a provision at constitutional level that all laws in force at a certain time regarding a certain issue are to be "considered not unconstitutional".[46] However, the ACC lifted this provision as violating the principle of rule of law and the democratic principle arguing *inter alia* that allowing for a suspension of the Austrian Constitution such as the relevant law prescribed would deprive the Austrian people of their constituent power[47] and in doing so protected them against the legislator. Accordingly, the ACC exercises control of constitutional reforms as it measures them against the fundamental principles of the Austrian Constitution. Despite the undoubted significance of this decision and its implications, the ACC's competence to review constitutional law only rarely leads to a finding of unconstitutionality.

A reform touching upon those principles requires a referendum to be held in order for their amendment. With only two referenda held to date—one on the accession to the European Union in 1994 and the other on the use of nuclear power in the 1970s—[48] such far reaching constitutional reforms (dismemberments) remain the exception. This in turn leaves the vast majority of constitutional reforms—including the ones passed in 2020—under the scrutiny of the ACC in light of the fundamental principles of the Austrian Constitution.

IV. LOOKING AHEAD

So far, concerns regarding a possible unconstitutionality of the few legislative amendments implemented at constitutional level in 2020 have not been raised. Nevertheless, the taken constitutional reforms remain open to future review by the ACC. The pending proposals have yet to be dealt with and potential shortcomings of constitutional control in the legislative process revealed in times of crisis can still hope to be picked up by parliamentary debate. With many legislative proposals in the waiting, especially the initiative regarding the creation of a new office of Federal Public Prosecutor has received fresh impetus due to recent political events. Parliamentary investigations of potential corruption of a past government have given rise to question the independence of the Office of Public Prosecution as the ministry of justice has the competence to give instructions. Furthermore, the initiative to reform Austria's secrecy approach towards public administration seems—once again—to have advanced. Despite the topic being adjourned in November 2020, the government has reportedly agreed on a legislative proposal in early 2021.[49]

As the COVID-19 Pandemic sets out to remain the dominant topic of 2021, the evaluation of past measures taken as well as the implementation of those yet to be taken will undoubtedly bring up new questions of constitutionality. The year 2020 has shown the resilience of the Austrian Constitution once more since constitutional reforms adopted were very few in numbers and more importantly not profound in matter and significant reforms taking place in response to the current pandemic are not to be expected.

37 Susanne Gstöttner and Konrad Lachmayer, *No Benefit of Hindsight: Austria's Ongoing Legal Struggle in the Fight Against the Pandemic, VerfBlog*, 2020/12/03, https://verfassungsblog.de/no-benefit-of-hindsight.

38 Konrad Lachmayer, 'The Austrian Constitutional Court' in András Jakab,Arthur Dyevre and Guilio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017), 75; 86-87; Konrad Lachmayer and Niklas Sonntag, 'Austrian Legal Culture' in Søren Koch and Jørn Øyrehagen Sunde (eds), *Comparing Legal Cultures* (Revised and Extended 2nd Edition, Fagbokforlaget Pub 2020) 511–539.

39 See for a discussion of the Weberian ideal types of judicial roles Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' [2019] 67 The American Journal of Comparative Law 109-143.

40 VfSlg 20.225/2017; VfSlg refers to the official collection of judgments of the ACC—decisions are cited giving the number assigned within this collection and the year of the decision.

41 VfSlg 20.258/2018.

42 Harald Eberhard, 'Judicial activism und judicial self restraint in der Judikatur des VfGH', in Erwin Bernat et al (eds), *Festschrift Christian Kopetzki* (Manz 2019) 141, 150.

43 Konrad Lachmayer, 'Formalism and Judicial Self-Restraint as Tools Against Populism? Considerations to Recent Developments of the Austrian Constitutional Court' in Fruszina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge Publishing, in print).

44 ACC 11.12.2020, G 139/2019.

45 VfSlg 16.327/2001.

46 VfSlg 16.327/2001.

47 VfSlg 16.327/2001.

48 For the results see Federal Law Gazette No. 628/1978 and No. 735/1994.

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Barbados

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I. INTRODUCTION

As Barbados approaches 55 years of Independence, the Original Independence Constitution, characterized by a relatively conservative text, has been subject to little constitutional reform and strikingly has never been repatriated, as for example the Canadian constitution (though the British Monarch remains the head of state of Canada). Barbados is a Constitutional Monarchy and Parliamentary democracy which falls within the eponymous, even if metaphorical "Westminster Model" Constitution, premised on the First-Past-the-Post (FPTP) system. The FPTP system in 2018, yielded the short-lived but complete elimination of Her Majesty's Opposition in Parliament, with a clean-sweep by the governing party of 30-0, with both political parties accepting the results avoiding a descension into electoral chaos and a judicialization of politics that marred recent elections in Guyana.[1] This electoral decimation was followed by a quick defection from the Governing political party, which prompted the revival of Her Majesty's Opposition with a one-person opposition in the Lower House, and the related appointment of opposition senators in the Upper House, as accorded by the Constitution of Barbados (Constitution) to the Leader of the Opposition[2]. It is against this backdrop of undefeatable majorities that the limited constitutional reforms of 2020 are assessed.[3]

The sole constitutional amendment of 2020 does not raise any particularly novel or engaging issues. Instead, context is key. Beyond Parliamentary composition, the first contextual element is the totalizing nature of the Covid-19 pandemic and the deepening of Executive-centric governance. Secondly, lingering tensions from post-2018 constitutional and legislative reforms concerning the appointment and disciplining of the judiciary inform 2020 constitutionalism, the constitution-as-practiced, particularly concerning the appointment of a new Chief Justice. The third and most instrumental, is the emergence of the Caribbean Court of Justice's 'revolutionary epoch', which has resulted in two significant constitutional changes: a) the reading down of the existing (savings) law clause in the Constitution, and b) persuasive jurisprudence concerning the unamendability of the Constitution by way of the basic structure doctrine. These developments, the stalling of the economy, and electoral promises point to diverse possibilities of constitutional reforms in the future, all potentially promising and undoubtedly fraught.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. ALL A LEGAL FICTION?

Few Constitutional reforms were enacted in 2020. In fact, the sole amendment was enacted by virtue of the *Constitution (Amendment) Act, 2020* which raised the age at which the constitutionally established office-holders of the Director of Public Prosecution and the Auditor Generals were required to vacate office to the age of 67.[4] This amendment was a previously introduced Bill that failed in 2016 when the Opposition Senators (now Government) abstained from the vote, depriving the Bill of the requisite majority needed to enact the Amendment. In substance, the *Act* was no different and is best understood as emerging from the vicissitudes of political life.

The State's legislative and regulatory agenda has been dominated by two phenomenon; the Covid-19 Pandemic[5] and the International Monetary Fund such that constitution-making, though not constitutionalism, has ground to a halt.[6] The response to the Covid-19 Pandemic, premised on the avoidance of the declaration of a constitutional state of emergency, and the use of ordinary legislation (the Emergency Management Act) to limit rights, has thus largely been executive-centric with little legislative intervention and, or Cabinet oversight, given Cabinet's authority has been delegated to the Prime Minister (PM).[7] Thus there is an expansion of executive primacy and

1 See for example, Cynthia Barrow-Giles & Ronnie R. F. Yearwood, "CARICOM and the 2020 unsettled elections in Guyana: a failed political (legal) solution?" (2020) 109 (5) The Round Table: The Commonwealth Journal of International Affairs <https://www.tandfonline.com/doi/full/10.1080/00358533.2020.1819621>

2 Constitution of Barbados, 1996 (amended) s 36 (3)

3 The relativity however is derived from the composition of the senate where the Governing Party has control of 12 of the 21 seats in the Senate. This thus requires the acquiescence of a minimum two of the other nine members (seven independents appointed by the governor general and two by the leader of the opposition) to vote with the Governing Party members, if that is presumed a requirement of the constitution. On one occasion, the non-Government Senators voted against or abstained from a Constitutional amendment, thereby depriving it of it of successful passage.

4 This follows another similar and limited Constitutional Reform in 2018 where via Constitution (Amendment) Act, 2018, Parliament modified the qualifications for membership of the Senate and the provisions relating to disqualification for membership of the Senate; which was driven by a practical need; two intended senators did not meet the requirement provisions as there were limitations on Barbadian citizens holding dual citizenship.

5 Catastrophe Fund Bill, 2020; Barbados Optional Savings Scheme Bill, 2020; Remote Employment Bill, 2020; Emergency Management (Amendment) Bill, 2020

6 Companies (Amendment) Bill, 2020; Central Bank of Barbados Bill, 2020; Planning and Development (Amendment) Act, 2020

7 Emergency Management Act (amended) 2020, section 28 A (1)(6).

a growing state of 'queen-ification' to modify the language of distinguished Caribbean jurist Tracy Robinson.[8] Beyond the Covid-19 Pandemic, the management of the Barbados Economic Recovery and Transformation (BERT) program, a self-described home-grown program entered into with the International Monetary Fund (IMF) to remedy an unprecedented economic crisis has dominated the political agenda of the Government of Barbados.[9]

Constitutionalism nonetheless continued apace. In October 2020, Barbados appointed its fifth Chief Justice since Independence. On this occasion, and for the first time the appointment was advertised and made pursuant to the recommendation of a new body, the Judicial Appointments Committee (JAC). These form a part of the lattice of the 2019 Constitutional and legislative reforms where the Government of Barbados amended the Constitution of Barbados and the Supreme Court of Judicature Act (SCJA). The amendments included:

- increasing the number of judges in the High Court,[10]
- the establishment of a commercial division of the High Court,[11]
- expanding the grounds on which a judge may be removed from office,[12] and
- the establishment of a Judicial Appointments Committee to appoint judges.[13]

The appointment of the JAC and the expansion of the grounds for the removal of a judge merit brief analysis.

The amendment of the SCJA to establish the JAC appears as an attempt to address the 1974 Constitutional amendment which gave the PM the direct power to appoint judges as set out in section 81(1) of the Constitution; but also, perhaps represents a new example of deepened Prime Ministerial primacy since the enactment of the Constitution. It appears that section 81(1) of the Constitution was not directly amended but the change to it was effected through the amendment to the SCJA, section 93A(1), which states that "There is hereby established a Judicial Appointments Committee which shall be responsible for making recommendations to the Prime Minister, in respect of the persons to be appointed to any vacancy to the Supreme Court of Judicature, for the purposes of *section 81 of the Constitution*." The amendment to the SCJA therefore appears as an articulation of how the PM can exercise the power expressed in section 81(1) of the Constitution to appoint judges, which remains intact as the assumption would be that the SCJA and the JAC are subservient to the Constitution.

In the alternative, the amendment to the SCJA may appear as contrary to section 49 of the Constitution which states, that, "No Act of Parliament shall be construed as altering this Constitution unless it is stated in the Act that it is an Act for that purpose", given that the amending law affecting the exercise of a Constitutional power by the PM is the SCJA and not the Constitution. Further, any amendment to the part of the Constitution related to the judiciary requires a two-thirds majority of both Houses of Parliament, instead of a normal majority. Though given the supermajority of the governing party amending the Constitution is easily achievable, so in examining in the alternative, one is left to wonder why the amendment to section 81 of the Constitution to introduce the JAC was not a direct amendment to section 81(1) of the Constitution, which remains intact.

The new JAC is responsible "for making recommendations" to the PM for vacancies of judges including the Chief Justice.[14] Judicial appointment committees are usually instruments used to enhance judicial independence in removing the power of the executive, especially in our Westminster model, from being involved in appointing judges. The explanatory memorandum to the amendment bill which proposed the JAC, noted that the JAC will be "called into action by the Prime Minister where it is determined that there is vacancy in the Supreme Court of Judicature which must be filled…"[15] The establishment of the JAC to reflect a reimagining or rejuvenation of our political conventions appears chimeric as the power ultimately remains vested in the PM. That said, the removal of the power 'directly' from the PM and the vesting in the JAC through Constitutional Amendment appears a sturdier device for guaranteeing the Independence of the Judiciary.

The nature and functioning of the JAC raises several concerns of concentration of the power regarding judicial appointments in the Executive, even if indirectly. These include:

1. The Chief Justice is reduced to merely an ex officio member of the JAC, whereas the PM appoints the Chair of the JAC.[16]
2. All members of the JAC, except the Chief Justice, are appointed and can have their appointment revoked by the PM.[17]
3. The Prime Minister determines the remuneration and allowances of members of the JAC.[18]
4. There are no provisions for compelling a PM to execute the statutory provisions to call the JAC into action. The law states that JAC "shall only be required where the Prime Minister determines that a vacancy, which shall be filled, has occurred in the Supreme Court of Judicature."[19]

Having attended to the appointment of the judiciary, the remainder of this section addresses the constitutional amendment of an additional cause for removal of a judge. Through Constitution (Amendment) (No. 2) Act, 2019–16, the legislature introduced a new constitutional provision under which judges can be dismissed from the Bench if they

8 Tracy Robinson, COVID-19 Implications: Public & Private Law Perspectives | Mona Law | Public Forum (2020) <https://www.youtube.com/watch?v=8vr5-NMroHA&ab_channel=UWIMonaMedia> accessed 8 February 2021

9 For example, International Monetary Fund, *Barbados Fourth Review Under the Extended Arrangement*, IMF, 11 December 2020 < https://www.imf.org/en/Publications/CR/Issues/2020/12/11/Barbados-Fourth-Review-Under-the-Extended-Arrangement-Requests-for-Augmentation-of-Access-and-49952>

10 Supreme Court of Judicature (Amendment) Act, 2019, s 4

11 Supreme Court of Judicature (Amendment) Act, 2019, s 15

12 Constitution of Barbados, 1996 (amended) s 84 (3)

13 Supreme Court of Judicature (Amendment) Act, 2019, s 93A

14 Supreme Court of Judicature (Amendment) Act, 2019, s 93A (1). Section 81(1) of the Constitution states, "The Chief Justice and other Judges of the Supreme Court shall be appointed by the Governor-General, by instrument under the Public Seal, on the recommendation of the Prime Minister after consultation with the Leader of the Opposition."

15 Supreme Court of Judicature (Amendment) Bill, 2019, Explanatory Memorandum, Clause 5 < https://www.barbadosparliament.com/uploads/bill_resolution/4d148fc8afe894d46bc1e06af078a10e.pdf>

16 Supreme Court of Judicature (Amendment) Act, 2019, s 93A (2), Fourth Schedule, clause 1 (a)

17 Supreme Court of Judicature (Amendment) Act, 2019, s 93A (2), Fourth Schedule, clause 4

18 Supreme Court of Judicature (Amendment) Act, 2019, s 93A (2), Fourth Schedule, clause 9

19 Supreme Court of Judicature (Amendment) Act, 2019, s 93A (2), Fourth Schedule, clause 2. Also see note, 15, as Sch 4, clause 2 accords with the Explanatory Memorandum to the bill prior to it becoming an Act.

take more than six months to deliver a decision on any matter that comes before them. It responds to the chronic nature of delay in judgments from Barbadian Courts which has been a matter of note, and notoriety for Barbados.[20]

The amendment to the Constitution elaborates a separate species of misconduct which in its formulation, in our view, draws a near strict-liability analogy: the failure to deliver a judgment in six months. It is not the unreasonable failure, or simply delay as a pattern which may fall within the broad category of serious misconduct. *In Dean Boyce et al v The Judicial Legal Services Commission* [2018] CCJ 23 (AJ) the CCJ addressed the same mischief which underlies the Barbados constitutional amendment, judicial delay in the giving of judgments. In keeping with the Latimer guidelines, delay in Belize was dealt with under the rubric of judicial misbehaviour or misconduct. The use of this broader rubric is to be preferred as it provides an appropriate discretion to the determining body to consider the circumstances of the case and the judges judicial behaviour generally. In singling out the delay in giving a judgment, this approach fails to address systematic factors, and seemingly with so wide and pervasive a problem, it fairly might be said that all judges are at risk of removal. A view could be taken that this exposes the judiciary to unjust pressure.

The Latimer House Principles require each of the three arms of government to maintain high standards of accountability, transparency, and responsibility in the conduct of all public business. As noted by JA Jamadar in *The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T*, "Accountability by public officers, including judges is of paramount value in a democracy… Freedom and the rule of law depend significantly on accountability for their survival."[21] The balance then between accountability and independence is thus one which must be delicately poised. The dicta of Justice Kokoram in *LATT V Dr. Keith Rowley*, is likewise prescient:[22] "The rule of law depends upon this independent Judiciary insulated from harassment or pressure, to make decisions free of fear or favour to "calmly poise the scales of justice unmoved by armed power undisturbed by the clamour of the multitude".

On assessing the reform as discussed above, the PM still has the power to appoint judges and the grounds for dismissal has been expanded for delay. These raise the issue of actual or perceived interference, and whether there is continued contravention of judicial independence and separation of powers. In essence, do these amendments amount to legal fiction?

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. THE CARIBBEAN COURT OF JUSTICE: DECOLONIAL RATIONALITIES AND THE DISMEMBERMENT OF COLONIAL CONSTITUTIONS

The Caribbean's tortured process of constitutional inheritance, drafted in Westminster by elites with little input from the constituting power of the state, the people, and bequeathed to the fledgling independent states, has always stood at variance, with historical notions of written constitutions as emanating from a people, and as fundamentally disruptive of relations of subjugation.[23] Calls for repatriation, and the indigenizing of our Constitutions abound.[24] Repatriation rather than a singular event, may be understood as a site for multiple avenues of praxis. Albert for example, locates a key mechanism or axis of this repatriation beyond textual repatriation, in the establishment and acceptance of the of the Caribbean Court of Justice (CCJ) as the final appellate Court for Barbados, and separation from the colonial coat-tails of the Judicial Committee of the Privy Council.[25] Understood as constitutional dismemberment, the dismemberment is effected via the very act of institutionalization of an indigenous court—an act by the Legislature which has had the effect of deconstructing the constitution; "self-Conscious efforts to unmake colonial constitutions while retaining legal continuity with the old."[26]

If the institutionalization of the CCJ in and of itself can be fundamental act of rupture, and hence dismemberment, then it follows that such a decolonial Court via its judgments may further dismember the Constitution.[27] In this instance, we assess the CCJ's jurisprudence in *Nervais v R*[28] and *Belize International Services Limited v Attorney General Of Belize*[29] as fundamental constitutional dismemberment, whereby the CCJ adopts and expands upon existing modes of interpretation to fundamentally transform the constitution by altering the scope of fundamental rights and discovering supra-constitutional structures which undoubtedly produce something new.

In *Nervais*, the CCJ dismembered the Constitution via its practical erasure of the Savings Law Clause[30] which previously limited a court's ability to declare laws which were passed prior to Independence and hence before Barbadian lawmakers fully exercised the Sovereign Power of the State, inconsistent with or in contravention of the Bill of Rights in the Constitution. While the Jamaica Charter repealed that clause via legislative fiat; the CCJ in *Nervais* effectively read-down the clause by cementing the most restrictive of interpretations of the savings law clause such that a new human rights-regime can safely be said to exist. The CCJ appears to have adopted a McIntoshian-inspired reading of the Barbadian Constitution as an "instrument of justice …[which] must be interpreted to yield the integrity and coherence of its meaning as an instrument of such constitutive purpose."[31] That test of coherence

20 For example, in 2005, in Barbados Rediffusion v. Mirchandani, [2005] CCJ 1 (AJ), para 45 the Court notes that "The periods for which these judgments remained undelivered total more than seven years. We would be failing in our duty if we did not express our strong disapproval of judicial delays of that order. They deny parties the access to justice to which they are entitled and undermine public confidence in the administration of justice. We would like to think that such delays are now a thing of the past in Barbados". Then, in 2020, in Knox v Deane and others [2020] CCJ 5 (AJ) BB, the Court lamented A delay of over four years in a case that turns on whether a judge was right or wrong in making a garnishee (order to seize assets) borders on the intolerable.

21 Civil Appeal No. P075 of 2018

22 Claim No. CV2019-03989

23 McIntosh Simeon CR, *Caribbean Constitutional Reform: Rethinking the West Indian Polity. Kingston* (The Caribbean Law Publishing Company 2002)

24 Drayton RH, Whose Constitution? Law, Justice and History in the Caribbean: 6th Distinguished Jurist Lecture (Judicial Education Institute of Trinidad and Tobago 2016) <https://kclpure.kcl.ac.uk/portal/en/publications/whose-constitution-law-justice-and-history-in-the-caribbean(55e4ed04-e9a6-47f9-803d-dd37baa20cdd)/export.html> accessed 8 January 2021;

25 Albert R, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale Journal of International Law 1

26 Albert R, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019), 91

27 Robinson TS, Bulkan A and Saunders A, *Fundamentals of Caribbean Constitutional Law* (Sweet & Maxwell 2015)

28 *Nervais & Severin v The Queen*. [2018] CCJ 19 (AJ)

29 *Belize International Services Limited v Attorney General of Belize [2020] CCJ 9 (AJ) BZ*

30 Section 26, Constitution of Barbados.

31 McIntosh S, Homosexuality-Constitutional Question, THE ST LUCIA MIRROR, Jun. 3, 2005, available at http://www.stluciamirroronline.com/2005/june3/art1.htm.

is thus met where our Constitutions are understood as "expressing a coherent vision of justice and fairness."[32] The Court rejected the notion of 'the plain meaning' of a text, and read the constitution holistically in a search for meaning including the broader constitutive aims and purposes. In this vein, McIntosh, argued and the CCJ appears to concur that "judicial activism on behalf of higher standards of political morality" is permissible provided that the decision meets the test of coherence.[33] Coupled with the expansion of the scope of justiciable rights via an assessment of the preambulatory opening state of the Bill of Rights in the Constitution as grounding independent rights, the Court explicitly engages a holistic reading of the Constitution to produce a new juncture for which there is no turning back.

2. THE EMERGENCE OF A SUBSTANTIVE REVIEW OF CONSTITUTIONAL AMENDMENTS

The Barbados Constitution, lays down a substantive law of the state which remains binding until amended by the constitutionalized special procedures as included in the constitution for so doing.[34] All laws in the Barbadian Constitution are subject to the edict of the Supremacy Clause which provides that "This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."[35] As noted in *Hinds v R* the constitution, whether Bill of Rights or otherwise, imposes "a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers".[36] Historically, this fetter however maybe altered or even removed, as long as compliance with the formal provisions for amendment have been complied with. These legislative reforms over the last 5 years by the Parliament squarely fall within the categorization of a 'simple' amendment which coheres with the existing constitution and keep[s] the constitution consistent with its pre-change form. A classic view of the amendability of the Barbadian Constitution as being limited procedurally only by section 49 is thus satisfied. This view however is changing.

In *Barry Bowen v. The Attorney General of Belize* Claim,[37] then Chief Justice Conteh of Belize introduced the concept of the basic structure doctrine to Caribbean Constitutional vocabulary. The decision in *Belize International Services Limited* expands upon this, providing acceptance of the Basic Structure Doctrine as part of the constitutional schema within Caribbean Constitutions which establishes a non-textual regime of unamendability. Jamadar in *BISL*, reflecting on the court's judgment in *Mc Ewan*[38] noted that:

> "The Court declared the rule of law to be a core constitutional principle, effectively cementing it as a part of the basic 'deep' structure in Caribbean constitutionalism…Inherent in the constitutional frameworks of our so-called Westminster-derived constitutions are unwritten constitutional principles; features, principles, and values that are constitutive and so form part of the basic 'deep' structure of these Constitutions."[39]

The Basic Structure Doctrine thus enables a substantive assessment of constitutional amendments in Commonwealth Caribbean Courts. While Jamadar's decision was an individual and hence independent judgment from the majority in *BISL*, it reflects an authoritative synthesis of the Court's jurisprudence along the yellow brick road to the Basic Structure Doctrine and a persuasive judgment for Barbadian Courts. In our view, these represent fundamental acts of judicial dismemberment in the production of a new constitutional order. While these amendments, in our assessment are not likely to violate the Basic Structure Doctrine, its recognition is pregnant with potential.

These expansive approaches by the CCJ demonstrates the Courts pre-eminence as a decolonizing institution. The CCJ as a particular creature of Caribbean sociocultural and legal imagination has acted as counter majoritarian and enlightened institution[40], tasked with the work of decolonial 'smaddification'- recognizing the dignity inherent in Caribbean citizens. To explain in historical context, Girvan argues:

> "What unites us is a common frame of reference of our historical experience. But what also unites us, in a context of diversity, has been the affirmation of what my old friend and colleague Rex Nettleford called "smaddification"…All the labor that was brought here was brought here in a condition of exploitation of one way or another and the process of creating a Caribbean identity out of those conditions is a process of resistance, of struggle and of affirmation of self, of the dignity of the human person and of the right to autonomy of our societies…[41]

Gabrielle Elliot-Williams speaking in the aftermath of the Caribbean Court of Justice's decision in *McEwan* noted the Court's conscious act of discontinuity. Elliot-Williams argues:

"CCJ also signalled its decolonising capacity by articulating Caribbean identity in inclusive terms. It rightly affirmed that trans persons are entitled to full membership in the political community, in circumstances where its position is likely an anti-majoritarian one. The CCJ is demonstrating its decolonizing capacity in a context where, it is argued, the Privy Council cannot."[42]

Beyond the decision in *McEwan,* a return to *Severin,* points us to the CCJ's acuity in recognizing how the general savings law clause and the exclusion of the preamble from constitutional justiciability functioned as a constraint on constitutional time; an assessment of the law as freezing in time, and place- particular relationships of subjugation. These colonial laws which have mutated from anti-majoritarian at the time of their enactment, targeted at the majority of

32 McIntosh SCR, *Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence* (Ian Randle Publishers 2005), 80
33 McIntosh SCR, *Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence* (Ian Randle Publishers 2005), 60
34 See for example, section 49 of the Barbados Constitution
35 Constitution of Barbados, 1996 (amended) s 1
36 [1976] 1 ALL ER 353, at 360
37 No. 445 of 2008
38 Quincy Mc Ewan, Seon Clark, Joseph Fraser, Seyon Persau, and Society Against Sexual Orientation Discrimination v Attorney General of Guyana [2018] CC 30 (AJ) GY
39 Belize International Services Limited v Attorney General of Belize [2020] CCJ 9 (AJ) BZ
40 Barroso LR, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 The American Journal of Comparative Law 109
41 Girvan N, 'Caribbean Integration: Can Cultural Production Succeed Where Politics and Economics Have Failed' [2012] Keynote address St. Martin Book Fair (May 2012)
42 Elliott-Wiliams G, 'The CCJ Decolonizing Caribbean Constitutionalism' (2019) 45 Commonwealth Law Bulletin 742

the population, towards 'loved laws' targeted at distinct minorities in their post-colonial deployment[43] have thus now been thrust into a Barbadian legal sphere where constitutional time is now unbound. The clock is ticking.

V. LOOKING AHEAD

The government of Barbados in the most recent Throne Speech[44] announced that Barbados was to become a republic by 30 November 2021. The government of Barbados has proposed that Barbados would become a republic, dispensing with the current political system of a constitutional monarchy. Therefore, the external British monarch represented by a Governor General in Barbados would be completely replaced by a Barbadian head of state not representative of any external monarch, even if only that head of state is ceremonial.

This is not the first time that a government of Barbados has announced that Barbados would become a republic, only for it not to materialize. In 1998, the Constitutional Commission recommended the change to republicanism.[45] In January 2005 the government promised that a referendum would be held to determine if Barbados would become a republic and that it would be included in the general elections.[46] The 2005 Referendum Act proposed the question as:

> Do you agree with the recommendation of the Constitution Review Commission that Barbados should become a Parliamentary republic with the head of State of Barbados being a President who is a citizen of Barbados?[47]

However, it was not held and some ten years later in 2015,[48] the government announced that Barbados would be moving to a republic in the near future with no specifics on what form the republic would take and the process to get there, whether via a referendum or not. In the most recent announcement that Barbados is to become a republic, it is still not clear whether the government will put the issue to a referendum, the form of republic, and if any wider constitutional changes such as term limits and reform on the unelected upper house of Parliament (the Senate) would also be introduced. Given the Covid pandemic, it remains to be seen whether becoming a republic will be a priority for the current government, or other political priorities will overtake the issue as have happened in the past. As recently observed by a section of the British media regarding the removal of the Queen as head of state of Barbados; "It is actually quite unusual for a country to remove the Queen as its head of state. The last to do so was Mauritius in 1992. Other Caribbean countries like Dominica, Guyana and Trinidad and Tobago became republics in the 1970s… Of course, some have talked for years of slipping the royal anchor and establishing their own heads of state. But other political objectives often get in the way."[49]

Beyond promised constitutional amendments in this form, the government of Barbados has indicated in interest in engaging in referenda concerning same-sex marriage and the legalization of the recreational use of marijuana. Reliant on constituent legitimacy and hence representative democracy bona fides, the Government appears to avoid legislative-driven fundamental changes to the constitution on issues of minority rights or for which there is likely to be significant majoritarian pushback. This is suggestive of a representative, if not populist approach to Constitutional reform. Referendums in the Caribbean are inevitably, and already, rocky terrain [50] As such, the use of direct democracy concerning minority rights remains suspect.

The emergent jurisprudence of the CCJ and political commitments by the Government of Barbados have the potential to transform Barbadian Constitutionalism over the next years. Justice Jamadar in *Air Services Ltd* articulated a constitutionally based duty to consult, distinct from administrative law or other sources.[51] It is a constitutional imperative in furtherance of governance built on "broad-based participation in national decision-making".[52] Consultation is both "important and necessary"[53] when context mandates it, as the constitution is supreme. While the Barbadian Constitution differs in its articulation of the preamble from the Guyanese constitution, which is the basis of *Air Services Ltd*, there is scope for a court to ground a duty to consult in the preambular values of the Barbados Constitution, including "a society in which all persons may, to the full extent of their capacity, play a due part in the institutions of the national life."[54]

We hope that the state of constitutionalism then may transcend a critique made as Barbados approached its Fiftieth Anniversary:

> The failure of … Barbados in developing an indigenous jurisprudence, has not merely been the drafting of a Constitution, divorced from its constituent base and an elite (male) political leadership; nor merely the failure of (most) judges (particularly the JCPC), in the face of a conservative and inconsistent text, to employ typologies of reasoning which may breathe new life into a restrictive text. It has been the failure of the Legislature to do the work of meaningful constitutional reform in the face of the obvious limitations of the Constitutional text; and the failure of the Judiciary, in the face of decades of constitutional neglect and the permitting of rights decay by the political directorate, to be effective guardians of the Constitution and its spirit through effective re-authoring of the Constitution through its interpretation.[55]

43 See for example, Robinson T, 'Sticky Colonial Criminal Laws' (2020) 75 University of Miami Review Caveat 58, Available at SSRN: https://ssrn.com/abstract=3727371

44 Barbados Government, Throne Speech, (15 Sep 2020) <https://pmo.gov.bb/2020/09/15/opening-of-parliament-and-the-throne-speech/>

45 Barbados Government, *Constitution Review Commission Report,* (Government Printing Department, 1998)

46 'Referendum on Republic to be bundled with election' (CBC, 26 Nov 2007) <https://web.archive.org/web/20071128050750/http://www.cbc.bb/content/view/13417/10/>

47 Referendum Act 20025 <http://www.caribbeanelections.com/eDocs/legislation/bb/bb_Referendum_Act_2005.pdf>

48 'PM says Barbados moving towards Republic' Jamaica Observer (Jamaica, 23 March 2015) <https://web.archive.org/web/20150324053426/http://www.jamaicaobserver.com/latestnews/PM-says-Barbados-moving-towards-Republic>

49 James Landale, 'Barbados to remove Queen Elizabeth as head of state' BBC (London, 16 Sep 2020) <https://www.bbc.com/news/world-latin-america-54174794>

50 Grenade WC, 'Direct Democracy and Party Politics in the Commonwealth Caribbean: An Analysis of the 2016 Referendum on Constitutional Reform in Grenada' (2020) 58 Commonwealth & Comparative Politics 495

51 Air Services Ltd v AG et al [2021] CCJ 3 (AJ) GY, para 44

52 Air Services Ltd v AG et al [2021] CCJ 3 (AJ) GY, para 37

53 Air Services Ltd v AG et al [2021] CCJ 3 (AJ) GY, para 44

54 Constitution of Barbados, Preamble, clause (d)

55 Rashad Brathwaite, "Gendered Dynamics In Constituting The Postcolonial State: Barbados At 50" The Bar Bench Journal 2018

Interestingly, on the first amendment of the Constitution in the current administration to appoint two senators that normally would not have been qualified to be senators, the Prime Minister of Barbados, Mia Mottley indicated a commitment to constitutional reform, on the grounds that the country had significantly changed since Independence.[56]

Things are changing. Maybe.

V. FURTHER READING

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56 Barbados Advocate, 'Constitution Amendment Passed in Lower House' (*Barbados Advocate*, 6 June 2018) <https://www.barbadosadvocate.com/news/constitution-amendment-passed-lower-house> accessed 8 February 2021

Belgium

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I. INTRODUCTION

In Belgium, constitutional reform primarily takes place through the formal amendment procedure of Article 195 of the Constitution. Article 195 consists of a rigid procedure with an intervening election and ultimate approval by a two-thirds majority of both Houses of Parliament.

Belgian's amendment procedure can be characterized as a comprehensive, single-track process, which means that there is only one formal amendment procedure (i.e., single-track) that applies to all amendable constitutional provisions (i.e., comprehensive).[1]

Since 1970, Belgium has evolved from a unitary country to a federal state with subnational Regions and Communities through six substantial state reforms. In the past decade, negotiations on federal government formation have been very arduous. After the federal (subnational, and EU) elections on 26 May 2019, a long and cumbersome process to establish a federal government started. The corresponding number of seats in the House of Representatives (i.e., 52 of the 150 seats) of the caretaker minority government of Prime Minister Charles Michel—later on replaced by Sophie Wilmès as the first female Prime Minister in Belgian history—decreased after the election to 38 seats and thus merely 25.3% of the total number of seats.

In the middle of the ongoing arduous government formation, the COVID-19 virus was confirmed to have spread to Belgium on 4 February 2020. After an unsuccessful attempt to establish an 'emergency government', members of the Wilmès II minority government (Francophone and Flemish liberals and Flemish Christian-Democrats) took the oath before the King on 17 March 2020. As it is a constitutional custom in Belgium that the government requests a vote of confidence of Parliament, Wilmès II gained the support of a large majority in the House of Representatives on 19 March 2020 as a temporary government. This temporary government was given full powers in order to be able to take necessary measures to effectively combat the pandemic, yet under the promise to renew the request for a vote of confidence of parliament after ultimately six months.

After those six months had passed and almost 500 days after the election, a new, full-fledged government was finally established on 1 October 2020 by a coalition of Francophone and Flemish liberals, socialists, and ecologists, as well as the Flemish Christian-Democrats, led by Flemish liberal Prime Minister Alexander De Croo. In the Coalition Agreement of De Croo I several constitutional reforms have been announced and will be discussed in this report (*II. Proposed, Failed, and Successful Constitutional Reforms*). They relate most importantly to an intended trajectory under the direction of both a Francophone and a Flemish Minister competent for institutional reform to modernize, increase the efficiency, and deepen the democratic foundations of the state structure based on a broad democratic debate (A.), democratic renewal and citizen participation (B.), the intention to include the formal amendment procedure of Article 195 of the Constitution in the proposed list of revisable constitutional articles (C.), the intended amendment of Article 7*bis* of the Constitution on sustainable development (D.), and several other initiatives for institutional reforms (E.).

Subsequently, the report will situate constitutional reforms and evolutions in a broader context (*III. The Scope of Reforms and Constitutional Control*). Firstly, the role of the Constitutional Court and the Council of State will be mentioned as important interpreters of the Constitution (A.). For instance, the Legislative Section of the Council of State wrote an urgent opinion on the use of 'special power' decrees to combat the pandemic. Moreover, the Administrative Litigation Section ruled on several ministerial decrees to control the COVID-19 virus, as they pressurize important principles such as proportionality, legality and democratic control by Parliament. It is important to adopt a hermeneutical approach to constitutional reform, recognizing that constitutional meaning is attributed by multiple actors who interpret constitutional provisions and principles in specific contexts, resulting in living constitutionalism.[2] Secondly, the report will discuss the impact of the potential reuse of the 'legal trick' used in the Sixth State Reform which sidesteps the formal amendment procedure with two readings and an intervening election by adding a transitional provision (B.). Thirdly, a recent proposal to introduce 'confederalism' might be categorized as a proposed 'dismemberment' (C.).

Finally, some critical observations will be made regarding the resilience of the formal amendment procedure and its guarantees, the fulfilment of the ambitions regarding constitutional reform mentioned in the Coalition Agreement of De Croo I, and, among others given the protracted federal government formations, the future of Belgian's complex institutional architecture that seems to be reaching its limits (*IV. Looking Ahead*).

1 Richard Albert, 'The Structure of Constitutional Amendments Rules' [2014] Wake Forest Law Review 939

2 David A. Strauss, *The Living Constitution* (Oxford University Press, 2010)

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2020, several constitutional reforms have been proposed in the Coalition Agreement of the new government De Croo I. These reforms are intended by the new coalition, but—for the time being—have not (yet) been implemented. In the last decade, the formation of a federal government has proven to be very arduous. With 541 days of government formation negotiations in 2010-2011, Belgium is the 'proud' world record holder for longest time without a government in peacetime.[3] This time, negotiations on the Sixth State Reform caused the long delay. Nonetheless, the most recent federal government formation also lasted for almost 500 days, this time without substantial state reform negotiations. As a result, the Coalition Agreement states that these protracted government formations must be avoided in the future. To this end, rules for the formation of a new federal government will be evaluated, and for instance the options of inserting a formal deadline or an unblocking mechanism will be explored.[4]

Moreover, the Coalition Agreement includes a number of proposed institutional and constitutional reforms, of which the most important are listed below.

1. MODERNIZATION, INCREASED EFFICIENCY AND DEEPENING OF THE DEMOCRATIC FOUNDATIONS OF THE STATE STRUCTURE

First of all, the newly established federal government aims to make an 'important contribution' in the field of modernization, increased efficiency and deepening of the democratic foundations of the state structure. The intended goal is a new state structure from 2024 onwards with a more homogeneous and efficient division of powers, at least in the domain of health care. No less than eight ministers and one secretary of state share substantial powers regarding health policy, requiring intense cooperation between the federal and subnational level which caused tensions during the combat of the COVID-19 pandemic.[5] The intended new state structure would take into account the principles of subsidiarity and interpersonal solidarity, and it is the aim to reinforce the federated states in their autonomy and the federal level in its effectiveness.

In order to achieve this, the federal government aspires to initiate a broad democratic debate to evaluate the existing structure, involving citizens, civil society and academia, under the direction of two Ministers of Institutional Reform (one Flemish and one Francophone). It would be the aim of this process to explore and formulate recommendations on how the Constitution and legislation can be modernized to strengthen democracy, the rule of law and fundamental rights. The federal government wants to strengthen confidence in politics by making democratic renewal a priority and wants to modernize the democratic functioning by providing for new forms of direct participation of citizens in political decision-making.[6]

The coalition's ambition to actively seek the participation and advice of citizens in the redesign of the state structure is rather remarkable in contrast to the traditionally elitist and secretive state reform process of negotiations between the leaders of involved parties. In this regard, we believe it is necessary that due attention will be paid to important preconditions for such citizen participation, such as proper information provision and inclusiveness of the process to avoid the emergence of a participation elite. More fundamentally, we believe it could be wise to consider formally including (the option of) a 'preliminary phase of citizen participation' in the amendment procedure of Article 195 of the Constitution and thus embedding the most fundamental rules of the game for such a process rather than making ad hoc arrangements.[7]

2. DEMOCRATIC RENEWAL AND CITIZEN PARTICIPATION

Overall, we can observe that there is a cautious upward trend in Belgium towards democratic renewal and more active citizen participation. This is shown by initiatives such as the G1000[8], the introduction in the Sixth State Reform of Article 39bis of the Constitution which provides the possibility for the subnational Regions to adopt a concrete legal framework—with a two-thirds majority—for the organization of regional (advisory) referenda[9], and several initiatives that experiment with civic involvement on the local level, such as participatory budgeting through subsidies.[10]

In the past year of 2020, there was quite some attention for so-called 'citizen dialogues' that directly involve randomly selected citizens in political deliberation. As of February 2019, the German-speaking Community of Belgium has ensured permanent citizen involvement of randomly selected citizen in Parliament's activities. Ever since, the 'Ostbelgien Model' has been an inspiration for the rest of the country. As of 2021, for instance, 'mixed committees' will be established in the Brussels Region, in which elected representatives and citizens will deliberate together. The federal Coalition Agreement also explicitly calls for experimentation with new forms of direct citizen participation in the political decision-making process in order to "enrich" representative democracy, such as civilian cabinets or mixed panels within the House of Representatives consisting of both Members of Parliament as well as citizens selected by lot able to formulate recommendations to the legislative branch. Such citizen participation is on a voluntary basis and could be organized "on tour" close to the citizens. Moreover, the House of Representatives will implement through its House Rules the 'Act of 2 May 2019 on petitions submitted to the House of Representatives' in order to enable a citizen's petition to propose a legislative initiative in

3 'Longest time without a government in peacetime' <https://www.guinnessworldrecords.com/world-records/96893-longest-time-without-a-government-in-peacetime> accessed 15 February 2021

4 'Coalition agreement 30 September 2020', <https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf>, 83, accessed 15 February 2021

5 See Jurgen Goossens, 'Legitimacy of the COVID-19 pandemic approach by temporary minority government with special powers in Belgium' (published in Dutch) [2020] TVCR 300, 309

6 'Coalition agreement 30 September 2020', <https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf>, 79 and 82-84, accessed 15 February 2021

7 See on citizen participation in the Belgian constitutional process and on constitutional referendums: Stef Keunen and Daan Bijnens, 'Ceci est une fiction: constitutional referendums in the Belgian legal order' (published in Dutch) [2017] TBP 248-261; Ronald Van Crombrugge, 'Democratic constitution-making: utopia or real possibility?' (published in Dutch) in Jeroen Van Nieuwenhove, Stefan Sottiaux, Christian Behrendt and Wouter Pas (eds.), *Leuven Constitutional Positions 4* (die Keure 2019) 251-295

8 For more information about this initiative, see <http://www.g1000.org/nl/> accessed 15 February 2021

9 Anne-Sofie Bouvy and Aurélie Heraut, 'La consultation populaire en Région wallonne' [2019] RBDC 3-88

10 See for Flemish citizen participation initiatives on the local level: Eric Lancksweerdt, 'The Decree on Local Government and Citizen Participation' (published in Dutch) [2018] T.Gem. 208-221

the relevant Chamber committee. Moreover, the coalition announces to lower the voting age in EU elections to 16 year.[11]

Finally, the new coalition announces that the abovementioned broad democratic debate involving citizens, civil society and academia will also discuss potential constitutional reforms, among others, as regards the future of the Senate, the statute and number of MP's, the procedure of verification of the credentials of elected MP's, and the procedure for dissolution of the Chamber.[12]

3. INCLUSION OF ARTICLE 195 OF THE CONSTITUTION IN THE LIST FOR REVISION

From a constitutional reform perspective, it is important to mention that the Coalition Agreement further states that the government instructs the two Ministers of Institutional Reform to draw up a provisional list of constitutional articles which will be revisable after the next election. The Agreement states that this provisional list will be the subject of an announcement in the Senate and Chamber at the start of the term of office. It further stipulates that the list will be supplemented at the end of the democratic debate with the articles that are necessary to translate the guiding recommendations, in particular with regard to democratic renewal and the division of powers.

It is important to mention that the Coalition Agreement expressly states that "this list must include at least Article 195 of the Constitution".[13] It thus seems that the controversial 'legal trick' used to circumvent the strict amendment procedure during the legislature of 2011-2014 might be used again, namely by declaring the constitutional amendment procedure in Article 195 *itself* subject to amendment.[14] In view of the rationale of the two phases and the intervening election embedded in the constitutional reform procedure, serious questions should be raised concerning this technique, as discussed in section III.

4. PROPOSED AMENDMENT OF ARTICLE 7BIS OF THE CONSTITUTION ON SUSTAINABLE DEVELOPMENT

Additionally, it is the intention of the government to submit a proposal to Parliament to amend Article 7*bis* of the Constitution, which has been declared revisable in the previous legislative term.[15] This constitutional provision contains the general policy objective that the federal State, the Regions and the Communities—in exercising their respective powers—pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations.[16]

It is the coalition's aim to modernize article 7*bis* taking into account the transition to a climate-neutral society, circular economy and halting of the loss of biodiversity. To this end, the government is investigating how the federal government and the Regions and Communities can achieve more cooperation and a better coordination with regard to climate policy. It is the goal to amend Article 7*bis* in order to provide a foundation for a cooperation agreement and/or a special inter-federal Climate Act. The federal government errs on the side of caution, by stating that it will re-include Article 7*bis* in the constitutional revision declaration if adoption of the amendment proves impossible during this legislative term during which it needs approval of a two-thirds majority.

5. OTHER INSTITUTIONAL REFORMS

In addition to the constitutional reforms mentioned above, the federal government, among others, also intends to achieve a more integrated and global security policy in the Brussels-Capital Region. In this regard, the competences for prevention and security in a previous state reform already attributed to the Brussels Region will be strengthened. It is another goal to strengthen and streamline consultation and cooperation between the federal and the subnational level, so that policies are better coordinated. Moreover, the cooperation agreements on foreign policy will be evaluated and updated in order to harmonize the foreign affair actions of the federal state and the subnational entities and their role in EU and multilateral decision-making.[17]

The Coalition Agreement stipulates that the two Ministers of Institutional Reform will establish the necessary contacts to find additional parliamentary support to reach the necessary (super)majorities. Some institutional provisions that are intended to be amended are embedded in 'special majority laws'. This type of quasi-constitutional legislation consists of legislative acts approved in both federal legislative chambers by a majority vote in each linguistic group (provided that the majority of the members of each group is present) as well as a two-thirds majority of yea votes on the total number of votes cast by the two linguistic groups. These majorities in each linguistic group are *not* required when amending the Constitution. In other words, besides the two phases with an intervening election it is in that regard even tougher to amend these special laws.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. CONSTITUTIONAL INTERPRETATION

Due to the gradual evolution towards a federal state, the constitutional legislator decided to establish a Constitutional Court (formerly called 'Arbitration Court') in 1980 to review the constitutionality of legislation (i.e. laws, decrees and ordinances) and its compliance with the division of powers established by or in pursuance of the Constitution. As a result, the Constitutional Court became the most important interpreter

11 'Coalition agreement 30 September 2020', <https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf>, 79 and 82-83, accessed 15 February 2021

12 Ibid., 83-84

13 Ibid., 79

14 See on the Belgian constitutional amendment procedure, e.g., Jan Velaers, 'Article 195, transitional provision: a temporary facilitation of the constitutional revision procedure' (published in Dutch) in Jan Velaers, Jürgen Vanpraet, Werner Vandenbruwaene and Yannick Peeters (eds.), *The Sixth State Reform: Institutions, Powers and Resources* (Intersentia 2014) 1-18; Jeroen Van Nieuwenhove, 'The constitutional revision procedure: towards a circumvention or towards a revision?' (published in Dutch) [2011] TBP 531-542; Bernard Blero, 'La refonte de l'article 195 de la Constitution: no future?' [2012] APT 587-598

15 See <https://www.senate.be/home/sections/institutioneel/20190524_institutional/20190524_institutional_nl.html accessed 15 February 2020>; Belgian Official Gazette 23 May 2019.

16 'Coalition agreement 30 September 2020', <https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf>, 80, accessed 15 February 2021; see on Article 7*bis* of the Constitution: Jan Velaers, *The Constitution—An article-by-article commentary. Part I—The federal Belgium, the territory, the fundamental rights* (die Keure 2019) 129 (published in Dutch)

17 'Coalition agreement 30 September 2020', <https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf>, 79-82, accessed 15 February 2021

of the Belgian Constitution and thus the main engine of informal—yet incremental and limited—constitutional change by interpretation of existing constitutional norms. Another important interpreter of the Constitution is the Legislative Section of the Council of State which offers a priory advice on proposed legislation. Consequently, both institutions have a substantial impact on the division of powers in Belgium. J. Vanpraet refers to this process as the 'latent state reform'.[18]

The year 2020 was of course dominated by combatting the COVID-19 pandemic.[19] On 30 March 2020, two 'special power' acts (also called 'power of attorney' acts) were published in the Belgian Official Gazette. In these acts Parliament temporarily attributed part of its legislative powers to the minority government Wilmès II to tackle the COVID-19 crisis more swiftly and adequate. Consequently, during a period of three months the government did not need to ask prior permission of Parliament to take necessary health or economic measures to fight the virus. Such special power decrees of the government may repeal, supplement, change or replace applicable legal provisions, even with regard to matters that the Constitution explicitly reserves to the legislator. These Royal Decrees must be ratified by Parliament within one year of their entry into force. Otherwise, they lose their legal validity and are deemed never to have had legal effect. In an urgent advice the Legislative Section of the Council of State reminded of the constitutional principles and limitations of the crisis measures of the executive in the context of the special powers doctrine, though stated that the proposed special power legislation met the conditions as developed in its previous advisory practice.[20]

During the health crisis, the federal government decided to mainly combat the pandemic through ministerial decrees, which has been heavily criticized by constitutional scholars.[21] Many crisis measures curtailing fundamental rights and freedoms were taken by ministerial decrees, relying on the Civil Security Act of 2007 as the necessary legal basis for the corona measures. This Act, however, was intended for quick and efficient interventions in case of acute and temporary emergencies, such as fires, explosions or the release of radioactive materials. Nonetheless, the general meeting of the Administrative Litigation Section of the Council of State (judgments no. 248.818 and 248.819 of 30 October 2020) dismissed two claims for suspension in case of extreme urgency against the curfew and closure of catering establishments, rejecting arguments based on the alleged violation of legal principles such as the principle of due care, proportionality, equality, and the freedom of enterprise, and stating that the protection of civil security can also include catastrophes like infections with a living virus. The pandemic, however, persists and serious concerns have been raised concerning the legality principle and the lack of the possibility of parliamentary control.[22]

2. REUSE OF THE 'LEGAL TRICK' WITH ARTICLE 195 OF THE CONSTITUTION?[23]

Article 195 of the Constitution contains the formal constitutional amendment procedure which consists of two main phases and an intervening election. Firstly, Parliament (i.e. the House of Representatives and the Senate) with a simple majority and the King (i.e. *de facto* the federal government) each adopt a list of constitutional provisions that are 'declared to be revisable', which results in the publication of a joint list of revisable constitutional provisions. Hereafter, Parliament dissolves and new elections are organized within 40 days. Afterwards, during the 'second reading' the newly elected Parliament has the power to amend the constitutional provisions that were declared to be revisable. In order to effectively amend the Constitution, two thirds of the members of each House of Parliament must be present and a supermajority of two thirds of these present members are required to approve the amendment.

The current amendment procedure of Article 195 of the Constitution still dates back to the original adoption of the Belgian Constitution in 1831. It is the aim of the rigidity of the amendment process to avoid that one single majority could substantially amend the constitution without prior consultation of the voters. Nonetheless, some legal scholars argue that the amendment procedure of Article 195 is too rigid and outdated.[24]

After the federal elections of 13 June 2010, it took Belgian politicians 541 days to negotiate a new, Sixth State Reform and to form a new government. However, in 2011, the list of constitutional provisions which were declared to be revisable in the first phase of the amendment procedure did not contain all the constitutional provisions that were required for the implementation of the delicately balanced final agreement on the Sixth State Reform. After a regime crisis of 541 days, however, the negotiating parties strongly wanted to avoid the organization of new elections or continued negotiations. As a result, they started thinking outside the box in order to implement the entire agreement without the approval of a new revision statement nor new elections. The revision list included the constitutional amendment procedure of Article 195 of the Constitution *itself* and the involved parties subsequently decided to supplement Article 195 with a 'transitional provision'. The transitional provision enabled a two-thirds majority as required by Article 195 to *immediately* amend the necessary constitutional provisions during the ongoing parliamentary term. The transitional provision contained an exhaustive list of immediately revisable constitutional provisions, but was not regarded as a revision statement leading to dissolution of Parliament.

Although from a strictly legal perspective one could argue that a two-thirds majority was permitted to amend Article 195 in such a way[25], serious concerns have rightly been raised as the constitutional

18 Jürgen Vanpraet, *The latent state reform. The division of powers in the case law of the Constitutional Court and the advisory practice of the Council of State* (die Keure 2011) (published in Dutch)

19 See Luc Lavrysen, Jan Theunis, Jurgen Goossens, Toon Moonen, Pieter Cannoot, Sien Devriendt and Vivianne Meerschaert, 'Belgium', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *I·CONnect-Clough Center 2020 Global review of constitutional law* (forthcoming)

20 Council of State, Legislative Section, 25 March 2020, no. 67.142/AV. See Jurgen Goossens, 'Legitimacy of the COVID-19 pandemic approach by temporary minority government with special powers in Belgium' (published in Dutch) [2020] TVCR 300, 304-305; Patricia Popelier, 'COVID-19 legislation in Belgium at the crossroads of a political and a health crisis' [2020] *The Theory and Practice of Legislation*, no. 8, 138-141

21 See, e.g., Patricia Popelier, 'COVID-19 legislation in Belgium at the crossroads of a political and a health crisis' [2020] *The Theory and Practice of Legislation*, no. 8, 138-141

22 See Luc Lavrysen, Jan Theunis, Jurgen Goossens, Toon Moonen, Pieter Cannoot, Sien Devriendt and Vivianne Meerschaert, 'Belgium', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *I·CONnect-Clough Center 2020 Global review of constitutional law* (forthcoming)

23 See Jurgen Goossens and Pieter Cannoot, 'Belgian Federalism After the Sixth State Reform' [2015] Perspectives on Federalism, no. 7.2, 33-34

24 See, e.g., Jeroen Van Nieuwenhove, "The new "transitional provision" to Article 195 of the Constitution. A reusable temporary deviation from the amendment procedure?' (published in Dutch) [2012] TvW 156

25 On 20 June 2012, the Venice Commission ruled that the 'transitional provision' neither violated the letter and the spirit of the Constitution nor international norms and standards. See Opinion on the revision of the Constitution of

amendment procedure and its guarantees were in practice temporarily set aside with this 'legal trick'. It has been warned before that the adoption of the 'transitional provision' could henceforth be used as a precedent, so that only declaring Article 195 of the Constitution revisable might be sufficient to achieve a substantial constitutional reform after the intervening election.[26] Such a reuse of this legal trick would again severely undermine the guarantees embedded in Article 195.[27] Nonetheless, the Coalition Agreement expressly states that "this list must include at least Article 195 of the Constitution", which would thus enable to open up Pandora's box of constitutional reform once again in the next legislative term. In this regard, it must be mentioned that the Constitutional Court does not regard itself competent to review constitutional amendments and potentially declare them unconstitutional.

3. TOWARDS 'CONFEDERALISM': DISMEMBERMENT?

In the last decade it has regularly been proposed in Belgium to introduce or evolve towards 'confederalism', and again in 2020 with the proposal for a declaration to revise the Constitution of 3 December 2020 submitted by Peter De Roover of the Flemish nationalists (N-VA). Although in Belgium with 'confederalism' politicians usually mean further developed 'federalism' with substantially more transfer of powers to the subnational level. However, it should be mentioned that Article 1 of the by-laws of N-VA opts for 'an independent republic of Flanders'. In principle, confederalism is indeed a relationship between *independent* states who agree in a treaty to establish a confederation in order to collaborate in certain policy domains with institutions representing the participating states. Whatever the exact intended meaning may be, proposals for confederalism in Belgium could potentially be categorized as a constitutional 'dismemberment' rather than an amendment, as they may be understood to be at odds with the existing constitutional framework and may deliberately seek to undo an elemental part of the constitution of the Belgian federal state.[28]

IV. LOOKING AHEAD

Given the likely chance of the reuse of the 'legal trick' executed in the Sixth State Reform to circumvent the formal constitutional amendment procedure, the future resilience of the formal amendment procedure and its fundamental guarantees should be questioned. The Coalition Agreement of 30 September 2020 states that the list of revisable constitutional provisions must include *at least* Article 195 of the Constitution, which would thus enable to open up Pandora's box of constitutional reform once again in the next legislative term. As this raises serious constitutional concerns, we advise to urgently start the debate on the modernization and diversification of the current comprehensive single-track amendment process rather than once again relying on an ad hoc 'legal trick' if one happens to see fit.

The Coalition Agreement ambitiously aims to organize a broad democratic debate to seek modernization, increased efficiency and deepening of the democratic foundations of the state structure, as well as democratic renewal reforms and increased citizen participation. Nonetheless, it should be observed that the intentions are rather vaguely mentioned in the Agreement, so that quite some effort and negotiations will still be needed to further crystallize those intentions of constitutional and institutional reform.

As the past protracted government formations raise the question whether the current institutional bipolar framework of Belgium's complex federal architecture is reaching its limits[29], it is interesting to see what the result will be of the announced evaluation of rules for the formation of a federal government, such as a formal deadline or an unblocking mechanism. Nonetheless, such mechanisms will not solve the inherent tensions within the complex Belgian institutional architecture. Hence, it remains to be seen whether and when 'a new political generation' will effectively modernize Belgium's state structure. There have already been six successive step-by-step renovations of the Belgian 'house' giving rise to two distinct types of gradually growing subnational 'chambers', the Regions and Communities, progressively resulting in a complex institutional labyrinth.

V. FURTHER READING

Jurgen Goossens, 'Legitimacy of tackling COVID-19 pandemic by temporary minority government with special powers in Belgium' (published in Dutch) [2020] TVCR 300-313

Patricia Popelier, 'COVID-19 legislation in Belgium at the crossroads of a political and a health crisis' [2020] The Theory and Practice of Legislation, no. 8, 138-141

Belgium, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282012%29010-e> accessed on 15 February 2021

26 Jurgen Goossens and Pieter Cannoot, 'Belgian Federalism After the Sixth State Reform' [2015] Perspectives on Federalism, no. 7.2, 34

27 See Patricia Popelier, 'The trick with Article 195: A Patch for the Bleeding with the Blessing of Venice' (published in Dutch) [2012] CDPK 421-443

28 Richard Albert, *Constitutional Amendments* (OUP 2019) 76-94

29 Jurgen Goossens, 'Belgium, quo vadis? The story of a government, migration and regime crisis' [2019] TvCR 388-389

Bolivia

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I. INTRODUCTION

The year 2020 was definitely one of great political changes in Bolivia; afflicted by the political and social crisis that brought the resignation of Evo Morales to the presidency of the Plurinational State of Bolivia in November 2019, the year 2020 was seen as a year of great uncertainty and social instability; It is for this reason that the Plurinational Constitutional Court of Bolivia, through its concentrated control of constitutionality, played an important role in granting a minimum of stability within the State, trying at all times to keep Bolivia within the framework of a true Rule of Law, so this report will be focused on the state stability that the State organ in charge of being the guardian of compliance with the Political Constitution of the Plurinational State of Bolivia had to provide, at the time, for the preservation of a Rule of Law.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Bolivia has a rigid procedure for reforming its Constitution, as established in art. 411 of the Political Constitution of the State, which states that a total reform of the Constitution—or one that affects its fundamental bases, rights, duties and guarantees, or the primacy and reform of the Constitution— will only take place through an original plenipotentiary Constituent Assembly through a referendum activated by twenty percent of the electorate; by an absolute majority of the members of the Plurinational Legislative Assembly; or by the President of the State. And, for a partial reform, through a popular initiative signed by at least twenty percent of the electorate; or by the Plurinational Legislative Assembly, by means of a constitutional reform law approved by two thirds of the total of the present members of the Plurinational Legislative Assembly. Any partial reform will require an approving constitutional referendum.[1]

Despite this rigid regime of constitutional reform, the practice of Law in Bolivia has given a determining role to the constitutional precedent as well as within its system of sources of law, in this sense, it was not surprising that stability in a context of institutional breakdown, has come from a constitutional ruling.

Thus, due to a consultation on the constitutionality of draft laws requested on December 24, 2019 by Mónica Eva Copa Murga, President of the Plurinational Legislative Assembly of Bolivia at that time, the Plurinational Constitutional Court of Bolivia was requested -as the entity in charge of exercising control of constitutionality-[2] to rule on the constitutionality of draft Law 160 / 2019-2020 "CS" - Exceptional Law for the Extension of the Constitutional Mandate of Elected Authorities - specifically, arts. 1 and 4 of the referred project[3]; resulting in this way the Plurinational Constitutional Declaration 0001/2020 of January 15, which declared the constitutionality of arts. 1 and 4 of the aforementioned project.

Due to the system of sources in the practice of Law in Bolivia, this declaration signified a significant change in the extension in the period of constitutional mandate of the President of the Plurinational State, the Assemblymen of the Plurinational Legislative Assembly and the Elected Authorities of the Autonomous Territorial Entities, to restore constitutional normality, exceptionally extending them until the possession of the new elected authorities for the period 2020-2025.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Plurinational Constitutional Court of Bolivia is the entity that ensures the supremacy of the Constitution, exercises control of constitutionality, and safeguards the respect and validity of constitutional rights and guarantees[4]; Likewise, its rulings are of a binding nature and of mandatory compliance, and against them there is no further ordinary appeal[5].

1 Article 411 of the Political Constitution of the Plurinational State of Bolivia.

2 Article 196 of the Political Constitution of the Plurinational State of Bolivia.

3 The draft law 160 / 2019-2020 "CS" -Exceptional Law for the Extension of the Constitutional Mandate of Elected Authorities- stated:
Article 1 .- (Purpose) The purpose of this Law is exceptionally to extend the period of constitutional mandate of the President of the Plurinational State, the Assemblymen of the Plurinational Legislative Assembly and the Elected Authorities of the Autonomous Territorial Entities, to reestablish the constitutional normality.
Article 2.- (Regulatory framework) This Law is based on Articles 1, 7, 9, 11, 12, 156, 168, 272, Paragraph II of 285, 288, Paragraph IV of the First Transitory Provision of the Political Constitution of the State, and Law No. 1266 of November 28, 2019, on the Exceptional and Transitory Regime for the holding of General Elections.
Article 3.- (Scope of application) This Law shall be of mandatory application for the Presidency of the Plurinational State, the Assemblymen of the Plurinational Legislative Assembly and the Elected Authorities of the Autonomous Territorial Entities.
Article 4.- (Exceptional extension of the mandate of authorities) Exceptionally, the mandate of the President of the Plurinational State, the Assemblymen of the Plurinational Legislative Assembly and the Elected Authorities of the Autonomous Territorial Entities elected for the period 2015-2020 is extended until the possession of the new authorities for the period 2020-2025.

4 Article 196 of the Political Constitution of the Plurinational State of Bolivia.

5 Article 203 of the Political Constitution of the Plurinational State of Bolivia.

In this understanding, within the attributions of the Plurinational Constitutional Court of Bolivia, it is to resolve doubts about the constitutionality of a Bill emanating from the Plurinational Legislative Assembly, in order to confront the text of said Project with the Constitution State policy and guarantee constitutional supremacy.

Under this parameter, the President of the Plurinational Legislative Assembly requested the examination of constitutionality of articles 1 and 4 of the draft of Law 160 / 2019-2020 "CS" -Exceptional Law for the Extension of the Constitutional Mandate of Elected Authorities-, which under the role of the Constitutional Court granted by the Supreme Norm, its pronouncement granted stability to an entire country.

It is not possible to speak of a constitutional reform in the strict sense, but it is possible to speak of a constitutional gap that was filled by the understanding and interpretation of the Plurinational Constitutional Court, since the Political Constitution of the State did not plan to do in case that the mandates of both the president and the legislators had to be extended, in this case because the 2019 elections resulted in the resignation of former president Juan Evo Morales Ayma, and the subsequent annulment of the results of that election, for an alleged fraud.

The Plurinational Constitutional Declaration 0001/2020 of January 15 declared the constitutionality of arts. 1 and 4 of the draft Law 160 / 2019-2020 "CS", Exceptional Law of Extension of the Constitutional Mandate of Elected Authorities, of the Organs of the Public Power of the central level (Executive and Legislative Organs) and of the elected authorities of the Organs Executive and Legislative of the Autonomous Governments of the subnational level; under the following main foundations:

> *1. Regarding the interpretation according to the Political Constitution of the State, the Constitutional Procedural Code and constitutional jurisprudence,* the Plurinational Constitutional Court has indicated that it has the role of clarifying the law in difficult or complex cases, where the norm has contemplated a factual reality that generates complex phenomena that endanger both the State as such and the fundamental rights and guarantees, for this reason, the space of normative darkness must be identified and clarified by virtue of the protection of the full validity of rights and the safeguarding of the regular operation of the Constitutional State of Law, in observance of arts. 1 and 196.I and II of the Constitution, so that when this phenomenon exists, there is a legal gap that implies the absence of a norm applicable to a specific reality, so it is a situation that refers to a void, being that a legal pathology is noticed.

In this type of case, the Political Constitution of the State grants specific criteria that should govern the interpretive work of the Plurinational Constitutional Court, being that in its art. 196 indicates that: "as criteria to be applied in its interpretive role, the Pluri-National Constitutional Court shall give preference to the intent of the constituent assembly as demonstrated in its documents, acts and resolutions, as well as the literal tenor of the text "; likewise, the Constitutional Procedural Code provides in its art. 2.II that may be applied: "1. The systematic interpretation of the Political Constitution of the State, and the interpretation according to the purposes established in the constitutional principles; 2. The rights recognized in the Political Constitution of the State, in accordance with the International Human Rights Treaties and Conventions ratified by the country, when they provide more favorable standards. In the event that these treaties declare rights not contemplated in the Political Constitution of the State, they will be considered as part of the constitutional order".

> *2. On the principles, purposes, functions and duties, as the basis for the existence and functioning of the Plurinational State of Bolivia. On the constitutional objective, its characterization and scope,* the Constitutional Court has supported, in particular, the thesis on the essential purposes and functions of the State established in art. 9 of the CPE, emphasizing the article that indicates that one of the main purposes is to "Guarantee compliance with the principles, values, rights and duties recognized and enshrined in this Constitution."

Under these understandings, and in the face of a probable power vacuum that could arise after the resignation of the then President of the Plurinational State of Bolivia, the Constitutional Court pointed out that the founding principles established in the Political Constitution of the State, due to their fundamental and indeterminate nature , but mainly because they carry an axiological justification that radiates to other norms, they allow a systematic vision of the constitutional text to overcome the literal interpretation of an express provision.

In this sense, and continuing with this logic, it established that: "...if the extension would be constitutionally provided in Bolivia or if there was a normative solution to avoid the power vacuum, which naturally occurs due to an absence of authorities due to the end of their term of office mandate, the legal problem contained in the constitutionality consultation would have a solution through a standard rule; however, if not, an additional element is required; that is, a reasonable justification in the face of an imminent event that endangers or threatens the validity of the Constitutional State of Law and with it, that of the principles, purposes, functions and duties of the State. This element must allow verification that the extended mandates correspond to the basic organizational structure of the Public Power, determined in art. 12 of the CPE; It should also make it possible to ensure the system of checks and balances in the structure of the extended mandate, also considering that they do not meet in a single Body, nor are they delegated powers to each other, according to Article 7 of the CPE; because in the opposite direction, a threat to the correct and normal fulfillment of the principles, purposes, functions and duties of the State would be inevitable, and there would even be a risk of a fracture of the constitutional order."

As can be seen, the interpretation made by the Plurinational Constitutional Court clearly surpassed that of a purely literal interpretative technique, taking into account a systematic and teleological interpretation, and appealing, above all to the principles, purposes, functions and duties, as a basis existence and operation of the Plurinational State of Bolivia. The constitutional objective, its characterization and scope.

Under this criterion, constitutional validity was granted to the extension of the mandate of the elected authorities of the Organs of the Executive and Legislative Public Power, both at the central level and at the subnational level, with the following sub-rules:

1. Because of its exceptional origin.

2. The limitation on its duration.

3. Its reasonable justification, in such a way that it does not respond to a discretionary or arbitrary nature, but is understood by a situation that entails a breakdown of the constitutional order and/or implies imminence of a power vacuum.

4. It should only pursue the constitutional purpose –object- of the normal functioning of the Organs of Public Power, for the realization of the founding principles, values and state goals, and the protection of fundamental rights.

It is clear that the intention of the Court was to grant constitutional stability to the entire state apparatus, making use, for this purpose, of the interpretive tools that the State Constitution itself gives to the body in charge of constitutional control; in addition to trying to approach, above all, the principles, purposes, functions and duties that the Government has to keep the country within the Rule of Law.

There is no doubt that it was an atypical situation where the extension of the elected authorities in both the Executive Power and the Legislative Power was not regulated, but the Court knew how to be within reach of the situation, granting at that time, a halo of institutional stability, by avoiding a power vacuum, and consequently, extending the mandate of the elected authorities, due to an exceptional situation, with a specific limitation, granting a reasonable justification that allows not to reach the discretionary or arbitrary character, being that the situation must be understood within the framework of a possible fracture of the constitutional order, and only to achieve the constitutional purpose or object of the normal functioning of the Organs of Public Power, for the realization of the founding principles, values and state purposes, and the protection of fundamental rights.

The arguments against this type of declarations that save exceptional and urgent moments, were found in the legitimacy of the extended mandates of authorities, that is, a mandate that had to conclude in the time for which the citizens would have voted for those authorities; However, it should be noted in this part, the democratic legitimacy that the Plurinational Constitutional Court of Bolivia has.

Since the New Political Constitution of the Plurinational State of Bolivia of 2009, Bolivia has a democratic system for the election of the highest jurisdictional and constitutional authorities, as established in its article 198, stating that: "The Judges of the Pluri-National Constitutional Court shall be elected by universal suffrage, pursuant to the procedure, mechanism and formalities used for the election of the members of the Supreme Court of Judges"; In this sense, we are facing authorities that enjoy a certain type of democratic legitimacy in their decisions, so an argument endowed with a democratic reason against the decisions of the current members of the Constitutional Court lacks solid support.

However, the declaration of constitutionality, at the time of maintaining the Plurinational State of Bolivia within the framework of a State of Law, and observing the purposes and principles that they themselves granted in their Political Constitution of the State of 2009, protected at all times in the model of the Democratic Constitutional State of Law, as required by art. 1 of its own Constitution: "Bolivia is constituted as a Unitary Social State of Pluri-National Communitarian Law (Estado Unitario Social de Derecho Plurinacional Comunitario) that is free, independent, sovereign, democratic, inter-cultural, decentralized and with autonomies. Bolivia is founded on plurality and on political, economic, juridical, cultural and linguistic pluralism in the integration process of the country".
In that understanding, the role played by the Plurinational Constitutional Court of Bolivia through the Plurinational Constitutional Declaration 0001/2020 of January 15, was fundamental and transcendental, by filling a legal gap through a teleological and systematic interpretation, maintaining in at all times to the Plurinational State of Bolivia, within the framework of a State of Law, stabilizing an atypical and dysfunctional situation that occurred in Bolivia since October 2019.

IV. LOOKING AHEAD

The timely intervention by the Plurinational Constitutional Court of Bolivia allowed a state stability, and avoided a constitutional fracture; however, this type of intervention from the courts does not allow to ask the classic questions regarding the democratic legitimacy of the judges when proposing solutions that exceed the declaration of rights, and it has much more political structural overtones, as was the case from Bolivia.

The first and long-standing question is whether to really grant democratic legitimacy to the judges of the high courts - in the case of Bolivia, the Magistrates of the Supreme Court of Justice, the Agro-Environmental Court, the Council of the Magistracy, and the Plurinational Constitutional Courtare elected by universal suffrage and it allows their decisions to be called "democratic decisions" due to the participation, through a representative democracy, of the election of the Judges of the high courts. It is clear that the Bolivian model is far from reconciling the conflicting positions of democracy and the constitution, however, it is a model, which in exceptional cases - such as what happened between 2019 and 2020 in Bolivia- has allowed to overcome the crises generated, since the Executive and Legislative Power have been able to be saved through the body in charge of exercising concentrated control of constitutionality, such as the one handled by the Plurinational Constitutional Court of Bolivia.

The second question refers to the institutional crisis that Bolivia went through in 2019 and 2020, a question that makes us wonder how consolidated the rule of law is in Bolivia, and if the New Political Constitution of the State of 2009 has really responded to the socio-structural changes that Bolivia has been claiming for itself since its creation as a country. Events that occurred in 2019 show the institutional weaknesses that, despite having a progressive Constitution, continue to drag over the years. Although there is a plurinational and multicultural approach, many policies proposed from the paradigm of a "New Latin American Constitutionalism" cannot come to fruition, because the basic structures of every State of Rights continue to appear weak and prone to being cracked in any moment.

And the third question, should the courts have as much power to resolve political and social crises as happened in Bolivia? The question comes here not because of what happened in particular, but rather considering the possibility that the Constitutional Court could have acted in a different way, in that case, and with a different ruling than the one

given with the Plurinational Constitutional Declaration 0001/2020, the Court had the power to finish cracking the entire state apparatus, and with it the Rule of Law; since a reasoning to the contrary could have left the Plurinational State of Bolivia with a significant power vacuum, and even being able to concentrate the entire state decision in a single Power—either executive or legislative; Therefore, beyond taking into account the response and the role that the Constitutional Court had in the social political crisis of 2019 and 2020, it is worth asking ourselves if this collegiate body, made up of nine magistrates, really has too much power when making decisions and policies of an entire country.

Due to all of the above, the Plurinational State of Bolivia still has a long way to go regarding its constitutional scaffolding, and the true role that it should occupy in the development of the Rule of Law in Bolivia. The perspective is not clear enough at a time when the political and social crisis hits Bolivia; However, the Constitutional Court knew how to respond to what the moment and the situation demanded, by keeping an entire country within the framework of a true Rule of Law.

V. FURTHER READING

New Political Constitution of the Plurinational State of Bolivia 2009.

Constitutional Procedural Code -Law No. 254 of July 5, 2012-.

Plurinational Constitutional Declaration 0001/2020 of January 15.

Bosnia and Herzegovina

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I. INTRODUCTION

The constitutional transition of Bosnia and Herzegovina (BiH) is still not finished, even 25 years after the end of the war and the Dayton Peace Agreement (DPA). The Constitution has been adopted as "annex IV" of the international "General Framework Agreement on Peace".[1] This Agreement ended the war, but its underlying cease-fire logic turned out to become an obstacle on the country's path towards European integration. In fact, the DPA is based on strong guarantees for the groups in order to stabilize the post-conflict situation. But the result is a "*divide et impera*"-situation as well as status quo-thinking everywhere in politics and institutions ('stabilitocracy')[2], blocking dynamic evolution and adaptation.

Interventions by the Constitutional Court, [3] and by the High Representative of the International Community tried to counteract obstructionist tactics; the latter by making use of his far-reaching coercive powers ("Bonn powers").[4]

However, after a decade, the international semi-protectorate and the exercise of the "Bonn powers" were increasingly criticized.[5] They were to be substituted by "local ownership" combined with the attractiveness of future accession to the EU as the pull factor (this change of perspective is generally known as "from Dayton to Brussels"). After post-war stabilization, the "ownership" concept appeared as the necessary and logical next step in post-war transition. However, the preconditions for "ownership" based upon democratic legitimacy and responsibility were completely lacking: There was neither *détente* in the cold war-like relations within the country, nor (any sign of) reconciliation. Without an overarching consensus on the future of the country, no (constitutional) change could be expected.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The Dayton Constitution's transitional character was always implicit, even without an express "sunset-clause". Its transitional function was clear from the fact that international engagement (the stabilizing "fourth constituent part" of the system)[6] was of temporary nature only and would be reduced after some time.

From a comparative point of view, the Constitution can be amended quite easily. The amendment-procedure only requires a decision by the Parliamentary Assembly, including a two-thirds-majority in the House of Representatives (article X). This simple procedure facilitates change, at least in theory, and may therefore be considered another indicator for the transitional character of the Constitution (conceived as a basis for a consolidation phase, but not supposed to last long in its original form). In practice, any constitutional amendment would require the agreement of both Entities, the RS and the FBiH. If a shift of functions from an Entity to the State were involved, also amendments to the Constitutions of the RS or FBiH, or the Statute of Brcko District, may be required.

Thus, any amendment depends on the political will to agree upon changes regarding the common denominator of State and society. And

1 The DPA was also signed by the Presidents of the two neighboring States, Tudjman and Milosevic, in order to guarantee the continuity of BiH by their formal commitment not to interfere within its affairs as well as to provide legitimacy to the Peace Agreement through the involvement of the kin-States of two of the three major groups. See for the text of the DPA/GFAP <http://www.ohr.int/dayton-peace-agreement/> and for the text of the Constitution <http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf>.

2 See for this concept Florian Bieber, *What is stabilitocracy?*, (BiEPAG Blog, 5 May 2017) <https://biepag.eu/what-is-a-stabilitocracy/> and Heinrich Boell Stiftung (ed.), *'Stabilitocracy' and/or radicalism*, (Perspectives, Issue no. 7, November 2019) <https://www.boell.de/sites/default/files/2019-12/perspectives%20-%2011-2019%20-%20web%281%29.pdf>. Other countries in the Balkans have seen a democratic backsliding, too, and the consolidation of semi-authoritarian regimes, e.g. Serbia under the current President Aleksandr Vucic.

3 In its landmark ruling of July 2000, the 'constituent peoples'-case (U-5/98-III, 2000): For the Constitutional Court, the Dayton Peace Agreement had established a multinational system at all levels of government, with institutional equality of the three constituent peoples (Bosniaks, Croats and Serbs), which led to the incompatibility of those provisions in the subnational Entity Constitutions with the Dayton Constitution, which had privileged one (RS) or two (FBiH) of the constituent peoples, respectively.

4 The Bonn Powers were first recognized to be within the High Representative's authority under the Dayton Agreement (annex 10) by the Peace Implementation Council (PIC) at its Bonn Conference in December 1997. They comprise the enactment of laws and the removal of obstructionist elected officials. In 2002 the High Representative even imposed amendments of the Entity Constitutions necessary for implementing the 'constituent peoples' decision (see previous footnote); the amendments were based upon a previous agreement among the main political parties which, however, did not lead to the adoption of the amendments in the Entity assemblies.

5 See the famous critique of the Bonn powers in Gerald Knaus and Felix Martin. *Lessons from Bosnia and Herzegovina: Travails of the European Raj*. Journal of Democracy 14, no. 3 (2003) 60–74, and European Commission for Democracy through Law (Venice Commission), *Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative*, Venice (11 March 2005).

6 Sumantra Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention* (Oxford University Press, 2002) 267; this efficiently describes the IC's essential role, in addition to the three constituent peoples.

as such a common vision is lacking, even today, most of the dominant political actors do not want change or advocate changes that would entrench the current ethno-authoritarian system further.[7] Far-reaching veto powers have produced a "negative peace" permitting obstruction which could only be overcome by the special powers of substitution exercised by the High Representative, leading to the de-facto Protectorate. The dominance of the ethnic element in the institutions—earmarked political and administrative posts at State level, ethnic caucuses in Parliament—has been described as "ethnic democracy", which is combined with "ethnic federalism", as the two Entities continue to consider themselves as "homelands" of specific constituent peoples.[8]

Already 10 years after the war, in 2005, the Council of Europe's Venice Commission criticized the country's constitutional situation with clear and harsh words listing the problems one by one.[9] This profound analysis is still valid and provides an excellent orientation for any reform effort. The main critical points identified are the confusing overlap of territorial structures and ethnicity as well as the composition of the State Presidency and the House of Peoples, the weakness of the structures at State level, and the lack of both a clear definition and a limitation of the "vital interest"-veto. The latter should be limited to core matters of "identity interest" of the three constituent peoples, such as language, culture and religion.[10]

This clarification and the 10th anniversary of the Dayton Agreement in 2005, led to immense pressure by the International Community in order to achieve constitutional reform. In the end, Bosnian politicians signed a declaration of intent on constitutional reforms to be completed by the end of March 2006. Representatives of the eight leading political parties worked on the amendments under the guidance of the US Institute for Peace, USIP, and Donald Hayes, former deputy High Representative in the country. The proposed amendments included among other things enhanced State-level competencies, improved and simplified decision-making procedures and representation of minorities in the State Parliament. The tripartite Presidency should have been transformed into a single one, together with two Vice Presidents. As fewer powers were foreseen for the Presidency and more powers for the Council of Ministers, the members of the former should have been elected only indirectly by the Parliamentary Assembly. Although seven of the eight biggest political parties embraced the agreed constitutional amendments, known as the "April package", the amendments failed approval in the Bosnian Parliament by merely two votes.[11]

Attempts to broker agreements between party leaders behind closed doors followed. They failed, too. Bosnian political leaders discussed hypothetical constitutional reforms in the so-called Prud process, 2008. The Prud Agreement included issues such as state property, census, constitutional changes, the reconstruction of the Council of Ministers and a commitment for solving the legal status of the Brčko District.[12] At the time, the process was greeted as a possible start of a genuine locally driven process; however, apart from the Declaration it ended without any tangible result. At a subsequent meeting in Banja Luka on 26 January 2009, in another Joint Declaration, the party leaders set out a plan for BiH as a decentralized country with the current three levels of government but envisaging an intermediate level with four territorial units with legislative, executive and judicial branches of government. But the (deliberate) vagueness of the text of the declaration gave rise to different interpretations about the concrete design of the intermediate territorial units (conservation of RS, elimination of Cantons, creation of cross-entity regions or of a Sarajevo district).[13] In October 2009, in an attempt to reach constitutional reforms, the International Community (including the EU) summoned political leaders in the NATO base at Sarajevo airport. But these "Butmir talks" did not produce any tangible progress, either.

After these fruitless attempts, the topic 'constitutional reform' was by and large abandoned by the International Community, which in parallel strongly reduced its presence and active engagement in the country. BiH's transition entered into a new phase, without constitutional reform.

The only successful amendment of the Constitution of Bosnia and Herzegovina so far, has regarded the result of the international arbitration regarding the strategically important city of Brčko, through the recognition of its special status as "Brčko District".[14] In March 2009, the Parliamentary Assembly of BiH adopted a constitutional amendment that establishes the Brčko District as a unit of local self-governance making the end of supervision over the District possible; a new article VI(4) was added after Article VI(3) of the Constitution. According to the amendment, Brčko remains under the sovereignty of the State in the areas falling within the competencies of the institutions of Bosnia and Herzegovina, while its territory is a shared property of the Entities. The constitutional amendment on Brčko was one of the five objectives set by the Peace Implementation Council (PIC) for the closure of the Office of the High Representative.[15]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The indications provided by the comprehensive and detailed analysis of the Venice Commission already in 2005 are still valid and may serve for orientation on what needs to be changed. In the meantime, the need for constitutional change has been confirmed by various judgments of the European Court of Human Rights (ECtHR) and, subsequently, as a consequence of the country's application for EU membership.

7 Those, in particular the Bosnian Croat party HDZ, who call for a third Croat-majority Entity which would be a further step towards complete ethno-federal division of the country.

8 On Bosnia and Herzegovina's federal system see Jens Woelk, *Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes*, Michael Burgess, G. Alan Tarr (eds.), *Constitutional Dynamics in Federal Systems: sub-national perspectives* (McGill-Queen's University Press 2012), 109-139, and Soeren Keil, *Multinational Federalism in Bosnia and Herzegovina* (Ashgate, 2013).

9 European Commission for Democracy through Law (Venice Commission), *Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative*, Venice (11 March 2005).

10 A definition has been introduced in the Entity Constitutions (through the amendments imposed by the High Representative in 2002): Article 70 Constitution RS (Amendment LXXVII) and article 17a Constitution of the Federation (Amendment XXXVII).

11 See R. Bruce Hitchner, *From Dayton to Brussels: The Story Behind the Constitutional and Governmental Reform Process in Bosnia and Herzegovina*, The Fletcher Forum of World Affairs, Vol. 30.1, 2006, Joseph Marko, *Constitutional Reform in Bosnia and Herzegovina 2005-06*, in European Yearbook of Minority Issues (EYMI), Vol 5, 2006/07 (Brill 2007), and Sofia Sebastian, *Leaving Dayton Behind: Constitutional Reform in Bosnia and Herzegovina,* FRIDE working Paper 46, November 2007.

12 The Agreement was concluded by the leaders of the three main ethno-nationalist parties Sulejman Tihić (SDA), Dragan Čović (HDZ BiH) and Milorad Dodik (SNSD) in Prud, in the municipality of Odžak, on 8 November 2008.

13 See International Crisis Group, *Bosnia's Dual Crisis*, Europe Briefing no. 57 (Sarajevo/Brussels, 12 November 2009) <http://www.crisisgroup.org>.

14 On 5 March 1999, the Final Award resulted in the establishment of an internationally administrated "district". The District has been recognized by Amendment I to the Constitution of BiH (31 March 2009).

15 See Matthew Parish, *A Free City in the Balkans: Reconstructing a Divided Society in Bosnia* (I.B.Tauris, 2009).

In a series of cases the ECtHR had to decide on complaints by citizens of Bosnia and Herzegovina who claimed to be discriminated against and deprived of their right to stand for election for specific institutions, as they either were not members of one of the three constituent peoples, did not declare as such, or were excluded because of their residence.

In December 2009, the ECtHR ruled that the exclusion of Bosnian citizens from standing for election to the State Presidency and to the House of Peoples on the grounds of their ethnic (non-)affiliation is discriminatory (Sejdic-Finci case).[16] The Constitution of BiH limits access to both institutions to citizens belonging to one of the three "constituent peoples", i.e., Bosniaks, Croats or Serbs.

In this first case, Dervo Sejdic and Jakov Finci had complained about their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their Roma and Jewish origin. They invoked Articles 3 (prohibition of inhuman and degrading treatment), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the European Convention on Human Rights, Article 3 of Protocol No. 1 (right to free elections) and Article 1 of Protocol No. 12 (general prohibition of discrimination) to the Convention. The Court decided in their favour.

Azra Zornić won a similar case in 2014, when she appealed to the ECHR because she was not allowed to stand for the Presidency and the House of Peoples after she refused to declare herself a member of the three constitutive peoples, but only as "a citizen of Bosnia and Herzegovina".[17] The ECHR noted in its ruling: "The finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in Sejdić and Finci."

In the complaint filed by Ilijaz Pilav, the European Court of Human Rights ruled that Bosnia and Herzegovina discriminated against this citizen by refusing his candidacy for the Bosnian presidency because he was a Bosniak living in a municipality that is part of Republika Srpska, Bosnia's Serb-dominated entity.[18]

In a recent, similar case, the application concerned Svetozar Pudarić's ineligibility, as a politician residing in the Federation of Bosnia and Herzegovina who declares himself as Serb, to stand for election to the Presidency of Bosnia and Herzegovina. The applicant relied on Article 1 of Protocol No. 12 to the Convention. Again, the Court found a violation considering "that this exclusion is based on a combination of ethnic origin and place of residence, both serving grounds of distinction falling within the scope of Article 1 of Protocol No. 12".[19]

According to the Court, "time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens".[20]

However, until today, none of the judgements has been implemented.[21]

The implementation of the Sejdić-Finci case law of the ECtHR requires differentiation between territorial and ethnic representation. A clear distinction (and separation) is needed between the territorial interests expressed through (representatives of) territorial units and the guarantee of group rights and collective identities. While the former regard the whole population and rights of citizens, the latter refer to specific issues of particular relevance for a distinct group within the population. By contrast, the current constitutional arrangement is based on the underlying assumption that territorial interests are identical with those of the respective dominant group in a given territory (e.g. Serbs in RS, Croats in some parts of the Federation and Bosniaks in others). However, there are many ambiguities and overlaps in the Dayton structures, which are further reinforced in practice by the system of ethnically divided political parties and media. By contrast with most other federal systems, federalism in BiH does not increase democratic participation of all citizens, but rather serves ethnic interests.

Thus, the current dominance of ethnic and collective representation needs to be balanced with the guarantee of individual rights of citizens. This is the obligation resulting from the Sejdic-Finci case law with regard to "Others" (i.e. those who are not belonging to one of the three constituent peoples). However, a correction is also necessary for those members of constituent peoples which are excluded or limited in their rights on grounds of residence. The primacy of individual rights is constitutionally established: article II.2 provides for the direct application of the European Convention of Human Rights and its Protocols, which "have priority over all other law".

The provisions of article II are expressly protected against any change of the Constitution (article X.2) which is proof of their quality as supreme law of the land: as they incorporate general, international values into the constitutional system, the guarantees of individual rights are beyond the reach of the constitutional legislator.

Restrictions of fundamental rights, which are possible in general, and in particular after a conflict, are subject to a proportionality test which shall guarantee that only least restrictive measures are applied and only as long as necessary. This is exactly the line of the ECtHR's argument in the Sejdic-Finci decision: a system that was justified to end a war may not be justified more than a decade after; also, because there are power sharing systems with lesser impact on individual human rights or freedoms.[22]

25 years after the end of the conflict, the logic of the system and its guarantees needs to be changed. Fundamental, individual rights of all citizens need to be emphasized as the rule and put first, while the safeguards of group characteristics are the exception from this rule, which needs to be justified. In a multinational system, the civic principle needs corrections in favor of the safeguard of specific characteristics of groups, but individual rights need to be respected and cannot be totally disregarded.

Efficient territorial governance is another important issue. In a country with less than 3.5 million inhabitants, any reduction of

16 ECtHR Grand Chamber *Sejdic and Finci v. Bosnia and Herzegovina* App nos. 27996/06 and 34836/06 (ECtHR, 23 December 2009).

17 ECtHR *Zornić v. Bosnia and Herzegovina* App no 3681/06 (ECtHR, 15 July 2014). In ECtHR, *Šlaku v. Bosnia and Herzegovina* App no 56666/12 (26 May 2016), the Court decided in the same way regarding a Bosnian citizen, of Albanian ethnicity, i.e. a member of a recognized minority group in BiH.

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

19 ECtHR, *Pudarić v. Bosnia and Herzegovina* App no 55799/18 (ECtHR, 8 December 2020), para. 26.

20 ECtHR *Zornić v. Bosnia and Herzegovina* App no 3681/06 (ECtHR, 15 July 2014), para. 43.

21 Although welcomed by a great majority of scholars, the judgments have also been criticized as discouraging judicial interference with politically negotiated power sharing-arrangements which are necessary for ending violent conflicts; see Christopher McCrudden and Brendan O'Leary, *Courts and Consociations, How Human Rights versus Power-Sharing* (Oxford University Press 2013).

22 As demonstrated by the 2002 amendments of the Entity Constitutions, which ended the exclusion of "Others" in the Entities.

institutional complexity would be a huge gain for the democratic system (clarity in decision-making and political responsibility) and save resources. However, the current structure with two pre-existing, often antagonistic Entities can only be changed by means of a total revision of the Dayton Constitution, which does not seem politically realistic or feasible. Although a reform of one of the Entities, the Federation, may already offer considerable chances for improvement, by reducing the number of Cantons, at least, and transforming them into an efficient intermediate level of territorial governance with economic and planning functions, in the past, such proposals have always been rejected.[23]

Finally, as EU integration is a general political objective for the country, constitutional reforms may express this as well as by providing the legal foundations for achieving it. Following the example of EU integration-clauses which can be found in most EU Member States,[24] an EU integration-clause may be included in the BiH-Constitution which should: (a) name European integration as a constitutional objective; (b) provide a constitutional basis for the transfer of sovereignty rights to the EU and other international organizations; (c) contain provisions on internal State responsibility in coordination as well as on participation of sub-national units (Entities) and of Parliament(s) in the decision-making process; (d) regulate the principles of implementation procedures (including implied powers!). An integration clause with the limited scope of serving as a competence base for State coordination vis-à-vis obligations resulting from the EU integration process was already part of the 2006 "April Package".[25]

IV. LOOKING AHEAD

Adjustments to the current Constitution of Bosnia and Herzegovina are unavoidable for ending the phase of transition and creating sustainable stability without relying directly on international guarantees. The basis of any federal compact in Bosnia and Herzegovina will be a multinational constitutional system in which diversity is the rule. But the current equilibrium between constituent peoples, territorial government and individual citizens, needs to be corrected in favor of territorial and civic elements, limiting group rights and representation to areas of specific collective interests. Ethnicity will always play a role in a population characterized by diversity, but the ECtHR rightly reminds of the necessity to reduce the excessive emphasis put on the ethnic factor in the institutional sphere in favor of strengthening individual rights of all citizens.

The European Commission's Opinion on the Bosnia and Herzegovina's application for membership in the EU, published in 26 May 2019, is a document with concrete indications and clear priorities for the path towards EU accession. Among its 14 key priorities, the EC Opinion explicitly refers to various issues requiring constitutional change making it crystal-clear that EU accession will not happen without amendments to the Dayton Constitution.

Thus, after a decade of silence, constitutional reform is on the agenda again. In order to avoid traumatic change and guarantee sustainability, a gradual and locally driven process will have to be started and sustained. This will not work without international support. The Biden-Presidency in the United States makes close coordination and cooperation between the EU and the US possible which, after more than a decade, could open a window of opportunity for reform.

V. FURTHER READING

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23 For instance, in a proposal by the European Stability Initiative (ESI). 2004. *Making Federalism Work—A Radical Proposal for Practical Reform*, dated 8 January 2004. Available at <http://www.esiweb.org/index.php?lang=en&id=156&document_ID=48>.

24 See for Germany art. 23 Basic Law (GG), for Austria articles 23a-23f Federal Constitution (B-VG), and for the Member States which joined the EU in 2004 Anneli Albi, *'Europe' Articles in the Constitutions of the Central and Eastern European Countries*, Common Market Law Review2005, 42 (2). pp. 399-423, and Anneli Albi, *National constitutions in the face of Europeanising and globalising governance: Falling behind times?* In: C. Closa (ed.), *The Reform Treaty and national constitutions: towards further Europeanisation*? 2009 RECON.

25 Art. III 6 c of the "April Package" proposal. In Croatia, a constitutional amendment which paved the way for accession to the EU was adopted in June 2010. The purpose of separate chapter Chapter VII, entitled 'European Union', is to provide the legal grounds for Croatian membership in the EU and to regulate the status of EU law in the domestic legal order.

Brazil

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I. INTRODUCTION

Brazil was one of the hardest hit countries by the Sars-CoV-2 pandemic in 2020. Despite the fact that the country only has approximately 2.8% of the world population, Brazil concentrates 9% of COVID-19 cases and over 10% of coronavirus-related deaths worldwide. At the time of writing this report, the federal government was still struggling to secure the necessary number of vaccines and to come up with a national immunization plan.

In comparative terms, Brazil is a rare example of a country governed by a far-right populist that opted to travel down the path of "executive underreach" during this moment of international public health emergency.[1] According to Professors David E. Pozen and Kim Lane Scheppele, executive underreach can be defined as "a national executive branch's willful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily required) to address".[2]

President Bolsonaro decided that his political agenda would be better served by stepping down from the national stage and downplaying the severity of the pandemic. He infamously called COVID-19 "a little flu"[3], dismissed the rising death toll as "everyone's destiny"[4], and accused the press, state governors, the World Health Organization, and his political opponents of overreacting to the public health emergency that took the lives of over 200 thousand people in Brazil alone.

Instead of working alongside scientists and experts to promote social distancing, the use of masks, and the production of a vaccine, Bolsonaro spent millions to acquire and distribute medicines with no proven positive effect against the virus. In fact, one Public Health Minister was fired and a second resigned after publicly opposing the President's call to resist lockdown orders and encourage the use of hydroxychloroquine and ivermectin. Bolsonaro finally settled on an Army General with no prior public health training to guide the country through the deadliest pandemic in a century.

As a result, Brazil is only second to the United States when it comes to the number of total COVID-19 infections and deaths. It is against this turbulent (and deeply saddening) backdrop that we write this report to map and assess instances of constitutional reform in Brazil in 2020. Most of the changes to the Brazilian constitutional structure last year were prompted (or, at the very least, influenced) by the chaos that ensued after Bolsonaro's willful failure to address the Sars-CoV-2 emergency.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

According to Elkins, Ginsburg and Melton, national constitutions are more likely to endure when they are "flexible" and "specific" documents. Furthermore, constitutions are also more resilient when they are "inclusively generated".[5] In a sense, the Brazilian Constitution of 1988 checks all the boxes. The document was drafted in a highly inclusive manner, with different thematic committees receiving inputs from experts, civil society organizations and the citizenry at large.[6]

What is more, the document shows a high level of specificity. It ranges over 250 articles and regulates a broad array of disciplines; from culture to sports, criminal to tax law, and indigenous to elderly rights. The list could go on. The Brazilian Constitution is also a flexible document in comparative terms. Although the constitutional text suggests that the document is hard to amend from a procedural standpoint, in practice the Constitutions is frequently reformed. In 2020, the Brazilian Congress passed the 108th amendment to the constitution. It means that, in average, Brazil has three constitutional amendments every year.

With exactly three constitutional amendments passed in 2020, it is safe to say that it was a "pretty average" year in terms of constitutional reform in Brazil. The first two amendments (No. 106 and No. 107) deal directly with challenges presented by the COVID-19 pandemic, one relating to constitutional limits on public expenditure and another concerning the date of the 2020 municipal elections. The third

1 The authors would like to thank Daniela Urtado (Master's student, Pontifical Catholic University of Paraná) for her help with the research for this report.
2 For an analysis of executive underreach in Brazil during the pandemic, *see* João Victor Archegas, *Executive Underreach in Latin America: A Comparative Analysis Between Nicaragua and Brazil During the COVID-19 Pandemic*, in Antonio Gasparetto Júnior (org.), Medidas de Emergência na Administração Pública, Pantanal Editora (2020) and João Victor Archegas, *Comparative Emergency Powers: Brazil and the Philippines under COVID-19*, Católica Law Review (Forthcoming, 2021).
3 David E. Pozen and Kim Lane Scheppele, *Executive underreach, in pandemics and otherwise*, 114.4 AJIL (2020), 609.
4 CNN, *Bolsonaro calls coronavirus 'a little flu'. Inside Brazil's hospitals, doctors know the horrifying reality* (2020), Available at <https://edition.cnn.com/2020/05/23/americas/brazil-coronavirus-hospitals-intl/index.html> Accessed on February 10, 2021.
5 Business Insider, *Brazil is easing restrictions even though coronavirus deaths are at their highest, with President Bolsonaro saying death is 'everyone's destiny'* (2020), Available at <https://www.businessinsider.com/brazil-eases-lockdown-coronavirus-deaths-peak-bolsonaro-ignores-2020-6>, Accessed on February 10, 2021.
6 Zachary Elkins, Tom Ginsburg and James Melton, *The endurance of national constitutions*, Cambridge University Press (2009), 78-92.
7 Eneida Desiree Salgado, *Constituição e Democracia - Tijolo por tijolo em um desenho (quase) lógico: Vinte anos de construção do projeto democrático brasileiro*, Editora Fórum (2007).

amendment (No. 108) is the culmination of a long (and controversial) debate over the legal status of FUNDEB, a public fund dedicated to supporting and developing basic education in Brazil. We will further explore the scope of these reforms in the section below.

Aside from the three constitutional amendments that were successfully passed by the National Congress in 2020, the Bolsonaro administration proposed a new amendment in September (formally known as the Amendment Proposal No. 32/2020). The proposal was drafted by the Ministry of Economy and aims to restructure the Executive branch. Accordingly, the proposal was nicknamed by media outlets in the country as an "administrative reform".

If this proposal becomes a formal constitutional amendment in the future, the President would have more leeway to change the structure of the Executive without prior approval from the National Congress. As we argue below, this proposal is best described as a "dismemberment"[7] rather than a proper constitutional amendment and, moreover, violates the unamendable clauses (*cláusulas pétreas* or "stone clauses") of the Constitution, especially the separation of powers.

Another set of constitutional reforms were introduced by means of judicial decisions issued by the Supreme Court (*Supremo Tribunal Federal* or STF), the highest court in the land. It is important to note that while the Tribunal is constitutionally empowered to exercise judicial review of statutes and even constitutional amendments (following the doctrine of unconstitutional constitutional amendments), the institution is also a court of last resort, receiving appeals and hearing cases from all over the country that touch upon a broad range of legal and constitutional matters. Given the Constitution's specificity, the STF deals with aspects of the law that are not commonly associated with constitutionalism in other jurisdictions.

In 2020, the Court played an especially active role in addressing conflicts related to COVID-19. Probably the most enduring legacy of the Tribunal's decisions in 2020 will be the way in which the justices essentially invigorated Brazilian federalism.[8] In the absence of a more decisive plan of action coming from the President and his cabinet - after all, as noted above, the Bolsonaro administration fell prey to "executive underreach" -, dozens of state governors and hundreds of mayors across the country had to step up and lead the response to the pandemic. Some of the early measures adopted by states and cities were regional and local lockdown orders to curb the spread of the novel coronavirus. It is important to note that federalism in Brazil includes the Union, States and Municipalities.

However, President Bolsonaro was not willing to let that one slide. In his view, the country needed to keep moving forward despite the virus. After creating a false dilemma between the life and health of millions of Brazilians and the national economy, Bolsonaro became a critic of lockdown orders, which, under his account, were "bad for the economy". However, even after he publicly called for these regional and local orders to be lifted, 25 out of 27 governors kept them in place. Infuriated, the President ignited a major constitutional crisis between the Union and the several States. It was his belief that, under the Constitution, state governors were not legally entitled to act independently on the matter.

The case eventually reached the Supreme Federal Tribunal through a constitutional action (*Ação Direta de Constitucionalidade* No. 6.341) presented by the Democratic Workers Party (*Partido Democrático Trabalhista*). In a provisional order handed down by Justice Marco Aurélio, the Tribunal reinforced the constitutional competence of the Union, States and Municipalities to act *jointly* on public health issues - in other words, the Union had no ascendency over States and Municipalities in this area.

Therefore, despite Bolsonaro's disagreements, mayors and governors were constitutionally entitled to declare lockdown orders in order to fight local and regional outbreaks. To put it differently, the STF bolstered administrative decentralization in Brazil by empowering local authorities that needed to act quickly to prevent the spread of the virus within their communities.

Furthermore, the Tribunal was also a key player in blocking, through judicial review, two attempts by the Bolsonaro administration to reform the Constitution. The first one covered the power granted by the Constitution to the President to unilaterally issue *medidas provisórias*[9] or provisional acts to regulate urgent matters. Article 62 of the Constitution prescribes that provisional acts have the same "force" as statutes and, once they are signed by the President, should be immediately submitted to the appreciation of the National Congress. All provisional acts should be passed into law by parliament within a maximum of 120 days, otherwise they are automatically revoked. Congress can also expressly revoke the act by voting to block its conversion into law before the constitutional deadline transpires.

On the 23rd of March, Bolsonaro's Attorney General asked the Supreme Federal Tribunal to suspend, for a period of 30 days, the constitutional requirement of legislative approval of provisional acts (*Arguição de Descumprimento de Preceito Fundamental* No. 663). If the Court accepted such request, Bolsonaro would have the power to act unilaterally, without legislative oversight (and, likewise, without a formal declaration of a state of emergency) for an entire month.

On the 27th of March, Justice Alexandre de Moraes rejected the President's request to extend the validity of his provisional executive orders. In a vehement rebuttal, the Justice noted that the proposed move would amount to an unconstitutional encroachment of the Executive upon the Legislative's prerogatives, violating the separation of powers (which is an unamendable clause in the Constitution).

The second case dealt with the possible reelection of the President of the House of Representatives and the President of the Senate (*Ação Direta de Inconstitucionalidade* No. 6.524). According to Article 57 of the Constitution, every two years the representatives and senators should meet to elect the presidents of both houses of Congress. The presidents serve for a period of two years and, under the constitutional text, are prohibited from being reappointed to the same position in the "immediately subsequent election"[10].

Bolsonaro and his aides were calling for the STF to recognize a "constitutional mutation" in the meaning of the text that would allow the President of the Senate at that time (who was friendly to Bolsonaro) to run for reelection while blocking the President of the House of Representatives (who publicly opposed Bolsonaro) from his reelection bid.

8 Richard Albert, Constitutional Amendment and Dismemberment, 43.1 YJIL (2018) , 02.

9 Thomas Bustamante, Emilio Peluso Neder Meyer and Felipe Tirado, *Opposing an Idle Federal Government: The Brazilian Federal Supreme Court on Mandatory Vaccination*, Verfassungsblog (2020).

10 Clèmerson Merlin Clève, *Medidas Provisórias*, Revista dos Tribunais (2021).

11 Kenji Kanegae, *The Brazilian Constitution Hanging by a Thread*, Verfassungsblog (2021).

In fact, the only justice who signed on to this specific interpretation of the constitutional text was Nunes Marques, so far the only magistrate appointed to the bench since Bolsonaro took office in January of 2019. All the remaining ten justices were split on the question of whether they should allow both presidents to run for reelection or none at all. The latter position prevailed.

A majority of six justices understood that reelection is prohibited within the same legislative term (which, in Brazil, amounts to a four-year period) but is permitted if it happens to take place in the transition between terms. That meant that neither the President of the House nor the President of the Senate would be allowed to run for reelection in 2021 given that a new term is only set to begin in 2023. But, for example, the presidents who are elected in 2021 can run for reelection in 2023, when the new legislative term begins.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In the last section, we advanced a broad overview of the proposed, failed, and successful constitutional reforms of 2020 in Brazil. In this section, we offer context and analysis of the reforms discussed above. First, we start with a brief discussion of the context in which the three constitutional amendments of 2020 are placed. Second, we make an argument for why the proposed amendment known as the "administrative reform" fits squarely into the concept of "constitutional dismemberment". Finally, we offer some insights on the role of the STF in protecting the constitutional framework during the pandemic and restricting the idea of "constitutional mutation".

The first amendment of 2020 (No. 106) was passed by Congress in May after the Senate declared a state of public calamity to deal with the coronavirus pandemic in March. The declaration was based on Article 60 of Complementary Law No. 101/2000 (also known as the Fiscal Responsibility Act), which allows Congress to declare a state of public calamity to suspend ordinary limits on public expenditure by the national government. Through a legislative decree passed on March 20, the Senate declared a state of public calamity in Brazil until December 31.

The legislative decree had two distinctive effects: "First, it [suspended] important statutory limitations and [allowed] the government to spend more financial resources to fight the pandemic than it would otherwise be authorized to. Second, [...] it [created] an oversight committee that [was] responsible for tracking down government expenditure related to the public health emergency."[11]

However, given the specificity of the 1988 Constitution, the document had to be amended to accommodate the temporary changes introduced by the legislative decree. This was necessary, in part, because Bolsonaro resisted calls to declare a state of emergency under the Constitution. Since the state of public calamity follows from a statute and not the Constitution itself, some constitutional limitations had to be temporarily suspended in order to make the legislative decree fully operational.

The second amendment of 2020 (No. 107) was passed in July when the country was approaching the peak of the pandemic's "first wave". Under Article 29, the elections for mayor, vice-mayor and city counselors should happen concomitantly throughout the country on the first Sunday of October every four years. Once again, the Constitution's specificity made a constitutional amendment necessary to postpone the elections. Accordingly, the Constitution was amended to push back the date of the 2020 municipal elections from October to November, buying more time for public authorities to implement safety protocols and prevent the spread of the virus on election day.

But this reform did not happen without some controversy. The Constitution states that electoral rules should be settled at least a year before election day. This is known as the "principle of anteriority" and it was regarded by some as an impediment for the approval of amendment No. 107. Since the amendment was passed only four months prior to the new election date (which took place in November 2020), some commentators argued that the reform violated the principle and, therefore, should be ruled as an unconstitutional constitutional amendment.[12]

Elections in Brazil take place every two years. National and state elections also take place every four years and are interspersed with municipal elections. The pandemic reignited a long-standing debate on whether Brazil should have a single round of elections every four years, unifying the vote to save public money. Fortunately, this argument was once again defeated. As Justice Barroso - who was the President of the Superior Electoral Tribunal in 2020 and resisted calls to unify the elections - noted, the staggered electoral cycle is vital to our democracy.

Finally, the third amendment of 2020 (No. 108) was passed in August. The rule deals mainly with basic education, which includes nursery school, preschool, elementary school, high school and youth and adult education. The Constitutional Amendment No. 53 of 2006 brought under constitutional protection the so-called "Fund for Maintenance and Development of Basic Education and Appreciation of Education Professionals" (*Fundo de Manutenção e Desenvolvimento da Educação Básica e Valorização dos Profissionais da Educação*—FUNDEB).

The recipients of FUNDEB's financial resources are the states, the federal district (where the country's capital, Brasília, is located) and the municipalities that offer educational assistance to their citizens. Nevertheless, the 2006 amendment had a 14-year sunset clause. The 2020 amendment, enacted just as the 2006 amendment was due to expire, made the fund permanent and increased the participation of the Union in the financing of basic education in Brazil. Furthermore, in December of 2020, the Federal Statute No. 14.113 was passed by Congress and sanctioned by President Bolsonaro to further regulate the fund.

Moreover, as we noted above, the Bolsonaro administration, acting through the Ministry of Economy, proposed a new constitutional amendment in 2020 that is still under consideration by the National Congress. Formally called Amendment Proposal No. 32/2020, the document was nicknamed "administrative reform" by media outlets, a reference to the fact that its chief objective is to restructure the national Executive branch and hand over broad powers to the President to further change its structure in the future without legislative approval.

If the amendment is approved, Bolsonaro will be able to unilaterally extinguish or reorganize government departments by issuing an executive order. Under the current constitutional text, this can only be done by enacting a statute through ordinary legislative means or signing a

12 João Victor Archegas, *Pushing the Boundaries of Legal Normality: Brazil's Response to COVID-19 as a 'Legislative Model' Approach*, Verfassungsblog (2020).

13 For a discussion on the "constitutional electoral principles" in Brazil, *see* Eneida Desiree Salgado, *Princípios Constitucionais Eleitorais*, Editora Fórum (2010).

provisional act, which needs to be approved by Congress subsequently.

Therefore, the new amendment would amount to executive aggrandizement, undermining the legislative oversight that representatives and senators currently exert over the Executive branch regarding its structure. To put it differently, it would neutralize one important element of the constitutional system of checks and balances. This is, therefore, a concerning sign of democratic erosion.

According to Tom Ginsburg and Aziz Huq, democratic erosion is an "incremental, but ultimately still substantial, decay in the three basic predicates of democracy - competitive elections, liberal rights to speech and association, and the rule of law."[13] There are five main mechanisms of democratic erosion: formal constitutional amendment, the elimination of institutional checks, centralizing and politicizing executive power, shrinking the public sphere, and the elimination of political competition.[14] Bolsonaro's administrative reform checks the first three boxes.

Consequently, the proposal is best described as a "constitutional dismemberment" that advances democratic erosion by undermining the constitutional system of checks and balances in Brazil. In the same vein, it is important to note that the separation of powers is an unamendable rule under the 1988 constitutional text. As Richard Albert notes, amendments can be (mis)used as tools for dismantling the building blocks of constitutional democracy. The phenomenon, which the author ingeniously calls "dismemberment", involves "self-conscious efforts to repudiate the essential characteristics of the constitution."[15] These "essential characteristics" can be "a fundamental right, a load-bearing structure, or a core feature of the identity of the constitution."[16]

As we noted in the section above, the scope of constitutional reform in Brazil in 2020 is not restricted to the amendments that were passed or proposed throughout the year. The Federal Supreme Tribunal also played an important role. Many scholars in the country criticize the Tribunal for different reasons. Some underscore how the justices have a tendency to act individually in detriment of the Court as a distinct institution (in fact, just one of the decisions we analyze below was decided collegially; the others are individual or provisional orders that may take years to be endorsed or rejected by the Court's plenary) while others argue that the STF is a champion of "judicial activism". However, last year's events highlighted the (often forgotten) fact that the STF is central to our constitutional and democratic order.

It should be noted that the Tribunal is being attacked by Bolsonaro and his supporters.[17] One of the President's sons (who is an elected representative in Congress), went as far as to suggest that closing the Court would be an easy task with the support of the military. On another occasion, a group of *bolsonaristas* launched fireworks against the Court's building in Brasília to simulate a military bombing operation. In a country that has experienced decades of military rule and human rights violations in the past, these threats all are too real to ignore. As Chief Justice Rehnquist once remarked, "somewhere out there, beyond the walls of the courthouse run currents and tides of public opinion which lap at the courthouse door [...] if these tides of public opinion are sufficiently great and sufficiently sustained, they will have an effect upon some of the cases decided within the courthouse."[18]

In his influential (and equally controversial) paper "The Roles of Constitutional Courts in Democracies", Justice Barroso identifies three roles that these institutions can play: countermajoritarian, representative, and enlightened.[19] In a way, by identifying other roles aside the classic countermajoritarian role, Barroso is echoing Rehnquist's words and acknowledging how the Court interacts not only with the constitutional text, but also with the public outside the courthouse and history at large.

One may disagree with Justice Barroso's depiction (and, to be sure, some of the authors of this report do), but it is hard to miss the fact that in 2020 the Court did more than to simply invalidate legislation in a countermajoritarian fashion; it also defended, at least in the cases that are part of this report, the core commitments of Brazilian constitutionalism and democracy. It did so by bolstering administrative decentralization when the Bolsonaro administration opted to exercise "executive underreach" and by keeping the President at bay when he attempted to use the crisis as an excuse to weaken the constitutional system of checks and balances.

Finally, on a different note, it is especially interesting to consider how the Tribunal rejected the argument that a "constitutional mutation" had taken place in the reelection case. The proponents of this view reminded the Court that, under the original text of the Constitution, the President of the Republic herself was not allowed to run for reelection. But that changed when President Fernando Henrique Cardoso pitched the idea that such prohibition could be lifted by Congress, which led to the approval of Constitutional Amendment No. 16 in 1997.

Accordingly, they argued, this changed the meaning of "term limits" in the Constitution at large and, to preserve the "symmetry" between branches, this new meaning should also inform the way we interpret Article 57 (which regulates the election of the Presidents of the House and Senate). However, in his vote, Justice Barroso reminded his peers that a "constitutional mutation" is limited by the semantics of the constitutional text and should preserve the fundamental principles that give identity to the Constitution. In his view, this particular "mutation" did not pass muster.

IV. LOOKING AHEAD

After reviewing the state of constitutional reform in Brazil in 2020, in this section we offer a few insights on what to expect going forward. In this vein, the main constitutional debate in the near future will be reform of the constitutional tax system. As we mentioned above, the 1988 Constitution covers a lot of legal ground, including tax law. Therefore, in order to change some core components of the tax system, Congress needs to amend the Constitution.

There are currently two amendment proposals under discussion in Congress that deal with this matter (Proposal No. 45/2019 and

14 Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy*, The University of Chicago Press (2018), 43.

15 Ginsburg and Huq, 90-119.

16 Richard Albert, *Constitutional Amendment and Dismemberment*, 41.1 YJIL (2018) , 02.

17 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, Oxford University Press (2019), 85.

18 For an analysis of Bolsonaro's tumultuous relationship with the STF in 2020, *see* João Victor Archegas and Leticia Kreuz, *The 'Constitutional Military Intervention': Brazil on the Verge of Democratic Breakdown*, Verfassungsblog (2020).

19 The New York Times, Excerpt of Justice Rehnquist's speech in *Judicial Isolation* (1986), Available at <https://timesmachine.nytimes.com/timesmachine/1986/04/17/949486.html?pageNumber=44>, Accessed on February 05, 2021.

20 Luís Roberto Barroso, *Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies*, 67 AJCL (2019), 127–28 .

Proposal No. 110/2019). In broad strokes, the proposals aim to simplify the collection of taxes by creating a unified "Tax on Goods and Services" (*Imposto sobre Bens e Serviços* - IBS). This new tax will impact the federative system as a whole. There is also a growing concern among scholars about how it will affect the state of social inequality in Brazil.

Another forthcoming reform that was already analyzed in this report is the Amendment Proposal No. 32/2020, which deals with a potential "administrative reform" and intends to change constitutional provisions on civil servants, public employees, and the structure of the administrative state. Although the text of the proposed amendment can still change as the National Congress discusses its adoption in the near future, at the time of writing this report the proposal was best described as a "constitutional dismemberment", violating the separation of powers in Brazil (which is an unamendable rule under Article 60 of the 1988 Constitution).

Finally, the Supreme Court is still to reach a final decision in most of the cases cited throughout this report. For example, the provisional order signed by Justice Marco Aurélio that reinforced the constitutional competence of the Union, States and Municipalities to act *jointly* on public health issues will still be reviewed by the STF sitting *en banc*. Although a final decision on the merits will certainly not affect how states and municipalities responded to the pandemic since the provisional order was issued, it remains to be seen where the other justices will fall on the question of how decentralized we want our federal system to be.

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Bulgaria

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I. INTRODUCTION

In 2020, Bulgaria witnessed everyday anti-corruption protests from the beginning of July until November demanding overall reforms in the judicial and prosecutorial system. Ever since its adoption after the fall of the communist regime, the democratic 1991 Constitution has undergone five reforms in 2003, 2005, 2006, 2007 and 2015, all of them carried out by the National Assembly. The most recent constitutional amendments of 2015 restructured the Supreme Judicial Council (SJC), the key institution governing the Bulgarian judiciary, by splitting it into two colleges—one for judges and the other for prosecutors. These constitutional changes were supposed to strengthen the judicial independence and the integrity standards in the magistracy.

However, the following years have been marked by a series of controversies among the members of the SJC and scandals over undue political influence over judges and prosecutors. On a number of occasions, the President of the Republic of Bulgaria, the European Commission for Democracy through Law (Venice Commission), as well as many other public voices from the political parties and the civil society in Bulgaria have been questioning the constitutional framework of the institution of the Prosecutor General as being one with unlimited power and impunity of office.

Mass civil protests were triggered in the beginning of July 2020 after a few political activists attempted to come ashore with a small inflatable boat on a strip of beach on the Black Sea coast, called "Rossenets", near the residence of a famous Bulgarian politician—Ahmed Dogan. In 2009 he became notorious for his statement in front of voters: "I am the instrument of power that distributes the portions of financing in the state". The opposition activists tried to plant a Bulgarian flag on the beach, but they were pushed back in the sea waters by several muscular men in sunglasses despite their explanations that any beach in Bulgaria is an exclusive public property accessible to all citizens. The watchmen at the beach were later confirmed by the President of the Republic of Bulgaria to be working at the National Security Guard. Immediately afterwards, on 9th July 2020, police officers and prosecutors raided some offices in the Presidency targeting the President's secretary and one of his advisers.

This series of events aroused a wave of daily civil demonstrations calling for the Prime-minister and the Prosecutor General to step down. None of them resigned but in the peak of the heated political tension in the mid of August 2020 the Prime-minister Boyko Borissov and his political party Citizens for a European Development of Bulgaria (GERB) announced their proposal to initiate the procedure to convoke the Grand National Assembly for the adoption of a new Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

This was the first time in the history of the democratic 1991 Constitution when the leading political formation at the government in office actually set an entirely new Constitution in the political agenda. It came out of nowhere and the President and the opposition leaders, as well as many legal experts looked upon it as a political stunt.

Nevertheless, on 17th August 2020 the biggest parliamentary caucus of GERB filed into the Registry office of the National Assembly a proposal to all the other parliamentary groups to initiate consultations on an enclosed draft for a new Constitution. This move in itself was unprecedented because the start of such discussions do not need to be registered anywhere. In the practice of all the previous constitutional reforms political consultations started without any kind of institutional filing. After reaching an agreement and a sufficient majority on the basic targets of constitutional amendments the MPs would propose to the parliament to establish an Interim Committee to work on the text of the bill. In this case, however, the parliamentary customs were disregarded.

The August version of the draft immediately became subject of severe criticism that whatever was presented to the public was unprofessionally composed and drafted. It lacked a Preamble and Motives, or any kind of explanation of the need for a new Constitution. Moreover, the chapter of the fundamental rights and liberties was shifted at the end of the text, thus bearing a resemblance to the 1947 socialist Constitution that laid the foundation of the totalitarian regime renowned for its disrespect to human rights. These flaws of the publicly announced draft were addressed by highly esteemed constitutional scholars, such as Professor Ekaterina Mihaylova, well-known for her decade's long experience in many constitutional and legislative reforms in Bulgaria. She also pointed out that the proposed changes provided for legislative initiative to the governing bodies of the judicial and prosecutorial systems did not have any parallel in the democratic constitutional models. They

bore a slight resemblance to some arrangements in Russia, where the Constitutional Court and the Supreme Court were granted the right to introduce legislative bills but even there it was restricted only to matters of their competence. No constitutional scholar or legal adviser came forward to defend the August draft.

On 2nd September 2020, more than half of the MPs (127) signed another restructured version of the so-called "New Constitution" and registered it in the Parliament to launch the constitutional amendments process through the Grand National Assembly. The comparison between the August and September versions of the 2020 "New Constitution" proposal revealed that in two weeks' period some anonymous drafters among the ruling political parties' coalition made efforts to address the first public criticisms.

The September version followed a structure almost identical to the current Constitution[1] and wiped out the above-mentioned striking flaws in the August version. That new draft was sent to the Venice Commission to issue an urgent interim opinion prior to its consideration at a plenary session (pursuant to Article 14a of the Venice Commission's Rules Procedure). It was notable that the English text of the September version of the 2020 "New Constitution" draft, sent by the Chairman of the National Assembly of Bulgaria on September 18th 2020, and published by the Venice Commission, actually highlighted in red colour the new provisions. These highlights raise the doubt that what was being "sold" to the Bulgarian public as a brand-new constitution was actually put forward to the international community as a partial constitutional reform, touching on the number of seats in the Parliament, the arrangements of the judicial and prosecutorial system, and the constitutional amendment procedure itself.

The current 1991 Constitution is codified, has no unamendable rules, and differs between two procedures for constitutional change. The burdensome procedure is attributed to the Grand National Assembly, incorporating the constituent power and consisting of 400 members. The lightweight procedure is for constitutional amendments by the National Assembly, acting as the parliament and consisting of 240 members. In Bulgaria the constitutional powers to introduce a bill for adoption of a new Constitution belong to either the President or to at least half of the members of the Grand National Assembly. Any other preliminary drafts could be viewed only as a basis for the political consultations preceding the debates in the parliament that is supposed to pass a resolution for announcement of elections for Grand National Assembly with a majority of two-thirds of the votes of all MPs.

The draft of the 2020 "New Constitution of the Republic of Bulgaria" literally reproduced most of the texts of the current Constitution. The heavy procedure through the Grand National Assembly was required for the following elements of the 2020 proposed changes:

1. Reduction by two of the number of the seats in the Parliament —from 240 MPs to 120 MPs and thus affecting the political representation of the Bulgarian people.

2. Reorganization of the system of governance of the judiciary and the prosecution service. The Supreme Judicial Council was removed and two separate bodies of Judicial Council of Judges and Judicial Council of Prosecutors were introduced, thus fully dividing the administration of the judicial and prosecutorial systems. The Prosecutor General's term of office was reduced from 7 to 5 years and his appointment was conferred upon the Judicial Council of Prosecutors without any mechanism of check and balances, such as the current role of the President to appoint the Prosecutor General on the basis of the proposal of the SJC, sitting in plenary session.

3. Elimination of the Grand National Assembly and granting the powers of all constitutional reforms to the National Assembly.

However, it is questionable whether all these changes substantiated a completely new Constitution as neither the current constitutional identity nor any of the constitutional principles any values were explicitly affected.

The draft introduced also some constitutional amendments that could have been adopted by the National Assembly through the lightweight procedure where the bill is introduced by one quarter of the MPs and passed in three ballots by a majority of three quarters of the votes of all the MPs. The most notable and welcome one was the introduction of the individual complaint to the Constitutional Court. Such reform has long been advised by the constitutional scholarship in Bulgaria with a view to expansion of the access to constitutional justice and strengthening the protection of human rights

On 1st October 2020, the Parliament set up an Interim Committee of 18 MPs to review, discuss, analyse and offer changes in the draft of a new Constitution. The President challenged the constitutionality of that parliamentary resolution before the Constitutional Court.

On 25th November 2020, the Parliament voted on the proposed draft of a New Constitution so that to launch elections for Grand National Assembly. The resolution was not adopted since it was short of the number of votes required. This outcome also rendered the constitutional case initiated by the President devoid of purpose and for this reason the Constitutional Court closed the file.

Taking into consideration the trigger, the participants and the time frame one cannot unequivocally determine the August–November 2020 process at the National Assembly as a proposed and failed constitutional reform. No actual and serious political intentions to further the proposed constitutional changes could be identified. The Venice Commission issued their urgent opinion on 20th November 2020 noting that the draft was prepared within the parliamentary majority without any external input and without being preceded by any serious public debate. Furthermore, the reasons for the constitutional form were not well-explained and the whole process lacked the significant participation of the public and the experts.

1 The only difference was that the last chapter 10th of the current Constitution about the coat of arms, seal, flag, anthem, and capital of Bulgaria was dissolved and all its provisions were included in the 1st chapter of the so called "New Constitution" draft.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

It is quite meaningful that in the mid of the anti-government civil demonstrations in Bulgaria the ruling political party GERB decided to "play the Constitution card".

The last decade in Bulgaria has been marked with fervent political and legal debates about the institution of the Prosecutor General, inherited from the communist past, and proved to be the most controversial issue in the current constitutional model of the Republic of Bulgaria. It has been addressed on multiple occasions not only by the Venice Commission, but also by the European Commission within its Cooperation and Verification Mechanism, and by the European Court of Human Rights (ECtHR) ever since the *Kolevi v. Bulgaria,* app. No. 1108/02 (ECHR, 5 November 2009).

Constitutional reform was certainly expected to address the issue of the omnipotent and de facto unaccountable Prosecutor General in Bulgaria. At the end of 2019 the President initiated a series of political consultations with the political parties, civil society groups and legal professionals to probe whether broad consensus could be achieved for such a reform. In the mid of March 2020, however, the focus of the society was shifted to the emergency situation with the COVID-19 pandemic so these discussions were halted.

All the previous constitutional amendments of 2007 and 2015 turned out to be limited in scope and purposes. They were unable to accomplish the anticipated transformative change in the governance of the judicial and prosecutorial system to enhance their role in the fight against corruption and organized crime. The former Minister of Justice Hristo Ivanov, who initiated the 2015 constitutional reform, resigned in December 2015 immediately after the Parliament's vote that actually rendered his proposals pointless and crippled the reform. Upon his resignation he concluded that the parliamentary parties had no actual political will to change the *status quo* and that they actually maintained the "supremacy of the Prosecutor General" in Bulgaria. In 2020 Mr. Hristo Ivanov was one of the opposition activists in the small boat that attempted to reach the beach of "Rossenets" with the Bulgarian flag. This symbolic act of bringing back to the citizens the captured state was an inspiration to the following July-November 2020 civil demonstrations.

In response to the mass protests the Bulgarian government decided to turn the constitutional reform into their own trump card. A purely procedural technique of starting parliamentary consultations for convening the Grand National Assembly was used so that the ruling party could take the initiative to lead and frame the debate on the necessary constitutional changes. Given their proposals in the August and September versions of the so-called New Constitution, it has become clear that they had no political intention to amend the institution of the Prosecutor General and the hierarchical model of prosecutor service. Quite the reverse that central issue that needs to undergo a radical transformation was blurred among other questions that suddenly were brought to the fore. The constitutional debate was shifted to issues that were never before in its focus, such as the abrupt and large (by 50%) reduction of the MPs in the National Assembly and the removal of the constitution-making body of the Grand National Assembly. The latter is a central pillar that upholds the stability of the current Constitution. It guarantees that no populist and opportunistic political trends might violate the existing Constitution, either by remaking the constitutional identity or by repealing any fundamental rights and liberties.

The proposal to eliminate the Grand National Assembly and to confer all its powers to the National Assembly with a number of seats reduced by two had the potential to be a rather transformative change and could be described as a kind of constitutional dismemberment. Such a populist question was raised and voted in a non-binding referendum in 2016. However, no constitutional scholar in Bulgaria ever defended such a drastic decrease in the number of the seats in the Parliament as such a reduction was viewed as one deteriorating the system of political representation deeply rooted in the traditions of Bulgarian parliamentary democracy ever since its first 1879 Tarnovo Constitution. Moreover, the explanatory notes to the New Constitution draft offered no clear and viable justification for such a reform. Actually, the proposal was not even accompanied by a sketchy analysis of the many factors that should be taken into account, such as the unicameral structure of the Bulgarian parliament, the total population, the geography and the ratio of cities and rural districts, the electoral and the party systems, etc. Hence, the double reduction of the MPs seats in the Parliament was viewed as one weakening the representative democracy in Bulgaria and raised a lot of tension among the participants in the constitutional debate.

The 2020 New Constitution draft also offered a simplification of the constitutional amendment procedure by authorizing the National Assembly to adopt any and all changes to the Constitution by a qualified majority. The draft proposal provided for a certain category of constitutional changes to be confirmed by a national referendum by more than half of the votes cast with a turnout of more than half of the electorate. As a matter of fact all the issues in the scope of the new phase of approval by national referendum in the constitutional amendment procedure were copy paste from the current competence of the Grand National Assembly, such as the adoption of a new Constitution, changes of the territory of the Republic of Bulgaria, changes in the form of government, including its republican and parliamentary foundations, the direct application of the Constitution and the irrevocability of fundamental rights, the constitutional amendment procedure itself. Given the negative past experience of adoption of the 1947 Dimitrov Constitution by a national referendum, as well as the lack of tradition and good practices examples of referendums, it is difficult to foresee the impact of this constitutional dismemberment on the future of the Bulgarian Constitution. Neither the Venice Commission nor the constitutional experts in Bulgaria could find the rationale behind those draft changes in the constitutional amendment procedure.

Although the anticipated focus of the constitutional reform should have been the accountability of the Prosecutor General and the institutional framework of the prosecution service in Bulgaria, none of the 2020 drafts of the so-called New Constitution addressed this issue. The reform further divided between the existing colleges in the current Supreme Judicial Council by creating two separate independent

Councils of judges and prosecutors, as well as two corresponding inspectorates operating under them. The proposal seemed to increase in double the bureaucracies within the governance of the judicial and prosecutorial systems without effectively creating any new checks and balances mechanisms to enhance the judicial independence and the fight against corruption. Moreover, the proposed draft in no way addressed the persisting issue of the composition of the Council of Judges not being fully in line with important standards of the Council of Europe. Most significantly the judges elected by their peers to represent the professional community in the Council of Judges continued to be a minority compared to the group of the members *ex officio* and the political quota, elected by the Parliament.

The 2020 New Constitution draft touched on the framework of the Prosecutor General and prosecution office, however, in a direction quite opposite to the long-standing recommendations of the Venice Commission, the European Commission and the ECtHR. First of all, the severely criticized constitutional provision that the prosecutor shall observe and ensure in general the legality in society continued to be reproduced unscathed from all the socialist constitutions of 1947 and 1971 to the democratic 1991 Constitution until the 2020 New Constitution draft. The idea of the oversight power of the prosecutor originates from the Leninist communist ideology. It is highly problematic within any democratic constitutional model as it provides the prosecution office with competences outside the criminal law sphere including the discretion to take part selectively in some administrative and civil proceedings.

Secondly, the so called "Judicial Council of Prosecutors" as proposed by the 2020 constitutional reform draft, mirrored the "Judicial Council of Judges" without taking into consideration that unlike judges the prosecutors were actually organized in a strictly hierarchical system, in which the lower prosecutors subordinated to the higher ones. After the 2015 constitutional reform in Bulgaria and the creation of the College of Prosecutors within the SJC almost all the votes in it were unanimous and that fuelled serious doubts in the society that the prosecutors followed informal instructions from their superiors.

Ever since 2017 the Venice commission has emphasized in several opinions to the Bulgarian authorities that the lay members of the Prosecutorial Council should not have any present or future hierarchical subordination links to the Prosecutor General. Moreover, without a strong and truly independent component that council seems to act as a window dressing for the decisions taken in advance by the Prosecutor General. In this context the Prosecutorial council is unlikely to either protect the careers of individual prosecutors from undue influence or to appoint any senior prosecutors against the will of the Prosecutor General. Hence, such a structure would never be an efficient check on the Prosecutor General or a guarantee for the autonomy of the individual prosecutor.

Instead of addressing these deficiencies in the current constitutional model, the 2020 drafts actually came out with a structural reform that would not remedy but would further deepen these malformations in the prosecution service. The drafters actually insulated all the decisions as regards the appointment or removal of the Prosecutor General to the Council of Prosecutors, without introducing any warranties for its independence from the Prosecutor General. The proposal also eliminated the last remaining weak procedural check on the appointment of the Prosecutor General, i.e., the President's power to refuse the appointment upon first proposal and to return it for second deliberation in the council.

The Constitutional Court of the Republic of Bulgaria does not necessarily exercise any direct substantial control of the undergoing constitutional reforms. No *a priori* constitutional review of any constitutional amendments drafts is required or even possible given the powers of the Constitutional Court, exhaustively listed in Article 149 of the current Constitution. The institution might only indirectly be involved in the amendment process upon the request of any of the seizing subjects (such as the President, one-fifth of all the MPs in the National Assembly, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court of the Prosecutor General). Such involvement is limited either to provide binding interpretations of the Constitution (usually the constitutional provisions of the amendment procedures), thus playing an enlightened role, or to rule on the constitutionality of the acts passed by the National Assembly in the undergoing constitutional amendment procedure, thus playing a countermajoritarian role.

In the course of the proposed and failed 2020 constitutional reform in Bulgaria the President challenged the constitutionality of the Interim Committee set up by the National Assembly arguing that its competence is vested only in the Grand National Assembly. However, the file of this constitutional case was closed before the Constitutional Court could issue its ruling because the Parliament repealed the contested resolution right after the unsuccessful vote on the launch of Grand National Assembly elections.

IV. LOOKING AHEAD

The year 2020 in Bulgaria will be remembered for its mass civil protests and political tensions in which the Government used the Constitution as a "play card" to remain in power. Contrary to the legitimate expectations any viable reforms of the institution of the Prosecutor General and the prosecution service in Bulgaria were left in the lurch. The constitutional debates were shifted to non-existing issues such as the system of political representation and the procedures of constitutional amendments. Such political moves however might achieve only short-term objectives and in no way may restore the confidence of the Bulgarian citizens in their government. All the international partners of Bulgaria and its citizens have long been anticipating a radical constitutional reform in the prosecutorial system.

The outcome of the 2021 parliamentary elections will give us a much clearer picture of the scope of the future constitutional developments in Bulgaria. Provided that the stakeholders for a radical reform in the prosecution do not achieve a parliamentary majority, it is very likely that the *status quo* will be maintained. Only superficial and cosmetic legislative changes without any transformative effect for the prosecution service might be implemented to gloss over the criticism coming from the institutions of the European Union and the Council of Europe.

V. FURTHER READING

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European Commission for Democracy through Law (Venice Commission). 'Bulgaria. Urgent Interim Opinion on the Draft New Constitution, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure, Strasbourg, Opinion No. 1002 / 2020 CDL-PI(2020)016 (20 November 2020), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)016-e, accessed 2 February 2021.

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Canada

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I. INTRODUCTION

In Canada, formal and multilateral constitutional amendments are quite rare, due in large part to the high degree of rigidity of the amendment formula. Indeed, Richard Albert goes as far as to write that the "Constitution of Canada may be even harder to amend" than that of the United States, the latter being "widely regarded as one of the world's most difficult democratic constitutions to change by a formal constitutional amendment".[1] The multiple failures experienced by actors who have tried to reform the Constitution through formal and multilateral amendment procedures have led to a constitutional *status quo*, and to an increasing use of para-constitutionality.[2] As a result, in recent years, the evolution of the Canadian Constitution has not really taken place formally, but rather in an informal, indirect and incremental way, through the unilateral action of members of the federation or by intergovernmental agreements. In that regard, 2020 is no exception.

The formal amending formula of the Canadian Constitution, which we briefly discuss later, is found in Part V of the *Constitution Act, 1982*.[3] Whenever a constitutional change occurs through this amending formula, it leads to a *formal* amendment, while an amendment made outside the amending formula is an *informal* one.[4] Part V contains three multilateral and two unilateral procedures for amending various parts of the Constitution. While none of the multilateral procedures were formally engaged in 2020, it would be misleading to think that nothing happened with respect to constitutional change in Canada in the past year. Actually, consistent with the structure of Canada's Constitution and its culture of constitutional amendment, several events in 2020 provide insight into the evolution of our Constitution.

This report focuses on these events, which, while keeping the text of the codified Constitution intact, can be seen as constitutional reforms, as formal or informal constitutional amendments or maybe even, in the future, as parts of constitutional dismemberments.[5]

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Over the last decades, certain issues have recurred in the debates about constitutional change in Canada. They include changes to the voting system, Senate reform, and the reconciliation with Indigenous Peoples. The year 2020 saw some developments and attempts relating to each of these.

1. ELECTORAL REFORM

Since the arrival of the new millennium, proposals and discussions about possible electoral reforms have accelerated in some provinces and within the federal order. While Canadians never had the opportunity to express their views on electoral reform at the federal level in a Canadian-wide referendum, several provinces have held referendums on the issue. British Columbia did so three times (2005, 2009 and 2018), just as did Prince Edward Island (2005, 2016 and 2019).[6] Lately, on the federal scene, Justin Trudeau's Liberal Party won a federal election in 2015 with promises of electoral reform before the next election, a promise that was abandoned in 2017.[7] Up to now, all attempts to reform the federal or provincial first-past-the-post voting systems have failed.

1 Richard Albert, 'The Difficulty of Constitutional Amendment in Canada' (2015) 53 Alb LR 85, 86. See also Richard Albert, *Constitutional Amendments—Making, Breaking, and Changing Constitution* (Oxford, Oxford University Press, 2019) 105ss.

2 On the concept of para-constitutionnality, see Johanne Poirier and Jesse Hartery, 'L'ingénierie para-constitutionnelle : modifier la constitution par la bande et par contrat' in Dave Guénette, Patrick Taillon and Marc Verdussen (eds), *La révision constitutionnelle dans tous ses états* (Montreal & Brussels, Éditions Yvon Blais & Anthemis, 2020) 427.

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

4 There can also be informal constitutional *changes* that are not necessarily informal constitutional *amendments*. This happens, for instance, when an informal change occurs on a matter that is not subject to a possible formal constitutional *amendment*. However, for the purposes of this report, we will not distinguish between constitutional changes and constitutional amendments.

5 This report will not discuss constitutional evolution through judicial interpretation of constitutional provisions. We invite readers interested in this issue to consult the following decisions, in which the Supreme Court of Canada revised the scope of certain rights under the Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982): *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32, 451 DLR (4th) 367 (s. 12—Right not to be subjected to cruel and unusual treatment or punishment); *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13, 447 DLR (4th) 1 (s. 23—Minority language educational rights); *R v KGK*, 2020 SCC 7, 443 DLR (4th) 361 (s. 11*b*)—Right to be tried within a reasonable time); *Fraser v Canada (Attorney General)*, 2020 SCC 28, 450 DLR (4th) 1 (s. 15(1)—Right to equality).

6 See Julien Verville, *La réforme du mode de scrutin au Québec* (Québec, Presses de l'Université du Québec, 2020) ch 2, 'Les projets de réforme ailleurs au Canada' 29-45; André Barnes and James R. Robertson, 'Electoral Reform Initiatives in Canadian Provinces', Library of Parliament, Doc. PRB 04-17E; Don Desserud and Jeffrey F. Collins, 'The ongoing saga of electoral reform in PEI' (*Policy Options*, 11 April 2017) <policyoptions.irpp.org/magazines/april-2017/the-ongoing-saga-of-electoral-reform-in-pei>.

7 Alex Boutilier, 'Trudeau abandons pledge to reform Canada's elections' (*The Star*, 1 February 1 2017) <www.thestar.com/news/canada/2017/02/01/trudeau-drops-pledge-to-reform-canadas-electoral-system-in-his-first-term.html>.

That being said, there is currently one voting system reform underway in the province of Quebec. The 2018 election in that province resulted in the formation of a new government by the *Coalition Avenir Québec*. That party had promised an electoral reform during its first term. About a year after taking office, it introduced Bill 39—*An Act to Establish a New Electoral System*,[8] which aims at introducing a new proportional voting system. The Bill successfully passed a second parliamentary approval vote last October, and detailed review of the government's proposals began in early 2021. The adoption of Bill 39 is highly probable, since the current Quebec government holds a majority in the National Assembly. If that Bill passes, the new electoral system will come into force *only if* it is approved by a referendum, to be held simultaneously with the first general election after the Bill is assented to. This reform is therefore still underway. It will be interesting to see if this referendum yields a different result than those held in other provinces, all of which led to the rejection of the proposed electoral reform.

The process put in place there is quite interesting. In Canada, referendums are consultative (except at the municipal level): they require legislative action to become effective. Normally, if a popular consultation is held, the population votes and *afterwards*, a statute can be adopted to give effect to the popular will. However, this time, legislative action is taken *before* the referendum. That referendum is therefore supposed to allow—or not—for the statute to come into force.[9] As such, in addition to the interest in the content of the reform (the voting system), the process itself is noteworthy and potentially instructive for the future use of referendums in constitutional reforms in Canada.

2. SENATE REFORM

In a different, yet complementary fashion with electoral reform, another province recently adopted laws that could reopen the debate about Senate reform and the method of selecting senators.

In Canada, senators are appointed by the federal executive, which has full discretion in the choice of senatorial candidates. Nevertheless, from 1989 to 2012, Alberta held senatorial elections to "choose" the candidates to be appointed by the federal government to the Senate. During this time, 10 nominees were elected and 5 of them were later appointed to the Senate by Ottawa. The Act under which these elections were held expired in 2016.[10]

In the meantime, in 2014, the Supreme Court of Canada ruled that senatorial elections could not be introduced by ordinary federal statute. According to the Court, such reform would alter the architecture of the Canadian Constitution and would therefore require a multilateral constitutional amendment.[11] In the *Reference re Senate Reform*, the Court writes:

> We conclude that introducing a process of consultative elections for the nomination of Senators would change our Constitution's architecture, by endowing Senators with a popular mandate which is inconsistent with the Senate's role as a complementary legislative chamber of sober second thought. This would constitute an amendment to the Constitution of Canada in relation to the method of selecting Senators. It thus attracts the general amending procedure, without the provincial right to "opt out": s. 42 (1) (b), *Constitution Act, 1982*.[12]

Since then, no senatorial elections have taken place in Alberta. However, in 2019 and 2020, the province decided to reinstate senatorial elections, by enacting Bill 13, the *Alberta Senate Election Act*,[13] and Bill 27, the *Alberta Senate Election Amendment Act*.[14] These two statutes allow senatorial elections to be held during municipal or provincial elections or in a stand-alone process. The next senatorial elections will take place at the same time as Alberta's municipal elections on October 18, 2021.[15] It will be interesting to see whether the current federal government will choose to act on the results of these elections and appoint elected candidates to the Senate. Some questions could also eventually be raised with regards to the constitutionality of such undertaking, considering the opinion of the Supreme Court in the *Reference re Senate Reform*.

3. REFORMS REGARDING INDIGENOUS PEOPLES

Reconciliation with Indigenous Peoples is a major theme in Canada, as well as a recurrent topic of possible constitutional reforms. Even if no formal constitutional amendments occurred in this regard in 2020, there were notable developments.

First, in December 2020, Canada's Minister of Justice, David Lametti, introduced Bill C-15—*An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*.[16] It aims to implement, step by step, the UN *Declaration on the Rights of Indigenous Peoples*, another election campaign commitment on the part of the Liberal Party. The Bill also responds to a recommendation from the Truth and Reconciliation Commission of Canada.[17] Its preamble provides that "the rights and principles affirmed in the Declaration constitute the minimum standards for the survival, dignity and well-being of Indigenous Peoples of the world, and must be implemented in Canada". When the UN General Assembly adopted the Declaration, in 2007, Canada was one of only four countries to vote against—along with Australia, New Zealand and the United States.[18] The country later decided to endorse the Declaration, in 2010. It remains to be seen if and when Bill C-15 will be passed by parliament, especially given that the federal government that tabled it is in a minority situation and that

8 Bill 39, *An Act to Establish a New Electoral System*, 1st Sess, 42nd Leg, Quebec, 2019.

9 Indeed, section 227 of Bill 39 provides that "this Act comes into force only if, following a referendum to be held on the same day as the first general election after (*insert the date of assent to this Act*), the majority of the votes declared valid, that is 50% of the votes plus one vote, are in favour of the new electoral system provided for by this Act". The Bill then mentions the referendum question: "Do you agree with replacing the first-past-the-post electoral system by the mixed electoral system with regional compensation set out in the Act to establish a new electoral system? Yes/No".

10 *Senatorial Selection Act*, RSA 2000, c S-5. See section 54: "This Act expires on December 31, 2016".

11 *Reference re Senate Reform*, 2014 SCC 32.

12 *Ibid*, [70].

13 *Alberta Senate Election Act*, SA 2019, c A-33.5.

14 *Alberta Senate Election Amendment Act*, 2020, SA 2020, c 19.

15 See Elections Alberta, 'Senate/Referendum' <https://www.elections.ab.ca/elections/senate-referendum/>.

16 Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2020.

17 Truth and Reconciliation Commission of Canada, *Calls to Action*, 2015.

18 United Nations, Department of Economic and Social Affairs, 'United Nations Declaration on the Rights of Indigenous Peoples' <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

an election is likely to be held within the next year. But if adopted, Bill C-15 could initiate the larger process of reforming the constitutional relationship between Indigenous Peoples and state authorities.

Another significant reform regarding Indigenous Peoples results from the adoption of *An Act Respecting First Nations, Inuit and Métis Children, Youth and families*[19] by the federal Parliament in early 2020.[20] The Act also mentions that "the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples". It aims to "affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services" and "set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children".[21] However, as discussed below in Part III, Quebec requested an advisory opinion from its Court of Appeal regarding the constitutionality of this new federal Act.[22] The outcome of this reform is therefore also pending.

Finally, from a more local perspective, but still highly relevant, it is worth noting the constituent process put forward by the indigenous community of Mashteuiatsh, in Quebec, in order for the Pekuakamiulnuatsh First Nation to adopt its own constitution.[23] Generally, the adoption of a constitution by an indigenous community is provided for and governed by the prior signature of a treaty between the latter and state authorities.[24] However, the process put in motion by the Pekuakamiulnuatsh First Nation is autonomous and takes place outside of a treaty. In that sense, this initiative is empowering, and could usher interesting developments regarding indigenous constitutionalism in Canada.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

To fully understand the reforms discussed above, a first brief review of the amending formula of the Canadian Constitution is in order. Part V of the *Constitution Act, 1982* contains five different amendment procedures. Three of those are multilateral, and require the support of the federal parliament and of several or specific provinces. Some amendments require the unanimous consent of all provinces.[25] Others require the consent of at least seven provinces, which tally at least 50% of the Canadian population (the 7/50 procedure).[26] Finally, some necessitate the support of the province(s) directly affected by an amendment.[27] None of those procedures were used in 2020. Actually, the last time a multilateral amendment occurred in Canada was in 2001.[28]

Two other procedures are unilateral. They allow the federal[29] and the provincial[30] parliaments to change, autonomously and on their own, elements of the Constitution that only concern them (minor changes to the federal institutions for the federal parliament and provincial constitutions for the provinces). Electoral reforms, for instance, fall within this category, at both the federal and provincial levels. In order to achieve such a constitutional change, a parliament simply follows its ordinary legislative process, and, in some circumstances, must convey explicitly its intention to amend the Constitution.[31] Whenever those unilateral procedures are used, they represent *formal* constitutional amendment. Thus, they must not be confused with constitutional reforms that, although they occur by ordinary law, do not fall within the scope of application of those procedures, and therefore are rather *informal* constitutional amendments. The laws in Alberta that relate to senatorial elections are examples of such informal amendments, which bring about changes that are outside the scope of the provincial unilateral procedure since they go beyond mere amendments to the constitution of the province.

1. THE 2020 CONSTITUTIONAL REFORMS IN CANADA: AMENDMENTS OR DISMEMBERMENTS?

Trying to qualify constitutional reforms as amendments or as dismemberments is a challenging undertaking. It requires looking into a society's pre-existing constitutional architecture and anticipating the effects of a given reform. While amendments build on an existing constitution, dismemberments break up with a pre-existing constitution. As Richard Albert writes: "A dismemberment of a constitutional structure entails a clear break from how the constitution organizes the allocation of power, how it balances competing claims to and the exercise of authority, or how its public institutions function".[32]

The three types of reforms discussed in part II are, in our view, all amendments or attempted ones, although they could eventually be seen as component parts of dismemberments. For instance, were the Quebec electoral reform to succeed, this would considerably alter the province's political system, making it harder to have majority governments again. This could eventually be conceived as a dismemberment in Albert's terms.[33] This said, for the time being, estimates tend to show that majority governments would remain possible even after the reform.[34] The latter would therefore amount to an amendment. The same can be said of Alberta's senatorial elections and of the reforms regarding Indigenous Peoples that occurred in 2020. If they were to constitute the starting point for major potential changes to Canadian bicameralism, or to the relationship between Indigenous Peoples and state authorities, they could partake in a dismemberment.[35] But for now, they most probably embody constitutional amendments.

19 *An Act Respecting First Nations, Inuit and Métis Children, Youth and families*, SC 2019, c. 24.
20 Order in Council P.C. 2019-1320 September 6, 2019.
21 *An Act Respecting First Nations, Inuit and Métis Children, Youth and families*, *supra*, preamble and s 8.
22 See Order in Council No. 1288-2019.
23 See Tipelimitishun, 'La démarche constitutionnelle des Pekuakamiulnuatsh' <www.tipelimitishun.com/fr/>.
24 See *Nisga'a Final Agreement*, s 22.12; *Tlicho Final Agreement*, s 7.1; *Tsawwassen First Nation Final Agreement*, s 24.3.
25 *Constitution Act, 1982*, s 41.
26 *Ibid*., s 38 and 42.
27 *Ibid*., s 43.
28 *Constitution Amendment, 2001 (Newfoundland and Labrador)*, SI/2001-117, (2001) C Gaz II, 1-2.
29 *Constitution Act, 1982*, s 44.
30 *Ibid*., s 45.
31 See *Succession Eurig (Re)*, [1998] 2 SCR 565 [35].
32 Richard Albert, *Constitutional Amendments*, *supra*, 85.
33 See Richard Albert, *Constitutional Amendments*, *supra*, 88-89 and the example of New Zealand.
34 Quebec, Secrétariat à l'accès à l'information et à la réforme des institutions démocratiques, 'Mode de scrutin mixte avec compensation régionale—simulation': <cdn-contenu.quebec.ca/cdn-contenu/adm/min/conseil-executif/publications-adm/autres_documents/reforme-scrutin_simulation_.pdf?1579703730>; Naël Shiab, 'Et si nous avions eu un mode de scrutin proportionnel?' (*Radio-Canada*, 2 October 2018) <ici.radio-canada.ca/special/2018/elections-quebec/resultats-proportionnelle-mixte-compensatoire-mode-scrutin/index.html>.
35 In support of our point, see Richard Albert, *Constitutional Amendments*, *supra*, 85: "A constitution, then, may be dismembered either to improve liberal democracy outcomes or to weaken them. We can accordingly speak of the dismemberment of the Turkish Constitution from democratic to authoritarian, just as we can interpret the Reconstruction Amendments as dismembering the infrastructure of slavery in the U.S. Constitution".

2. CONTROLLING CONSTITUTIONAL REFORMS: THE ROLE OF THE COURTS

The constitutionality of constitutional reforms may be assessed by the Supreme Court of Canada, sitting as a final court of appeal, but also by first instance tribunals and appellate courts.

Such control can be *ex-ante*, if a provincial or the federal executive requests an advisory opinion from a provincial court of appeal or the Supreme Court of Canada. Judges could be asked which procedure should apply to a given modification.[36]

The control can also be *ex-post*, if the validity of an amendment is challenged once it has already occurred.[37] In such case, the Court's role is to determine whether the procedure used to implement the amendment was the correct one. Although *ex-post* review is usually done through a normal judicial review procedure initiated before a tribunal of first instance, it can also be done through a reference (advisory opinion) procedure at the request of the provincial or federal government.

Whether the control is *ex-ante* or *ex-post*, Courts may also have to determine whether a regular statute is, in fact, a constitutional amendment subject to a formal amendment procedure.[38] While courts may review compliance with the rules set out in Part V, they are unwilling to add additional requirements based on principles or a structural analysis of the Constitution.[39] It is also important to note that there are no unamendable rules in the Canadian Constitution. Accordingly, as long as a change complies with Part V, the courts cannot place any material limits on the power to amend the Constitution.[40]

Of the constitutional reforms identified in Part II, the only change that is currently subject to constitutional review is the one that is introduced by *An Act Respecting First Nations, Inuit and Métis Children, Youth and families*. Indeed, just days before the coming into force of the Act, the Quebec government challenged its validity before its Court of Appeal. The Attorney General of Quebec alleges, among other things, that Part V of the *Constitution Act, 1982* does not authorize the federal Parliament to unilaterally enact sections 8 and 18 to 26 of the Act and to define the scope of section 35 of the *Constitution Act, 1982*, which recognize existing aboriginal and treaty rights.[41]

In rendering its decision, the Court of Appeal will have to determine whether the federal law constitutes, in fact, a constitutional amendment to section 35. The outcome of this decision will be significant, as it will assess, for the first time, the procedure applicable to the modification of aboriginal rights and the (eventual) role of Indigenous Peoples in the amending formula, which is largely silent in this regard. The only exception is that prior to alterations to constitutional provisions that directly affect them, Indigenous Peoples must be invited to participate in a constitutional conference.[42] It is very likely that the significance of these issues will take this case all the way to the Supreme Court.

IV. LOOKING AHEAD

In addition to the foregoing, a number of issues pertaining to constitutional reform are lurking in the next few months and years.

Amongst the most prominent ones, a referendum is scheduled in Alberta in October 2021—at the same time as the senatorial elections— to authorize a constitutional initiative that would propose a change to the equalization formula[43] provided for in section 36 of the *Constitution Act, 1982*. Effecting the change would, however, require a formal amendment. This referendum will involve several outstanding issues with respect to the Canadian amending process, including the effects of a constitutional referendum, the ability of a province to initiate a constitutional amendment on its own, and the scope of the duty to negotiate. Special attention should be given to the latter. Indeed, in its 1998 *Reference re Secession of Quebec*,[44] the Supreme Court of Canada stated that while "the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation", those "representatives may, of course, take their cue from a referendum". In the same paragraph, the Court added: "The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table".[45] Therefore, this 2021 referendum in Alberta could test the duty to negotiate, something that has not happened since this duty was recognized by the Supreme Court over twenty years ago.

Curiously—maybe—the *Reference re Secession of Quebec* is and will remain at the heart of another constitutional debate in the near future. Following the 1998 Supreme Court *Reference*, the federal parliament adopted the *Clarity Act*,[46] to which Quebec's National Assembly replied with its Bill 99—*Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*.[47] The latter provides that the "Québec people has the inalienable right to freely decide the political regime and legal status of Québec"[48] and that in a self-determination referendum, "the winning option is the option that obtains a majority of the valid votes cast, namely 50% of the valid votes cast plus one".[49] The constitutionality of this statute was challenged and, in 2018, the Superior Court of Quebec ruled that it is compatible with the Constitution of Canada.[50] The debate is now before the Court of Appeal, which heard the parties' claims in late 2020.

The year 2021 should also see some reforms with regards to linguistic rights at the federal and provincial levels. The federal government is expected to present to parliament, early in 2021, a white paper on the future of official languages in Canada, including changes to be

36 See for example: *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704; *Reference re Secession of Quebec*, [1998] 2 SCR 217.

37 See for example : *Hogan v Newfoundland (Attorney General)*, 2000 NFCA 12, 183 DLR (4th) 225 (NL CA); *Potter v PG Québec*, [2001] RJQ 2823 (QC CA).

38 See *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433.

39 See Sébastien Grammond, 'Le contrôle judiciaire des modifications constitutionnelles au Canada' in Dave Guénette, Patrick Taillon and Marc Verdussen (eds), *La revision constitutionnelle dans tous ses états* (Montreal & Brussels, Éditions Yvon Blais & Anthemis, 2020) 71.

40 See *ibid*, 69-70.

41 See the Letter of the Attorney General of Quebec to the Chief Justice Nicole Duval Hesler, filed in the Quebec Court of Appeal on April 6, 2020, in the *Reference to the Quebec Court of Appeal regarding the Act respecting First Nations, Inuit and Métis Children, Youth and Families* (500-09-028751-196).

42 *Constitutional Act, 1982*, s 35.1.

43 See Dean Bennett, 'Alberta premier promises referendum on equalization reform' (*Global News*, 17 June 2020) <globalnews.ca/news/7077744/jason-kenney-fair-deal-panel-referendum-equalization/>.

44 *Reference re Secession of Quebec*, [1998] 2 SCR 217.

45 *Ibid*, [88].

46 *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c. 26.

47 *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, CQLR c E-20.2.

48 *Ibid*, s 2.

49 *Ibid*, s 4.

50 *Henderson* v *Procureure générale du Québec*, 2018 QCCS 1586.

made to the *Official Languages Act*.[51] Similar reforms are expected in New Brunswick[52]—the only province that is officially bilingual—and Quebec,[53] where the government is expected to introduce legislation to amend the *Charter of the French language*[54] in the first half of the year. Proposals are even made suggesting that Quebec should and could unilaterally and formally amend the Canadian Constitution in that regard.[55]

Finally, there is also the ongoing constitutional challenge to Quebec's Bill 21—*Act Respecting the Laicity of the State*.[56] Bill 21, which came into force on June 16, 2019, aims to affirm the laicity of the State in Quebec and to prohibit certain persons from wearing religious symbols while exercising their functions in public institutions. To that end, it amended the province's *Charter of Human Rights and Freedoms*[57] to specify that persons must maintain proper regard for State laicity in exercising their fundamental freedoms and rights. The validity of the Act is currently disputed before the Quebec Superior Court on the grounds that it is inconsistent with the provisions of the Canadian Charter, even though the "notwithstanding clause" was used by the provincial legislature to prevent any constitutional challenge. The ruling is expected in 2021 and is also likely to find its way to the Supreme Court.

V. FURTHER READING

Alain-G. Gagnon and Johanne Poirier (eds), *Canadian Federalism and Its Future—Actors and Institutions* (Montreal & Kingston, McGill-Queen's University Press, 2020, 440 pages).

Dave Guénette, Patrick Taillon and Marc Verdussen (eds), *La révision constitutionnelle dans tous ses états* (Montreal & Brussels, Éditions Yvon Blais & Anthemis, 2020, 664 pages).

Maja Sahadžić, *Asymmetry, Multinationalism and Constitutional Law—Managing Legitimacy and Stability in Federalist States* (London, Routledge, 2020, 280 pages).

51 *Official Languages Act*, RSC 1985, c 31 (4th Supp). See Stéphanie Chouinard, 'Revising the Official Languages Act: Will History Repeat Itself?' (*Policy*, 16 December 2020) <policymagazine.ca/revising-the-official-languages-act-will-history-repeat-itself/>.

52 Jacques Poitras, 'Higgs faces crucial test with review of languages act' (*CBC News*, 2 November 2020) <www.cbc.ca/news/canada/new-brunswick/language-act-review-1.5783926>.

53 Canadian Press, 'Refonte de la loi 101: le dépôt du projet de loi reporté au printemps' (*Radio-Canada*, 24 November 2020) <ici.radio-canada.ca/nouvelle/1752092/langue-projet-loi-francais-quebec-reporte-printemps>.

54 *Charter of the French language*, CQLR c C-11.

55 Patrick Taillon, 'La langue de la loi' (*Le Devoir*, 18 January 2021) <www.ledevoir.com/opinion/idees/593465/langue-francaise-la-langue-de-la-loi>.

56 *Act respecting the laicity of the State*, CQLR c L-0.3.

57 *Charter of Human Rights and Freedoms*, CQLR c C-12.

Cape Verde

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I. INTRODUCTION

There were no major changes in 2020 to the Cape Verde Constitution (which was adopted in 1992). This year's political agenda was not marked by the use of the formal procedure of constitutional reform; the CCCV did not recognize any constitutional convention or the incorporation of previously non-included rights in the bill of rights; and no clear informal changes to the constitutional norms were identified; on the academic level, no work addressing questions or domains relevant to constitutional reform was published.

With this general assessment in mind, this report, the first in this global review of constitutional reform, presents the general regime for constitutional reform in CV and its previous institutional practice and deals with proposed, failed and successful constitutional reforms (II), then discusses the scope of those reforms and the role of the constitutional jurisdiction in ensuring control of the enactment of amendments (III), and finally gives a perspective on constitutional reform for next year (IV).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. FORMAL CONSTITUTIONAL REFORMS

1.1 CONSTITUTIONAL REFORM BY PARLIAMENT AS THE REFORMING POWER

The periodicity of constitutional reform in the CV legal system is conditioned by the amendment regime established by the Basic Law (BL). Although limited by an eternity clause that protects some provisions directly linked to constitutional identity (Article 290), it is also based on a general principle that other norms can be reformed (Article 286), because the BL is the *lex suprema* but is neither *lex perfecta* nor *lex aeterna* (AJ Pina-Delgado Concurring Opinion to Judgment (J) 27/2017). That possibility is tempered by the existence of a set of norms that try to guarantee certain levels of constitutional legitimacy and stability of the BL. This is done by prohibiting formal revisions of the BL in situations of constitutional crisis (declared state of siege or state of emergency) (Article 292) and, especially, by limiting the frequency of the use of the formal constitutional reform process. The regime establishes an ordinary procedure according to which formal constitutional reform can only take place five years after the approval of the last constitutional act of reform, and an exceptional and expedited extraordinary procedure that allows formal constitutional reform at any time, but increases the approval majority from two thirds (Article 288(1)) to four fifths of the members of parliament (MPs) in full exercise of their functions (Article 286(2)). This explains why, although the Constitution was adopted in 1992, it could be formally revised in 1995 through the extraordinary procedure (to insert a minor change in the text to change a rule that would have led to the postponement of the general elections of 1996), and in 1999 and 2010 by the ordinary procedure to bring in comprehensive changes to the constitutional text. In 2005, a formal attempt to initiate constitutional reform failed in parliament.

This concentration model, which systematizes a myriad of amendments to the Constitution into a single constitutional bill (Article 288), can be initiated by any MP (Article 286(3)) and obliges all other interested MPs or organized parliamentary groups to table their own amendments within sixty days (Article 287(2)). It has the effect of allowing the formal procedure for constitutional reform to be dormant for years. The long interregnum without formal constitutional changes can be used for informal proposals and discussions on possible amendments to the Constitution in political and academic circles.

The year 2020, despite the "season" having been open since 2015, was not a year of constitutional reform. The possibility was plainly rejected by the leader of the party that controls parliament—the center-right *Movimento para a Democracia* (MPD)—and the Prime Minister (PM) Mr. Correia e Silva. However, some constitutional reform ideas were propagated by other political actors. Although they do not initiate an amendment procedure in the proper sense, such ideas are publicly discussed and in many cases are revived when political groups, through MPs, promote them through the formal procedure in Parliament. Additionally, a comprehensive constitutional reform proposal was announced without much development by the junior parliamentary party—UCID, or *União Cabo Verdeana Independente e Democrática*—in a public communication by its chairman. Until now, the draft elaborated by its main legal adviser, Professor Geraldo Almeida, has only circulated in legal academic circles.[1] Ultimately the lack of support from the other two parliamentary parties and the number of UCID MPs—only three out of 72—has discouraged its proponents from presenting it in wider society and even more from tabling it in parliament.

Thus, the obvious conclusion is that none of the proposals of the BL

1 Text on file with author.

have led to actual reforms, but all of them are still viable in the context of the constitutional regime and practice and may be picked up in the years ahead.

2. FORMAL CONSTITUTIONAL REFORM BY INTERNATIONAL NORM-CREATION PROCEDURE OR ORDINARY LEGAL PROCEDURE

In relation to the non-enumerated rights clause, another manner in which the Constitution can be reformed is through the intervention of the CCCV. The CCCV may recognize, and incorporate into the system of protected rights, civil rights that are included in international treaties that bind the State or that are enacted by parliament or by the government as ordinary normative bodies. The power to recognize the constitutional status of such norms lies with the courts, and ultimately with the CCCV, which can incorporate them if they have constitutional content, that is, if they refer to an essential dimension of individual life similar to the one that justifies the recognition of the enumerated rights (J-07/2016, written by AJ Pina-Delgado). In 2020, the CCCV did not recognize the incorporation of any new right to the constitutional system.

3. INFORMAL CONSTITUTIONAL CHANGE

Finally, informal constitutional change can also be recognized by the courts, especially in the field of relations between branches of government and political actors. The CCCV has accepted the possibility of the establishment of *contra legem* constitutional customs in the specific field of constitutional law, and invoked a power to recognize them as a ground for constitutional change (Advice 2/2020 written by AJ Pina-Delgado). Additionally, most constitutional challenges can lead to informal constitutional changes, depending on the way that they are articulated by the plaintiffs and defendants and decided on by the courts. In 2020, two challenges had that potential, but they were both rejected by the CCCV. The first concerned the absence of the definition of the content of a legal act whose approval was delegated by parliament to the executive through an enabling act (Advice 2/2020), and the second was related to the attempt to prevent MPs who abstained in a parliamentary vote on a bill to approve a treaty, or who belonged to a party that voted in favor of a similar bill in a previous legislature, to challenge the constitutionality of the rule by submitting a referral to the CCCV (J-10/2020, written by AJ Lima).

III. THE SCOPE OF THE REFORMS AND CONSTITUTIONAL CONTROL

1. THE SCOPE OF THE (PROPOSED) REFORMS

1.1. CHANGES TO THE GENERAL PRINCIPLES CHAPTER OF THE CONSTITUTION

Some of the proposals focus on the first part of the Constitution, which contains basic values, general principles, and the characterization of the State and its main features.

1.1.A. MAKING THE NATIVE LANGUAGE OFFICIAL

At present, Article 9(1) of the Constitution establishes that the official language of the country is Portuguese, but it adds in the following paragraph that the State shall promote the conditions for making the CV native language official. The Creole language, as it is called, is rightly considered to be an element of the national identity. This is the reason why several political personalities and entities—namely the Minister of Culture and Creative Industries,[2] the President of the Republic (PR),[3] and UCID in its proposal—have promoted a discussion about a change of the Constitution to make the CV native language an official language in parallel with Portuguese.

1.1.B. SUPPRESSION OF THE CAPITAL CITY SPECIAL STATUS CLAUSE

Article 10 of the Constitution, besides stating that the capital city of the country is Praia, which is located on the main island of Santiago, establishes that this municipality shall have a special status. Social and political movements in the second most populated island of the archipelago, S. Vicente, complain about what they call the excessive centralization of power in Praia, and have demand that the norm be removed from the Constitution because it amounts to unjustifiable discrimination against other islands and municipalities. So far, there has not been much endorsement of this demand by the wider political class.

1.2. CHANGES TO THE CONSTITUTIONAL SYSTEM OF BASIC RIGHTS AND DUTIES

Another group of proposals targets the norms in the part of the Constitution dedicated to basic rights and duties.

1.2.A. LIMITATION OF PERSONAL LIBERTY FOR PUBLIC HEALTH REASONS

To legitimize the institutional and home confinement of persons for public health reasons, which is not covered by the clause on the limitation of personal freedoms (Article 30 of the BL), the Minister of Health and Social Security suggested the insertion of an amendment.[4] Progress was not made on this proposal, mainly because some members of the cabinet considered that such restrictions were not unconstitutional, and because there was no relevant external pressure to make this amendment, as the measures were not challenged publicly, much less in the courts.

1.2.B. DEFINITION OF THE SCOPE OF THE RIGHT TO NATIONALITY IN THE CONSTITUTION

This proposal can be found in the UCID document, and argues for a change to Article 5(1) of the Constitution (Citizenship), because this precept establishes that CV citizens are those who are recognized as

2 https://santiagomagazine.cv/cultura/abraao-vicente-defende-revisao-constitucional-com-debate-sobre-crioulo-como-lingua-oficial.
3 https://www.tsf.pt/mundo/lingua-mae-pr-de-cabo-verde-insta-a-acelerar-crioulo-como-lingua-oficial-na-constituicao-11846167.html.
4 https://expressodasilhas.cv/politica/2020/05/14/ministro-da-saude-desafia-assembleia-para-uma-revisao-constitucional/69447.

such by legislative acts or international treaties. This formula, according to the proponents of the proposal, makes the right of nationality dependent on these instruments, voiding it as a constitutional right since it is dependent on the discretion of those in public power. Remembering that this power was previously abused, the proposal is to insert a norm according to which all individuals who were born in CV or are the offspring of CV parents are CV nationals.

1.2.C. RELOCATION OF THE RIGHT TO CHALLENGE ADMINISTRATIVE ACTS IN COURT

The judicial review of administrative acts is not new in the framework of the Constitution. It is already established in Article 245, which was inserted into the segment dedicated to public administration. The UCID proposal is that one of the paragraphs of this clause—namely the central one that establishes a right to challenge, in court, acts of the administration that violate rights or that damage legally protected interests—should be relocated to the civil and political rights chapter, because it would then be understood as a right of the citizen and not as a privilege.

1.3. CHANGES TO THE POLITICAL AND ELECTORAL SYSTEM

Other prospective changes are related to the political and electoral system and were, in most cases, proposed by UCID.

1.3.A. CREATION OF A SINGLE ELECTORAL DISTRICT

The first of the changes tackles the plurality of electoral districts established by Article 102 of the Constitution. This article also assigns to the legislation on elections the task of defining the number of electoral districts and the quantity of mandates allocated to each. Critics argue that this legal regime tends to favor the maintenance of a *de facto* bi-party system. UCID, the third parliamentary party, states that the system is unjust and undemocratic, because it hinders the electoral prospects of smaller parties (which see most of their votes wasted), and attributes different weights to the votes of CV residing in the islands and those of electors in the diaspora. UCID therefore proposes that, instead, there would be a single district that would encompass the whole national territory and the diaspora. From a theoretical point of view, the proposal was justified by adding that an MP, according to the Constitution, represents the nation and not only his/her district, so he/she should be elected by the universality of electors and not only by the voters of a single district.

1.3.B. POSSIBILITY OF SUBMISSION OF CANDIDACIES IN PARLIAMENTARY ELECTIONS BY GROUPS OF CITIZENS

The second major proposed reform of the political and electoral system established by the Constitution is an amendment to Article 106, which defines the conditions for the presentation of candidates in democratic elections. In the case of parliamentary elections, only political parties and coalitions of political parties can present candidates. This is considered by the UCID proposal as an undemocratic establishment of hegemony by political parties over individuals and civil society, as discriminatory measure, because a person who is not registered on the list of a political party is banned from running for important public offices—the Speaker of Parliament (SoP), an MP, and, indirectly, the PM—and as a violation of the right of political participation. Therefore, UCID proposes a change in the constitutional provision, to permit groups of citizens, who can currently only present lists in municipal elections, to contest parliamentary elections.

1.3.C. CONCENTRATION OF ALL ELECTIONS ON THE SAME DAY

Elections in CV are scheduled on different days, because the Constitution and the Municipalities Statute establish different terms (five years for the PR and MPs (Articles 128 and 150-151), and four years for elected municipal representatives), and because the Constitution imposes a hiatus of at least one hundred and eighty days between presidential and parliamentary elections (Article 112(2)). After a West African regional study on the costs of elections and the financing of democracy recommended the concentration of all elections on the same day to save resources,[5] the chairman of UCID took the opportunity to advance the need to change the Constitution, but this idea was coldly received by the other important political parties, namely the MPD and the PAICV—the main opposition party—as well as by the minister responsible for parliamentary affairs.[6]

1.3.D. REDUCTION IN THE NUMBER OF MEMBERS OF PARLIAMENT

Another of UCID's proposals is the reduction in the number of MPs from the current maximum of 72 (Article 141(1)) to a maximum of 60. The reason given by the proponents is that, in a small country with a population of only 550,000 people, the current number of MPs is excessive.

1.3.E. POSSIBILITY OF CREATING A PARLIAMENTARY GROUP WITH THREE MPS

The UCID proposal also targets another subject very dear to the party: the number of MPs necessary to constitute a parliamentary group. The current constitutional rule—Article 149(1)—provides that a parliamentary group is established with a minimum of five MPs. UCID, which presently has three MPs, proposes a change to lower that threshold to three.

1.3.F. IMPOSING LIMITS ON THE POWERS OF AN ACTING PR

Article 141 of the Constitution establishes that, when the PR is temporarily absent abroad, as well as in cases of the office being vacant, the PR shall be replaced by the SoP or, if the latter is prevented from

5 https://asemana.publ.cv/?Estudo-recomenda-congregacao-de-todas-as-eleicoes-em-Cabo-Verde-num-unico-dia&ak=1

6 https://inforpress.cv/tres-eleicoes-num-so-dia-ucid-concorda-mpd-pondera-paicv-contra-propostas-avulsas-e-governo-diz-nao/

doing this, by the Deputy SoP. In 2017, the CCCV ruled that the SoP violated the Constitution, namely the separation of powers principle, because, while assuming *ad interim* the role of Acting PR, he presided over parliamentary sessions (J-27/2017, written by CJ Semedo). The change proposed by the UCID is the result of that judgment, insofar as it inserts an amendment to the Constitution to state that the Acting PR is prevented from performing acts that are manifestly incompatible with the functions of the PR.

1.3.G. OBLIGATION TO DEFINE THE CONTENT OF A DELEGATED LEGAL ACT IN THE ENABLING ACT

A potential constitutional change would result from the challenge launched by the PR to an enabling Act aimed at altering the Drug Trafficking Criminalization Act. It was the PR's understanding, presupposing that this requirement is imposed by the BL, that the Constitution requires the content of a delegated act to be defined. However, this is hardly the case. The CCCV had already stressed that the rule simply establishes that such an enabling Act must include the "object, the scope and the duration of the authorization". Thus, the norm would simply support the idea of general legislative indications, but would not require the broad definition of the content of the act (Advice 02/2018 written by AJ Pina-Delgado). The CCCV again emphasized the same opinion by the slim majority to two to one (Advice 02/2020 written by AJ Pina-Delgado), rejecting the argument that one should read the rule as also including the expression "content", which, implicitly, would lead to a change of the Constitution through the incorporation of an additional requirement for the validity of an enabling Act that did not previously exist.

1.4. CHANGES RELATED TO THE JUDICIAL SYSTEM

Certain amendments to constitutional clauses related to the judicial system were also inserted in UCID's proposal. These were generally justified as being for the purposes of safeguarding the independence of the judicial institutions or strengthening the judicial system.

1.4.A. APPOINTMENT OF JUDGES OF THE AUDITORS' COURT BY THE JUDICIAL COUNCIL

The Auditors' Court, with the CCCV and the Supreme Court of Justice, is one of the three superior courts of the CV judicial system. However, as established by Article 203(2)(d), it is the only one that has all five of its judges appointed by the executive. The UCID proposal starts from the idea that it does not make sense that the judges of a judicial organ that oversees public expenditure and scrutinizes the accounts of state entities (mainly those connected with the administration) are appointed by the executive without any specific professional requirements established by the Constitution. Therefore, it proposes that the Auditors' Court judges be appointed from among career judges by the Judicial Council following a competitive examination.

1.4.B. APPOINTMENT OF THE ATTORNEY GENERAL BY THE NATIONAL ASSEMBLY ON THE INITIATIVE OF THE PUBLIC PROSECUTOR'S COUNCIL

Mutatis Mutandis, the same reasons justify the UCID proposal to change Article 226(4)— under which the Attorney General (AG) is appointed by the PR after a proposal made by the executive—with a formula according to which the holder of the position is appointed by parliament following a proposal sent by the Public Prosecutor's Council.

1.4.C. RECOGNITION OF THE STANDING OF THE NATIONAL ASSOCIATION OF MUNICIPALITIES TO REFER A CONSTITUTIONALITY REVIEW CASE TO THE CCCV

The last proposal put forward by UCID aims to widen the group of entities that can refer cases to the CCCV to review the constitutionality of normative acts. Currently, the standing to refer a case to that court is established by Article 280 of the BL, which grants it to the PR, the PM, the SoP, the AG, fifteen MPs, and the Ombudsman. Under the above-mentioned proposition, an amendment would add the Chairman of the National Association of Municipalities to that list, but only in matters "of local interest".

1.4.D. PREVENTION OF MPS WHO ABSTAINED IN A PARLIAMENTARY VOTE ON A BILL TO APPROVE A TREATY, OR WHO BELONGED TO A PARTY THAT HAD VOTED IN FAVOR OF A BILL TO APPROVE A SIMILAR TREATY IN A PREVIOUS LEGISLATURE, TO CHALLENGE THE CONSTITUTIONALITY OF A RULE BY REFERRING THE MATTER TO THE CCCV

This argument was made by the SoP when defending a resolution that authorized the PR to bind CV to a treaty that was deemed to be unconstitutional by opposition MPs. The effect of accepting this argument would lead to the incorporation in the Constitution of a special requirement—namely, a negative vote—that would have to be satisfied before MPs could challenge the constitutionality of acts before the CCCV. The Constitution does not support to the smallest degree the insertion of such a condition through interpretation. However, the claim made by the SoP was meritless and, as such, it was dismissed as nonsensical by the CCCV (J-10/2020).

2. EVALUATION AND EFFECTS OF THE PROPOSED REFORMS

Most of the proposed reforms of the Constitution, despite the discussions that can be held on their necessity and merits, would fall under the reforming power of parliament, but one of them could prove to be controversial. This is the possibility of altering Article 30, which recognizes personal freedom, to add another cause allowing the deprivation of personal freedom. It could be argued that this is incompatible with the limits to constitutional reform established by Article 290(2), which states that rules recognizing civil and political rights are unamendable.

The set of constitutional amendments to the political and

electoral system proposed by UCID would have a structural impact on the Constitution, but, even so, they would not amount to a dismemberment.[7] They would, more modestly, shift the political system away from a classic liberal system which has competitive elections—but is dominated by two big and traditional parties— and is more concerned with political stability, economic development, and civil rights than with popular democracy. For better or for worse this would change significantly, with the possibility of groups of citizens presenting lists for parliamentary elections and, in particular, with the creation of a single electoral district formed from the national territory and diaspora voters, which would avoid small parties' votes being wasted and allow a more balanced system between liberalism and popular democracy.

3. THE ROLE OF THE CCCV AND CONTROL OF CONSTITUTIONAL REFORM

On the one hand, under the current constitutional design, the CCCV plays a counter-majoritarian role, and some of its judges are rather clear that this understanding drives their analysis of cases, at least when rights are the basis of litigation.[8] But, on the other hand, as concerns the new roles discussed in recent scholarship,[9] it is not very clear that the CCCV is authorized to perform a representative role or an enlightened one. Either way, the constitutional judges in CV do not see themselves in a broad representative role—which is illustrated by their resistance to the adoption of decisions in the "name of the people"—except perhaps for the limited cases in which legislative conditions to apply civil rights are not established by the legislature, where the Court creates rules to be applied in a concrete case and while the legislative omission persists (J-31/2019, written by AJ Pina-Delgado). The Court can arguably adopt an enlightened role, but only in the framework of the broad construction of the norms regarding rights and principles in the Constitution, which it has to interpret with fidelity to the text but in accordance with comprehensive entrenched national values—which, according to the Court, are dignity, personal freedom, equality, self-government, and solidarity. Therefore, both the counter-majoritarian role and the sparks of the enlightened role of the CCCV, are, in a certain manner, the offspring of the self-image of the Court as a protector of national public values, as enshrined in the BL. In this sense, the CCCV can review constitutional acts aimed at changing the BL under the formula of Article 280, which subjects any rules or resolutions with normative content and even resolutions with a "specific and concrete" nature to successive review of constitutionality. That being said, no such procedure has ever been used, and certainly not in 2020.

IV. LOOKING AHEAD

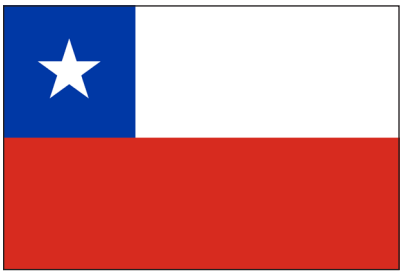
It is very unlikely that a formal procedure for constitutional reform will be triggered in 2021. With two general elections, to elect a new Parliament and a new PR, and in the absence of a mood that favors the structural understandings necessary to change over this time, any reform of the BL is more likely to be connected to the CCCV, if it recognizes the incorporation of a treaty or statutory rights into the Constitution or if it recognizes constitutional changes operated by constitutional custom.

7 In the sense developed by Richard Albert, 'Constitutional Amendment and Dismemberment' (2018), 43 Yale J Int Law 1

8 See José Pina-Delgado, 'Anti-Democrática e Contra-Maioritária, e Depois? Em que Sentido? Com que Consequências? Reflexões sobre a Legitimidade e Posição da Justiça Constitucional na Relação de Tensão entre Soberania Popular e Direitos Individuais no Estado Contemporâneo' (2016), in: *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos* (Almedina), vol I, 273

9 See Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Role of Constitutional Courts in Democracies' (2019) Am J Comp L 109

Chile



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I. INTRODUCTION

The current Chilean Constitution (hereinafter "the Constitution") was created in 1980, after a referendum summoned by the dictatorship of Augusto Pinochet, which was carried out in a context of serious restrictions for civil liberties and without minimum standards for any political process to be considered democratic. This genesis can be seen as the original sin of the Chilean basic law and is one of the reasons that explain its lack of democratic support, despite the considerable changes to its content over time, being the two most important, the one from 1989, known as the reform of the transition, and the one in 2005, attached to the name of the president at the time, Ricardo Lagos.[1]

This lack of support was especially apparent at the events in October 18 of 2019 and the following months, when people came out to the streets all over the country to protest and express their discomfort caused by inequalities and injustices, on what was commonly named as the "social outbreak" (estallido social). On one hand there was a plurality of social demands, many of them articulated around the idea of dignity, on the other hand there was a total perplexity of the government and professional politicians in general, unable to respond with anything else but violence during the first days of protests.

In the context of global demands for a change of the Chilean model, the idea of changing the whole Constitution began to gain strength, as a mean for reaching a new social pact with a democratic basis.[2] Nonetheless, the Constitution did not contemplate any rule for its complete reform, and for the last 30 years after the dictatorship ended there was no political will to change it. Only by the social pressure of the people in the streets, politicians reached an agreement, popularly known as the "agreement for peace" (acuerdo por la paz), with the purpose of beginning a constituent process by amending the Constitution and calling for a referendum.

Through the statute (ley) nº 21.200, issued December 24 of 2019, the Congress amended the chapter XV of the Constitution, hereby named "Constitutional reform and the process for elaborating a new Constitution of the Republic". The aforementioned referendum took place on October 15 of 2020, when Chilean citizens had to decide if they wanted a new Constitution and, if so, what would be the organ in charge of the process. 78,28% of the voters supported the constitutional change, and 79% voted for a "Constitutional Convention", an organ where all of its members are elected democratically, instead of the "Mixed Convention", partly composed by directly elected representatives and by members of the Chilean Parliament.

Against this backdrop, the most important constitutional reforms during 2020 were oriented to execute this referendum and the constituent process to come, but there were also reforms on other issues, mainly related to the Covid-19 outbreak as the economic crisis forced the Chilean Parliament to adopt emergency measures.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. SUCCESSFUL CONSTITUTIONAL REFORMS

Among the successful constitutional reforms in Chile during 2020, it is possible to distinguish between those related to the constituent process and its referendums, and those addressing other issues, particularly, related to the Covid-19 crisis and the need for emergency measures that have taken the form of amendments.

1.1 SUCCESSFUL CONSTITUTIONAL REFORMS RELATED TO THE CONSTITUENT PROCESS

As it was previously mentioned, the constituent process itself started as a constitutional reform, setting the basic rules and a schedule for its development. Accordingly, the additions or changes to the original arrangement took the form of constitutional amendments in a broad sense. These are stated below in chronological order:

1. March 23, statute nº 21.216: This reform added two transitory dispositions, the twenty-ninth and the thirtieth. The purpose of the former was to provide better opportunities for independent candidates, this essentially means that they can compete in the elections by creating their own lists for their districts without

1 For a brief overview of the changes on Chilean Constitutions: Enrique Navarro, 'Reformas a la Constitución chilena' (2014) Revista de Derecho Público 13.

2 An explanation of the relation between the social crisis and the demand for a new Constitution, in: Octavio Ansaldi and María Pardo-Vergara, 'What Constitution? On Chile's Constitutional Awakening' (2020) 31 Law and Critique 7.

an affiliation to a specific political party. While the latter aimed to set rules for guaranteeing equal gender presence among candidatures (for lists of independents and parties) and the constitutional Convention, in the scenario this would have been the chosen organ at the plebiscite.

2. March 26, statute nº 21.221: The original date for the referendum was April 26, but due to the Covid-19 crisis, this amendment rescheduled it for October 25, giving more time to the authorities to set up minimum conditions to ensure the health and security for all citizens during the process. With this goal in mind, the amendment modified the article 130 and the twenty eighth transitory disposition, along with adding from a thirty-third to a thirty-seventh.

3. August 26, statute nº 21.261: This reform introduced a forty-second transitory disposition to regulate funding, transparency and propaganda for the campaigns in the referendum, imposing limits to financial contributions, publicity and general boundaries to the campaign expenses with sanctions for those who surpass them.

4. August 27, statute nº 21.257: This amendment added a forty-first transitory disposition, ordering the Directive Board of the Electoral Service to issue rules and instructions for the proper development of the referendum.

5. December 10, statute nº 21.296: After the referendum of October 2020, and the victory of beginning a constituent process through a Constitutional Convention, the new task was to complement the rules for the elections of representatives for this organ. The first amendment with this purpose modified transitory dispositions twenty-ninth and thirtieth, aiming to facilitate independent candidatures, lowering the requirements for their inscription with a smaller number of the sponsorships needed for independent candidatures or for lists.

6. December 23, statute nº 21.298: In order to guarantee an accurate representation of the Chilean society in the constituent organ, the reform set special rules for indigenous people and for people with disabilities. For the first group, the amendment ensures 17 seats out of a total of 155 in the Convention, specifying the number of representatives for each community according to their population, with the condition of certifying their ethnicity following an established criterion. For the second group, the reform indicates that they must be represented, at least in 5% of the candidatures of one party or pact of parties, but differently from the first case, the reform does not guarantee seats for people with disabilities in the organ.

1.2 SUCCESSFUL CONSTITUTIONAL REFORMS NON RELATED TO THE CONSTITUENT PROCESS

There were also reforms on other issues, such as terms limits for the reelection of certain authorities[3] and the regulation of the parliamentary diet along with the income of other public officials.[4] But the most important changes beside the constituent process were oriented to adapt the constitutional chart to the new challenges and conditions imposed by the sanitary crisis. These are stated below in chronological order:

a. March 26, statute nº 21.219: This amendment added a thirty-second transitory disposition, enabling the Chilean Congress to have its sessions using telematic means, specifying the cases and circumstances of when it is allowed to use this system.

b. July 30, statute nº 21.248: The goal of this amendment was to allow citizens to voluntarily withdraw 10% of their savings from the Chilean Retirement System managed by the AFPs (Administradoras de Fondos de Pensiones), as a palliative measure to face the economic crisis caused by the pandemic. Therefore, the thirty-ninth transitory disposition set the conditions for users to exercise this faculty, establishing among others, that people with unfulfilled child support obligations could get their savings directly retained up to the owed amount, if the right owner requires it.

c. August 20, statute nº 21.253: The amendment bestowed the Chilean Central Bank with special faculties to face the economic crisis, adding a subsection to article 109 which regulates the organ, allowing it to sell and buy bonds in the open secondary market, as a tool for avoiding the crash of values of the Chilean debt instruments, keeping the offer and supply balance in a scenario where the behavior of investors could intensify the damage of the national currency.

1.3 FAILED CONSTITUTIONAL REFORMS

At the beginning of the year the Senate voted against the constitutional project about the property rights over water, that aimed to set it as national good for public use, allow temporary concessions with limited and specific purposes, to prioritize its use for human consumption, safeguarding community and ancestral uses, and to guarantee the rights with constitutional action in Courts. Currently, water rights are ruled by the Civil Code, the Code of Waters and the Constitution, which, despite of already conceiving hydric resources as a public good, allow privates to have rights for exclusive exploitation and, as owners of these rights, to trade them in the market as any private good. This failed reform caused big discomfort amongst the people, especially

3 Ley nº 21.238, Reforma constitucional para limitar la reelección de las autoridades que indica 2020.

4 Ley nº 21.233, Modifica la Constitución Política de la República en materia de determinación de remuneraciones de autoridades y funcionarios que indica 2020.

considering that drought and unequal distribution of hydric resources are a big part of the challenges that Chile is currently facing.

Another failed reform was the rejection of the project for protecting critical infrastructure, that would have added a new article 42 bis to the Constitution, giving the President the power to deploy the armed forces without declaring state of constitutional exception for the protection of power plants and the necessary systems to fulfill basic social needs. This project did not obtain enough votes in the Deputies Chamber and is currently in Mixed Commission, which is a mechanism to solve controversies between the Senate and the Chamber of Deputies. This project had a strong opposition as it was conceived as another tool for the executive to face social protests with violence and resort to armed forces indiscriminately instead of addressing the substantive aspects of these political issues.

The third failed reform was the amendment for adding a forty-third transitory disposition in the Constitution, allowing citizens to withdraw 10% of their savings from the Chilean Retirement System for a second time, with the possibility of requiring the reattainment of the owed amount of child support obligations in the same terms of the past reform (statute nº 21.248). This project was rejected at the Senate for not reaching enough votes and was consequently passed to Mixed Commission, it was also taken to the Constitutional Court by the President, where it was ruled out as unconstitutional for reasons which will be explained in the next part of this work.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

To analyze the scope of these reforms, several aspects of the Chilean constitutional and political background must be considered. As professor Richard Albert points out, "a formal amendment cannot on its own tell us how to evaluate the nature and significance of the constitutional change. We must also know the relevant history, politics, and laws of the jurisdiction, as well how the change is perceived by the relevant legal elite and the people".[5] Therefore, if the categories proposed by the author are applied to the Chilean context during 2020, it is possible to distinguish between those constitutional reforms that can be considered mere amendments[6] to the existing constitutional text, and others that are better described as a dismemberment[7] of the very identity of the current Constitution.

Consequently, constitutional changes such as the statute nº 21.219 that allows Congress to have telematic sessions, and the statute nº 21.253 which gives the Central Bank more tools to fulfill its role to control the monetary politic of Chile in "exceptional and transitory situations", fall within the scope of amendments, because they are oriented to adapt the performance of certain institutions to new conditions without touching key elements. Something similar can be said about the statute nº 21.238, that modifies the existing rules about the reelections of senators, deputies, governors, regional councilors, mayors and municipal councilors, as it does not undermine the core constitutional principles.

However, when it comes to the reforms related to the constituent process, it is possible to conceive this group as a massive dismemberment to the constitutional text, and the enumerated reforms during 2020 as amendments to this dismemberment, as they are minor changes to an original planification initiated in 2019. According to Fernando Atria's thesis in "The Cheating Constitution" (La Constitución tramposa),[8] what characterizes the constitutional text is the use of cheats (trampas) to protect Pinochet's legacy from the dynamics of democracy, maintaining the status quo crystalized in norms with supra-majoritarian quorums.[9] From his point of view, if a constitution is a fundamental decision about the identity and the form of the political community, the 1980's Constitution is a decision imposed by the dictatorship to neutralize the political agency of the Chilean people, to prevent them to act and take decisions as political agents.[10]

If this standpoint is accepted, it is plausible to assert that the removal of the cheats implies the very destruction of the Constitution,[11] and consequently, that the reform of December of 2019 was the key that opened the door for Chilean people to discuss about the political identity and the form they want to give for themselves; without cheats to protect the existing model as they will be starting from a blank page. In the light of the classification proposed by professor Albert, the statute nº 21.200 can be conceived as a dismemberment because it bypassed the cheats of the Constitution. In fact, Atria states, when commenting on the agreement which led to the reform, that it worked as an emergency switch taken by political forces within the constituted institutions, to channel the social demands representing the constituent power, in his own words, "the Agreement meant in fact giving up the Constitución tramposa".[12]

Some of the changes made to the original design of the constituent process during 2020, can be seen as amendments to this general dismemberment, in the sense that they operated as corrective measures, rescheduling the dates for the referendum and establishing basic rules for the campaigns and the development of the electoral processes. But from the point of view of the general constitutional text, some of these reforms are better understood as dismemberments, in the sense that they fulfill an elaborative function within the constituent process, advancing the political process towards a stronger representation of the people of the country, by guaranteeing the presence of indigenous people and equal gender representation.

5 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 12.

6 According to professor Albert, an amendment "is a constitutionally continuous change to higher law—a change whose content is consistent with the existing design, framework, and fundamental presuppositions of the constitution". ibid. 79.

7 There is a dismemberment when "reformers transform the constitution while seeking to retain legal continuity, whether by altering a fundamental right, a central structure, or a core feature of constitutional identity (…) It results in a constitution that is incompatible with the existing constitution, either in its framework, purpose, or fundamental presuppositions". ibid. 91.

8 This book could be considered one of the most influential critical works about the Chilean Constitution, as "the far-reaching dissemination of the book's central metaphor (catchy, to say the least), has certainly turned his 2013 book into the standard explanation that the left will draw upon when it comes to laying down the reasons why the 1980 Constitution needs to go" Ansaldi and Pardo-Vergara (n 2) 12.

9 Fernando Atria, *La Constitución Tramposa* (LOM) 46-56.

10 ibid. 45.

11 ibid. 55.

12 Fernando Atria, 'Constituent Moment, Constituted Powers in Chile' (2020) 31 Law and Critique 51, 56.

Finally, special considerations are demanded by the constitutional reforms authorizing the withdrawal of 10% of the savings in the Chilean pension system because, as the reader may have noticed, there were two similar projects and, while the first was successfully enacted, the second was rejected by the Senate and declared unconstitutional. While this was highly controversial among scholars and lawyers in general, it did not have the same repercussion in the rest of citizens. Mainly, because by the time the Constitutional Court ruled, another statute had already been enacted authorizing people to withdraw the same percentage of the savings, but this time through a bill of a qualified quorum law (ley de quorum calificado) presented by the President.[13]

To explain how a constitutional reform can be considered unconstitutional while a bill with lower quorum requirement and with the same goal did not arouse this problem, we need to review the arguments offered by the Court. The Court's rationale started by assessing its competence on the matter based on article 93 nº 3 of the constitutional chart, bestowing the tribunal with power to resolve constitutionality issues on bills, constitutional reform bills and international treaties before they are approved by Congress, when asked by the President, any chamber of Congress, or 1/4 of its members, without expressing or specifying any limitation, concluding consequently that they were competent to refer not only to formal aspects but to the substantive dimension of the reform.[14]

The Court ruled that the reform was against the Constitution for two reasons. First, because any project on the right to social security needs to come from the President according to article 65 nº 4, so to accept the amendment proposed by Congress would have led to a violation of the principle of legality and the separation of powers from articles 6 and 7.[15] Secondly, considering that the reform affects the right to social security, regulated on chapter II of the Constitution, the reform could not change the destiny of pension savings through a transitory disposition that requires a minor quorum (3/5) than the one needed for amending a permanent norm on that chapter (2/3), according to article 126. In other words, the legislative would have wanted to change a core regulation using the transitory dispositions as a tool for avoiding the constitutional threshold.[16]

The decision was controversial because of the serious doubts over the real sphere of competence of the Court to settle a substantive issue in a constitutional reform,[17] within a text without unamendable rules to grasp its reasoning, also because there was not a clear object of the controversy since the bill was rejected by the Senate, and finally, because the final decision was obtained by a tie among the members of the organ, and the balance was finally inclined by the vote of the President. This adds another element to the discussion about the role of this Court, that has been accused before of politically acting as a third chamber (among Deputies and the Senate), a position that has been explicitly recognized by the president of the institution during an interview.[18]

In this case the Court played a counter-majoritarian function as described by professor Barroso,[19] invalidating a bill that was being discussed in Congress before it was enacted, with its faculty of preventive review. But despite the arguments mentioned by Barroso to support the legitimacy of constitutional jurisdiction exercising this role, the Chilean Court seems to be in a weak position, accusing the consequences of the political spotlight received during these last years,[20] acting as an unleashed institution according to some scholars,[21] or as a tiny monster in the eyes of others.[22] These factors tend to support the idea that the Court will be subjected to important changes in the new Constitution.[23]

IV. LOOKING AHEAD

Although the 1980 Constitution will still be ruling until the referendum of 2022, it is expected that the constitutional change will be the main concern looking ahead, hence what follows is a brief overview of the milestones the process has to overcome. At the moment these pages were written, the candidates have already registered their lists for the election of the 155 representatives on April 11 of 2021.

The constituent organ will be installed approximately by May, and it will be working for 9 months, extendable up to 12. On their first session, the members of the Convention will have to elect their president, a vice-president and, also during the beginning of its work, a technical secretariat, composed by experts and professionals to assist them. One of the most important duties of the Convention at its early stages is to give itself the regulations for its own organization and internal procedures, in an agreement that will require a quorum of 2/3 of the representatives.

Independently of the rules that the Convention decides to give itself, the organ will be bonded by formal and substantial limitations already contemplated in the reform to the Constitution. Within the former, there is a limit of time of 12 months, after which it will be automatically dissolved, and there are also quorums of 2/3 to adopt decisions about the constitutional norms, among the latter, there is the intangibility of the republican character of the State, the democratic regime, the international treaties and the enforceable judicial decisions.

13 Ley nº 21.295, Establécese un retiro único y extraordinario de los fondos previsionales en las condiciones que indica 2020.

14 *Requerimiento de inconstitucionalidad presentado por SE el Presidente de la República, respecto del proyecto que modifica la Carta Fundamental, para establecer y regular un mecanismo excepcional de retiro de fondos previsionales, en las condiciones que indica (Boletines Nº 13736-07, 13749-07 y 13800-07 refundidos)* [2020] Tribunal Constitucional Rol nº 9797-20, considerandos 6, 15.

15 ibid. Considerandos 16, 23.

16 ibid. Considerandos 24, 30.

17 A relevant point to have in mind, is that this is the first time the Chilean Court resolves the constitutionality of a constitutional reform, because the previous incident of this nature was declared inadmissible, hence, there was no pronouncement about it. See: *Requerimiento de un grupo de Senadores acerca del Nº 7 del artículo único del proyecto de reforma constitucional sobre el Poder Judicial, en cuanto sustituye el inciso primero de la octava disposición transitoria de la Carta Fundamental* [1997] Tribunal Constitucional Rol nº 269-97.

18 Leslie Ayala, 'María Luisa Brahm, Presidenta Del TC: "Antes de Que Yo Llegara Había Causas Detenidas En El TC Por Mucho Tiempo, al Límite de La Corrupción"' *La Tercera* (18 April 2020).

19 Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 The American Journal of Comparative Law 109, 125.

20 Fernando Atria, 'Sobre El Tribunal Constitucional En La Doctrina Tradicional (I): Conceptualismo Constitucional' (2020) 6 Derecho y Crítica Socia 114.

21 There is a serie of columns by Atria and Salgado with that title, beginning with: Fernando Atria and Constanza Salgado, 'El Tribunal Constitucional Desatado (1): Un Poder Insoportable' *El Mostrador*.

22 Claudio Fuentes, 'Un pequeño monstruo llamado Tribunal Constitucional' *CIPER Chile* (April, 4, 2018).4, 2018

23 Even before the social outburst the idea that the Constitutional Court needed important reforms was already part of the academic discussion. See: Grupo de Estudios de Reforma al Tribunal Constitucional, 'Informe Final: 25 Propuestas Para Un Tribunal Constitucional Del Siglo XXI'.

It is currently being debated if the whole draft would have to be approved by the same quorum inside the convention as closure of the procedure, what is certain, is that the final document will be subjected to a new referendum, approximately on August of 2022 with mandatory vote.[24] If the draft is approved, the proposed text will become the new Chilean Constitution, but if it is not, the current Constitution will still be ruling and there is an important grade of uncertainty about the social and political implications of this scenario.

V. FURTHER READING

Claudia Heiss, *¿Por qué necesitamos una nueva constitución?* (Aguilar 2020)

Jaime Bassa, *Proceso constituyente en Chile: desafíos para una nueva constitución* (Thomson Reuters 2020)

Fernando Atria, Constanza Salgado, Javier Wilenmann, *El proceso constituyente en 138 preguntas y respuestas* (LOM 2020)

Hassan Akram, *El Estallido. ¿Por qué? ¿Hacia dónde?* (Ediciones y Publicaciones El Buen Aire 2020).

24 In Chile voting is voluntary since 2012 (ley nº 20.568), and while the referendum of entrance in October of 2020 followed this general rule, the plebiscite for approving the final draft will have a mandatory vote backed with fine sanctions.

China

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I. INTRODUCTION

This report discusses the constitutional reform of China in 2018.[1] Although the constitutional changes cover a wide range of paragraphs in the Preamble, General Principles, and State Institutions of the Constitution of the People's Republic of China[2], the most striking revisions are the codification of the leadership of the Chinese Communist Party in article 1, the abolition of term limits for the president and vice president in the article 79, as well as the creation of commissions of supervision with a new section in the Chapter of State Institutions.[3] After describing the content of the constitutional reform, this report applies the theory of constitutional amendment and dismemberment to the constitutional changes.[4] Finally, a looking ahead on the problems caused by the insertion of independent supervisory commissions will be mentioned.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

All proposed constitutional reforms succeeded in China in 2018. The Amendment of 2018 contains 21 articles, altering the Preamble, General Principles and State Institutions of the Constitution. Those changes can be subsumed into eleven groups according to official Explanations on the Amendment to the Constitution of People's Republic of China (Draft) by Wang Chen (the Vice-Chairman and Secretary General of the National People's Congress Standing Committee).[5]

The first is extending the guiding ideology in the seventh paragraph of the Preamble.[6] For starters, the Amendment incorporates "Scientific Outlook on Development" and "Xi Jinping Thought on Socialism with Chinese Characteristics in a New Era" into the guiding ideology, along with the extant theories: Marxism—Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and the Theory of Three Represents.[7] In addition, the wording "apply the new development philosophy" , which is the economic aspect of "Xi Jinping Thought on Socialism with Chinese Characteristics in a New Era",[8] is added as the guidance of economic development.[9]

The second is updating plans and goals of national development in the seventh paragraph of the Preamble.[10] The new plans insert the promotion of social and ecological advancement along with the promotion of the coordinated development of material, political and cultural ethical advancement.[11] The new goals are "to build China into a great modern socialist country that is prosperous, strong, democratic, culturally advanced, harmonious and beautiful, and realize the great rejuvenation of the Chinese nation."[12] Accordingly, the State Council is vested with a new function on "directing and managing … ecological conservation".[13]

The third is regarding promoting rule of law and enforcing the Constitution.[14] The former changes the phrasing "improve the socialist legal system" into "improve socialist rule of law" in the Preamble.[15] The latter refers to a new requirement that state employees shall publicly swear an oath to the Constitution at inaugurations.[16] The latter also

1 中华人民共和国宪法修正案 [Amendment to the Constitution of the People's Republic of China], adopted by the First Session of the Thirteenth National People's Congress of the People's Republic of China on 11 March 2018, effective from 11 March 2018 (Amendment 2018).

2 中华人民共和国宪法 [Constitution of the People's Republic of China], adopted at the Fifth Session of the Fifth National People's Congress and promulgated by the Announcement of the National People's Congress on December 4,1982; amended in accordance with the Amendment to the Constitution of the People's Republic of China adopted at the First Session of the Seventh National People's Congress on April 12,1988, the Amendment to the Constitution of the People's Republic of China adopted at the First Session of the Eighth National People's Congress on March 29, 1993, the Amendment to the Constitution of the People's Republic of China adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, the Amendment to the Constitution of the People's Republic of China adopted at the Second Session of the Tenth National People's Congress on March 14, 2004, and the Amendment to the Constitution of the People's Republic of China adopted at the First Session of the Thirteenth National People's Congress on March 11, 2018 (The Constitution (with 2018 Amendment)).

3 Amendment 2018, article 52; Feng Lin, 'The 2018 Constitutional Amendments: Significance and Impact on the Theories of Party—State Relationship in China', (2019) 1 China Perspectives 11.

4 The distinction between constitutional amendment and dismemberment, see Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) 76—92.

5 王晨[Wang Chen]: "关于《中华人民共和国宪法修正案（草案）》的说明"['Explanations on the Amendment to the Constitution of People's Republic of China (Draft)'] (2018) S1中华人民共和国全国人民代表大会常务委员会公报[Gazette of the Standing Committee of the National People's Congress of the People's Republic of China] 85.

6 Wang (n5) 91—92.

7 Amendment 2018, article 32; Constitution 1982 (with 2018 Amendment), para 7 of the Preamble.

8 Wang (n5) 92.

9 Amendment 2018, article 32; Constitution 1982 (with 2018 Amendment), para 7 of the Preamble.

10 Wang (n5) 92.

11 Amendment 2018, article 32; Constitution 1982 (with 2018 Amendment), para 7 of the Preamble.

12 Amendment 2018, article 32; Constitution 1982 (with 2018 Amendment), para 7 of the Preamble.

13 Amendment 2018, article 46; Constitution 1982 (with 2018 Amendment), article 89, item (6).

14 Wang (n5) 92—93.

15 Amendment 2018, article 32; Constitution 1982 (with 2018 Amendment), para 7 of the Preamble.

16 Amendment 2018, article 40; Constitution 1982 (with 2018 Amendment), article 27, para 3.

includes altering the Law Committee of the National People's Congress (NPC) to the Constitution and Law Committee of the NPC.[17]

The fourth is concerning the narrative of Chinese revolution and development in the Preamble. The wording "Through the long process of revolution and development" in the tenth paragraph is amended to read "Through the long process of revolution, development and reform".[18] Besides, the sentence in the twelfth paragraph,"The achievements of China's revolution and development would have been impossible without the support of the world's people", is revised to "The achievements of China's revolution, development and reform would have been impossible without the support of the world's people".[19]

The fifth change is on the "united front" of non-party people and ethnic relations.[20] For starters, the "broad patriotic united front" extends to contain "patriots who … are dedicated to the rejuvenation of the Chinese nation".[21] Secondly, as for ethnic relationship, the amendment suggests in the eleventh paragraph of the Preamble that "Socialist ethnic relations of … harmony are established and will continue to be strengthened." [22] Accordingly, the first paragraph of article 4 is amended to impose an obligation of the state to "uphold and promote relations of … harmony among all ethnic groups."[23]

The sixth is issuing new guidelines on foreign policies in the twelfth paragraph of the Preamble.[24] It pronounces that China "keeps to a path of peaceful development, follows a mutually beneficial strategy of opening up", and "promotes the building of a human community with a shared future".[25]

The seventh is entrenching the comprehensive leadership by the Communist Party in the article 1 of the Constitution.[26] It reads that "Leadership by the Communist Party of China is the defining feature of socialism with Chinese characteristics."[27]

The eighth let the state "champion core socialist values" in paragraph 2 of article 24.[28]

The ninth is abolishing the term limits of the Chinese president and vice president.[29]

The tenth is vesting the people's congresses of cities with districts and their standing committees with powers to formulate local regulations. It reads that "The people's congresses of cities divided into districts and their standing committees may, provided there is no conflict with the Constitution, laws or administrative regulations, or with the local regulations of their province or autonomous region, formulate local regulations in accordance with the provisions of law, which shall go into force after submission to the standing committee of the people's congress of their province or autonomous region and the receipt of approval." [30]

The final and most important constitutional change in 2018 is insulating the supervision function from the executive branch[31] and vesting it in independent national and local commissions of supervision[32] (at and above county level[33]).The chairpersons of supervision commissions at all levels shall be elected and removed by the people's congresses at the corresponding levels.[34] In addition, "[t]he National Commission of Supervision shall be responsible to the National People's Congress and the National People's Congress Standing Committee. Local commissions of supervision at all levels shall be responsible to the state organs of power that created them and to the commissions of supervision at the next level up."[35]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

This part initially analyses the constitutional changes of China in 2018 from a perspective of the distinction between constitutional amendment and dismemberment.[36] Then, it discusses the role of constitutional control in China.

A constitutional amendment, functionally, can be defined with four fundamental features. Firstly, "[t]he subject of a constitutional amendment is higher law", "not ordinary law".[37] Secondly, "[a]n amendment is moreover authoritative in both law and politics". Its legal authority means that it has a higher rank than ordinary law, while its political authority denotes that the reformers "abide by it until and unless they succeed in reversing it".[38] Thirdly, the scope (content) of an amendment "is consistent with the existing design, framework, and fundamental presuppositions of the constitution".[39] Fourthly, "[a]n amendment may have one of four distinct purposes. It can be corrective, elaborative, reformative, or restorative."[40] On the other hand, a constitutional dismemberment denotes "[w]hen reformers transform the constitution while seeking to retain legal continuity, whether by altering a fundamental right, a central structure, or a core feature of constitutional identity".[41]

All the Chinese constitutional changes meet the first two criteria of amendments, so that we only need to consider whether they can cross the last two thresholds to be amendments.

17 Amendment 2018, article 44; Constitution 1982 (with 2018 Amendment), article 70, para 1. Wang Chen's report does not list it in group of enforcing the Constitution, but lists it alone. See Wang (n5) 97—98.
18 Amendment 2018, article 33; Constitution 1982 (with 2018 Amendment), para 10 of the Preamble.
19 Amendment 2018, article 35; Constitution 1982 (with 2018 Amendment), para 12 of the Preamble.
20 Wang (n5) 93—94.
21 Amendment 2018, article 33; Constitution 1982 (with 2018 Amendment), para 10 of the Preamble.
22 Amendment 2018, article 34; Constitution 1982 (with 2018 Amendment), para 11 of the Preamble.
23 Amendment 2018, article 38; Constitution 1982 (with 2018 Amendment), article 4, para 1.
24 Wang (n5) 94.
25 Amendment 2018, article 35; Constitution 1982 (with 2018 Amendment), para 12 of the Preamble.
26 Wang (n5) 94.
27 Amendment 2018, article 36; Constitution 1982 (with 2018 Amendment), article 1, para 2.
28 Amendment 2018, article 39; Constitution 1982 (with 2018 Amendment), article 24, para 2; Wang (n5) 94—95.
29 Amendment 2018, article 45; Constitution 1982 (with 2018 Amendment), article 79, para 3; Wang (n5) 95.
30 Amendment 2018, article 47; Constitution 1982 (with 2018 Amendment), article 100, para 2; Wang (n5) 95.
31 Amendment 2018, article 46; Constitution 1982 (with 2018 Amendment), article 89, item (8); Amendment 2018, article 51; Constitution 1982 (with 2018 Amendment), article 104, para 1;
32 Amendment 2018, article 52; Constitution 1982 (with 2018 Amendment), article 124—127 (Section 7); Wang (n5) 95—97.
33 Amendment 2018, article 48; Constitution 1982 (with 2018 Amendment), article 101, para 2.
34 Amendment 2018, article 41; Constitution 1982 (with 2018 Amendment), article 62, item (7). Amendment 2018, article 42; Constitution 1982 (with 2018 Amendment), article 63, item (4). Amendment 2018, article 48; Constitution 1982 (with 2018 Amendment), article 101, para 2.
35 Amendment 2018, article 52; Constitution 1982 (with 2018 Amendment), article 126.
36 Albert (n 4) 76—92.
37 Albert (n 4) 79.
38 Albert (n 4) 79.
39 Albert (n 4)) 79.
40 Albert (n 4) 80.
41 Albert (n 4) 91.

The first group of constitutional changes regarding guiding ideology in the Preamble can be identified as elaborative amendments. Both "Scientific Outlook on Development" and "Xi Jinping Thought on Socialism with Chinese Characteristics in a New Era" (including its economic aspect "the new development philosophy") are coherent extensions of "achievements in the adaption of Marxism to the Chinese context"[42] which has been codified in the seventh paragraph in the Constitution.[43]

Another case of the elaborative amendment is the tenth change on vesting the power to formulate local regulations to the legislatures of cities with districts. It extends the power to make local regulations from the legislatures of provinces and direct—controlled municipalities to cities with districts. It keeps coherent with central—local relationship in the fourth paragraph of article 3: "The division of functions and powers between the central and local state institutions shall honor the principle of giving full play to the initiative and motivation of local authorities under the unified leadership of the central authorities."

In the same way, most groups of the constitutional changes of 2018 are elaborative amendments, including the second group (updating plans and goals of national development), the third group (promoting rule of law and enforcing the Constitution), the fourth group (the narrative of Chinese revolution and development), the fifth group (the "united front" of non-party people and ethnic relations), and the eighth group (the state's obligation to "champion core socialist values"). They all maintain fidelity with the existing constitutional framework. They also do not fix constitutional errors, they do not restore the original constitutional meanings, nor do they merely revise existing rules. In fact, they extend existing rules with something new but within their boundaries.

Although the aforementioned changes are definitely elaborative amendments, doubts might exist in other cases. An example is the sixth group concerning foreign policies. This group contains two changes. The first one is the insertion of the pronouncement that China "keeps to a path of peaceful development, follows a mutually beneficial strategy of opening up."[44] It is a natural elaboration of "the five principles of mutual respect for sovereignty and territorial integrity, mutual nonaggression, mutual noninterference in internal affairs, equality and mutual benefit, and peaceful coexistence" in the same paragraph. As a result, this is an elaborative amendment. However, the other insertion of the commitment that China "promotes the building of a human community"[45] is a departure from the conventional dictum of Deng Xiaoping to "...hide our capacities and bide our time; be good at maintaining a low profile; and never claim leadership",[46] which guided Chinese foreign policies in the past. But Deng's dictum does not have a constitutional rank. Consequently, the codification of "the building of a human community" does not "achieve a conflicting purpose"[47] that is "incompatible with the framework of the constitution"[48]. As a result, this constitutional change can also be regarded as an amendment rather than a dismemberment. It does not correct a flaw, it does not restore an earlier meaning, nor it does a mere revision of a rule. It can be identified as an extension of Chinese independent foreign policy and the work to "develop diplomatic relations and economic and cultural exchanges with other countries" in the twelfth paragraph of the existing Preamble of the Constitution. For these reasons, the group of constitutional changes on foreign policies can also be treated as elaborative amendments.

Another somewhat doubtful example is the incorporation of the leadership of the Communist Party of China in the article 1 of the Constitution. It seems like a dismemberment because the main body of the Constitution remained silent on the question of the ruling party in the past. However, the leadership of the Party has already been stated twice in the seventh paragraph of the Preamble before 2018. The first statement existed in the narrative of the past: "Both the victory in China's New Democratic Revolution and the successes in its socialist cause have been achieved by the Chinese people of all ethnic groups under the leadership of the Communist Party of China..."[49] The second statement existed in the commitment that "[w]e the Chinese people of all ethnic groups will continue, under the leadership of the Communist Party of China...,to uphold the people's democratic dictatorship, stay on the socialist road, carry out reform and opening up, steadily improve the socialist institutions..."[50]. Therefore, the inclusion of the leadership of the Party in article 1 is a fulfillment of the commitment in the Preamble, but not a fundamental transformation. It does no more than extend the principle of the leadership of the Party. Thus, this change can also be seen as an elaborative amendment.

On the contrary, there are some constitutional dismemberments in the constitutional changes of 2018. Firstly, the abolition of term limits of the Chinese president and vice president is a dismemberment that alters one of the essential features of Constitution of 1982.[51] Before the promulgation of the Constitution of 1982, constitutions of the PRC did not limit terms for senior state officials. In order to abolish the *de facto* life-long tenure in those posts, Deng Xiaoping and other drafters codified two-term limits for national leaders (including the president) in the Constitution of 1982.[52] It means that the removal of term limits runs contrary to the original intent of the drafters of the Constitution of 1982. Therefore, this alternation destroys one core feature of the existing constitutional structure. It should be understood as a constitutional dismemberment.

Secondly, the creation of commissions of supervision can also be identified as a dismemberment in constitutional structure. Before

42 Wang (n 5) 92.

43 The "achievement in adapting Marxism to the Chinese context" refers to Mao Zedong Thought, Deng Xiaoping Theory and the Theory of Three Represents, Scientific Outlook on Development and Xi Jinping Thought on Socialism with Chinese Characteristics in a New Era. See Xu Guangchun, 'Adapting Marxism to the Chinese Context over the 70 Years Following the Founding of the People's Republic of China' (2019) 11 (3) English Edition of Qiushi Journal <http://english.qstheory.cn/2019-11/14/c_1125223185.htm> accessed 15 February 2021.

44 Amendment 2018, article 35; Constitution 1982 (with 2018 Amendment), para 12 of the Preamble.

45 Amendment 2018, article 35; Constitution 1982 (with 2018 Amendment), para 12 of the Preamble.

46 Jacob Mardell, 'The "Community of Common Destiny" in Xi Jinping's New Era', The Diplomat, (25 October 2017) <https://thediplomat.com/2017/10/the-community-of-common-destiny-in-xi-jinpings-new-era/ > accessed 15 February 2021.

47 Albert (n 4) 84.

48 Albert (n 4) 84.

49 Constitution 1982, para 7 of the Preamble.

50 Constitution 1982, para 7 of the Preamble. One Chinese scholar believes that the Party's leadership in the Preamble is the "first fundamental principle" of the Constitution of 1982. See, 陈端洪[Chen Duanhong]: "论宪法作为国家的根本法与高级法"['On China's Constitution as Higher Law and Fundamental Law of China'] (2008) 20 中外法学 [Peking University Law Journal] 485, 494—495.

51 Amendment 2018, article 45; Constitution 1982 (with 2018 Amendment), article 79, para 3.

52 韩大元 [Han Dayuan]: "任期制在我国宪法中的规范意义——纪念1982年《宪法》颁布35周年"['The Importance of Fixed-Term Appointment System in China's Constitution: In Memory of the 35th Anniversary of Promulgating the 1982 Constitution'] (2017) 11 法学 [Law Science] 3, 4—5. Feng Lin, 'The 2018 Constitutional Amendments: Significance and Impact on the Theories of Party—State Relationship in China', (2019) 1 China Perspectives 11, 14.

the reform, the function of supervision is allocated to the executive branch.[53] The state institution for supervision at central level was the Ministry of Supervision under the State Council, which was re-established in 1987.[54] However, the insertion of supervisory departments under the executives led to two serious problems: firstly, the supervisory departments could not supervise officials in other branches; secondly, it was difficult to supervise chief executives at the same levels, because they are superiors of the chiefs of the supervisory departments.[55]After the constitutional reform of 2018, independent supervisory commissions take the place of the supervision departments under the executive branches at all levels.[56] They are responsible for legislatures at the same levels,[57] but not to the executives. This reform does not merely correct an error in the existing constitutional structure, but breaks the founding power configuration with a new branch. In this light, the reform on the allocation of supervisory power should be seen as a dismemberment of the original constitutional structure.

Now we turn to discuss the role of constitutional review in China. The power of constitutional review is vested in the National People's Congress and its Standing Committee, but not the judiciary.[58] Article 62, item (2) vests the National People's Congress with the authority on "overseeing the enforcement of the Constitution".[59] Article 67 gives the Standing Committee the powers of "interpreting the Constitution and overseeing its enforcement"[60] and "revoking administrative regulations, decisions and orders formulated by the State Council that are in conflict with the Constitution or laws".[61] However, constitutional amendments have never been reviewed in China.

IV. LOOKING AHEAD

The most important question after the 2018 constitutional reform is how to manage the relations between commissions of supervision, procuratorates, courts, and other law enforcement departments. Although the second paragraph of article 127 of the Constitution (with 2018 Amendment) set general principles of cooperation and checks and balances,[62] it still seems difficult to embed the commissions of supervision in the criminal procedure. Those difficulties include the coordination between the supervisory power of investigation and prosecutorial power of investigation, [63] as well as other coordination problems between Criminal Procedure Law and Supervision Law, which contains three challenges: "firstly, whether or not those cases investigated by the supervision committee [commission] should have the case filing procedure; secondly, how to coordinate compulsory measures when such cases are turned back to the investigation stage of supervision committee; lastly, whether or not the exclusionary rule of illegal evidence can be applied to the supervision committee's cases."[64]

V. FURTHER READING

韩大元 [Han Dayuan]: "任期制在我国宪法中的规范意义—纪念1982年《宪法》颁布35周年"['The Importance of Fixed-Term Appointment System in China's Constitution: In Memory of the 35th Anniversary of Promulgating the 1982 Constitution'] (2017) 11 法学 [Law Science] 3.

王晨[Wang Chen]: "关于《中华人民共和国宪法修正案（草案）》的说明" ['Explanations on the Amendment to the Constitution of People's Republic of China (Draft)'] (2018) S1中华人民共和国全国人民代表大会常务委员会公报[Gazette of the Standing Committee of the National People's Congress of the People's Republic of China] 85.

Feng Lin, 'The 2018 Constitutional Amendments: Significance and Impact on the Theories of Party—State Relationship in China', (2019) 1 China Perspectives 11.

53 Constitution 1982, article 89, item (8); article 108, para 1.

54 Stephen Thomson, 'The Public Sector Ombudsman in Greater China: Four Chinese Models of Administrative Supervision', (2017) 39 U Pa J Int'l L 435, 441.

55 秦前红 [Qin Qianhong]: "困境、改革与出路: 从'三驾马车'到国家监察"['Dilemma, Reform and Outlet: from "Sanjia Mache" to the National Supervision'] (2017) 13 中国法律评论 [China Law Review] 176, 177—178.

56 Lin (n 3) 15.

57 Amendment 2018, article 52; Constitution 1982 (with 2018 Amendment), article 126.

58 Zhiwei Tong, 'A Comment on the Rise and Fall of the Supreme People's Court's Reply to the Qi Yuling Case', (2010) 43 Suffolk University Law Review 669, 673—674.

59 Constitution 1982 (with 2018 Amendment), article 62, item (2).

60 Constitution 1982 (with 2018 Amendment), article 67, item (1).

61 Constitution 1982 (with 2018 Amendment), article 67, item (7).

62 Amendment 2018, article 52; Constitution 1982 (with 2018 Amendment), article 127, para 2: "The supervisory organs, in handling cases of duty-related malfeasance or crime, shall work together with adjudicatory organs, procuratorial organs and law enforcement authorities; they shall act as a mutual check on each other."

63 井晓龙 [Jing Xiaolong]: "监察调查权与检察侦查权衔接研究"['Review and Connection of the Relationship between the Supervisory Power of Investigation and the Prosecutorial Power of Investigation'] (2020) 12 法学杂志 [Law Science Magazine] 113.

64 程雷 [Cheng Lei]: "刑事诉讼法与监察法的衔接难题与破解之道"['Problem and Resolution of the Coordination between the Criminal Procedure Law and the Supervision Law'] (2019) 中国法学 [China Legal Science] 167, 182.

Colombia

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I. INTRODUCTION

Colombia has a formally rigid Constitution. Indeed, the three mechanisms to reform the 1991 Constitution (constitutional amendment, referendum, and constituent assembly) are much more difficult to pass than an ordinary law. However, the effective rigidity of the Constitution is much weaker than its formal rigidity. There are several causes that explain this difference between both forms of constitutional rigidity: i) the excessive power of the president, ii) the low level of independence of Congress, iii) the weakness of the political parties, iv) the indiscipline of the benches within the Parliament and v) the culture of both constitutional and legal reform to solve structural social problems. That explains why the 1991 Constitution has been amended fifty times in thirty years.

This report on the constitutional reforms (formal and informal) that occurred in Colombia during 2020 is divided into three sections (besides this introduction). Section II summarizes the most important (failed and still-in-discussion) proposals for constitutional change advanced during 2020. Section III analyzes three different types of constitutional reforms and events related to constitutional change. Namely, it explores (a) two constitutional amendments approved in 2020 which introduced the possibility of life imprisonment and created a new territorial body in the country; (b) the Constitutional Court's decision on the constitutionality of amendment 4/2019 which modified the extant system of fiscal supervision and; (c) a series of informal constitutional changes or constitutional mutations effectuated through certain judgements of the Constitutional Court, judgements that informally changed the interpretation of several provisions of the 1991 Constitution such as the definition of family –art. 42–, the rights of children –art. 44– and the procedural rights of convicted high-ranking officials –arts. 174 and 235–. Finally, the Section IV carries out a prospective examination of the constitutional changes that were proposed or are currently being discussed in parliament, the Constitutional Court and public opinion.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Colombia has traditionally been a country where manifold constitutional reforms are proposed, conducted, and passed. And 2020 was not an exception to this trend. To begin with, and from a quantitative perspective, Congress enacted two amendments which were originally tabled in 2019. Likewise, fifty-eight constitutional amendment bills were introduced to Congress in 2020. Just nine of them are still in discussion, while the rest of them (forty-nine) were shelved or withdrawn.

Let us now take a look, from a qualitative vantagepoint, at the nine proposals which are still under consideration by Congress as well as at some of the failed constitutional reforms (the two amendments passed in 2020 will be examined in detail in Section III). As for the former, we can detect some common features that characterize the subject-matter of nine bills which are still being considered by Congress. First, three amendment proposals relate to technology, innovation and individual rights. While one of them seeks to enshrine access to internet services as a fundamental right and establishes the government's obligation to offer subsidies to secure internet access for marginalized sectors of the population (AL Bill 201/2020C), the other two bills categorize Medellín (the second-largest city of the country) as a district or hub for the advancement of technology, innovation, and science (AL Bills 03/20 and 467/2020C). This categorization will eventually allow Congress to institute a distinctive legal and tax regime for the city of Medellin (via statutory law), regime that must be geared towards the promotion of technology, innovation, and science in said city.

A second set of proposals pertains to the protection of agriculture, farmers and the environment. One of the bills prohibits the importation, manufacture, sale, export and distribution of genetically modified seeds (AL Bill 008/2020C). The rationale behind this project is to guarantee the free access of native seeds to local farmers and peasants. In addition to this, two other proposals aim to forbid the exploration and exploitation of minerals in the moorlands of the country (AL Bills 22/2020 and 458/2020C). The relevance of this prohibition lies in the fact that although moorlands represent only 1.7% of the country's territorial area, they produce around 85% of Colombia's drinkable water. Access to drinkable water, in turn, has been characterized as a fundamental right by the Constitutional Court in multiple decisions (see, for instance, T-223/2018).

The remaining amendments currently under Congress' examination are in the early stages of congressional hearings and are intended to modify some relatively minor aspects of the structure of public power. Among others, they attempt to shorten the Congress' break at the beginning of each year and expand the power of Congress to summon public authorities (namely governors and mayors) to give an account of certain projects of national interest (see AL Bills 130/2020C and 406/2020C, respectively).

Regarding the failed forty-nine amendment proposals, most of them sought to modify the structure of public power, whereas a few attempted to add new rights to the Constitution. Just to mention some of the most relevant bills that were not adopted, we have several amendment projects that unsuccessfully tried to suppress the newly-minted Special Jurisdiction for Peace, regulate remotely-held congressional hearings, grant voting rights to members of the military, endow nature and sentient animals with rights, modify electoral and political rules, and permit the recreational consumption of cannabis.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. A POTENTIAL CONSTITUTIONAL DISMEMBERMENT AND AN "ELABORATIVE"[1] CHANGE: THE TWO AMENDMENTS ENACTED IN 2020

Congress adopted two amendments in 2020. These amendments modify the rights section of the Constitution and a particular point of the territorial distribution of power. First, constitutional amendment 1/2020 opens the door for imposing lifelong prison sentences for certain crimes perpetrated against minors such as intentional homicide and some types of sexual abuse. According to the amendment, review of the sentence shall be granted no later than twenty-five years after the lifetime sentence has been passed in order to assess the potential rehabilitation of the convicted person. Since this change might entail a dismemberment of the Constitution for it radically alters longstanding constitutional conceptions about the goals the criminal system should pursue, it could be held as unconstitutional and categorized as a replacement of the Constitution by the Constitutional Court. More specifically, there will be a constitutional debate on whether the amendment breaches human dignity –which is one of the core tenets on which the whole constitutional edifice is founded (see art. 1 of the 1991 Constitution)– because, arguably, it might significantly reduce the possibilities of rehabilitation to which any human being is entitled. In other words, the amendment could dramatically reduce the prospects of moral redemption because it would conceive of certain criminals as creatures akin to irredeemable moral monsters incapable of making amends and distinguishing right from wrong. And this idea might clash against basic notions of dignity.

The second amendment is certainly less controversial. On July 22nd, 2020, Article 325 of the Constitution was amended, creating the Bogotá-Cundinamarca Metropolitan Region as an administrative unit of regional associativity under a special regime to concertedly execute plans and programs, as well as to jointly provide public utilities. The Central Administrative and Planning Region (also known as RAPE) is an associative scheme of constitutional origin, created in accordance with articles 306 and 325 of the Constitution and with the Charter Law of Territorial Regulations (i.e., Ley 1454 de 2011). It seeks to gather together, under 'associations', territorial entities with juridical incorporation, administrative autonomy and autonomous patrimony (such as municipalities and provinces).

To this purpose, the Mayor's Office of Bogotá and the Governor's Office of Cundinamarca must have the endorsement of the city council and of the provincial assembly to join the Metropolitan Region. A charter law shall be created to define the running of this association; there shall be greater citizen participation and decisions will be made by the institutions that constitute the Region. The highest governing body shall be the Regional Council, which will be made up of the Mayor of Bogotá, the mayors of the municipalities of Cundinamarca who decide to join the Region, and the Governor of the province of Cundinamarca. The decisions of the Metropolitan Region are intended to have a higher hierarchy than those of the other territorial institutions in matters within its jurisdiction. However, each territorial entity will maintain its territorial autonomy since they will not be incorporated to the Capital District and the figure of core municipality will not prevail either, nor will there be a right to veto. In December 2020, an *actio popularis* was filed against the amendment. The Constitutional Court has not ruled on the matter yet. The petition contends that there was no prior consultation with the communities and the indigenous peoples living in the area, and there was no citizen participation in the creation of the said region.

2. AN ADDITIONAL MECHANISM OF FISCAL CONTROL. CONSTITUTIONAL AMENDMENT 4/2019 AND JUDGEMENT C-140/2020

On September 18, 2019, Congress passed Constitutional Amendment 4/2019. That amendment modified the fiscal control system established in Articles 267 and 268 of the Constitution. Specifically, the constitutional reform introduced a simultaneous and preventive control mechanism in addition to the subsequent and selective fiscal control tool that was initially provided for in the Constitution since 1991. This control is carried out by the Office of the Comptroller General in order to preserve State resources and prevent acts of corruption. The main power vested in the Comptroller General is to warn the administration (at all levels) about operations that pose a risk to public resources or potential corruption. The constitutional reform itself established that this power of fiscal control does not enable the Comptroller General to invade the powers of the administration or to obstruct the exercise of government activities. For this reason, the reform itself indicated that this is an exceptional tool whose result is not mandatory. In addition, the Comptroller General can only exercise this power to protect State resources through warnings that are not mandatory for the administrative authorities.

The Constitutional Court declared that Amendment 4/2019 was constitutional. The Court resolved the accusations made by the plaintiffs. They argued that the amendment had not reformed the Constitution but had replaced it. This constitutional substitution, according to the plaintiffs, occurred because the 1991 Constitution had established very clearly that fiscal control could only be subsequent and selective. With the change in the control system (concomitant and preventive), the plaintiffs argued that Congress had passed a fiscal control model that allowed the Comptroller General to co-govern with the administrative authorities. According to the plaintiffs, that co-government carried out by the Comptroller General was contrary to the separation of powers. As the separation of powers is an essential and irreplaceable principle of the 1991 Constitution, the plaintiffs asked the Constitutional Court to apply a substitution test in order to invalidate that constitutional amendment.

1 Richard Albert, *Constitutional Amendments. Making, Breaking and Changing Constitutions* (OUP 2019) 79-82

In judgement C-140/2020, the Constitutional Court reiterated that the principle of separation of powers is irreplaceable within the 1991 Constitution. However, the Court declared that constitutional amendment 4/2019 had not replaced the principle of separation of powers. According to the Court, this amendment had not established a prior system of fiscal control that would cause co-government. For the Court, this amendment only introduced a mechanism to prevent corruption and to avoid the loss of financial resources of the State. On the one hand, this mechanism is in addition to the subsequent and selective fiscal control that has existed since 1991 and is currently being maintained. On the other hand, this mechanism is different from prior control in which the Comptroller General could obstruct or block the administration. Finally, the Court ordered that the exercise of all fiscal control should respect territorial autonomy. Based on these three arguments, the Court declared the constitutionality of the amendment and rejected the plaintiffs' requests.

3. "CONSTITUTIONAL MUTATIONS" WHEN EXERCISING ABSTRACT AND CONCRETE JUDICIAL REVIEW BY THE CONSTITUTIONAL COURT

3.1 DECISION C-028/2020

In this decision, the Constitutional Court declared as unconstitutional the expression "legitimate" contained in articles 1165, 1468, 1481 and 1488 of the Civil Code. These provisions recognized an inheritance right only for legitimate descendants and ascendants of the testator, thus excluding those who did not have such condition, such as extra-marital or adopted children.

One decade ago, in decision C-577/2011, the Constitutional Court had expanded the concept of monogamous and heterosexual family established in article 42 of the Constitution. Building on that judgement, in decision C-028/2020 the Court quashed the concept of legitimate child or legitimate heir stipulated in article 1165 of the Civil Code. Decision C-028/2020 performed a constitutional dismemberment of the Constitution's article 42 since, by declaring unconstitutional the concept of legitimate heir enshrined in the Civil Code, this judgement prohibits discriminating against adopted children, children born outside of marriage, and even foster children. This decision broadens the concept of family, and also promotes equality among all children. It seeks to eliminate the difference between children on the basis of birth and recognizes other modes of filiation and different types of family (which has been understood as the basic institutional pillar of society).

3.2 DECISION C-034/2020

In this case, the Constitutional Court studied a challenge against the constitutionality of the law that governs the general pension system of the country (Law 797/2003). Article 13 of this law excluded underaged siblings of a deceased person who were economically dependent on him/her from survivor's benefits derived from the defunct person's pension. The plaintiff observed that this exclusion constituted an omission on the part of the legislator, generating a discriminatory treatment against minors.

Pursuant to the Constitution, the best interest of children is an overarching value (art. 44). Something similar can be said of the right to equality (art. 13), and article 26 of the Convention on the Rights of the Child. Based on this, the Constitutional Court recognized the unenforceability of said legal provision, considering that art. 44 of the Constitution imposes an obligation on the family and on the State to assist and to safeguard children from the economic vulnerability they could suffer from if their economic support disappears. The Court issued a ruling to solve the legislative omission, extending the survivors' pension to the excluded minors. This is a constitutional dismemberment insofar as the scope of article 44 of the Constitution, which stipulates a duty to protect children, was extended to the siblings of the deceased person as explained above.

3.3. DECISION SU-146/2020

This case refers to a former cabinet minister who was sentenced to 17 years of imprisonment and banned from performing public duties by the Supreme Court of Justice. He filed a *tutela* action against the Criminal Cassation Chamber of the Supreme Court of Justice, considering that, by issuing the conviction, it disregarded his fundamental rights to due process and to access a second-instance court in appeal (articles 29 and 31 of the Constitution), as well as the principles of good faith and legitimate trust. The conviction against the minister was issued in 2014 when judgements produced against high-level officials (i.e., "aforados", like the minister in question) could not be appealed (arts. 235 and 174 of the Constitution), that is, these senior officials were tried by a single court (the Supreme Court) without appeal (different from ordinary criminal trials where judgements can be appealed).

In a previous decision the Constitutional Court had ruled that a decision issued by a single-instance court (without appeal opportunities) did not violate the principle of access to a second-instance court nor the right to an appeal. In that case, it concluded that an appeal was not the only way to guarantee due process, since the right of defense of the "aforados" was secured through extraordinary remedies such as the extraordinary review of the decision or by means of *tutela*.

Nevertheless, the Constitutional Court changed its mind some years later. In 2006 and 2014[2] the Court held that articles 235 and 174 of the Constitution infringed upon due process and the right to challenge a conviction in accordance with the Inter-American system of Human Rights and the so-called 'constitutional block' doctrine.[3] In 2014, the Constitutional Court urged the legislature to enact legal rules to regulate the possibility for convicted senior officials to appeal their sentences.

Congress followed the Court's instruction and amended the Constitution in 2018 (see Amendment 01/2018). This amendment modified article 235 of the Constitution and established the access to a second-instance court for "aforados". However, it did not specify from which moment this right to appeal could be exercised. This created a vacuum that led the Supreme Court of Justice to interpret that the amendment should only be applied to cases that took place from 2018 onwards. Yet, the Constitutional Court disagreed with

2 See Decisions C-934/2006 and C-792/2014.

3 The Inter-American Court of Human Rights in the Liakat Ali Alibux vs Suriname case in 2014, set the precedent for appealing convictions regardless of the rank of the person on trial. See Liakat Ali Alibux v. Suriname, Preliminary Objections, Merits, Reparations and Costs, (Jan. 30, 2014).

this interpretation by the Supreme Court. In decision SU-146/2020, the Constitutional Court granted the plaintiffs the right to challenge their conviction even if this conviction was passed before 2018. In light of an Inter-American Court of Human Rights' ruling,[4] as well as of article 8.2.h of the American Convention on Human Rights, the Constitutional Court set January 30th, 2014 (the Inter-American Court's decision's date) as the moment in time from which the right to access a second-instance court ought to be granted. The Constitutional Court's ruling produced a slight constitutional dismemberment insofar as it established the retroactive nature of Amendment 01/2018, while ordering the Supreme Court of Justice to guarantee the right to challenge "aforados" convictions produced after January 30th, 2014.

The cases we have just presented show a Court with an active role in its duties as guarantor of the Constitution's supremacy and of democracy. These three cases show the will to enlighten and promote social progress. They display the search for pluralism in a changing society and the consolidation of dignity and of quality of life for individuals. We adopt the concept of illuminism in this case to describe a Court that gains legitimacy in its decisions by materializing what is fair and righteous in its pronouncements. We see rulings that reveal a dialogue among courts that consolidate global constitutionalism through common values in the harmonization of democracy and progress.

IV. LOOKING AHEAD

Section II described the nine constitutional amendment bills still under Congress' consideration. Some of them (like the 'Medellín as technological district' and the 'mining prohibition in moorlands' proposals) have already completed one of the two rounds of congressional discussions the Constitution requires to approve constitutional amendments. The remaining ones either have started the first round of discussions ('internet as fundamental right' and 'no genetically modified seeds' bills) or just been introduced to the House of Representatives (minor modifications to public power). Attention should be paid to all these projects to amend the Constitution, particularly the ones that are halfway through the amendment process.

Some other potential constitutional reforms are on the way and they loom large in 2021. For a start, the constitutionality of Constitutional Amendment 1/2020 (see Section III) has been challenged before the Constitutional Court via *actio popularis*. The main argument behind these citizens' petitions revolves around a potential violation of the constitutional principle of human dignity. A Court's decision on these petitions is expected in 2021. Also, the Constitutional Court is currently reviewing Amendment 2/2020 (see Section III) as a result of another *actio popularis* that argues, *inter alia*, that the creation of a metropolitan region replaces several pillars of the Constitution (like territorial autonomy and democracy). A decision on this issue should be rendered in 2021 as well. In addition to this, several political sectors have declared that they plan to present some other constitutional changes to Congress. Former President Álvaro Uribe announced that his political party will put forward a constitutional referendum to, among others, amend the judiciary. Some other political forces, on their part, expressed they will propose an amendment bill to reschedule the presidential and congressional elections so that both take place on the same date.

4 ibid.

V. FURTHER READING

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Costa Rica

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I. INTRODUCTION

The Constitution of Costa Rica was promulgated in 1949, after a civil war set off by an electoral crisis in 1948. It is composed of 197 articles and was the result of a mixture of conservative and liberal ideas. Economically speaking, it is a moderate Constitution, with hints of capitalist, socialist and welfare institutions.

The Constitution regulates two ways for its amendment.

The partial reform which is approved by the only Chamber of the Congress using a special procedure provided for in article 195. The bill must be filed only in the ordinary periods of sessions by at least 10 of the 57 Representatives or at least 5% of registered voters, must be passed by two thirds of those representatives in five different sessions of discussion and voting, in two different constitutional periods (which go from May 1st to April 30th). It also includes a consultation to the Constitutional Chamber of the Supreme Court. This procedure is reserved for amendments of one or a few articles that don´t transform radically the constitutional system.

The general reform procedure is mandatory for major amendments that completely change the Constitution or the basis of the constitutional system, as well. The bill must be passed by the General Assembly by two thirds of its members. Then, a constituent assembly must be elected.

Since 1949, the Costa Rican Constitution has been partially amendment 62 times, in a wide variety of aspects, such as voting age, the independence of governmental agencies, the constitutional judgements, presidential reelection, recognizing of "new" fundamental rights, among others.

As will be explained bellow, in 2020 Costa Rican Congress passed two partial amendments. Many others are filed but in process. One of those passed bills changed the months when new amendments can be filed.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL AMENDMENTS

In 2020, the Costa Rican Congress discussed about no general amendment proposition and ten partial amendments propositions. Two of them, the bills 21382 and 21145, were passed and they are the ultimate constitutional amendments. The rest of them are in different stages of the legislative procedure.

The approved amendments are:

1.3.1. BILL 21382.

Proposed by all the 57 members of the Congress. Presented on May 1st, 2019. Reviewed by the Constitutional Chamber of the Supreme Court on decision 2020-03982, in which the Chamber founded no evidence of any procedural violation. Approved by Resolution Nº 9849 of June 5th, 2020.

This amendment added a new paragraph to Article 50 to recognize the human right of access to drinking water and its status as a public asset. The original text of the article 50 was focused on Welfare State. In 1994, it had an important amendment, which recognized the right of a healthy and ecologically balanced environment and stablished a civil action for the protection of that right. The new amendment is the evolution of that regulation, specifying the right to access and use of drinking water for everyone.

1.3.2. BILL 21145.

Proposed by 17 representatives of opposition parties. Presented on November 18th, 2018. Reviewed by the Constitutional Chamber of the Supreme Court on decision 2019-11681, in which the Chamber founded no evidence of any procedural violation. Approved by Resolution N° 9850 of June 22nd, 2020.

This modification amends Article 116 to expedite the legislative process in extraordinary sessions period. The Congress considered that the former regulation didn´t allow more expeditive procedures and a best use of the extraordinary sessions to discuss the initiatives of the Executive Branch.

Nowadays, the legislative time is divided into two ordinary periods, when the Congress does not need a call from the Executive to meet. Those periods are from August 1st to November 30th and from February 1st to April 30th. At the rest of the year, the Congress just will meet if called by the Executive, with the agenda set by the Government. With the original text of Article 116, the Congress meets ordinarily from May 1st to July 31st and from September to November 30th.

The ongoing amendments are:

1. BILL 22059

Presented by 14 representatives of Government and opposition parties. Filed on June 30th, 2020. The bill is currently waiting to be discussed by the Congress at the place 28 of the agenda.

This proposal scope to amend Article 121(section 9) to hold the member persons of the supreme powers in competent criminal courts as required by law, therefore ensuring the principle of equality, independence of the judiciary, and other basic principles of due process, as well as the right to a second instance.

Nowadays, all those public authorities, when convicted, have special procedures before the Third Chamber of the Supreme Court, which makes the process less expeditive and reduce the use possibilities of technical defense of the convicted official.

2. BILL 22310

Presented by 12 representatives of Government and opposition parties. Filed on November 17th, 2020. The bill is currently waiting to be discussed by the Congress at the place 36 of the agenda.

The bill´s objective is to repeal Article 91(section 1) to allow political participation of persons with intellectual, mental or psychosocial disabilities. This is in accordance with article 29 of the Convention on the Rights of Persons with Disabilities.

At this time, the Constitution allows that the individuals who has a state of interdiction to be banned on the electoral process. The bill´s objective is to eliminate that provision.

3. BILL 22298.

Filed by 15 representatives of Government and opposition parties. Presented on November 10th, 2020. The bill is currently waiting to be discussed by the Congress at the place 34th of the agenda.

Modify Arts. 106 and 108 to create a constituency encompassing all indigenous territories. Instead of 57 members, there will be 59 so that two legislators representing indigenous peoples will be added, this to ensure their political participation and comply with ILO Convention 169, as well as Article 1 of the Constitution.

The bill project pretends to assure an effective representation before the Congress to the different indigenous peoples located country-wide that include several different ethnical groups, with specific cultural and linguistic characteristics.

4. BILL 22266.

Presented by 15 representatives of Government and opposition parties. Filed on October 20th, 2020. The bill is currently waiting to be discussed by the Congress at the place 33 th of the agenda.

The bill is projected to amend Article 176 so that the principle of financial balance prevails over the principle of constitutional autonomy, and it is prohibited to create institutions and programs without providing for the relevant budget. This initiative comes in the context of a critical financial crisis, with the higher deficit of Government in decades, so it points to assure that all public agencies will implement the austerity measures.

5. BILL 22246.

Filed by 10 representatives of Government and opposition parties. Presented on October 1st, 2020. The bill is currently waiting to be discussed by the Congress at the place 32 th of the agenda.

The bill´s objective is to repeal the last paragraph of Article 60 because the proponents consider it limits freedom of association and violent freedom the principle of respect and non-discrimination, as well as international law; prohibits foreign employees from being elected to the union board of directors. This limitation does not exist for foreign employers who may be on the boards of business chambers.

6. BILL 22213.

Presented by 12 representatives of opposition parties. Filed on September 19th, 2020. The bill is currently waiting to be discussed by the Congress at the place 31 th of the agenda.

The bill pretends to modify Articles 121(section 14) and 174 so that municipalities have the power to make donations of affected real estate for a public purpose in favor of state institutions, without requiring authorization from the Congress.

Nowadays, the requirement of legislative approval is an obstacle for expeditive public policies that need the transfer of municipal assets to other organizations.

7. BILL 22211.

Presented by 11 representatives of opposition parties. Filed on September 15th, 2020. The bill is currently waiting to be discussed by the Congress at the place 30 th of the agenda.

The objective of the bill is to modify Articles 174 and 121(section 14) so that municipalities can donate to other public entities without requiring legislative authorization, and that they may decree the disposal of goods in favor of other State institutions. All this according to a special law that will be dictated. As it can be observed, this bill and the 22213 have a similar scope and content.

8. BILL 22063.

Filed by 11 representatives of opposition parties. Presented on June 6th, 2020. The bill is currently waiting to be discussed by the Congress at the place 29 th of the agenda.

The bill looks for modifying Article 24 so that the right to protection of personal data is constitutionally guaranteed as a human right. This will change the concept of "intimacy" to that of "private life" which is broader and conforms to international regulations.

The right to privacy has been broadly developed by the constitutional jurisprudence. But there is not an explicit regulation in the Constitution for that right.

III. THE SCOPE OF AMENDMENTS AND CONSTITUTIONAL CONTROL

The constitutional amendments approved by the Congress in 2020 have an important background. Both were constantly claim by certain groups in Costa Rica's society. Both were passed during a very extraordinary context, in the middle of a pandemic that altered the political and economic life in the country.

The recognition of the access of drinking water as a fundamental right.

Costa Rica is a tropical country, with plenty of precipitations several months of the year, mostly in the Central Valley, the Caribbean Coast and the Central and Southern Pacific as well. Nevertheless, the Northern Pacific Area has a drier weather with less months of rains a year and less millimeters of rain compared with the rest of the country.

This region, located in the province of Guanacaste, has the most important beach resorts and services for visitors as well as the most extended plantations of rice, sugar cane, melons and other important products. Many of the Guanacaste´s aquifer mantles are in serious danger because of the reduction of natural recharge and the saline intrusion, which comes from the sea water and occurs when the internal level of aquifer is low.

These natural conditions have produced sources of conflict between the local farmers, the inhabitants of rural villages, the tourist entrepreneurs and the Government, among other actors. That´s why this amendment is a way to reconcile those interests. The text of the new last paragraph or Article 50 is:

> "(...) Everyone has the human right, basic and indispensable of access to safe drinking water, as an essential good for life. Water is an asset of the nation, indispensable to protect such a human right. Its use, protection, sustainability, conservation and exploitation shall be governed by the law to be created for this purpose and priority shall be given to the supply of drinking water for the consumption of individuals and populations."

The new constitutional regulation establishes the drinking water as a human right, which gives priority for human consumption of water, but doesn´t avoid other commercial and industrial uses of it. For example, it is possible that even in a dry climate area some water will be used for large-scale agriculture and tourism, provided that the supply of populations located in the influence zone of wells is ensured and that with mass use, there are no risks of drying or contamination by salt intrusion or other sources.

Other important aspect of this amendment is that the water (the sources of water would be probable a more accurate concept) are asset of the Nation, which provides all the protection regarded to these assets by Article 121(section 14) of the Constitution. These goods are considered ungarnished, unprehensible and inalienable. Its exit from public property can only be given by law approved by the Congress.

As all the partial amendments of the Constitution, the bill 21382 was reviewed by the Constitutional Chamber of the Supreme Court. This is a mandatory part of the procedure, according to Articles 10 (section b) of the Constitution and article 96 of the Constitutional Jurisdictions Act. The called "constitutional consultation" is made once the bill has passed the first discussion and voting on the Congress. The Chamber can evaluate the constitutionality of the procedures used by the Congress for the approval of this constitutional amendment. It cannot determine whether the content is valid, as the rules of the constitution can´t be considered unconstitutional.

However, in its ruling 2020-03982, the Chamber concluded that:

> "IX.- In short, in the case of a proposal for partial amendment of the Political Constitution, the Chamber concludes that the processing of legislative file 21.382 is in conformity with the procedure laid down in article 195 of the Political Constitution, article 210 of the Rules of Procedure of the Congress and what was previously stated in the judgment of this Chamber, number 19-25241, while as regards the content of the proposed reform , it is appreciated that it develops the previous criteria identified by public international law, international human rights law, and the law of the Constitution on the subject."

In this case, as an exception, the Chamber reviewed the content of the amendment and compared it with the international standards of human rights, to conclude that the bill was according with those regulations and principles.

1. THE REGULATION OF ORDINARY LEGISLATIVE SESSIONS

The government system established in the 1949 Constitution is basically presidential, albeit with some features typical of parliamentarism. The influence of the Philadelphia Constitution of 1789 is evident in terms of the strong separation of powers between the legislative and the executive.

The Congress meets ex officio at so-called regular period of sessions, and sessions only when convened by the Executive at the extraordinary period of sessions. These periods are very relevant to both powers, as it allows them to carry out their agenda of priority projects.

Before the amendment, the ordinary periods were two: from May 1st to July 30th and from September 1st to November 30th. Consequently, the extraordinary periods were from August 1st to August 31st and from December 1st to April 30th. Legislative time needed to be reorganized, so that both powers could have similar and time-deranged periods to achieve more effective work and a more equitable and reasonable distribution.

The new Article 116 establishes that:

> "Article 116.- The Congress shall meet each year on the first day of May, even if it has not been convened, and its regular sessions shall last six months, divided into two periods: from the first of August to October 31st and from the first of February to April 30th. A legislature comprises the ordinary and extraordinary sessions held between the first of May and the following April 30th."

The bill was reviewed by the Constitutional Chamber, which ruled the judgment number 2019-15575, which determines that:

> "(...) In essence, the project seeks to maximize legislative time, make work more dynamic and that agreements and decisions be made in the least interrupted way possible, thus achieving greater efficiency and efficiency at work and in resource management. Previous overview that will undoubtedly lead to greater productivity and better performance of both the Legislative and Executive Branch. It should also be noted that in this context the proper functioning of the democratic system and a better distribution of the powers and political responsibilities of each of the aforementioned powers of the Republic are guaranteed, thus strengthening the balance and the system of weights and balances, as expressly stated by the constitutional ordinals 1st and 9th.(...)"

Nor did the Chamber find any flaws in the procedure used by the Congress. However, what is striking is that, again, it analyses the text approved by Congress, this time, in relation to other constitutional rules, what should be understood as an excess in the powers of the Constitutional Court.

2. THE ONGOING BILLS:

From the other 8 bills described above, three have a special political impact: 22059, 22266 and 22063.

The Bill 22059 it is intended to reform article 121(section 9) of the Constitution, to eliminate the special procedures that currently regulate the trial of the members of the supreme powers: the President of the Republic, its Vice-presidents and Ministers, the Members of the Congress and the Judges of the Supreme Court. It is proposed that these officials should be tried by ordinaries courts, by the same procedures established for the rest of the persons.

At this moment, there are several criminal processes against members of the supreme powers. The most notorious is a complaint against the President of the Republic, his Minister of the Presidency and other senior officials, who are accused of having transgressed people's privacy by doing big data processing work for precision public policy decision-making. In the event that the bill passes at the Congress, it will have impact on the trial against the President.

The Bill 22266 is projected to amend Article 176 so that the principle of financial balance prevails over the principle of constitutional autonomy, and it is prohibited to create institutions and programs without providing for the relevant budget.

Costa Rica is going through a sharp fiscal crisis. This crisis is compounded by resistance from public agencies that enjoy autonomy from complying with the austerity measures demanded by the Government, including those established in new laws. This project aims to eliminate any doubts regarding the possibility of disrespecting the principle of budgetary balance.

Finally, the ban on creating new agencies without budgetary support faces a practical inconvenience of increasing the size of the state without providing it with sufficient resources to cope with its new functions.

The Bill 22063 seeks to strengthen article 24 of the Constitution so that this rule expressly protects the right to privacy, and not just the private communications.

Again, the criminal proceedings against the President of the Republic regarding the handling of people's data interact with this amendment proposal, since thematic axis of the criminal trial is precisely the processing of personal data.

IV. LOOKING AHEAD

In the future, some of the above-mentioned draft amendments may become a constitutional amendment. Although an election year is coming, in which the legislative agenda is often complicated by the dynamics of parties seeking power, some of the initiatives, especially those that gather greater consensus, such as those that support municipalities or data protection, may advance. Other proposals will certainly receive strong opposition from some sectors, so they could probably be postponed.

Other substantial issues that have been discussed in the recent past and could be re-presented as constitutional amendment projects after the elections are those relating to the following issues:

1. Amendment of the Election System of Representatives of the Congress. The current Election System is proportional, based on Hare's formula modified with electoral barrier. There has been discussion in recent years about the need to establish a mixed system, combining elements of proportional and majority systems.

2. Amendments in the Constitutional Justice System. Over the 30 years of the Constitutional Chamber's watch, it has been discussed whether it is appropriate for legislative consultancies to continue to be resolved. It has also been debated whether lower-ranking constitutional courts should be created to resolve amparo and habeas corpus processes, and thus reach the Chamber only cases of constitutionality control and unification of jurisprudence.

3. Costa Rica has been debating its form of government for decades. The adoption of a parliamentary or semi-parliamentary model has been proposed several times. Considered that since the 2002 election the country has moved from a bipartisan to a multiparty model, it is possible that the issue will become relevant, due to the difficulties that a pulverized congress can generate in the governance.

4. Finally, there is a latent risk that ultra-conservative, fundamentalist-based parties will seek to try to impose a rollback agenda on fundamental rights, in terms of the right to equality of all people, especially women, LGBTI people, migrants, among others.

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Cuba

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I. INTRODUCTION

In February 2019, a new Constitution was adopted in Cuba[1], with which significant changes were introduced in dissimilar aspects if we compare it with its predecessor of 1976, partially reformed in 1978, 1992 and 2002[2].

Since the entry into force of the new constitution, a legislative creation process began, with the purpose of adopting a set of normative provisions aimed at complementing it. To conduct this process in an orderly manner, it was approved by the National Assembly of People's Power (NAPP), the supreme body of state power[3], a legislative schedule in its plenary session of December 2019. In the same year, important acts were adopted in the constitutional sphere that had a significant imprint in 2020, as were the cases of the acts on the organization and operation of the NAPP and the municipal assemblies of People's Power and popular councils.

This broad process of normative creation is based, among other aspects, on the fact that the Cuban constitution was considered as a *minimum norm*, that is, that it would only contain the most general aspects of the different matters regulated in it, a criterion that does not correspond with the most advanced of contemporary legal doctrine, and that was surpassed since the second half of the 20th century from the development of concepts such as the rule of law, human rights or constitutional axiology[4]. Its creation depended on a drafting commission, made up of experts from various subjects, government officials, deputies to the NAPP, the highest representatives of social and mass organizations legitimized by the state as representatives of the different sectors of civil society, among others. Thus, a procedure similar to that used in the definition of the contents of the previous constitution was followed. At the head of this commission was Raúl Castro Ruz, in his capacity as First Secretary of the Communist Party of Cuba[5].

After a draft constitution was prepared and it was approved by the NAPP in plenary session, it was considered a draft constitution and was submitted to popular consultation for several months[6]. After this popular debate some modifications were made to it [7], and the final project was approved by the NAPP to be submitted to a popular referendum, and finally approved on February 24, 2019[8].

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. SOME RELEVANT ASPECTS OF THE 2019 CONSTITUTIONAL REFORM

Before commenting on the main topics regarding constitutional reform in Cuba during 2020, it is necessary to put in context some of the most transcendental aspects implemented with the new constitution. Within the political foundations of the Cuban state, it is recognized that this is a socialist state of law and social justice (article 1), as well as the principles of popular sovereignty (article 3), constitutional supremacy (article 7) and legality (article 9). In addition, the character of the superior leading political force of society and the State of the Communist Party of Cuba is recognized (article 5), underlining that it is the only political force in the country, while establishing the secular character of the state (article 15).

Among the economic foundations, it is stipulated that in the Republic of Cuba a socialist economic system governs based on the ownership of all the people over the fundamental means of production as the main form of property, and the planned direction of the economy, which has in accounts, regulates and controls the market based on the interests of the company (article 18). The constitution also defines the property structure, recognizing eight types of property (Article 22), including personal and private property, differentiating between them from the first does not include means of production and the second does.

The catalog of fundamental rights in the 2019 constitution is much broader than that of its 1976 predecessor. In the article 40 is recognizes

1 All the articles of Cuban Constitution cited in this report can be checked in: <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2019-ex5_0.pdf> accessed 19 January 2021.

2 See Martha Prieto, 'La Constitución cubana de 2019: nuevos contenidos y necesidades' [2020] <http://scielo.sld.cu/scielo.php?script=sci_arttext&pid=S0253-92762020000100003&lng=es&nrm=iso> accessed 19 January 2021.

3 Article 102 of Cuban Constitution.

4 See M. García Canales, 'Principios constitucionales y principios generales' [1989] Revista de Estudios Políticos 64.

5 See Oscar Figueredo and Dianet Doimeadios, 'Preside Raúl Castro Ruz Comisión de la ANPP para Reforma Constitucional' (*Cubadebate*, 2 June 2018) <http://www.cubadebate.cu/noticias/2018/06/02/preside-raul-castro-ruz-comision-de-la-anpp-para-reforma-constitucional/> accessed 19 January 2021.

6 See 'Cuba inicia consulta popular para modificación de Carta Magna' (*Telesur*, 13 Agosto 2018) <https://www.telesurtv.net/news/cuba-inicia-consulta-modificacion-carta-magna-20180813-0015.html> accessed 25 January 2021.

7 See 'Resultados del proceso de consulta popular' (*Juventud Rebelde*, 22 de diciembre de 2018) <http://www.juventudrebelde.cu/cuba/2018-12-22/resultados-del-proceso-de-consulta-popular> accessed 25 January 2021.

8 See Comisión Electoral Nacional, 'Resultados finales del proceso de referendo' [2019] <http://www.eleccionesencuba.cu/parte-informativo3> accessed 25 January 2021.

human dignity as the supreme value that supports the recognition and exercise of the rights and duties enshrined in the Constitution, treaties and laws. Likewise, the enjoyment and the inalienable, imprescriptible, indivisible, universal and interdependent exercise of human rights is recognized and guaranteed to the person, in correspondence with the principles of progressiveness, equality and non-discrimination (Article 41). The principle of formal equality of persons before the law is inserted in the content of article 42, since it is stated that all persons are equal before the law, receive the same protection and treatment from the authorities and enjoy the same rights, freedoms and opportunities, without any discrimination based on sex, gender, sexual orientation, gender identity, age, ethnic origin, skin color, religious belief, disability, origin national or territorial, or any other personal condition or circumstance that implies distinction harmful to human dignity. Regarding this last article, it is worth mentioning the expansion of the categories of special protection set forth in it with respect to its similarity in the 1976 constitution[9].

Among the fundamental rights were included the right to life (article 46), to free development of the personality (article 47), to personal and family privacy (article 48), to free movement (article 52), to truthful, objective and timely information (article 53), among others. As guarantees of constitutional rights, due process is recognized in the judicial and administrative sphere (article 94) and with special reference to criminal proceedings (article 95), as well as habeas corpus (article 96) and habeas data (article 97).

One of the aspects in which the most transformations occurred with the entry into force of the 2019 constitution was in the structure of the state. Among these, we can mention the inclusion of due transparency as one of the rules that is part of the principle of socialist democracy (article 101, subsection h)), related to the actions of state bodies, their directors and officials. The figure of the president of the republic was established as head of state (article 125), who is elected by the NAPP (article 126), which continues to be the supreme body of state power (article 108). In addition, the person who exercises said position can only do so for a maximum of ten years, that is, two periods of five years, and must be reelected after the end of his first term (Article 126). Likewise, the prime minister is recognized as the head of government, who will be in charge of the council of ministers and will be elected by the NAPP (articles 140 to 143). Both the president and the prime minister must be deputies to the NAPP.

Other important elements regarding the structure of the state are:

- The President, the Vice President, and the Secretary of the National Assembly of People's Power are also a part of the Council of State (Article 121).
- The Comptroller General of the Republic (article 160), created since 2009, and the National Electoral Council (article 211) are recognized with constitutional rank.
- The Provincial Government of People's Power and the figures of the provincial governor and vice-governor are established, who are the highest executive-administrative leaders in their territorial demarcations, as well as direct the provincial councils (articles 170 to 184).
- The figure of the municipal mayor is established as president of the Municipal Administration Council (article 203).
- The principle of municipal autonomy is recognized (article 168).

Finally, in terms of constitutional reform, it is established that the constitution can be amended by the NAPP by means of an agreement adopted, by roll call, by a majority of no less than two-thirds of the total number of its members (Article 226). An initiative is recognized to promote constitutional reforms to various subjects, including citizens, through a petition addressed to the NAPP and signed before the National Electoral Council, at least by fifty thousand voters (Article 227). When the reform refers to the integration and functions of the National Assembly of People's Power or the Council of State, the powers or the term of office of the President of the Republic, the rights, duties and guarantees enshrined the constitution also requires ratification by the favorable vote of the majority of voters in a referendum called for such purposes (article 228). As with the 1976 constitution after its reform in 2002, an intangibility clause is inserted by stating in article 229 that the pronouncements on the irrevocability of the socialist system established in article 4, and the prohibition of negotiate under the circumstances set forth in subsection a) of article 16.

2. THE LEGISLATIVE IMPLEMENTATION OF THE CONSTITUTIONAL REFORM IN 2020

The most important aspects in terms of constitutional reform are related with the adoption of laws and decree-laws complementary to the 2019 constitution, as well as the modification, in December 2020, of the legislative schedule approved a year earlier, which affected the regulation of several Fundamental rights. Regarding the decree-laws, it is appropriate to point out that they are approved by the Council of State, the body that represents the NAPP between each of its sessions, since the members of the national legislative body are not political professionals, nor are those who make up the municipal assemblies of People's Power[10].

3. COMPLIANCE WITH THE LEGISLATIVE SCHEDULE

In another vein, during 2020 four laws were approved in Cuba. These were the Foreign Service Act, the Act on the organization and operation of the Council of Ministers, the Act on the recall of those elected to the organs of People's Power, and the Act on the President and Vice President of the Republic. Of the sixteen decree-laws planned for 2020, eleven were approved, as well as fourteen others that, although not included in the legislative schedule, were put into effect by the Council of State[11].

Regarding the content of some of these laws, it is important to highlight two things. The first is that the Act for the recall of those elected to the organs of People's Power was not implemented for the empowerment of voters. These only intervene directly in the recall of the delegates to the municipal assemblies of popular power elected by their constituency, but not in that of the rest of the popular representatives[12]. This situation represents an obstacle in the exercise of the right to political participation of citizens (article 204 of the Constitution), in terms of recall.

9 See article 42 of Cuban Constitution of 1976, reformed in 1978, 1992 and 2002. *Gaceta Oficial Ordinaria Nº3, de 31 de enero de 2003.*

10 Article 115 of Cuban Constitution.

11 See Oscar Figueredo, 'Asamblea Nacional aprueba nuevo cronograma legislativo (+ Infografías)' (*Cubadebate*, 17 December 2020) <http://www.cubadebate.cu/noticias/2020/12/17/asamblea-nacional-aprueba-nuevo-cronograma-legislativo-infografias/> accessed 19 January 2021.

12 See Act of recall of those elected to the organs of People's Power, Act No. 135/2020, <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2020-o88.pdf> accessed 19 January 2021.

On the other hand, in the Act of the President and the Vice President of the Republic, broad powers are granted to the first, and it is allowed to issue presidential decrees that in the law are divided into two large groups: those of general interest and those that are not. The main difference between the two is that the former are published in the official gazette, while the latter are not. The latter can be notified only to their recipients[13]. This could eventually imply a violation of the rule of due transparency that all state organs, their directors and officials must comply with, as stipulated in subsection h) of article 101 of the constitution.

4. CHANGES IN THE LEGISLATIVE SCHEDULE

At the end of 2020, the legislative schedule was modified, in the sense that the dates of adoption of several laws and decree-laws were changed[14]. In some matters, these changes meant postponing the adoption of normative provisions, which must be formal guarantees of constitutional rights. For example, of the 33 pending laws on the schedule, it was decided to approve 25 in the 2021-2022 period, including several decree-laws. These include the Act on Protection of Personal Data and the Act on the Claim of Constitutional Rights before the Courts. An act on transparency and access to information will not be approved until October 2022, so there will not be a formal guarantee for this right until then. For the next legislature of the NAPP and its Council of State, which begins in 2023, 10 laws that were originally planned to be adopted in this legislature that ends in 2022 remain. Among them, it is worth mentioning the laws of migration, foreigners, citizenship, on the rights of demonstration and assembly, as well as the law of defense and national security.

Regarding the Act on the Claim of Constitutional Rights before the Courts, it should be noted that it is worrying that it has not been made public, until the beginning of 2021, what its content will be. As previously stated, the Cuban constitution has been conceived as a minimum norm, so the laws adopted to complement it will be crucial in the definition and scope of constitutional rights. In accordance with the provisions of article 92 of the Constitution, the State guarantees, in accordance with the law, that people can access judicial bodies in order to obtain effective protection of their rights and legitimate interests. The expression of conformity with the law, in a context where the constitution has not been conceived as the norm that contains the minimum and maximum elements to delimit the scope of state power, as well as one of those limiting elements of power being fundamental rights It could mean that the aforementioned law excluded from judicial protection some rights enshrined in the constitution. If this situation arises, it would also violate the principles of equality and non-discrimination and interdependence of constitutional rights, recognized in article 41 of the fundamental law.

These changes that have occurred in the legislative schedule, and that the Cuban authorities have justified based on the complex epidemiological situation that existed in the country in 2020 with COVID-19, raise several doubts about their real commitment to compliance with said schedule. A phenomenon that manifested itself for many years in Cuban political and legal-constitutional practice, during the validity of the 1976 constitution, was that of unconstitutionality by omission. In this carta magna the regulation of various constitutional rights was referred to special laws that were never adopted, in the 43 years of its validity (1976-2019)[15].

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

A first element to establish is that Cuba lacks constitutional jurisdiction, so there are no special actions and processes for the defense of constitutional rights, such as the amparo action or the unconstitutionality action[16]. To the above, we must add the non-existence of a concentrated body that administers justice in constitutional grounds, as well as a practice judicial extended in the application of the constitution, as a norm for the solution of cases before the courts. This phenomenon, which is long-standing and has been mentioned several times by the national doctrine, implies the scarce direct applicability of the constitutional text by Cuban judges, which in turn has led to the practically null interpretation of its contents[17].

Constitutional control in the country is of a political nature and is exercised by the NAPP, in accordance with the provisions of subsection e) of article 108 of the Constitution. This continues to be, in our opinion, one of the main debts of the constitutional design of the Cuban state with a view to its democratization, together with the preponderant role granted to the Communist Party of Cuba, which is recognized as the only organization of its kind in the country and the leading political force superior of society and the state, as provided in article 5 of the constitution. In practice this has meant, since the 1976 constitution was adopted, that the actions of this organization have never been subject to the control of state bodies. In addition, the NAPP has the constitutional power to interpret the constitution and the laws (article 108 subsection b)), but has not defined the content and scope of the aforementioned article 5.

This order of things supposes a state of tension between the principle of popular sovereignty and the leading character of the communist party. The non-establishment of constitutional limits to the only political force in the country, the inexistence of a judicial chamber specialized in the judicial control of constitutionality, and the practically null interpretation of the constitutional contents by the NAPP, has promoted a political practice that benefits the influence of party organs in the decision-making process. In this way, state bodies directly linked to the principle of popular sovereignty, in particular the NAPP, yield in their decision-making capacity to party decisions, which predefines the content and scope of the actions to be carried out by state bodies, as happened with the constitutional reform itself in 2019[18].

IV. LOOKING AHEAD

In the immediate future, the adoption of various laws and other

13 See Act of the President and Vice President of the Republic of Cuba, Act No. 136/2020, <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2020-089.pdf> accessed 19 January 2021.

14 See Agreement Number IX-76 of the NAPP <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-03.pdf> accessed 19 January 2021.

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.

16 See Amanda Prieto, 'Garantías judiciales y propuestas para la defensa de los derechos constitucionales: Cuba, 2019' [2020] <http://scielo.sld.cu/scielo.php?script=sci_arttext&pid=S0253-92762020000100223> accessed 19 January 2021.

17 See Martha Prieto, 'En pos de la aplicabilidad directa de la constitución cubana de 1976 (un breve comentario)' [2020] <https://www.revistaius.com/index.php/ius/article/view/256/358> accessed 19 January 2021.

18 Yan Guzmán, 'Lineamientos, constitución y líneas para una reforma constitucional anunciada en Cuba' [2015] <https://www.jstor.org/stable/24369349?refreqid=excelsior%3A7f8cb15fde9da2d842a57b04e2aab584&seq=1> accessed 19 January 2021.

regulations focused on the legislative development of constitutional provisions should be expected. It has been defined that between 2021 and the following year, around twenty-five laws (10 in 2021 and 15 in 2022), and twenty-nine decree-laws by the Council of State (18 in 2021 and 11 in 2022) must be approved by the NAPP.

Another important challenge is to make the application of constitutional content a common practice in the courts, which will not only depend on the legislative development complementary to the constitution, but also on the establishment and subsequent strengthening of a legal culture and practice in this regard. The latter is valued as fundamental, considering that article 1 of the current constitution declares Cuba as a socialist state of law. Similarly, it will be important that the regulations to be approved conform to the best international standards and practices.

In relation to these ideas, it is important to mention that for Cuba it will be crucial that in the immediate future the constitution is not considered only as a regulation that must be supplemented. It is necessary for the democratization of the socio-political and socioeconomic dynamics, as well as for the realization and consolidation of the character of a socialist state of law recognized in article 1 of the constitution, that the contents of the fundamental law become the action guides of authorities at all levels. The principles of constitutional supremacy and legality should become the benchmarks for decision-making processes, along with the rest of the axiological elements that inform the constitutional regulation of fundamental rights or the structuring and functioning of state bodies.

It will be necessary to establish a conception around fundamental rights that accepts their enforceability against the state, and that does not only recognize as legitimate the exercise of these when in affinity with the interests of the state. That is why, in the near future, special attention should be paid to creating formal, institutional and procedural legal guarantees that allow citizens to defend their rights against state power.

Cyprus

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I. INTRODUCTION

The Constitution of the Republic of Cyprus came into force in 1960, after the island gained its independence from the UK, establishing a unitary yet bi-communal State, comprised of the Greek and the Turkish communities. The Constitution consisted of 199 articles (plus one article inserted with the fifth amendment in 2006)[1] and three annexes. The eternal clause of article 182 of the Constitution creates permanency of the established system, by declaring the non-amendable nature of 48 out of the 199 articles (as found in Annex III) that primarily aim at preserving the principle of bi-communalism. Following the collapse and failure of the system in December 1963, with the withdrawal of Turkish officials from state organs, the Constitution surprisingly remained in force with the introduction of the law of necessity as the pillar upon which the State now functions.[2]

In 2020, only one amendment of the Constitution of Cyprus was adopted, in contrast to the four amendments that were implemented in 2019, bringing the total number of constitutional amendments to fifteen. This report discusses the fifteenth amendment of the Constitution adopted in 2020, relating to administrative court procedures for granting and withdrawing international protection for asylum and refugees. In the absence of other constitutional reforms, this report will then focus on a significant development relating to a previous amendment: the 2020 decision of the Supreme Court of Cyprus in *Electoral Petition 1/19*, which scrutinized the twelfth constitutional amendment enacted in 2019.[3] This decision undoubtedly constitutes a milestone for the development of Cypriot constitutional law, as the Supreme Court invoked for the first time the doctrines of "basic structure" and "unconstitutional constitutional amendments" and labelled them as theories with wide-ranging application in different instances.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. THE FIFTEENTH AMENDMENT OF THE CONSTITUTION OF CYPRUS

The fifteenth amendment of the Constitution of Cyprus was adopted by the House of Representatives on September 4, 2020, with Law 135(I)/2020.[4] The amendment was deemed necessary for the administration of justice for asylum seekers, in order to enable the legislative imposition of a different deadline for filing appeals before the International Protection Administrative Court.[5] Specifically, article 146(3) of the Constitution sets the time limit for filing a recourse against the validity of any decision, act or omission of the executive or administrative authorities to 75 days. The fifteenth amendment inserted to article 146(3) the following sentence: "unless a different deadline for filing an appeal against a decision, act or omission is explicitly provided by law" (translation by author). Subsequently, the House adopted Law 141(I)/2020,[6] amending the basic law regulating the establishment and operation of the Administrative Court for International Protection,[7] and reduced the deadline for filing recourse against decisions, acts or omissions of the Asylum Service and the Refugee Reviewing Authority to 30 days.[8] The deadline for filing appeals is even stricter (set to 15 days), in relation to specific administrative decisions (e.g. decision to reject the application of asylum seeker as manifestly ill-founded).[9]

The preceding amendment of the Constitution formed part of the wider government efforts to holistically regulate asylum issues (such as the abuse of asylum procedures), to tackle the increased irregular migration faced by Cyprus and to address the need for expeditious determination of the status of asylum seekers for securing the effectiveness of asylum management mechanisms. This reasoning is reflected in the preamble of Law 135(I)/2020, which presents the fifteenth amendment as necessary in order for Cyprus to comply with obligations under international and EU law in relation to asylum seeker rights. In terms of

1 Law concerning the Fifth Amendment of the Constitution of Cyprus (Law 127(I)/2006).
2 For the law of necessity, see Constantinos Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas, 2015); Constantinos Kombos, "Le Droit de la Nècessitè à Chypre", in Rossetto, J, Agapiou-Joséphidès, K, (eds) *La Singularité de Chypre dans l'Union Européenne: Diversité des droits et des statuts* (Mare and Martin, 2012) 371-405.
3 *Electoral Petition 1/2019, Michaelides et al. v. Chief Returns Officer et al.*, Decision of 29 October 2020.
4 Law concerning the Fifteenth Amendment of the Constitution of Cyprus (Law 135(I)/2020).
5 The International Protection Administrative Court has exclusive jurisdiction to adjudicate on first instance on any recourse made to it by an asylum seeker under article 146 of the Constitution (as amended with the Law concerning the Eighth Constitutional Amendment (Law 130(I)/2015)) against a decision, an act or omission relating to the provisions of the Refugee Law.
6 Law regulating the establishment and operation of the Administrative Court for International Protection (Amending No. 2) (Law 141(I)/2020).
7 Law regulating the establishment and operation of the Administrative Court for International Protection (Law 73(I)/2018).
8 See article 12A(1), Law 73(I)/2018, as amended.
9 See article 12A(2), Law 73(I)/2018, as amended.

EU law, the preamble takes specific notice of Directive 2013/32/EU on common procedures for granting and withdrawing international protection,[10] and the therein understanding that it is in the interests of both Member States and asylum seekers for a decision on applications for international protection to be made as soon as possible.[11] Accordingly, the 75-day limit provided under article 146 of the Constitution was deemed disproportionate to the requirement of reaching a final decision promptly. It should be noted that the amendment passed from the House with 38 votes in favor and 14 against from the main opposition party that construed this amendment as incomplete, and as failing to tackle the issue of the increased flow of irregular migrants at its root. Moreover, the opposition viewed the reduction of the time limit for filing appeals as being incompatible with effective judicial protection and as establishing hasty and summary procedures that may result in inhumane treatment. The effectiveness of the amendment in terms of protecting asylum seeker rights remains to be seen, while the same applies in relation to the compatibility of the law with constitutional provisions and EU law.

2. THE TWELFTH CONSTITUTIONAL AMENDMENT OF 2019 UNDER JUDICIAL SCRUTINY: HOW DID WE GET THERE?

On October 3, 2019, the House of Representatives introduced the twelfth amendment of the Constitution of Cyprus. The need for adopting this amendment was underpinned in the 2016 parliamentary elections that gave rise to a long constitutional saga before the Supreme Court, relating to a legal lacuna that prevented the House of Representative from functioning with full composition. The legislature attempted to rectify the situation with numerous attempts, but those were all struck down by the judiciary as unconstitutional, thus leading the House of Representatives to amend the relevant constitutional provisions and the Supreme Court to review the amendment in *Electoral Petition 1/2019*. At this point, reference should be made to the background and rulings that preceded *Electoral Petition 1/2019* in order to better appreciate the Court's reasoning.

The House of Representatives is a unicameral body, with legislative powers in all matters,[12] and comprised of 56 members with five-year terms.[13] The parliamentary electoral system is proportional.[14] In the 2016 parliamentary elections, one of the seats was allocated to the chairwoman of the Solidarity Movement. Following the declaration of her election by the Chief Returns Officer (CRO), but before her public affirmation and commencement of the term of office, she notified in writing her decision not to take the parliamentary seat, and to keep her seat in the European Parliament instead. Subsequently, it was for the CRO to decide in accordance with the constitution and relevant electoral legislation how to allocate that seat. Yet, the denunciation of the office, prior to the initiation of the office term, was an unprecedented and unregulated matter, that created a novel of constitutional matter: the matter of a 'non-taken parliamentary seat', viz. seat that were never formally occupied by a person belonging to a party because the elected persons failed to give the required affirmation.

On the other hand, articles 66(2) and 71 of the Constitution provided for the filling in of 'vacated seats' (i.e. seats that were occupied and then became vacant) in accordance with electoral laws. The issue of 'vacated seats' is further regulated by article 35(1) of the Election Law (Law 72/1979),[15] which provides that vacated seats shall be assigned by the CRO to the next candidate from the same political party having obtained the highest number of votes in the elections. If this procedure of article 35(1) cannot be applied, article 35(2) calls for by-elections. In the absence of the regulation of non-taken seats, the CRO applied by analogy the provisions for vacated seats and allocated the seat to the runner-up of the Solidarity Movement. The decision of the CRO was challenged by a candidate of another party through an electoral petition to the Supreme Court, arguing that the seat should have been granted following a by-election.

In *Electoral Petition 2/2016*,[16] the Supreme Court unanimously declared the decision of the CRO to allocate the seat to Solidarity's runner-up as null and void. The Court held that in the absence of a public affirmation, Solidarity's chairperson never held the position of a representative. Thus, the seat was not 'vacated' in the sense of article 35(1) of the Election Law, thus filling the seat in accordance with that provision was not the only available choice. Following this decision, the House amended article 35 of the Election Law in such manner to retroactively provide for seats vacated before the affirmation of an elected person to be granted to the runner-up of the same party.[17] In accordance with the amended legislation, the CRO granted the seat again to Solidarity's runner-up and the same petitioner filed a new electoral petition against the CRO's decision.

In *Electoral Petition 1/2017*,[18] a narrow majority of the Supreme Court (6-5) held the decision of the CRO to be null and void, finding that the amending law was in breach of articles 65, 66, 69 and 71 of the Constitution and also of the democratic principle of popular sovereignty. The Supreme Court reiterated that the seat was never vacated, as it never belonged to Solidarity; it was *ab initio* a non-taken and non-occupied parliamentary seat, notions unknown to the constitutional text. It should be noted that the minority, with well-articulated reasoning, held that the absence of a constitutional procedure for regulating non-taken seats does not deprive the House of Representatives of its authority to exercise legislative powers in all matters, including the power to adopt legislation for the regulation of filling vacant seats.

10 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

11 Ibid, recitals 18 and 20 and article 46(4). Yet the Directive also recognizes that in well-defined circumstances where an application may be unfounded or where there are serious national security or public order concerns, Member States may accelerate the examination procedure, 'by introducing shorter, but reasonable, time limits for certain procedural steps, without prejudice to an adequate and complete examination being carried out and to the applicant's effective access to basic principles and guarantees provided for in this Directive'.

12 Article 61 of the Constitution. Note that the legislative powers of the House of Representatives are limited by those matters expressly reserved to the Communal Chambers by the Constitution.

13 See Article 65(1) of the Constitution.

14 See the Law on the Election of Members of the House of Representatives of 1979 (Law 72/1979), as amended.

15 Ibid.

16 *Electoral Petition 2/2016, Andreas Michaelides et al. v. Chief Returns Officer et al.*, 31 May 2017. See also analysis in Constantinos Kombos, 'Cyprus', in Richard Albert and others (eds), *2018 Global Review of Constitutional Law* (The I·CONnect-Clough Center 2018) 74-75.

17 See Election of Members of the House of Representatives (Amending) Law (Law 82(I)/2017).

18 *Electoral Petition 1/2017, Andreas Michaelides et al. v. Chief Returns Officer et al.*, 30 April 2018.

Following the majority's decision in *Electoral Petition 1/2017*, the House attempted to regulate the constitutional gap identified by the majority of the Supreme Court, by amending once again the Election Law. This time, the House introduced the notion of 'non-taken seats' in the Election Law and provided for non-taken seats to be granted to the runner-up of the same party. The President of the Republic referred the amending law to the Supreme Court before its promulgation, for preventive review of its constitutionality, as per article 140 Constitution. In *Referral 4/2018*,[19] the Supreme Court held, for the third time, that the legislative attempt to regulate the gap regarding non-taken seats of the House of Representatives was unconstitutional, as it violated articles 31, 63, 64, 65, 66 and 71 Constitution and the principles of popular sovereignty and separation of powers.

After these failed attempts to regulate the issue, the House of Representatives proceeded to the enactment of the twelfth amendment of the Constitution and of articles 66 and 71 specifically. The twelfth amendment of the Constitution introduced the notion of 'renounced or non-taken seats' as parliamentary seats of elected candidates who before their nomination/proclamation (i.e. before the CRO announces the outcome of the elections and declares which candidates are duly elected on the basis of the certified election count) die or refuse to exercise their right to give the necessary affirmation or, following their nomination/proclamation and prior to their affirmation by virtue of Article 69, decline or fail to assume their duties.[20] The amendment further introduced the procedure for the filling in of non-taken seats 'in such manner as a Law may provide' and gave the procedure retroactivity.[21] In addition to the amendment of the Constitution, the House further amended the relevant provisions of the Election Law, with amending Law 131(I)/2019.[22]

The twelfth amendment came under judicial scrutiny in *Electoral Petition 1/2019* when the same runner-up from the Solidarity movement was once again declared by the CRO as a representative and the declaration was challenged by the same petitioner as the previous electoral petitions. The decision of the Supreme Court in *Electoral Petition 1/2019* is a landmark ruling for the development of Cypriot constitutional law, for two reasons. First, it resolved definitively an important constitutional issue, by invoking the principles of popular sovereignty, separation of powers and judicial precedent. Second, and most importantly, the Court introduced the debate of 'basic structure' that may not be amended and in addition the Court expanded its implied jurisdiction with regard to constitutional amendments. This aspect of the decision may prove more significant than the decision for the 56th seat, as it may have the effect of introducing the substantive review of constitutional amendments. The significance of *Electoral Petition 1/2019* for constitutional reforms is analysed in the next section.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. CONSTITUTIONAL AMENDMENTS AND THE LAW OF NECESSITY IN THE CYPRIOT CONTEXT: A BRIEF NOTE

The 1963 withdrawal of Turkish officials from state organs paralyzed the Cypriot state and led to the collapse of the system established under the 1960 Constitution, as it was impossible to comply with constitutional requirements based on bi-communalism. The alteration of the normative aspect of the system in order to bypass these insurmountable obstacles was not an option, as the eternal clause of article 182 of the Constitution safeguards the constitutionally-established system and excludes the amendment of provisions that preserve bi-communalism. Article 182(1) characterizes these provisions as 'basic articles' that 'cannot, in any way, be amended, whether by way of variation, addition or repeal'. The rest, non-basic, constitutional provisions may be amended by the House of Representatives, with enhanced and separate majorities (two-third majority votes of the Greek representatives and two-third majority votes of the Turkish representatives).[23] Consequently, in the absence of the required Turkish votes, constitutional amendments seemed legally impossible.

In the leading case of Cypriot constitutional law, *Attorney-General v. Mustafa Ibrahim*,[24] the Supreme Court enabled diversions from the constitutional provisions based on the justification of the doctrine of necessity that was defined as an implied intra-constitutional principle. As a result, laws that conflict with constitutional provisions are, exceptionally and subject to criteria establishing the application of the law of necessity, immunized from the invalidating effect of article 179 of the Constitution. Despite the initial refusal of the Supreme Court to uphold amendments of the Constitution on the procedural ground of the absence of the Turkish representatives and the permanent nature of a constitutional amendment that cannot be justified under the law of necessity and its criterion of temporariness,[25] the Supreme Court reversed its approach and accepted the possibility of constitutional amendments by circumventing the separate majorities requirement, without a clear or an express justification of the reversal of position.[26] Since 1989, the Constitution has been amended fifteen times.[27]

Two comments are warranted at this point. First, the Constitution does not expressly grant jurisdiction to the judiciary for reviewing the constitutionality of laws amending the Constitution. The Supreme Court assumed such implied competence following the first constitutional amendment and applied it.[28] Second, the Supreme Court limited its role of constitutional review of amendments on procedural grounds and did not enter in the examination of the substance of constitutional amendments. The Supreme Court's decision in *Electoral Petition 1/2019* is innovative in terms of expanding the scope of jurisdiction of the judiciary as regards constitutional amendments, with the introduction of the theoretical constructions of 'basic structure' and 'unconstitutional constitutional amendments' as justification.

2. ELECTORAL PETITION 1/2019: CONSTITUTIONAL REVIEW OF THE TWELFTH AMENDMENT FINAL RESOLUTION OF THE CONSTITUTIONAL SAGA ON NON-TAKEN SEATS

19 *Referral 4/2018*, *President v. House of Representatives*, 19 March 2019.
20 See Article 71 Constitution, as amended.
21 See Article 66 Constitution, as amended.
22 The Law on the Election of Members of the House of Representatives (Amending) of 2019 (Law 131(I)/2019).
23 Article 182(3).
24 *Attorney-General v. Mustafa Ibrahim et al.* (1964) 1 CLR 195.
25 See *President of the Republic v. House of Representatives* (1985) 3 CLR 2224; *President of the Republic v. House of Representatives* (1986) 3 CLR 1439.
26 See *Nicolaou v. Nicolaou* (1992) 1 CLR 1338.
27 See Constantinos Kombos, Athena Herodotou "(Un-)Constitutional Amendments: The Cypriot Paradigm" (2019) 25(3) European Public Law 305-324.
28 *Nicolaou v. Nicolaou* (1992) 1 CLR 1338.

In *Electoral Petition 1/2019*, the Supreme Court's approach focused on two elements: retroactivity and legislative reversal of judicial precedent as established in the previous decisions on the matter of popular sovereignty and electoral results. The Court began its analysis by making a general observation that the scope of application of the amendments must be compatible with the *ratio decidendi* of previous case law; and in the present case, the constitutional amendment and the amendment of the electoral law were aimed at achieving compliance with previous decisions. The Supreme Court then indicated that the matter of filling in non-taken seats by alternates of the same political party, rather than on the basis of a by-election, had already been decided and constituted judicial precedent, as per article 145 of the Constitution and the therein express provision that an electoral dispute is to be settled "definitively and irrevocably". The Court had already ruled in its previous case law that there was a breach of the principle of popular sovereignty in the sense that elections were decided based on the election results through general elections, thus by-elections should be held. Therefore, "the new provision that was inserted through the amendment of the Constitution cannot apply in relation to what has already been decided, otherwise there would be a conflict with another explicit provision of the Constitution, that is Article 145".[29]

The Court concluded that, similarly to its previous decisions on the matter, the principles of popular sovereignty and separation of powers are also violated in *Electoral Petition 1/2019*, since "with these amendments" the election of the runner-up "took place on the basis of specific legislation and not by free general election or a by-election by the people, that is the expression of popular sovereignty, which falls within those fundamental human rights which could not, *being regarded as covered by the basic structure of the Constitution*, be deprived of in a legislative manner. It is also clear that the separation of powers is being circumvented because the House of Representatives has, once again, impermissibly chosen to resolve the issue in this way despite the Supreme Court's final judgments to the contrary".[30] Therefore, the Court declared the election of the Solidarity's runner-up as null and void, being "the product of unconstitutional and unlawful procedure made under the provisions of the Twelfth Amendment of the Constitution Law of 2019 and the Election of Members of the House of Representatives (Amendment) Law 131(I)/2019".[31] But did the Court invalidate the twelfth constitutional amendment? Does its reasoning signify the endorsement by the Supreme Court of the basic structure doctrine, for the first time in the Cypriot constitutional context, and consequently the expansion of its jurisdiction to review of the substance of constitutional reforms? These are important constitutional questions that the Court failed to address adequately and clearly.

3. INTRODUCTION OF THE 'BASIC STRUCTURE' AND 'UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS' IN CYPRIOT CONSTITUTIONAL LAW

The Supreme Court undoubtedly endorsed the basic structure doctrine in its judgment in *Electoral Petition 1/2019*, at least in relation to the exercise of electoral rights and popular sovereignty. However, the Court's approach on the issue lacks depth, proper justification, and it is not clear if the reference to the basic structure was a mere obiter or if it was decisively applied in the decision. In particular, when examining the compliance of the legislature with its previous decisions, the Court observed that "the right of the constitutional drafter to amend a provision of the Constitution as an expression of the Parliament's representative capacity of the people, is limited by the fact that it cannot interfere with fundamental structures of the Constitution". The Court further explained that this theory of "basic structure doctrine" has been developed in other constitutional courts, primarily the Indian Supreme Court in *Kesavananda Bharati v. State of Kerala*.[32] The Court interpreted the doctrine as a limitation on the ability of the Parliament to adopt amendments to constitutional provisions that dissolve the basic structure of the Constitution or the principles upon which it rests. The Supreme Court of Cyprus then acknowledged the academic criticism of the basic structure doctrine for being a product of judicial activism,[33] and hastily dismissed the criticism on the basis that "judicial intervention is required and necessitated when amendments are used as a means for undermining from the inside the principle of democracy".

It is at this point that the Court seems to equate the doctrine of basic structure with unconstitutional constitutional amendments, without differentiation between the two theoretical constructions. Specifically, the Court continued to justify this judicial intervention on the theory of unconstitutional constitutional amendments, as developed and applied in States where an eternity clause is entrenched, with the view of protecting fundamental structures of democracy; in the absence of such clauses, the Supreme Court continued, the courts have recognized various indirect forms for limiting the power of constitutional amendments. It is interesting to note that while the Court identified such eternity clauses in the German, French and Italian constitutions, it failed to refer to the Cypriot eternity clause, as found in article 182 (and Annex III) of the Constitution. In any event, it is the Court's understanding that the basic structure of the Cypriot Constitution includes democracy, as well as the expression of the popular will which is equated by the Court with the electoral process and its result. The fact that the Court did not specify other aspects of the basic structure does not exclude the possibility of future addition of other aspects of the basic structure, including the independence of the judiciary, in view of the upcoming reform in the Cypriot administration of justice.

Consequently, the Supreme Court of Cyprus seems to have endorsed the notion of 'basic structure', or the notion of 'unconstitutional constitutional amendments', or both, in the Cypriot constitutional context by way of expanding judicial intervention as regards the substance of constitutional amendments. Nevertheless, the Court failed to clarify whether it applied these notions in *Electoral Petition 1/19* to invalidate the twelfth amendment, or whether it introduced the notion for future applications.

29 Translation by the author.
30 Translation by the author (emphasis added).
31 Translation by the author.
32 *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC1461. The Court further made selective references to the case law of the Czech Constitutional Court (2009/09/10 - Pl. ÚS 27/09: Constitutional Act on Shortening the Term of Office of the Chamber of Deputies), and of the Ukrainian Constitutional Court (Opinion of June 17, 2010, No. 2-v/2010).
33 The Court cited: Demetris Tsatsos, *Constitutional Law, Volume II* (4th ed, Sakkoulas, 1994) 44-47 (in Greek); Anna ÐledziÐska-Simon, "Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland" (2015) 13(1) International Journal of Constitutional Law 124–155; Michael Hein, "Do constitutional entrenchment clauses matter? Constitutional review of constitutional amendments in Europe" (2020) 18(1) International Journal of Constitutional Law 78–110.

4. SO, DID THE COURT INVALIDATE THE TWELFTH CONSTITUTIONAL AMENDMENT BY VIRTUE OF THE BASIC STRUCTURE DOCTRINE?

A closer examination of the Court's assessment of the amended article 66(2) of the Constitution, which created the context of *Electoral Petition 1/2019* in terms of retroactivity and judicial precedent, suggests that the Court did not invalidate the twelfth amendment. In particular, article 66(2) reads as follows:

> "(1) a renounced or non-taken or vacated parliamentary seat shall be filled in such manner as a Law may provide.
> (2) sub-paragraph (1) applies with respect to a renounced or non-taken or vacated parliamentary seat *on or after* the date of entry into force of the Twelfth Amendment of the Constitution Law of 2019".[34]

The Court focused on the second sub-paragraph of Article 66(2), as sub-paragraph 1 applies in future situations and was not affected by the decision and its findings on retroactivity and judicial precedent. On the contrary, the Supreme Court implicitly accepted the future application of article 66(2) for filling in non-taken parliamentary seats, as per sub-paragraph 1. It was sub-paragraph 2 and the retroactivity entrenched therein that was at odds with the Court's case law. However, the Court did not declare sub-paragraph 2 as invalid at any point of its decision and adopted a very peculiar approach for dealing with this matter. It exercised substantive review to the constitutional amendment but in a fragmented way; it only annulled the derivative act, viz. the CRO's declaration of Solidarity's runner-up as a representative. The absence of a formal declaration of invalidity of the constitutional amendment relating to retroactivity suggests that the Court did not annul the primary regulation of article 66(2)(2). Therefore, despite the innovative aspect of *Electoral Petition 1/2019* by introducing the basic structure doctrine in the Cypriot legal order (albeit in a way that could have been better articulated), the Court's 'half-way' application of the doctrine deprives Cypriot constitutional law the opportunity to appreciate its fundamental importance with regard to invalidating constitutional amendments.

IV. LOOKING AHEAD

The constitutional saga that arose in 2016 as a result of the constitutional gap for filling in non-taken parliamentary seats prevented the House of Representative from functioning with full composition for a whole term. The decisions of the Supreme Court were subject to criticism for several issues. For instance, the Supreme Court equated the will of the electoral body with the wider principle of popular sovereignty, something that is nowhere to be found in the constitutional text. Yet, article 182 is the preeminent expression of popular sovereignty in the Constitution that entrusts constituent powers to the House of Representatives. Moreover, the choice of an electoral system was not regulated by the Constitution, thus the choice rested on the House of Representatives. The House chose the proportional representation model, in accordance with articles 61 and 182 Constitution, and the Supreme Court confirmed such competence in its previous case law.[35] Additionally, it should be noted that the twelfth amendment was not the first amendment of article 66, as it was also amended in 1996 and upheld as constitutional by the Supreme Court.[36] However, the decisions of the Court relating to the non-taken 56th seat construe the attempts of the House of Representatives to regulate the procedure for filling in non-taken parliamentary seats as amounting to encroachment of the powers of the judiciary. Consequently, the Supreme Court's insistence on a by-election interferes with the distribution of seats following lawful elections, the third amendment of the Constitution and its own case law that recognized the authority of the House of Representatives to choose an electoral system and the procedure for filling in vacated seats. This contradicts the judicial precedent approach that the Court invoked in *Election Petition 1/2019*.

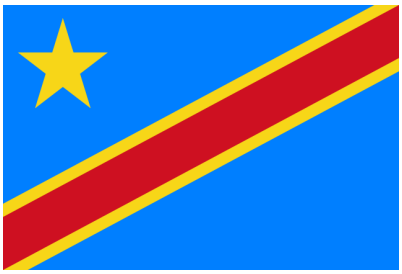
Moreover, and despite the Court's failure to provide a solid justification basis and sufficient consideration of the doctrine of basic structure, it is now an undeniable truth that the Supreme Court endorsed the said doctrine in the Cypriot constitutional context. Therefore, the Court expanded its implied jurisdiction and introduced a new tool for the review of the validity of constitutional amendments on the basis of this doctrine. The Court's brief reference to the basic structure doctrine was left open-ended, as additional aspects of the doctrine may be added in the future, beyond the principle of democracy, the exercise of electoral rights and popular sovereignty. Therefore, it will not come as a surprise if in the near future the Supreme Court uses this tool, by introducing the independence of the judicature as a fundamental component of the rule of law and thus as one of the aspects of the basic structure. That could be easily associated with the ongoing reform of the Cypriot system administration of justice, which will inevitably include constitutional amendments and will touch upon the hierarchy of courts as well as constitutional jurisdiction.

34 Emphasis added.

35 *Electoral Petition 5/1997, Yiannakis Koulounti v. House of Representatives* (1997) 1 CLR 1026; *Electoral Petition 1/1996, Mavrogenis v. House of Representatives* (1997) 1 CLR 43; *Electoral Petition 1/2009, Kyriacos Tyrimou v. House of Representatives* (2010) 1 CLR 1193.

36 See Law concerning the Third Amendment of the Constitution of Cyprus (Law 115(I)/1996); *Electoral Petition 5/1997, Yiannakis Koulounti v. House of Representatives* (1997) 1 CLR 1026; *Electoral Petition 1/1996, Mavrogenis v. House of Representatives* (1997) 1 CLR 43.

Democratic Republic of the Congo



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I. INTRODUCTION

The Constitution of the Democratic Republic of the Congo (DRC) of 18 February 2006 has been revised once, through the law of 20 January 2011. Even if no constitutional reform occurred in 2020, there were several proposals to amend again the Constitution. Proposals, such as those of Envol, an opposition political party,[1] were made in 2019 and debated throughout 2020. Their aims is apparently to consolidate local governance and above all democracy in preparation of the 2023 elections, which must be more credible than those of 2018-2019, 2011 and 2006-2007. President Antoine Felix Antoine Tshisekedi, who was in the first year of his term, appealed on the political class, in December 2019, to reflect on the possibility to amend the 2006 Constitution.[2] Because of his declaration, a Group of thirteen political actors (G13) started their consultation with state institutions, political parties and civil society organizations in 2020, after which they published a manifesto containing their proposals of electoral reforms, including several constitutional amendments.[3] The debate is likely to continue in 2021, which marks the 15th anniversary of the 2006 Constitution and offers an opportunity to take stock of its application.

This report identifies the proposed constitutional amendments and assesses their chance to be adopted or successful. It also examines their scope by taking into account the legal context in which they are suggested as well as the role that the Constitutional Court may play to review their constitutionality. Finally, this report highlights different aspects of the proposed constitutional reforms which could raise controversies before recommending some publications for further readings.

II. PROPOSED CONSTITUTIONAL REFORMS

Overall there are three political actors who submitted their proposals of constitutional reforms to the public opinion and the political class of the DRC between 2019 and 2020: President Félix Antoine Tshisekedi, G13 and Envol. It is remarkable that they all base their proposals on past electoral mistakes and irregularities that they seek to correct, to have more future credible elections. The nature of their proposals are identical to some extent. Envol published an extensive list of proposals, but apparently relinquished many of them, as the party's leader became a prominent member of G13, which suggested a minimal revision of the 2006 Constitution due to the political sensibility of the matter.[4] In combining the proposals made by the three actors, on the basis of the convergence of their views, a list of four proposals of constitutional reforms can be retained.

First, the proposal to re-establish the election of the Head of State by direct two-round ballot. This voting system was abolished by the constitutional amendment of January 2011. Two reasons advanced at that time to justify its adoption.[5] On the one hand, the financial burden to organize direct vote whereas the DRC is a poor country with little budgetary resources to finance its development policies. On the other hand, the bipolarization of the political situation which created the West (dominated by Congolese who speak Lingala) –East (dominated by Congolese who speak Kiswahili) division at the expense of national unity. But these reasons were perceived as a series of alibi because abolishing the direct two-round ballot appeared as a strategy for the then outgoing president, Joseph Kabila, to win easily his second term over the opposition. The current proposal of constitutional reform aims to correct the adverse effect of the majority one round ballot, provided for in article 71 of the Constitution, which, in fact, reduces the legitimacy of President-elected. Past experience shows that the latter received less than 50 per cent of votes in the 2011 and 2018 presidential elections.

Second, both President Félix Antoine Tshisekedi and Envol propose the election of governors of provinces by direct vote. They have been so far indirectly elected by members of provincial assemblies pursuant to article 198(2) of the Constitution. However, the regime of indirect elections has caused many cases of grand corruption of parliamentarians who sell their votes.[6] The situation reached worrying proportions during the 2019 senatorial and governors' elections. Many declarations by political actors and civil society organizations were issued to

1 **Simon Mulamba Mputu,** *Révision constitutionnelle RDC: voici les12 innovations de l'Envol* **(2019), Available at <https://www.laprosperite.online/index.php/nation/2891-revision-constitutionnelle-rdc-voici-les-12-innovations-de-l-envol>, Accessed on January 31, 2021.**

2 Félix-Antoine Tshisekedi Tshilombo, *State of Nation Address to Congress* (2019), Available at <https://www.presidence.cd/uploads/files/Discours%20sur%20l%E2%80%99e%CC%81tat%20de%20la%20Nation,%20devant%20le%20Parlement%20re%CC%81uni%20en%20congre%CC%80s.pdf >, Accessed on January 31, 2021.

3 DRC, *Consensus sur les réformes électorales : rapport final du Groupe de 13 personnalités –G13*, Kinshasa (2020).

4 Ibid 23.

5 Balingene Kahombo, 'Les fondements de la révision de la Constitution congolaise du 18 février 2006'(2014) 1 *KAS African Law Study Library* 428, 440-442.

6 Roger Thamba, *La corruption électorale en République Démocratique du Congo : une ébauche de solutions juridiques de prévention et de repression*, KAS African Law Study Library (2015), 155, 162-168 ; Balingene Kahombo, *Corruption and its Impact on Constitutionalism and Respect for the Rule of Law in the Democratic Republic of the Congo*, (Oxford University Press 2020), 287, 287-315.

condemn such corrupt practices which obviously undermine democracy and moral values in the DRC.[7] It is belied that electing governors of provinces directly by the people will reduce political corruption and increase their legitimacy.

Third, G13 propose to amend article 3 (2) of the Constitution by removing local entities, namely chiefdoms and sectors, from the list of decentralized territorial entities. The Group suggests to limit the list to cities and municipalities and to extend it to rural territories. The proposed constitutional reform aims to reduce the number of potential elected local officials and the financial costs so as to easy local elections, which have not been organized since 2006.

Fourth, both President Félix Antoine Tshisekedi and Envol propose to abolish the exclusive character of the Congolese nationality provided in article 10 of the Constitution and to establish a regime of doubly nationality, but only in favor of Congolese at birth. The latter would also have the right to recover the Congolese nationality at any time of their convenience upon an individual declaration. This is likely to solve the issue of reintegrating former Congolese in their nation of origin and allow for their participation in the DRC political affairs.

All these proposals have not yet been discussed by Parliament. They are just suggestions submitted to the political class and public opinion to provoke an extensive democratic debate. If they fail, that would not be a first in the political history of the DRC because other proposals to amend the Constitution made in 2007, 2013 and 2014 were rejected.[8] There are several procedural requirements which still need to be met. Above all, the proposals must be formalized in terms of initiatives for constitutional reforms. Pursuant to article 218 (1) of the DRC Constitution, such initiatives can be taken only by the President of the Republic; the Government, after deliberations within the Council of ministers; half of senators or members of the National Assembly; or a group of one hundred thousand Congolese. Any constitutional initiative must be submitted to the Senate or the National Assembly. This will enable the latter to decide separately on their admissibility by an absolute majority vote of each chamber. Finally, it will belong to the Congress (National Assembly and Senate meeting together) to adopt the proposal of constitutional reform by a two-fifth majority vote. Otherwise, the President of the Republic may convene the people to a constitutional referendum.

Given these legal requirements, it appears that the said proposals for constitutional reforms are still in their primary infancy. They may not be even discussed and adopted in 2021. Other political actors have called for more cautiousness and scrutiny before amending again the Constitution. Deputy Christophe Lutundula has suggested the creation of a scientific committee to evaluate the implementation of the Constitution before adopting any constitutional amendment.[9] Everything is likely going to depend on the approach chosen to foster the proposed reforms and the chance to find a political consensus.

III. SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

When he proposed to the political class to reflect on the possibility to amend the Constitution, the Congolese President recommended that all stakeholders should avoid to modify its unamendable provisions. These are provided for in article 2020 as follows:

> The republican form of the State, the principle of universal suffrage, the representative form of the Government, the number and duration of the terms of office of the President of the Republic, the independence of the judiciary, political and trade union pluralism, shall not be subject to any constitutional revision.
>
> Any constitutional revision that has as its object or effect the reduction of human rights and freedoms, or the reduction of the prerogatives of provinces and decentralized territorial entities, is strictly prohibited.

The first paragraph of article 220 of the Constitution lays down the principle of the immutability of certain constitutional provisions. This principle is very different from that, which is enshrined in paragraph 2, that is to say, the principle of non-reduction of the minimum of legal standards imposed by the Constitution. These principles protect the identity of the DRC constitutional order in a way that violating them through constitutional reforms would amount to destroying the foundations of the 2006 Constitution or adopting a different constitution.

Obviously, two of the proposed constitutional amendments do not create conflict or tension with article 220 of the Constitution. Rather, re-establishing the election of the President of the Republic by direct two-round ballot and prescribing double nationality for Congolese at birth will increase the scope of human rights and freedoms acknowledged to citizens. In particular, to revise again, article 71 of the Constitution will be a return to the constitutional order, which was disrupted by the establishment of one round-ballot through the 2011 constitutional amendment. This 2011 constitutional reform is believed to have violated article 220 of the Constitution, because it arguably removed the possibility given to citizens to express twice their choice in favor of the candidate they would like to see become President of the Republic, thus necessarily, reducing the rights and freedoms of the person.[10] One may then conclude that such a modification and re-modification of the very same article of the Constitution eventually tend to subject the constitutional order to the vagaries and moods of political actors.

7 Didier Kebongo, *Affaire de corruption autour de l'élection des sénateurs : les auditions ont débuté*, (2019) Available at <https://www.digitalcongo.net/article/5c935c69339b620004d93b58/> Accessed on February 20, 2021 ; Le Soir, *Corruption électorale en RDC : l'élection des gouverneurs reportée au 10 avril 2019*, (2019) Available at <https://www.lesoir.be/214005/article/2019-03-22/corruption-electorale-en-rdc-lelection-des-gouverneurs-reportee-au-10-avril> Accessed on February 20, 2021 ; Radio Okapi, *Election des gouverneurs et sénateurs : requête d'une information judiciaire sur les allégations de corruption*, (2019) Available at <https://www.radiookapi.net/2019/02/26/actualite/justice/election-des-gouverneurs-et-senateurs-requete-dune-information> Accessed on February 20, 2021 ; Radio Okapi, *RDC : l'ECC dénonce "la corruption à grande échelle des députés provinciaux par des candidats gouverneurs et sénateurs"*, (2019), Available at <https://www.radiookapi.net/2019/02/19/actualite/politique/rdc-lecc-denonce-la-corruption-grande-echelle-des-deputes-provinciaux> Accessed on February 20, 2021.

8 Joseph Cihunda Hengelela, *Les garanties juridiques de l'alternance politiques en République Démocratique du Congo*, KAS African Law Study Library (2015), 42, 63-64.

9 Radio Okapi, *RDC : Christophe Lutundula appelle à la révision de la constitution*, (2019), Available at <https://www.radiookapi.net/2019/06/22/actualite/politique/rdc-christophe-lutundula-appelle-la-revision-de-la-constitution> Accessed on February 20, 2021.

10 Pierre Akele Adau, *Réponses pénales au discours du désordre ou au désordre du discours constitutionnel en République Démocratique du Congo : la Cour constitutionnelle à l'épreuve*, African Journal of Democracy and Governance (2014), 43, 51.

However, the other two proposals of constitutional reforms are legally challenging. In fact, the modification of article 198(2) of the Constitution, in order to elect governors of provinces directly by the people, cannot be achieved without changing the previously established constitutional order relating to the form of the state and the prerogatives of the provinces locked by article 220 of the Constitution. The election of governors by the provincial assemblies form one aspect of the philosophy of the territorial organization of the state under constitutional regionalism.[11] Constitutional regionalism has to be understood as a political compromise according to which provinces are no longer just administrative entities but politically organized, possessing their own legislative and executive bodies in a united, indivisible, and non-federal state. Their organization and competences are guaranteed by the Constitution, and the central government does not in principle exercise control over their organs, officials, initiatives, and legal acts'.[12] Conflicts between the two levels of government are to be referred to the Constitutional Court for judicial determination. Changing the voting system of governors from indirect to direct election would amount to changing the entire architecture and constitutional design, so far as it would result in the abolition of a prerogative of provinces which is already acknowledged to members of provincial assemblies, their legislative bodies. In this regard, even the regime of governors' political responsibility could be affected. Elected directly by the people, governors may no longer be politically responsible before their provincial assemblies. The nature of constitutional regionalism and provincial parliamentarism established by the original Constitution have been changed.

It can be objected that this proposal of constitutional reform is not problematic as it also increases the rights of citizens who will now vote their governors, in line with the same article 220 of the Constitution. This argument is not convincing simply because the prerogatives of provinces are equally protected by the Constitution. The former (rights and freedoms of citizens) cannot be served at the expenses of the latter (prerogatives of provinces) without affecting negatively the constitutional order which is unamendable.

In the same vein, removing chiefdoms and sectors from the list of territorial decentralized entities may be understood as a reduction of their autonomy which is one of the rights conferred on them by the Constitution. The two entities will become mere administrative constituencies that do not have legal status protecting their autonomy and other prerogatives from the total control of the central government. This is precisely the kind of constitutional amendment which is prohibited because it tends to reverse the constitutional order regarding the presumption of state governance from local governments which are proximate to people rather than from Kinshasa, the very remote capital city.

Overall, two of the current proposals to revise the Constitution can be described as dismemberments inasmuch as they do repudiate or intend to destroy the basic foundations of the 2006 Constitution. Even if authors' declared, their will is to improve the quality of the Congolese democracy and local governance; constitutional issues could be submitted to the Constitutional Court. This jurisdiction may be seized by parliamentarians who could vote against the proposals. The constitutional control can be based on article 160 of the Constitution which confers on the Court the competence to review "laws" without any specification of their categories. Constitutional laws can be added to the list. As a reminder, several petitions against the 2011 constitutional amendments were submitted to the former Supreme Court of Justice, which transitionally exercised the competence of the Constitutional Court until April 2015.[13] Even if the Supreme Court of Justice did not rule on them, nothing prevents new petitioners from activating the same mechanism before the current Constitutional Court. It would be interesting for judges to affirm the Court's competence to review constitutional amendments.

IV. LOOKING AHEAD

The proposed constitutional reforms in the DRC can raise controversies, not about their constitutionality in the first place, but on their practical suitability. Several proposals seem to bear an internal contradiction in their motivation. On the one hand, the reform of local governance is predicated on the will to reduce financial costs to facilitate the organization of local elections. Yet, the same reason was the justification for the establishment in 2011 of the election the President of the Republic by majority in one round, the modification of which is now suggested in favor of a costly two-round ballot. On the other hand, the financial burden may even increase because the authors also propose the election of governors of provinces directly by the people.

One thing more is the proposed amendment of the list of territorial decentralized entities whilst since the adoption of the 2006 Constitution, Congolese have not had the chance to experience local elections and see if these entities could improve the style and quality of state governance which must be proximate to the people. In addition, electing governors of provinces directly by the people on the ground that this voting system will reduce political corruption or improve moral values in political affairs is not persuasive. What is forgotten is that any kind of election in the DRC has been characterized by corruption and vote-buying. If grand corruption of members of the provincial assemblies is more chocking because it concerns the ruling elites, past experience during the 2006, 2011 and 2018 direct elections show that corrupt practices were massively used and equally remain of great concern. It looks as if the main issue is not changing the voting system but the impunity of offenders due the general disregard of electoral and penal laws.

All these issues may lead to a lack of political consensus on the proposed constitutional reforms. But they are not among the questions on which the Constitutional Court is competent to rule because they are purely political and do not imply any conflict with the Constitution. The Court can rather review not only legal substantive issues related to article 220 of the Constitution, but also procedural matters relating to how the amendments are adopted in Parliament or by referendum.

The Court's constitutional review is not, in the current state of the Congolese positive law, mandatory, but optional. This is less protective of the constitutional order compared with organic laws whose promulgation is subjected to a prior review by the Constitutional Court. In order to solve this problem, article 160 (1) of the Constitution should be

11 Jacques Djoli Eseng'Ekeli, *Droit constitutionnel, l'expérience congolaise (RDC)*, L'Harmattan (2013), 191-194.

12 Balingene Kahombo, *Regionalism under the Congolese Constitution of 18 February 2006: Progress and Challenges*, (Oxford University Press 2019), 183, 184.

13 Radio Okapi, *Révision de la constitution: Lisanga Bonganga saisit la Cour suprême*, (2011), Available at <https://www.radiookapi.net/emissions-2/linvite-du-jour/2011/03/18/revision-de-la-constitution-lisanga-bonganga-saisit-la-cour-supreme> Accessed on February 20, 2021.

revised to make the Court's review mandatory given the higher importance of constitutional laws. In the same vein, a constitution is made to be observed and applied. The unflinching trend of the political class to amend the Constitution to serve their partisan interests, including provisions which they have never attempted to carry out, must be stopped so as to protect the will of the people who voted for it by referendum and therefore the sustainability of the constitutional order. It can be suggested to include a clause of stability in the Constitution, prescribing that the latter could be revised only after a fixed period of time of application, such as fifteen or twenty years.

V. FURTHER READING

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Ecuador

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I. INTRODUCTION

In 2020, the Ecuadorian citizenry enjoyed relative constitutional stability compared to previous years. Only one constitutional amendment that altered the way in which public budget is allocated among local governments was approved by the legislature.

The Constitutional Court (hereafter the Court or CC) issued five decisions on constitutional change matters. Three amendment proposals seeking to limit presidential veto and budget setting powers, and also modifying how local authorities of the Galapagos Islands are elected received a *dictamen de procedibilidad*,—i.e., a favorable decision from the Court that enables the National Assembly to discuss these proposals. The remaining two cases—a partial reform aiming at reducing the number of legislators and a proposal to call a constituent assembly– were deemed unconstitutional by the CC.

Meanwhile, the National Assembly has rejected several constitutional amendment projects that sought to limit the Council for Citizen Participation and Social Control's (CPCCS by its Spanish acronym) appointment powers, separate the Attorney General's Office (*Fiscalía General del Estado*) from the Judicial Branch, and redesign the unicameral legislature turning it into a bicameral one. A third partial reform project that obtained a favorable decision by the CC in 2019 is now being debated by the legislature. This partial reform project aims at eliminating the CPCCS. Amendment and partial reform attempts during the last year have thus been centered on organic constitutional issues.

This report first provides an introductory note on how constitutional modification procedures work in Ecuador. Part II addresses all constitutional change proposals submitted before the CC and discussed by the National Assembly in 2020. Part III discusses the elimination of the CPCCS through partial reform, modifications on legislative-executive relations and the inclusion of executive high-rank officials as persons subject to impeachment. We conclude the report in Part IV with some upcoming events.

1. THE ECUADORIAN CONSTITUTIONAL AMENDMENT SYSTEM

The Ecuadorian Constitution includes a three-track system of constitutional change which distinguishes constitutional amendment (*enmienda*), partial reform (*reforma parcial*) and constitutional replacement (*asamblea constituyente*). These three procedures can be initiated by citizens, gaining a number of signatures in support of their proposal, a group of legislators, or the President.

Amendment is the less demanding procedure. It can be approved either by simple majority in a referendum or via two-thirds supermajority of the National Assembly, without resorting to a referendum. When amendment is initiated by legislators, this procedure will include two debates in the plenary session of the legislature. Amendment proposals cannot alter the fundamental structure of the Constitution, cannot change the state's constitutive elements, cannot set restrictions on constitutional rights and their guarantees, or cannot modify any of the procedures for reforming the Constitution.[1]

Unlike amendment, partial reform can only be approved by referendum, after being passed by at least two-thirds of the National Assembly members in two plenary session debates. Partial reform proposals have fewer limitations than amendment ones. They cannot set restrictions on constitutional rights and guarantees, neither can modify the procedure for reforming the Constitution.[2] Constitutional replacement, on the other hand, is the more demanding procedure as it can only be carried out by a constituent assembly.[3]

Article 443 of the Constitution explicitly grants the CC the power to decide which of the three constitutional change mechanisms is appropriate to each case. In its decision 4-18-RC/19, the CC clarified that there are three stages in which judicial review of constitutional change procedures can be exerted. In the first stage, the Court determines which procedure –amendment, partial reform, or replacement– a given constitutional change proposal must follow. In all cases, constitutional change proponents shall recommend one of the three procedures and the Court will rule whether the proposal can or cannot be carried by the recommended path.

The second stage relates to those amendment and partial reform proposals that ought to be approved via referendum. In this case, proponents submit to the Court a petition that must include the recitals, questionnaire, and text of the constitutional change. The Court is then required to issue an opinion on the constitutionality of the proposal, which in turn depends on how the questionnaire complies with electoral principles such as fidelity and clarity to the electors. The Court also verifies if the content of the proposal is constitutionally valid.

The third stage consists of ex-post judicial review of constitutional amendments and reforms. Any individual is entitled to file an *acción*

1 Constitution of the Republic of Ecuador 2008, Article 441.
2 Ibid, Article 442.
3 Ibid, Article 444.

pública de inconstitucionalidad (writ for constitutional abstract review) within 30 days after the amendment or partial reform came into force. In this stage, the Court is only allowed to assess if the amendment or reform was approved following procedural grounds established by the Constitution and the law.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2020 several actors filed constitutional change proposals before the Court, whereas other previously adjudicated proposals were discussed by the National Assembly. Although some of these modifications are still being debated by the legislature, the cases that received a favorable opinion from the Court follow either the amendment or partial reform procedure. This section reports all cases ruled by the Court and discussed by the National Assembly in 2020.

1. ELIMINATING THE CPCCS OR LIMITING ITS POWERS?

Following the 1999 Venezuelan Constitution, the 2008 Ecuadorian Constitution established two new branches of government. In addition to the legislative, executive, and judiciary branches, the Constitution created the electoral branch and the transparency and social control branch. The latter is composed by the CPCCS, the Superintendencies, the Ombudsman, and the General State Comptroller.

The CPCCS is entrusted with the duty to foster civil society participation, as well as overseeing public bodies. Nonetheless, its most important power is the appointment of high-ranking public authorities such as the National Prosecutor, Superintendencies, Ombudsman, Public Defender, Attorney General, Comptroller General, National Electoral Council, Electoral Court justices, Judicial Council members, and the Constitutional Court justices. Although the current constitutional design provides filters for these designations such as citizen oversight or triads sent from other branches of government, the powers of this body have not been exempt from controversy. Critics have cautioned against the lack of legislative participation in the appointment of public authorities. Other voices maintain that the CPCCS has only reinforced the dominance of the President since there was no real participation of opposition parties or civil society within the appointment processes.

As of 2017, the year in which the consecutive governments of Rafael Correa -the former president of Ecuador- came to an end, criticism of this body materialized into a myriad of demands for constitutional reform focused on two fronts: eliminating the CPCCS or limiting its appointment powers. During 2019, three constitutional change proposals were subject to constitutional review. In cases 4-19-RC/19, 5-19-RC/19, and 7-19-RC/19, the CC ruled that the appropriate procedure for eliminating the CPCCS was a partial reform, as provided by Article 442 of the Constitution.

Although receiving a favorable decision from the CC, the National Assembly did not pass the elimination of the CPCCS. During the second debate scheduled on March 16th, the Assembly failed to reach the required majority (91 votes). Despite this, the current President—Guillermo Lasso—has announced that he will call a National Referendum to eliminate the CPCCS.

Another constitutional change related to the CPCCS aimed at transferring its appointment powers back to the National Assembly. This constitutional amendment proposal was initiated by fifty legislators. In case 8-19-RC/19, the CC ruled that the appropriate path for limiting the CPCCS´s powers was amendment, as defined by Article 441.2 of the Constitution. On January 14th, 2021, the amendment proposal was rejected by the legislature, since it did not reach the required two-thirds majority (91 votes).

In short, the existence of the CPCCS is currently an issue that generates a heated debate in Ecuador. The future of this institution is uncertain, but all signals point to its elimination through partial reform via referendum.

2. EXECUTIVE-LEGISLATIVE RELATIONS

In 2020, the Court also ruled on the adequate path to modify constitutional institutions that take part within the executive-legislative relations. These modifications include presidential veto override, impeachment, national budget management, and the number of members within the National Assembly. In addition, there was an initiative to change the Galapagos Islands local government`s composition. Overall, these initiatives have been filed by either a group of legislators or citizens.

3. VETO OVERRIDE

The President is a powerful actor in the Ecuadorian institutional setting, as she enjoys a great deal of formal and informal powers. The 2008 Constitution envisions a President able to tightly control the legislative agenda through total and partial veto power. Article 138 of the Constitution imposes a two-thirds majority vote for the National Assembly to override a partial veto.

In an attempt to balance the legislative agenda-setting power, a group of legislators proposed an amendment initiative aimed at establishing an absolute majority vote –i.e., more than a half of the National Assembly´s membership-, instead of the two-thirds members majority vote, to override the partial presidential veto. In a majority opinion, the CC ruled that the adequate procedure to undertake such a modification was the less restrictive amendment procedure.[4] The National Assembly´s discussion on this amendment proposal is still pending.

4. BUDGET MANAGEMENT

Consistent with the powerful executive tradition, the Constitution grants the president the attribution to formulate and control the national budget as well as public debt.[5] Whereas the Assembly is barely entitled to approve or observe –with a two-thirds majority- such a budget as well as oversee its execution.[6] Although the observations of the National Assembly are limited to income or expenditure issues, the president might ratify the original budget despite these observations.

A group of legislators proposed a constitutional amendment to balance power over the budget. The proposal seeks to expand National Assembly's attributions such as to (i) be informed about public companies´ budget, (ii) approve the executive´s expenditure when surpassing

4 Case No. *4-20-RC/20* [2020] CCE.
5 Constitution of the Republic of Ecuador 2008, Article 147.8.
6 Ibid, Article 295.

the legal maximum, and (iii) reform annual and quadrennial budgets. The latter point entails that the National Assembly might surpass the executive´s exclusive prerogative as the main budget setter, thereby becoming co-responsible for budget administration even when it does not obtain the required two-thirds vote to observe. Furthermore, since the legislature is exclusively in charge of processing the amendment, they will be biased when voting on this matter not to mention the lack of people's participation through a referendum.

In case 2-20-RC/20, the CC ruled that the adequate modification mechanism was the less restrictive amendment procedure except for the third point. Regarding the attribution to reform public budget, although the Court ruled an amendment was not an adequate mechanism, during the analysis it explained that the appropriate path was a partial reform since such attribution altered power balance.

5. NATIONAL ASSEMBLY MEMBERSHIP

Another constitutional modification submitted to the CC by a citizen initiative was aimed at –among other things- reducing the number of members of the National Assembly through a national referendum. This initiative lies in the steady decay of the legislative´s popular approval which in turn is fueled by a myriad of corruption scandals and a poor legislative performance over the last four-year period (2017-2020). The modification proposal sought to reduce the number of congress members from 137 to roughly 108.

In its decision 9-20-RC/20, the CC ruled that since the proposal did not alter the fundamental structure of the Constitution, nor the constitutive elements of the state, the suitable procedure was an amendment. Furthermore, the case advanced to the next stage of the constitutional review where the Court was entitled to control the questions to be asked during a potential national referendum. In this second stage, the Court established that the questionnaire did not meet the requirements to guarantee a neutral choice of the elector. For instance, the proposal stated that this modification would "alleviate the state´s financial situation and overcome the ineffectiveness of the National Assembly". Therefore the CC deemed this section as tendentious since it induced the voter to cast a favorable ballot.[7]

6. THE GALAPAGOS ISLANDS LOCAL GOVERNMENT

The Galapagos Islands have an outstanding universal value due to the immense diversity of flora and fauna. The Galapagos province has a special regime regarding its administration. Unlike the other provinces which are governed by a *Consejo Provincial* headed by a *Prefecto* as its chief of government, Galapagos has a Governing Council chaired by the representative of the President and composed by the mayors, representatives of local governments, and ministers of the president's Cabinet.[8]

A group of legislators proposed a set of amendments seeking to shift decision-making power from the central government to the locals. The reforms enclosed (i) the determination that the Province of Galapagos is an autonomous region and (ii) the reorganization of the special government system so that the president of the Governing Council is elected by popular vote.

In addition, the Constitution established limitations on migration, work, or any other public or private activity carried out in the archipelago.[9] Aiming for a restrictive regime for residence rights the National Assembly also proposed reforms concerning (iii) the change of terminology from "limitations" to "regulations" used in Article 258 when it explains that there will be *limitations* on certain rights and activities seeking the protection of the Galapagos' heritage and (iv) exclusive access to permanent residents of the Province to natural resources, investments, and sustainable environmental activities.

The CC ruled that amendment was the adequate procedural track for proposals (ii) and (iii). In contrast, proposals (i) and (iv) were declared unconstitutional by the CC because they altered the state´s territory and set restrictions on equal treatment and economic freedoms.[10] In January 2021, the proposal was archived by the National Assembly after it failed to achieve the necessary majority support -two-thirds- in the first debate.

7. THE FAILED CALL FOR A CONSTITUENT ASSEMBLY

In 2020, a constitutional replacement proposal was rejected by the CC during the second stage of review. In its decision 3-20-RC/20, the Court ruled that the proposal for convening a constituent assembly to draw up a new constitution was not neutrally presented to the electors, but rather manifested a suggestive tone. The proposal in fact included phrases such as, "*the constitution has created autocratic institutions* [...] *has caused a permanent moral, economic, political and social crisis* [...] *has only fostered corruption and impunity*".

8. PUBLIC BUDGET ALLOCATION AMONG LOCAL GOVERNMENTS

In late 2020, the National Assembly approved an amendment that sought to consider the number of kilometers of rural roads as an additional criterion to distribute the state budget among local governments. Before this amendment, the criteria contained in the Constitution were: (i) size and density of the population, (ii) unmet basic needs, prioritized and depending on the populations living in the territory of each local government, and (iii) achievements in the improvement of living standards, fiscal and administrative effort, and meeting of the targets of both the National Development Plan and the development plan of local governments. With the approval of the National Assembly, this amendment is currently part of the Constitution´s text.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Following Albert´s theory on constitutional amendment and dismemberment, in this section we briefly discuss whether some of the most important reported modifications - namely, (i) the elimination of the CPCCS and (ii) those changes that take part within the executive-legislative relations - might be classified under these categories. Regarding the elimination of the CPCCS, we argue that it can be classified either

7 *10-19-RC/20A* [2019] CCE.
8 Organic Law of Special Regime of Galapagos 2015, Articles 9 and 10.
9 Constitution of the Republic of Ecuador 2008, Article 258.
10 *1-20-RC/20* [2020] CCE.

as an amendment or a dismemberment, depending on how we interpret this constitutional change. The modification of executive-legislative relations falls more clearly within the amendment category. Then we underscore the role that the CC has played when reviewing constitutional change proposals and interpreting the Constitution. We argue that the Court has portrayed an active role when controlling constitutional change proposals and describe an example of such behavior.

1. AMENDMENT OR DISMEMBERMENT?

The main difference between amendment and dismemberment is that the former "keeps the constitution coherent with itself", whereas the latter "marks a fundamental break with the core commitments or presuppositions of the constitution."[11] Amendment expresses constitutional continuity. Dismemberment alters the constitution´s essential features, such as its institutional structure or its identity.

2. THE ELIMINATION OF THE CPCCS

The CPCCS was originally intended to empower and engage citizens in public decision-making. Instead, it has been an instrumental actor in consolidating presidential control over regulatory agencies and the judiciary. Under the administration of President Lenin Moreno, a transitional CPCCS overturned all appointments made by former President Rafael Correa´s government. In March 2019, elections were held to name new CPCCS´s members. Only six months after its election, the elected President and other three aligned members of the CPCCS were impeached, installing a new majority.

Despite the new CPCCS political alignment, pressure to eliminate this body still continues. Current partial reform proposals aim at eliminating an organism that has barely fulfilled its constitutional objectives. In this context, it is unclear whether this modification can be labelled as either constitutional amendment or dismemberment. If we conceive the elimination of the CPCCS as a change that will preserve and further separation of powers, judicial independence, accountability and transparency, it could be understood as an amendment, as long as it continues with the constitution-making project initiated in 2008. Yet, we can also think of the CPCCS´s suppression as a dismemberment, if we think it might curtail a radical impulse that inspired the Ecuadorian 2008 Constitution, namely, the involvement of citizens´ voices in public decision making.

What is clear is that it is hard to envisage how the elimination of the CPCCS may contribute to overcome structural constitutional issues such as political interference in the judiciary or hyper presidentialism, as high court judges and other public officials will surely be appointed by the long discredited legislature and the President.

3. EXECUTIVE-LEGISLATIVE RELATIONS

Modifications aimed at altering executive-legislative relations might be considered as amendments—i.e., they cohere with the existing Constitution and are processed following the management or partial reform mechanisms. All of these amendments share features such as (i) encompass actual changes to a higher law (subject), (ii) will entail compliance from political and legal actors (authority) (iii) continue with the constitution-making project (scope), and (iv) in this case pursue a reformative purpose. Particularly, proposed modifications such as changing the required vote to override a presidential veto, reducing the number of members of Congress or expand legislative´s attributions on the budget setting, and changing the Galapagos Islands government share all the aforementioned features—i.e., they are proper amendments that keep the constitution consistent with its pre-change general form. Moreover in terms of the purposes they might be deemed as reformative since they alter existing rules but without undermining the Constitution's core principles.

4. THE ROLE OF THE COURT AND THE INCLUSION OF PUBLIC AUTHORITIES AS PERSONS SUBJECT TO IMPEACHMENT THROUGH JUDICIAL INTERPRETATION

Although the Constitution expressly vests the CC with the power to enforce limitations on constitutional changes, it does not prohibit modifications on specific provisions. Instead, it refers to more general standards, such as the prohibition to modify "the fundamental structure of the Constitution" or "the constituent elements of the State." These broad categories require a more active interpretation by the Court, which given its powers, risks being discretionary. As stated above, the CC has maintained a relatively consistent jurisprudence on constitutional changes.

In 2020, the CC has actively exercised its constitutionally conferred powers. The Court resolved 5 cases concerning judicial review of constitutional amendments, which is the same amount of cases decided by the previous CC between 2008 and 2018.[12]

It should be noted that Article 436 of the Constitution provides for a broad catalog of powers of constitutional review. Thus, in addition to controlling constitutional change proposals, the Court has the power to modify the scope of constitutional provisions through judicial interpretation. Although this does not count as a formal amendment mechanism, the CC is empowered by the Constitution to define how organic constitutional provisions must be interpreted.

For example, in its decision 1-11-IC/20, the Court ruled that National Secretaries, Coordinating Ministers, Sectoral Ministers, and other Executive authorities, can be subject to legislative impeachment. The Court held that these officials exercise executive responsibilities for public policy. This ruling was issued in a context in which Ecuador ranked a poor 93rd out of 180 countries in the Corruption Perceptions Index. This interpretation opened the door to legislative control of the highest state authorities. The extension of impeachment can be seen as a constitutional change of an elaborative nature, as it advances the sense of the Constitution in line with its current values, such as transparency and accountability.

IV. LOOKING AHEAD

As discussed in this report, all constitutional reform proposals and amendments obtained a ruling from the CC. Thus, considering that on

11 Richard Albert, *Constitutional Amendments. Making, Breaking and Changing Constitutions* (OUP 2019).

12 It is worth noting that in 2018 all former CC´s justices were removed by a transitory CPCCS. In 2019, new justices were elected after a rigorous selection process.

7 February 2021, the representatives who will make up the legislature from May onwards were elected, the future of the pending constitutional reforms depends on the next legislature´s measures.

The great controversy that still survives and will have to be resolved within the legislature is whether or not to eliminate the CPCCS, since lessening its power to designate control authorities was definitively discarded by the National Assembly. Although the Constitutional Court has already ruled on the appropriate course of action, the path towards an eventual partial reform is still uncertain. It is important to consider that this organism positioned itself, during the years of Rafael Correa's governments, as the platform where citizens could be part of political decision-making. Thus, its elimination could mean, at least nominally, a structural change in the current configuration of powers.

In short, the proposed constitutional amendment that largely occupied the constitutional debate in 2020, will not materialize since it was rejected by the National Assembly. In this sense, 2021 will witness the debate on the partial reform to the Constitution that seeks to (i) definitively eliminate the CPCCS, (ii) the reduction of the Assembly membership, (iii) modify veto override majority, and (iv) separate the Attorney General's Office from the Judiciary. If these proposals gather support, a referendum could be held in the upcoming year.

Considering that the current justices of the CC have been in office for two years it seems to be too premature to assess its direction towards democracy underpinning. Thereby, there is not enough evidence to determine whether it plays a counter-majoritarian, a representative, or an enlightened role.

Finally, it is central to consider that 2021 is an electoral year in Ecuador. Citizens will elect new representatives for the executive and the legislature branches. From the legislative point of view, this will result in a heavily fractioned Assembly that will face difficulties in achieving the supermajority required to issue such reforms. Whereas from the executive side, some candidates have promised to undertake constitutional reforms chiefly aimed at reshuffling powers from the main political actors. More ambitious positions point to convening a Constituent Assembly to draft a new constitution.

V. FURTHER READING

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Egypt

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I. INTRODUCTION

Since 2013, there has been a progressive, unembellished decline in the rule of law and respect for human rights in Egypt. Governmental (public) authorities are using the law to consolidate and legitimize dictatorship and repression. This is reflected in new statutes and legislation(s) that limits rights and re-writes the affiliation between civilians and the state; the prosecution of peaceful activists using excessively vague and broad anti-terrorism law; media law, anti-protest law, among many others. Moreover, there has been an introduction of some constitutional amendments tolerating executive (the President) influence and interference in the functioning of what should be independent state institutions, including the judiciary.

In the same vein, substantial human rights issues included: illegal or arbitrary killings; comprising extrajudicial killings by the government (its public agents/officials); forced disappearance; torture; arbitrary detention; punitive and life-threatening prison settings; political prisoners; arbitrary intrusion with privacy; the worst forms of limitations on freedom of expression, the press, and the internet, including arrests (prosecutions) against reporters, censorship, site blocking, and the presence of unenforced criminal defamation; extensive interference with freedom of association and peaceful assembly rights, such as excessively restrictive acts governing civil society and political participation; violence targeting minorities (religious and other groups). The government paradoxically punished or prosecuted officers who committed violations, whether in the security apparatuses (intelligence community services/homeland security) or elsewhere in government. In most cases, the government did not expansively investigate accusations of human rights misuses, including most events of violence by security forces, contributing to an impunity environment.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. MAJOR CONSTITUTIONAL FAILURE(S)

Article 75 of Egypt's 2014 Constitution reads,

> Citizens have the right to form non-governmental organizations and institutions on a democratic basis, which shall acquire legal personality upon notification. They shall be allowed to engage in activities freely. Administrative agencies shall not interfere in the affairs of such organizations, dissolve them, their board of directors, or their board of trustees except by a judicial ruling. The establishment or continuation of non-governmental organizations and institutions whose structure and activities are operated and conducted in secret, or which possess a military or quasi-military character are forbidden, as regulated by law.[1]

Egypt's recent Non-governmental Organizations (NGOs) Law went into effect.[2] The law does away with punishments including jail time, heavy fines, as well as a national agency to govern the work of any foreign NGOs. Additionally, the law includes a security and intelligence-heavy body created by the 2017 NGO Law to approve and monitor foreign funding.[3] The law promotes substantial restrictions on civil society activities and places bureaucratic limitations on registration while creating extensive oversight and monitoring authority for state actors. This legislation was enacted in an environment considered by travel bans, asset freezes, and the arrest and prosecution of civil society members.[4]

Stricter new rules under Egypt's draconian anti-terrorism laws No.8 of 2015 on "Terrorist Entities and Terrorists" and Counter-Terrorism Law No.94 of 2015 further erode fundamental human rights and could result in more arbitrary detentions, enforced disappearances and torture allegations, and a wider crackdown on freedom of expression, thought, association and of peaceful assembly. On the war on terrorism, Article 237 of Egypt Constitution says

1 *See* Constitution Of Arab Republic Of Egypt, Jan. 18, 2014, Arts. 75,76,77 (Egypt), http://www.sis.gov.eg/Newvr/Dustor-en001.pdf.

2 *See, e.g., Long-Delayed Bylaws Regulating Civil Society Spark Concern Over Restrictive Potential*, Mada Masr, Jan. 21, 2021, https://www.madamasr.com/en/2021/01/17/feature/politics/long-delayed-bylaws-regulating-civil-society-spark-concern-over-restrictive-potential/ (last visited Mar. 15, 2021) ("the bylaws included vaguely worded articles that need to be reviewed, specifically citing Article 29, which prohibits associations from announcing or practicing certain activities before obtaining a license from the relevant authority.").

3 Mohamed 'Arafa, *The Tale of Post-Arab Spring in Egypt: The Struggle of Civil Society Against a Janus-Faced State*, 27 Ind. Int'l & Comp. L. Rev. 43 (2017).

4 Law No.70 of 2017 (for Regulating the Work of Associations and Other Institutions Working in the Field of Civil Work) *Al-Jarida Al-Rasmiyya* [The Official Gazette], May 29, 2017 (Egypt) ("An amended version of the NGO law was finally passed by Parliament in July 2019 . . . The new bylaws, which include 188 articles, are to be implemented starting January 12, 2022, before which all associations, organizations and companies doing civil society work are obliged to reconcile their legal status . . .").

> The state commits to fighting all types and forms of terrorism and tracking its sources of funding within a specific time frame in light of the threat in represents to the nation and citizens, with guarantees for public rights and freedoms.[5]

The deep concerns of this amended legislation will be related to the scope, necessity, proportionality test, discriminatory effects and the violation to the Constitution and national laws, as its more expansive provisions profoundly impinge on a variety of vital human rights.[6]

The new legislative changes covering anti-terrorism, protests, associations, and NGOs comprise extending the definition of "terrorist entity" and imposing new measures against individuals, businesses, media platforms, and trade unions and provide life sentences and capital punishment (death penalty) for funding terrorism. For example, trade unions could have assets seized and be added to the terrorism list. The ambiguous concept of terrorism under domestic criminal law, the enduring and permanent use of emergency authorities, resorting to the exceptional State Security Emergency Courts, and the expanded capacity of the Supreme State Security Prosecution are profoundly concerning.[7] The new amendments explain that any act that disturbs *public order* with force will be treated as terrorist activity and includes provisions to protect the security forces from accountability, establish firmer prison sanctions for terror-related offenses, as well as heavy fines for those who publish "false/fake news" and a special judicial circuit for terrorism cases.[8] The law already gives heavy imprisonment sentences for criminal acts that include "promoting or encouraging any terrorist offense."[9]

> Freedom of press and printing, along with paper, visual, audio and digital distribution is guaranteed. Egyptians—whether natural or legal persons, public or private—have the right to own and issue newspapers and establish visual, audio and digital media outlets. [...] It is prohibited to censor, confiscate, suspend or shut down Egyptian newspapers and media outlets in any way. Exception may be made for limited censorship in time of war or general mobilization. No custodial sanction shall be imposed for crimes committed by way of publication or the public nature thereof.[10]
>
> The state shall ensure the independence of all press institutions and owned media outlets, in a way that ensures their neutrality and expressing all opinions, political and intellectual trends and social interests; and guarantees equality and equal opportunity in addressing public opinion.[11]

The Egyptian government has amended various national laws to control information distribution and ensure its accuracy in both print and online media, including on social networks. Those laws include Law No.175 of 2018 on Anti-Cybercrime, Law No.180 of 2018 on Regulating the Press and Media, and Law No.58 of 1937 and its amendments to the Penal Code.[12] Law No.180 of 2018 requires that press institutions, media platforms, and news outlets (websites) must not broadcast or publish any information breaching the constitutional principles, granting the Supreme Media Council the power to prohibit or suspend the distribution, broadcast, or operation of any publications, newspapers, press outlets, or advertising materials covering information deemed to threaten national security; disturb the public peace [or] order; or promote discrimination, violence, racism, or bigotry.[13] The recent amendments authorize the SMC to suspend or block any personal website, blog, or social media account with a high number of followers—exceeding 5,000—if it publishes fake news advocating and inciting the violation of a specific law or promoting violence or hatred.[14]

Law No.175 of 2018 on Anti-Cyber Crime allows the investigating authority the power to block or suspend Egyptian-based or foreign websites highlighting content identified as intimidating to national security or the national economy. Further, any individual who hacks a website to adjust the information posted on such website or redistributes such information after changing it is accountable and punishable with a heavy fine and imprisonment.[15] Under the new amendments, the Attorney General may enforce a travel ban on individuals suspected of committing any act "considered a crime." Notably, the Penal Code states that "whoever deliberately spreads false information or rumors abroad about the internal conditions of the country that might weaken the country's financial credibility or harm the country's national interests is punishable by [imprisonment and a fine]."[16]

The Constitution provides for an independent judiciary, and generally, the government respected judicial independence and impartiality. The law provides for the right to a fair and public trial, but the judiciary often failed to maintain this right. Sometimes, individual civilian courts lacked neutrality and fairness and arrived at consequences that were politically inspired or without individual findings of guilt. The Constitution states:

> Civilians may not stand trial before military courts except for crimes that represent an assault against military facilities, military barracks, facilities protected by the military, designated military, or border zones; military equipment, vehicles, weapons, ammunition, documents, military secrets, public funds, or

5 *Id*., *Egypt Constitution*, art.237.

6 Mohamed 'Arafa, *Middle East Legislative Insight*: *Egyptian Antiterrorism Laws*, *Egypt Law No.*22/2018, *Egypt Law No.*8/2015, *Egypt Law No.*94/2015, LexisNexis Middle East Commentary (2019).

7 Egypt Law No.94/2015, art. 2

8 *Id*., arts.12,13,15,18,20, 27.

9 *Id*., arts.28, 29 "...funding terrorist acts. These would now include providing a place for training one terrorist or more; giving them weapons or documents in any way or form; offering support and financing to help terrorists travel, even if the provider does not have a direct link to the terrorist crime."

10 *Id*., *Egypt Constitution*, arts.70,71.

11 *Id*., art.72.

12 *See* Law No.175 of 2018, *Al-Jaridah Al-Rasmiyah*, vol.32 (bis)(c), Aug.14, 2018; Law No.180 of 2018, *Al-Jaridah Al-Rasmiyah*, vol.34 (bis)(h), Aug.27, 2018; Law No.58 of 1937 [Penal Code], *as amended by Law* No.95 of 2003, vol.25, *Al-Jaridah Al-Rasmiyah*, June 19, 2003. *See*, *e.g.*, Law No.45 of 2014 (on the practice of political rights regulating the content of electoral campaigns), *Al-Jaridah Al-Rasmiyah*, vol.23(bis), June 5, 2014, https://perma.cc/DD23-L3VM.

13 Law 180 of 2018, arts.4,19.

14 Mohamed 'Arafa, *The Archeology of the Freedom of Information Laws*: *Egypt 'Fake-News Laws'*, 20 Florida Coastal L. Rev.1 (2020). *Id*., Law No.180 of 2018, arts.20,21 which also "prohibits news outlets from posting information in print or online concerning a specific court case if such information will negatively affect the defendant in the case or the trial proceedings."

15 Mohamed Arafa, *Middle East Legislative Insight*: *Egyptian Cybercrime Laws*, *Egypt Law No.175/2018*, LexisNexis Middle East Commentary (2019). *See* Law No.175 of 2018, arts. 7,14(2),20(3), 9.

16 Law No.58 of 1937 (Egyptian Penal Code) (*reformed in* 1952), *Al-Jarida Al-Rasmiyya*, (Egypt), arts.98 & 80(d). Salma Islam, *In 'Fake News' Crackdown*, *Egypt Is a World Leader on Jailing Journalists*, *Bloggers and Social Media Users*, Los Angeles Times, Dec. 18, 2018, https://perma.cc/8ZH4-AZ9E.

> military factories; crimes related to conscription; or crimes that represent an assault against its officers or personnel because of the performance of their duties.[17]

Authorities used military courts to try civilians accused of threatening national security since the enactment of a 2014 decree ordering the military to "assist" police in securing "vital public facilities." Military trials were problematic to monitor because activists and rights groups were frequently subjected to restraint orders and the public access to information on these trials is very restricted. Also, defense attorneys in these trials struggled to gain access to their clients and to documentation related to the cases. Therefore, the quick rulings by military courts sometimes prohibited defendants from exercising their rights, especially the right to consult an attorney; sometimes, authorities denied them timely access to counsel, and judges ignored confessions gained under coercion or torture.

Along with the Criminal Procedural Code, the Constitution presumes defendants are innocent, and authorities typically notify them promptly with details of charges against them. Defendants additionally have the right to be present at their public trials, the right to consult an attorney, and the government is responsible for providing counsel if the defendant cannot afford a lawyer. On Due Process, the Constitution reads,

> The accused is innocent until proven guilty in a fair court of law, which provides guarantees for him to defend himself. The state shall provide protection to the victims, witnesses, accused and informants as necessary and in accordance with the law. [...] It is forbidden to grant any act or administrative decision immunity from judicial oversight. Individuals may only be tried before their natural judge. Extraordinary courts are forbidden. [...] The right of defense either in person or by proxy is guaranteed. The independence of lawyers and the protection of their rights are ensured as a guarantee for the right of defense.[18]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. CONSTITUTIONAL JEOPARDY: JUDICIAL CASES

1.1 ACTIVIST STRIPPED OF CITIZENSHIP AND THE ABUSIVE AMENDED NATIONALITY LAW(S)

The Egyptian government should reverse its abusive decision on December 24, 2020, to rescind the Egyptian nationality (citizenship) of political activist Ghada Naguib who lives abroad (in exile in Turkey). The Parliament should amend arbitrary citizenship laws so that they comply with Egypt's international human rights commitments.[19] This action is based on the Law No.26 of 1975, which gives the government discretionary authority to act without judicial review or legal oversight.[20] In January 2019, a *Giza Criminal Court for "terrorism"* and "*state security" Circuit* sentenced *in absentia* Naguib and her husband Hicham 'Abdallah to five years in prison, in a mass trial of over 25 defendants in what is known as the "*ikhwan* (Muslim Brotherhood) *media*," on charges of joining an illegitimate terrorist organization and broadcasting false news to undermine national security.[21]

According to Articles 15 and 16, the Prime Minister can strip anyone, whether Egyptian-born or naturalized, of their Egyptian nationality for numerous reasons, comprising if they "maintain permanent residence abroad and are convicted of a felony that harms state security from abroad," the government cited these articles in their decision against Naguib. Also, the same law gives the government extensive powers to strip the citizenship of those who acquired nationality through naturalization. The court verdict shows the entire case was based on National Security officers' accusations about the defendants' peaceful political actions. Security personnel accused the couple of conspiracy to overthrow the government through media, political, and human rights work. The charges violate fundamental rights, including freedom of association and their rights to free speech/expression, in which these convictions should be invalid.

In 2004, Egypt amended its citizenship and nationality laws to prevent discrimination against women by allowing children born to Egyptian mothers and foreign fathers to be granted Egyptian nationality like children of Egyptian men. Those born before this law had to file requests for naturalization, which the Interior Ministry frequently denied. The Universal Declaration of Human Rights 1948 states that "No one shall be arbitrarily deprived of his nationality."[22] The 1965 Convention on the Elimination of All Forms of Racial Discrimination (CEDAW) obliges states to "guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law,"[23] particularly in the enjoyment of essential human rights, including "the right to nationality." Egypt's nationality laws breach international law on the right to nationality. The UN Convention on the Reduction of Statelessness goes further in Article 9, which states that governments "may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds." The arbitrary deprivation of nationality, including on political grounds, is a ruin of human rights and vital freedoms and that governments use it to deprive people of basic human rights. Egypt needs to stop using the nationality issue as a weapon to silence political critics.

2. MUSLIMS AND CHRISTIANS ARRESTED FOR BLASPHEMY LAW(S)

The Egyptian Constitution stipulates, the

17 *Egypt Constitution*, arts.186, 204.

18 *Id*., arts.96,97,98. Defendants have the right to appeal to the Supreme Court (Cassation Court). Judges must pursue the nonbinding review of the grand *mufti* (religious leader) on all death penalties, and the president must confirm and sign these sentences.

19 *See, e.g.*, *'Punishing Dissent': Egypt Revokes Citizenship of 2011 Revolution Activist*, Middle East Eye, Feb. 11, 2021, https://www.middleeasteye.net/news/egypt-revolution-activist-citizenship-revoked-ghada-naguib (and for the official decision, *see* AlMasry Alyoum, Dec., 24, 2020, https://www.almasryalyoum.com/news/details/2197197).

20 Law No.26 of 1975 (on Egyptian Nationality [], Official Gazette No.22, May 29, 1975, arts. 4,15,16, https://www.refworld.org/docid/3ae6b4e218.html.

21 *See* The Supreme State Security *Case No*.1102 of 2017.

22 *UN General Assembly*, Universal Declaration of Human Rights, Dec.10, 1948, 217 A(III), art.15 https://www.refworld.org/docid/3ae6b3712c.html.

23 *UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women*, Dec.18, 1979, *United Nations, Treaty Series*, Vol.1249, p.13, art. 5, https://www.refworld.org/docid/3ae6b3970.html. This Convention calls for states to guarantee women equal rights with men regarding their children's nationality.

> Freedom of belief is absolute. The freedom of practicing religious rituals and establishing places of worship for the followers of revealed religions is a right organized by law [and] The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders.[24]

Recently, many arrest warrants have been issued for Egyptian Muslims and Christians accused of mocking and insulting religions. On November 13, 2020, Egypt's Attorney General ordered the arrest and custody of a stand-up comedian Mohammad Ashraf over "mocking the state-owned *Al-Qur'an Al-Kareem* [The Holy *Qur'an*] Radio Channel" during a two-minute video at one of his local shows. According to the prosecution's guilt motion, Ashraf is facing several charges, including "contempt of religion, threats to social peace and security vilifies the station, intimidating the values of Egyptian families, and the defamation (insulting) of the radio station's presenters [...], as he mocks their performances, describing their way as 'odd and peculiar.'" The motion emphasizes "zero tolerance" until he is handed the punishment that he deserves over mocking leading media figures that have presented meaningful religious shows."[25]

Also, on November 11, 2020, the Supreme State Security Prosecution investigated two Christians, Ayman R. Hanna and Mounir M. Hanna, and referred them to Criminal Court on the grounds of mocking Islam—they appeared in a video discussing Islamic prayers—and insulting *Sharie'a* law on blasphemy charges. Egypt's Penal Code criminalizes "any use of religion to promote or advocate extremist ideologies...with a view toward stirring up sedition, disparaging or showing contempt for any divinely revealed religion, or prejudicing national unity and social harmony."[26] The same Code provides up to two years of imprisonment "for possession, distribution, or manufacturing of documents in violation of '*public morals*,'" however, that concept is vague and undefined.[27] Civil rights activists are currently working on a bill—to be submitted and reviewed by the Supreme Constitutional Court—to amend the blasphemy provision in an effort to halt the imprisonment of citizens based on commentaries or ironic/sarcastic videos, as such imprisonment disrupts freedom of expression.

3. THE HELWAN FAMILY COURT LANDMARK RULING: A STEP BACK OR FORWARD? INHERITANCE LAW V. RELIGIOUS FREEDOM (SHARIE'A LAW INTERPRETATION AND GENDER EQUALITY)

In July 2020, the Cairo Appellate Court upheld a decision allowing the application of Coptic Orthodox Christian inheritance principles on distribution dispute, with the verdict to apply gender equality. Magda Y. Bendari filed a lawsuit against her siblings, who were calling for the invalidity of Law No.1797 of 2015.[28] It stipulates that "Islamic inheritance laws should be applied to cases involving members of the Christian community." Under Islamic inheritance law, female heirs inherit half that of their male siblings. In July 2019, the Nasr City Court ruled on the invalidity of a declaration of inheritance based on Islamic law and to re-distribute inheritance according to Christian law based on Law No.1 of 2000. Law No.1 of 2000 provides, "verdicts issued in personal status disputes between non-Muslim Egyptians who are of the same religion are made according to the laws of their religious faith [...] in a manner that does not violate public order." Egypt's Supreme Court (Court of Cassation) cited that "the basic rule regarding the inheritance between non-Muslim Egyptians is based on Islamic *Sharie'a*, except in cases of mutual consent among the heirs."

A historical moment for Coptic Christians that the Helwan Family Court rendered a milestone ruling lays down the norm that an Egyptian Family Court may apply Coptic Christian Canonical principles, in contradiction to the Islamic *Sharie'a* principles and thus, determine the shares of the heirs. Coptic Christian rules do not distinguish between male and female heirs and hence permit equal distribution of the deceased's inheritance amongst all surviving children. On the other hand, the *Sharie'a* principles specify that male sons get double the inheritance to that of their sisters –in this case– when it comes to inheriting their parents' estate.

Huda Nasrallah, a Coptic Egyptian activist, was the cornerstone behind this new judgment. After her father's passing, she received a succession order, issued in accordance with the Islamic principles, giving her—as one of the two heirs—the equivalent of half the share value of her brother's share received from her late dad's estate. She decided to challenge the *status quo*, and requested the Family Court to explicitly issue a succession order compatible with the Coptic inheritance rules—when determining the heirs and their respective shares—and thus award her a share equal to that of her brother. In this case, it was argued that the heirs commonly agreed (mutual consent) on the equal division of the inheritance and that Islamic succession order should be annulled on constitutional grounds. She argued that Article 3 of the Constitution gave the right to Coptic Egyptians to apply Canonic Laws as *their main source* of legislation on governing their personal status matters and that Law No.25 of 1944 reads, "if the deceased is non-Muslim, the heirs have the right to opt for the application of their own Canonic Laws instead of Islamic *Sharie'a* law."[29] Also, Nasrallah asked that the inheritance be distributed equally between male and female heirs, without any discrimination, according to the 1938's Coptic's Charter.

New Principle: This Judgment established a new significant rule in family inheritance law in Egypt, as it has brought to the fore increased dissent on the implementation of the *Sharie'a* principles to Coptic Christians' inheritance matters and could have a straight influence on the much-deferred issuance of the long-anticipated Christian's Unified Civil Law. This precedent has proven to be a provocative one; it had

24 *Egypt Constitution*, arts. 64,3.

25 *See* The Supreme State Security *Case No.*4034 of 2020 [*Misdemeanors*, *Sinbelawain*].

26 *Egypt Penal Code*, art.98(f) "ridiculing or insulting a heavenly religion or a sect following it."

27 *Id.*,art.178. On June 21, The Alexandria Appellate Court upheld the three-year jail penalty of the blogger and activist Anas Hassan and a fine of 300,000 EGP ($19,000) for "insulting religion" and "misusing social media" as he managed a Facebook page called "The Egyptian Atheists" to broadcast "atheistic ideas" and criticize the divinely revealed Abrahamic religions. Also, the same applied to another activist for promoting *Shii'a* Islam.

28 *Case No.*1478 of 2019 (South Cairo). *See also Cairo Court of Appeal Upholds Inheritance Equality Verdict Between Christians*, Daily New Egypt, July 13, 2020 ("The case was brought by [...] , who filed lawsuit...against her four siblings who were calling for the invalidity of Article No.1797 of 2015 [...] stipulates that Islamic inheritance laws should be applied to cases involving members of the Christian community..."), https://dailynewsegypt.com/2020/07/13/cairo-court-of-appeal-upholds-inheritance-equality-verdict-between-christians/.

29 Law No.25 of 1944 (on the applicable principles in inheritance matters), art.1.

a robust legal rationale by granting equal rights to women in inheritance, and introduced a new chapter of Egyptian Coptic women's rights which might enhance additional push for the issuance of the Christian Orthodox Unified Law.

IV. LOOKING AHEAD

Awaiting on its Desk: The Egyptian Parliament will look at a draft bill necessitating the dismissal of state agencies' staff without taking any disciplinary measures, to provoke the spread of radical ideologies. This bill intends to exclude employees and prohibit workers who are mentally affiliated with terrorist organizations from working for state bodies. The draft prohibits the fire of employees (dismiss workers), depending on the circumstances, in any of the state's agencies, unless they infringe the job's duties, cause harm to the state's economic interests, or threaten national security and safety beyond a reasonable doubt. Few amendments to the Criminal Procedural Code had been adopted to guarantee secrecy and protect the identities of victims but did not provide enough protection for witnesses or reporters. Also, still some genuine gaps continue in Egypt's laws relating especially to those on rape, sexual violence, and the treatment of survivors. However, its catastrophic human rights record transgressions, Egypt's regional and international allies did not go beyond random, ineffective expressions of concern and largely failed to condition security aid on accountability or progress in the human rights *status quo*.

V. FURTHER READING(S)

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El Salvador

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I. INTRODUCTION

Since the Constitution of El Salvador was enacted in December of 1983, it has been reformed in several times (more than 30). Nonetheless, the major and most relevant reforms took place in 1991 and 1992, as a consequence of the negotiation between the Government and the Guerrilla to end a 12 year long civil war. Those reforms included the creation of the Ombudsman, the prohibition to accuse civilians under military laws, to leave the criminal prosecution on charge of the Attorney General, to create a unique and independent Electoral Institution, and the restriction of the functions of the Army entrusting the national security in civilian police. After that, there has been minor changes in the Constitution. The last successful reform dates from 2014, when rights of indigenous people were recognized in article 63. In 2020, two reforms to the Constitution were approved by the Legislative Assembly, one referred to the recognition of the fundamental right to water, and the other one related to the correct terms to referrer to people with disability, same that have to be ratified by a second legislature (2021-2024). Nevertheless, in the past year, there were two important events related to constitutional reform that it´s worth to bringing up. The first one has to do with the first time in the history of El Salvador´s Constitutional Chamber in using its competence to process a case of loss of political rights of a citizen who promoted a reform against an eternity clause, specifically, the one referred to the prohibition of presidential reelection. The second one has to do with an executive decree in which the President of El Salvador delegated the Vice-president to create an especial commission for the study and proposal of future constitutional reforms. Due to the pandemic, in 2020 the activity of the national authorities focused in the fight against the Covid-19. Then, the constitutional reform was not a priority for the Legislative Assembly. As a result of that, we´ll take a look on those events related to constitutional reform, in order to offer a perspective of El Salvador´s political moment.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The Constitution of El Salvador is characterized by establishing an aggravated procedure for its reform, far different from that established for ordinary laws. Hence, we can qualify it as a rigid Constitution. Part of that difficulty can be seen from the reform initiative. In accordance with Article 248 of the Constitution, to reform the Constitution requires the initiative of at least 10 elected deputies. After that, the reform procedure involves a series of steps that have been established both by the Constitution and by constitutional jurisprudence[1]. The constitutional reform procedure in El Salvador can be summarized according to the following steps: a) Reform initiative, b) Favorable opinion of the Legislation and Constitutional Commission on the initiative, which enables it to be voted on by the full legislative session, c) Phase of dialogue and public deliberation in the adoption of the decree by which the amendment to the Constitution is agreed, and d) Phase of approval of the legislative decree through which the Constitution is amended[2], e) Information phase of the constitutional reform. This is intended for citizens to be aware of the reform that has been approved and that must be ratified by the next legislature, which may influence their election for the formation of said Assembly, f) Phase of dialogue and public deliberation by the new legislature for the adoption of the decree in which it is decided to ratify the constitutional reform agreement, g) Approval phase of the legislative decree through which the constitutional reform agreement is ratified[3], and h) Publication of the agreement to ratify the reform of the Constitution in the Official Gazette.

The foregoing aims to show that, for a constitutional reform to take place, there must be a broad consensus of the political forces represented in the Legislative Assembly, which is difficult to do. For this reason, after the multiple reforms carried out in the framework of the transition from war to peace, not many reform initiatives have managed to succeed in overcoming all the stages described above to become part of the constitutional text. As stated in the introduction, the last reform successfully approved and ratified dates from 2014, when indigenous peoples were recognized in Article 63.

In 2020, there were some constitutional reform initiatives, relating to the express recognition of the fundamental right to water, the current wording of an article of the Constitution in relation to people with disabilities, the recognition of the rights of nature, and the election

1 Inconstitucionalidades 7-2012 [2013] y 33-2015 [2017].
2 At this point, Article 248 of the Constitution establishes that the minimum quorum required for the Legislative Assembly to make a valid decision in this regard is that of half plus one of the elected deputies.
3 According to Article 248 of the Constitution, the minimum quorum for the validity of the ratification agreement of the constitutional reform is the vote of two thirds of the elected deputies. This special or qualified majority is one of the properties that defines the rigidity of the Constitution.

and duration of the post of magistrate of the Court of Accounts of the Republic. Only the first two managed to advance until their approval by the Legislative Assembly; nonetheless, they cannot yet be considered as part of the Constitution, as they require ratification by the next legislature. The reform regarding the right to water proposes the modification of Articles 2 and 69 of the Constitution. They are intended to expressly establish the fundamental right to water for all people and the obligation of the State to guarantee access to it in conditions of equality, wholesomeness and affordability. This reform is despite the fact that the Constitutional Chamber had already recognized in its jurisprudence[4] that the right to water is part of the right to the environment enshrined in Article 17 of the Constitution.

The other approved reform is to article 37.2 of the Constitution. Here it is a question of reformulation of the text, and it is the fact that the original wording of the article spoke of the right to work of people with "physical, mental or social limitations or disabilities". In the new wording, it is intended to incorporate an adequate and non-discriminatory language in accordance with the Convention on the Rights of Persons with Disabilities, referring to people "with some disability, be it physical, mental, intellectual or sensorial".

As can be seen, the constitutional reform activity carried out by the Legislative Assembly during 2020 was little, as is to be expected in systems with rigid constitutions. However, as anticipated in the introduction, there were two events that, although not constitutional reforms as such, are quite related to the issue. The first of them dealt with a competence never exercised by the Constitutional Chamber[5]. Articles 174 and 182 attribution 7 of the Constitution confer on the Constitutional Chamber the competence to declare the loss of their political rights[6] to persons who "sign acts, proclamations or accession to promote or support the re-election or continuation of the President of the Republic, or use direct means to that purpose"[7].

The case began with a demand 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, offered as a proposal for campaign and within his political platform that, upon becoming a deputy of the Legislative Assembly, would promote the re-election of the current President of the Republic, Nayib Bukele. The thing is that the Salvadoran Constitution considers as an eternity clause, that is, that it cannot be reformed by the derived constituent power, everything related to the alternation in the exercise of the Presidency of the Republic8. 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 Court's decision in this case will be analyzed in the next section.

The second event also has to do with the reform of the Constitution. On August 24, 2020, the President of the Republic, Nayib Bukele, issued Executive Decree number 225, by means of which he delegated the Vice President of the Republic to "Coordinate the Study and Proposal of Reforms to the Constitution, a task that will be carried out on an *Ad-Honórem* basis; being authorized to carry out the study, analysis, discussion and proposal of all those initiatives that have as objective a constitutional reform, as a basis for a modern and efficient legislation, according to the current needs of the society ". As a result of this assignment, the Vice President formed a study commission for such purposes.

Critics to this decision by the President did not wait. On the one hand, a sector of the population, including several academics, condemned that such a commission has an undemocratic purpose, which is to propose some constitutional reform that ends up allowing continued presidential reelection, thus breaking one of the eternity clauses of the Constitution. The foregoing is based on a series of undemocratic attitudes demonstrated by the President during 2020, such as having militarized the Legislative Assembly on February 9[9], having publicly stated that he would not comply with certain judgments of the Constitutional Chamber[10] or having ordered a series of illegal detentions to those who violated the general quarantine in the month of March[11].

On the other hand, another sector of legal opinion considered that the creation of said commission violates the constitutional reform procedure established in the Constitution, since it tries to attribute in a disguised manner a kind of constitutional reform initiative to the Vice President, when that only can be exercised by the elected deputies in a number not less than 10. Under this argument, two claims of unconstitutionality were presented before the Constitutional Chamber. The court´s decision will be presented in the next section.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Regarding the constitutional reforms enunciated in the previous section, none would present a problem that conflicts with the irreformable contents of the Constitution represented by the eternity clauses. The first of them, that is, the reform of Articles 2 and 69, expressly enshrines a new right in the Salvadoran Constitution, we are talking about the right to water. The Constitutional Chamber has established in its jurisprudence that the only way in which articles of the Constitution that establish fundamental rights cannot be reformed is when it is a regression for them, since the court has assumed the doctrine of regressive prohibition[12]. But, as long as it is a matter of improving its content and scope, or incorporating new rights, constitutional reform is perfectly possible. The second reforms mentioned above is merely a matter of reformulation of terms, that is, an adaptation of the text that refers to the right to work of people with disabilities so that it is not discriminatory.

Both modifications to the constitutional text can be classified as authentic constitutional amendments, since they do not interfere in any case with the basic structure of the Constitution represented by the eternity clauses, since these only prohibit the reform of what is related to the form and system of government, to the territory of the Republic

4 Amparo 513-2012 [2014].
5 Pérdida de los derechos de ciudadanía 1-2020 [2020].
6 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.
7 Article 75 ordinal 4th of the Constitution.
8 Article 248 of the Constitution.
9 In the Inconstitucionalidad 6-2020 Ac. [2020], the Constitutional Chamber condemned this act and called the President not to use the Army for political purposes.
10 https://elfaro.net/es/202004/el_salvador/24296/Nayib-Bukele-anuncia-que-no-acatar%C3%A1-%C3%B3rdenesde-la-Sala-de-lo-Constitucional.htm
11 The Constitutional Chamber also judged this issue through a series of *habeas corpus* in favor of the detained persons. See Habeas Corpus 148-2020 [2020].
12 Inconstitucionalidad 7-2012 [2013].

and the alternation in the exercise of the Presidency of the Republic[13]. Nonetheless, the foregoing does not mean that said reforms cannot have constitutionality problems. As there is a process of constitutional reform well defined by the Constitution and by constitutional jurisprudence, it could be breached by the Legislative Assembly, which would enable its judicial control by the Constitutional Chamber for procedural reasons. In other words, although the constitutional reforms have been approved by the first legislature, any citizen could be attentive that the reform procedure has been fully complied with both by the first and the second legislature, because if not, they could file a claim of unconstitutionality before the Constitutional Chamber against said constitutional reforms.

Speaking about judicial review of constitutional reforms by the Constitutional Chamber, this has only been exercised in two occasions[14]. In El Salvador, the unconstitutionality action has a popular origin, which means that any Salvadoran citizen can file a demand requesting that an act of direct application of the Constitution, a law or an omission be declared unconstitutional[15]. The first case in which the Constitutional Chamber had the opportunity to rule on the judicial review of constitutional reforms was in the unconstitutionality 7-2012, which later expanded in the second and until today the last case, the unconstitutionality 33-2015. The Constitutional Chamber has determined that, although competence has not been expressly attributed to it, it can exercise judicial review of constitutional amendments for procedural and content reasons[16], in order to: "a) preserve the distinction between the constituent and constituted powers; b) safeguard the democratic principle against abuses by the majority to protect minorities; and c) protect fundamental rights as a guarantee for the development of a true democratic debate". Also, because the power to reform the Constitution is a constituted power and, therefore, limited and controllable.

In El Salvador, there is no doubt about the competence assumed by the Constitutional Chamber for the judicial review of constitutional amendments. The only obscure point about said competence is that, to date, the Constitutional Chamber maintains that only the constitutional reform agreement is controllable, not its ratification, because at that point the reform is part of the Constitution and there can be no unconstitutional constitutional norms[17]. Then, what would happen if a reform were given to the eternity clauses and no citizen presented a claim of unconstitutionality against said reform in time? Would it be admissible only because it has become part of the Constitution, although in reality it is a constitutional substitution? These issues have not yet been resolved by the court.

Next, a brief reference will be made to the resolutions issued by the Constitutional Chamber in 2020 regarding the events related to constitutional reforms that were previously stated. Regarding the process of loss of citizen rights for promoting presidential re-election, the court admitted the claim and ordered the defendant to be notified so that he can appear in the trial. Therefore, there is still no substantive decision on the matter. Nonetheless, it will be interesting to know how the Constitutional Chamber will interpret the issue of promoting presidential re-election as a violation of an eternity clause versus the freedom of expression of citizens. In relation to the other related case, the one that has to do with the creation of a commission for the study and proposal of future constitutional amendments, the Constitutional Chamber issued a resolution before two demands presented by citizens[18]. In them, it rejected the demands under the main argument that the constitutional reform process and the reform initiative should not be confused with other constitutional dialogical activities that in no way can activate the institutional mechanism to give rise to a constitutional reform. Thus, the Constitutional Chamber clarified that both the Government and the citizens can discuss about constitutional reforms, but that the initiative to promote it only corresponds to the deputies of the Legislative Assembly.

From the above it is possible to infer that the Constitutional Chamber plays a countermajoritarian role in the Salvadoran democratic system. Although it is not elected by popular vote, it has the power conferred by the same Constitution to declare the unconstitutionality of laws and constitutional reforms promulgated by the Legislative Assembly, which has been elected by popular vote. In this activity, the duty it exercises is to ensure both the rights of the majority and the minorities, above all, taking care that the rights of the latter are not violated under majority arguments. The Salvadoran constitutional system is not designed so that the Constitutional Chamber plays a deliberative role, since it always grants the latter the last word in constitutional matters. Despite this, the Constitutional Chamber has promoted in some of its decisions the dialogue between the other powers (Legislative and Executive) to reach agreements on certain issues[19]. Nonetheless, the Constitutional Chamber, due to its constitutional design, is not authorized to dialogue among equals with the other powers, since it always has the last word.

IV. LOOKING AHEAD

As previously stated, one of the major issues yet to be resolved in the matter of constitutional reform is on the judicial review of unconstitutional constitutional amendments when they have already become part of the text of the Constitution. Until now, the position of the Constitutional Chamber is that it could not exercise such control; nonetheless, the political moment that El Salvador is experiencing will surely bring challenges that will force the Constitutional Chamber to rethink its position. In fact, the issue of constitutional reform has been continuously addressed by the President of the Republic, claiming that the Constitution needs certain updates. In the 2021-2024 period, according to the surveys[20], a Legislative Assembly is expected to be made up mainly of political parties related to the President of the Republic,

13 Article 248 of the Constitution.
14 Inconstitucionalidades 7-2012 [2013] y 33-2015 [2017].
15 Articles 174 and 183 of the Constitution.
16 Regarding the content reasons, the exercise of judicial review of constitutional amendments is quite evident if one takes into account that the Salvadoran Constitution, unlike others, has eternity clauses.
17 Inconstitucionalidad 52-2005 [2005].
18 Inconstitucionalidades 112-2020 [2020] y 113-2020 [2020].
19 Inconstitucionalidad 21-2020 Ac. [2020].
20 See https://www.uca.edu.sv/iudop/wp-content/uploads/PPT-PRELECTORAL-Noviembre-2020.pdf and https://elfaro.net/es/202009/el_salvador/24817/Encuesta-UFG-confirma-a-Nuevas-Ideas-como-primera-fuerza-en-solitario.htm

which opens the door for them to present a series of constitutional reform initiatives. In this scenario, the Constitutional Chamber must be in charge of controlling its constitutionality through the unconstitutionality claims presented by citizens.

V. FURTHER READING

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Eritrea

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I. INTRODUCTION

For a discussion of constitutional law in an Eritrean context, the most important departure point is recognition of the fundamental reality that Eritrea, as a country, is ruled without a formal constitution, written or unwritten. This observation is true regardless of the question of whether a given constitutional order is democratic or non-democratic (for instance, democratic in the case of Botswana or Norway, and undemocratic in the case of North Korea or Myanmar). In other words, since its emergence as a *de facto* independent state in 1991 and as a *de jure* independent state in 1993, the country did not have a functioning constitutional order. It is true that Eritrea formally adopted its first post-independence Constitution in 1997. Nonetheless, as will be seen below, the promises made in the 1997 Constitution have remained hollow words and bare ink on paper due to the Constitution's 'non-implemented' status.

In terms of the formal requirements of constitutionalism, or the very existence of an officially proclaimed constitutional framework, Eritrea is perhaps the only example in the world for lack of such a framework. The issue here is not about the distinction between written or unwritten constitutions. Eritrea has none of these two examples. The country is ruled by a single-party government, known as the government of the People's Front for Democracy and Justice (PFDJ). The government came to power in 1991, under its previous name of the Eritrean People's Liberation Front (EPLF), after defeating the occupying forces of Ethiopia. It changed its name into the PFDJ in 1994 at its Third Organizational Congress. Even as a political organization, the PFDJ has never convened an organizational congress since 1994. The country has also never seen free and fair general elections since its formal independence in 1993. In this context, Eritrea has been ruled under one of the worst forms of abuse of government power seen in the modern history of nation-states.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

There has never been any proposed constitutional reform in Eritrea, failed or successful, in the period under review (the year 2020). In light of what has been stated at the introductory section above, in an Eritrean context the very concept of constitutional reform is an alien notion, and so are the related concepts of: constitutional amendment, constitutional dismemberment, constitutional mutation, constitutional replacement and other events in constitutional reform, including the judicial review of constitutional amendments.

However, there is one important national document that needs to be discussed briefly, mainly in the form of providing a general contextual background about the crisis of constitutionalism in the country. This document is the country's 1997 Constitution, a text that was officially declared 'a dead document' by the country's President (Mr. Isaias Afwerki). This was communicated in a televised interview the State President gave on 30 December 2014. It is important to briefly revisit the historical development of the 1997 Constitution, starting from the early 1990s up to its adoption in 1997 and finally its official declaration as a 'dead document' in 2014. Much of the observation in this regard, also the discussion in the remaining parts of this contribution, relies heavily on the author's publication from 2016 cited in the list of references below.

The Eritrean legal system derives its influence from multiple legal traditions, owing to the country's history as a polity ruled in different times by different political forces, namely: ancient Abyssinian rulers, the Ottoman Turks, the Egyptians, the Italians, the British, and the Ethiopians. As a result, the country blends certain elements from each entity that has left its imprint through its long political history, including the authoritarian revolutionary dogma of the incumbent government, traced to the country's thirty years of armed struggle against Ethiopia.

As far as the establishment of a modern legal system is concerned, the furthest one can go back is to the Italian colonial era between 1890 and 1941, when Eritrea as a nation-state gained its present geo-political shape. Without forgetting the far-reaching negative implications of their colonial policies, the Italians are credited with having laid the foundations of the modern Eritrean state by establishing Eritrea as a single political entity or unit, introducing a formal judicial system with a robust bureaucracy, and bringing a relatively longer period of political stability to the country.

The British replaced the Italians for a brief ten years, from 1941 to 1952. Constitutional law was only formally introduced into Eritrea in 1952, when the UN federated Eritrea with Ethiopia. Under the UN federal arrangement, Eritrea was introduced with its first modern constitution, the 1952 Constitution. However, due to the short-lived nature of the federal arrangement with Ethiopia (which was unilaterally abrogated by Ethiopia in 1962), the 1952 Eritrean Constitution did not have

any significant impact on the political life of Eritrea. From 1962 until 1991, two successive Ethiopian governments ruled Eritrea: the feudal regime of Emperor Haile Selassie and the military junta of Mengistu Hailemariam (widely known as the *Derg* regime). Eritrea was subjected to the constitutional arrangements that reigned in Ethiopia under both governments, and as is generally known, the constitutions proclaimed by these regimes were not democratic in form or substance. Thus they have had little to no impact on the Eritrean polity as it exists today. Most importantly, nothing from these old constitutional experiences has been retained in present day Eritrea.

Eritrea attained *de facto* independence in May 1991, under the dominant leadership of the Eritrean People's Liberation Front (EPLF), now the People's Front for Democracy and Justice (PFDJ), the only political party of the country. For the first seven years, the country experienced a haphazard constitutional experience, which can be described as 'a failed attempt of transitional constitutionalism.' Applied in the context of countries emerging from conflict or repression, transitional constitutionalism is understood as one form of a social contract between transitional governments and their subjects, with the main objective of: limiting the scope of government power during the transitional period and inculcating this democratic culture into an impending conventional constitutional order. The most important embodiments of Eritrea's failed attempt of transitional constitutionalism are Proclamation No. 23/1992 and Proclamation No. 37/1993, which aimed to provide for the establishment, powers and functions of a provisional government (and later a transitional government) of Eritrea until the country could have adopted its first post-independence constitution.

In 1997, the country formally adopted its first post-independence constitution, the non-implementation of which has given rise to enormous amounts of academic and non-academic literature. A year after the ratification of the 1997 Constitution, the country was plunged into a devastating two-year border conflict with Ethiopia. Following the outbreak of the war, the government ruled the country under a *de facto* state of emergency. In actual terms, the mandate of the incumbent government has expired by the end of 1997, as envisaged by Proclamation No. 37/1993. The general elections envisaged by the newly adopted Constitution of 1997 never materialized, and this means that to this date the incumbent government is ruling the country by a brute force, perpetuating its illegitimate hold on power. Among other things, this has given rise to a widespread and systematic violation of human rights, as has been sufficiently established by two major reports of a commission of inquiry established by the UN Human Rights Council in Geneva. The government's perennial excuse of ruling the country under a *de facto* state of emergency (under the pretext of a prolonged and unresolved border conflict with neighboring Ethiopia) should have come to an end in July 2018 when Eritrea and Ethiopia signed a new peace agreement. Nonetheless, to this date there is no semblance of a return (or a concrete plan to do so) to a conventional or a functioning constitutional order.

Therefore, as far as the protection of fundamental rights and freedoms, including the promotion of orderly constitutional governance, are concerned, the 1997 Constitution has little practical relevance. For the purposes of academic discussion, however, the following key features of the Constitution can be discussed briefly. The status of the 1997 Constitution is one of the most contentious issues in Eritrea. Despite its formal 'ratification,' it has remained unimplemented. At procedural and formal levels, the non-implementation of the Constitution is also blamed on the lack of a clause on its 'entry into force,' which is peculiar to the Eritrean Constitution. Practically, however, the Constitution has remained unimplemented due to the lack of requisite political will on the part of the incumbent government. One clear indication of this is the statement attributed to the President of the country, cited in the preceding section.

With 59 Articles, the 1997 Eritrean Constitution is one of the shortest. The fundamental principles of the Constitution are enshrined in the first three parts of the document: the Preamble, Chapter One (General Principles), and Chapter Two (National Objectives and Directive Principles). The Preamble promises the establishment of a democratic order founded on the rule of law. It also has a strong revolutionary tenor, owing to the long and bitter armed struggle that preceded Eritrea's *de facto* independence in 1991. The importance of the rule of law as a key foundation for democratic governance is also accentuated in Article 29 of the Constitution. Chapter III of the Constitution deals with the protection of fundamental rights and freedoms. It can be considered as the Constitution's section 'Bill of Rights.' Articles 14 to 25 of the Constitution recognize the following fundamental rights and freedoms: equality under the law; the right to life and liberty; the right to human dignity; rights related to arrest, detention, and fair trial; the right to privacy; the rights to freedom of conscience, religion, expression of opinion, movement, assembly and organization; the right to vote and to be a candidate to an elective office; economic, social, and cultural rights and responsibilities; rights related to the family; the right to property; the right to administrative redress.

The list of rights enumerated in Chapter III is not exhaustive. This is clear from Article 29 (Residual Rights), which is forward-looking in its nature. It reads: 'The rights enumerated in this Chapter shall not preclude other rights which ensue from the spirit of this Constitution and the principles of a society based on social justice, democracy and the rule of law.' Certain rights are described as being non-derogable. These include equality before the law (Article 14(1) and (2)), the right to life and liberty (Article 15), the right to human dignity (Article 16), some rights related to arrest, detention, and trial (Article 17), and the right to freedom of thought, conscience, and belief (Article 19(1)).

The Constitution adopts a presidential system of governance and it also recognizes the principle of separation of powers. In terms of its preferred system of government, the Constitution has typical centralizing features. Article 1(5) of the Constitution declares that Eritrea is a unitary state. By virtue of its multi-ethnic, multi-lingual, and multi-religions nature, the most appropriate model for Eritrea would have been a certain form of federalism. With regard to the status of international law, the Constitution follows a dualist approach to domestication of international law, as envisaged in Article 32(4) and Article 42(6) of the Constitution. The Constitution adopts a stringent approach of constitutional amendment. According to Article 59 of the Constitution, constitutional amendment has to be done in a three-stage process: 1) initiation by 50% of all members of the National Assembly; 2) first approval by a three-quarters majority vote of all members of the National Assembly, and 3) finally second approval by four-fifths majority vote of all members of the National Assembly. The latter is to be given one year after the first vote of three-quarters majority.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In light of what has been discussed in the previous section, the topic of constitutional reform and control is practically not applicable to the present circumstances in Eritrea, it being a country ruled without a functioning constitutional order. As a matter of principle, the 1997 Constitution of Eritrea has one specific provision related to constitutional review. Article 59 of the Constitution envisages the establishment of a Supreme Court, a measure that has never taken place due to the 'non-implemented' status of the Constitution. The Supreme Court is envisaged to have 'sole jurisdiction of interpreting [the] Constitution and the constitutionality of any law enacted or any action taken by government.' In that sense, it can be presumed that the Supreme Court may have exercised powers related to constitutional review, if it were established as envisaged and if it also enjoyed the level of independence required for that kind of constitutional engagement. This, however, needs to be seen in the context of the overall constitutional crisis in the country. In the next section, this contribution will conclude by highlighting the most important steps that need to be taken in order to usher the country's long awaited transition to a functioning constitutional order.

IV. LOOKING AHEAD

As a country, Eritrea suffers from a deep-seated crisis of constitutional law, including alarming levels of human rights violations. In comparative terms, Eritrea is perhaps the only country in the world that does not have a functioning constitutional order. This is also true regardless of the question of whether a given constitutional order is democratic or non-democratic, as has been shown above. At a formal level of the debate, Eritrea has neither a written nor an unwritten constitution.

Ruled by one of the most repressive regimes in the world, the country finds itself stifled by deeply entrenched structural problems that are unique to its history. In addition to the absence of a working constitution or an effective constitutional framework, several other factors make the case of Eritrea so distinctive from many other countries; one such thing being an ongoing situation of crimes against humanity, or widespread and systemic violation of human rights, as established by the UN commission of inquiry on human rights in Eritrea (at least at a prima facie level).

The country is ruled by a government that came to power in the form of a liberation front, which clearly stipulated for itself a temporal limit of its mandate, ending in December 1997 (defined by Proclamation No. 37/1993). Since that time, the government is ruling the country without any legal basis for its rule, also giving rise to a menacing crisis of constitutionalism and gross violations of human rights.

There is a need for Eritrea to immediately transit itself to a democratic system of government by which the long awaited establishment of a constitutional order can be realized. The first and most important step in this regard would be the establishment of a government of national unity that shall include all political forces of the country, including those in exile. Experience of the last few years tells that unless regional and international actors exert meaningful pressure towards that end, the Eritrean Government will never take the first step in this regard. The prospects for constitutional governance will depend on such concerted efforts, including the active involvement of Eritrea's vibrant diaspora communities. Indeed, it is a combination of Eritrean and international pressure that can induce meaningful political change in Eritrea.

Since November 2020, Eritrea's crisis of constitutionalism has entered a new level of complexity, exacerbated by the country's involvement in the armed conflict currently taking place in the Regional State of Tigray, the northern province of Ethiopia. Eritrea's involvement (at least at the level of allegation) in the conflict has been reported by various credible sources, such as the European Union and the U.S. Government. The conflict in Tigray has seen egregious violations of international law, including alleged war crimes by all parties to the conflict. Eritrean soldiers are not free from such accusations. This is one major reason that Eritrea's long awaited transition to a democratic constitutional order shall be given utmost priority by all stakeholders that want to see a stable and peaceful Eritrea.

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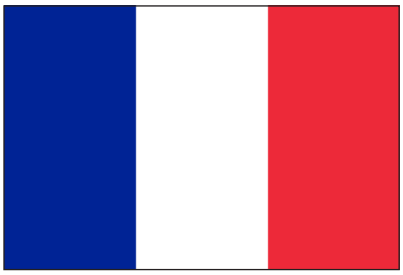
France



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I. INTRODUCTION

2020 was indeed an extraordinary year world-wide and, of course, France is no exception. Important legal changes were introduced in order to face the pandemic of COVID-19, most of those changes having the effect of limiting fundamental rights of citizens, most of which are protected by the French constitutional block (*bloc de constitutionnalité*)[1]. In fact, France has a number of legal texts that are considered to be of constitutional value, in addition to the main one, the Constitution of 1958: the Declaration of rights of man and citizen of 1789, the Preamble of the Constitution of 1946, the Charter for the environment of 2004, the republican principles of the Third Republic ("fundamental principles recognized by the laws of the Republic"), and constitutional objectives identified by constitutional judgments. The entire constitutional block is at the disposal of the Constitutional Council to control legislation with different forms of constitutional review. In order to implement changes in reaction to the pandemic, no constitutional change was needed. The health state of emergency was adopted with an ordinary law of March 23, 2020.

France has a rigid constitution; as a result, constitutional amendments are subjected to a specific procedure detailed in the Constitution (article 89). A constitutional reform can be proposed either by the Government or by the members of Parliament; it then has to be approved in identical terms successively by both chambers of Parliament—the National Assembly and the Senate; finally, it has to be ratified either by popular referendum or by Congress at a 3/5 majority, a joint session of both chambers. The decision about the ratification process belongs to the President if the initiative came from the Government; it goes automatically to a referendum if the initiative came from MPs. The French Constitution has been modified many times if compared to very rigid constitutions, such as the United States Constitution: out of the 24 constitutional amendments of the 5th Republic, only one was ratified by referendum, all the other passed through Congress. The requirement of the 3/5 majority implies that a larger consensus on the reform must be acquired by the governing majority, which is usually at the origin of a reform. As a result, unsuccessful constitutional reforms usually fail because of the opposition of the Senate, if the political majority is different from the National Assembly.

As a political regime at least partially presidential, the political history of the 5th Republic is marked by its presidencies. Almost every French President at the beginning of his term would announce a constitutional reform as a way to make a durable impact on French institutions. Of course, not all Presidents would manage to actually go through with the reform. Emmanuel Macron was no exception. Right after the presidential elections in 2017, the newly elected president gave a speech[2] in front of Congress and announced a comprehensive reform of the institutions of the 5th Republic.

Despite the numerous and sometimes hectic changes in the law to deal with the health crisis, the pandemic has effectively interrupted the Parliament's schedule for 2020, including the proposed constitutional reforms of 2019, preventing it from being discussed. Diverting the political attention to other pressing issues, coronavirus has probably killed the constitutional law bill which had been already agonizing since before the pandemic. This report will analyze the content and context of the proposed reforms and explain the reasons why it has been delayed, at least until the beginning of 2021, and probably abandoned indefinitely.

II. PROPOSED AND FAILED CONSTITUTIONAL REFORMS

To understand the proposed—but unsuccessful—constitutional reform of 2019, it is necessary to recall the previous version, proposed in 2018 and retired a year later in order to present a new one.

Not having been amended since 2008[3], the French Constitution has long been criticized for the unbalance of its institutions, which disproportionally favors the Executive at the expenses of the Legislative power. Even if a "rebalancing" of the two powers was the objective contained in the title of the 2008 reform, in the opinion of many constitutionalists, changes have not substantially altered the original balance. The Government is still the main actor of the legislative procedure, having multiple tools at its disposal to accelerate legislative debate and even to force the approval of a bill, if needed (by putting its own

1 Martin A. Rogoff, Fifty years of constitutional evolution in France: The 2008 amendments and beyond, Jus Politicum, n. 6, 2011. http://juspoliticum.com/article/Fifty-years-of-constitutional-evolution-in-France-The-2008-amendments-and-beyond-373.html.

2 Idris Fassassi, From a political revolution to constitutional changes: An analysis of Macron's proposed reforms, Constitutionnet, July 27 2017, https://constitutionnet.org/news/france-political-revolution-constitutional-changes-analysis-macrons-proposed-reforms.

3 Constitutional Bill of modernization of the institutions of the Fifth Republic, n° 2008-724, of July 23rd 2008. For a detailed analysis, see Martin A. Rogoff

survival at stake in front of the National Assembly[4]). Also, inside the Executive power, the balance is largely in favor of the President, giving him a predominant power over the Prime Minister, at least when they both come from the same political party (which has been consistently the case since 2002).

After the first declarations by Macron, the Government took some time to finalize the project of the reform, which was adopted by the Council of Ministers under the title "for a more representative, more accountable and more efficient democracy" on May 2018[5]. The project contained a series of proposed changes affecting the separation of powers of the Republic (legislative procedure, parliamentary control over government, criminal responsibility of ministers, multiple interventions over the organization of the judiciary, reorganization of local governments' powers) as well as the inscription in the Constitution of action against climate change, the prohibition of discrimination on the basis of sex and the elimination of the word "race" from the prohibited criteria of discrimination. However, this first project was quickly abandoned after a political scandal, known as the "Benalla affair", invested the Presidency. Alexandre Benalla, an aid of President Macron, employed by the Elysée palace, was filmed acting as a policeman and beating a protestor during the May 1st demonstration of 2018 in Paris. Both his actions and the lack of transparency of the Elysée towards the prosecution were put under scrutiny by both chambers of the Parliament. As a result, parliamentary debate over the constitutional reform was pushed *sine die* and the bill was eventually abandoned.

A year later, a revised, but similar project was elaborated by the Government, containing a constitutional reform "for a renewal of democratic life", which was submitted to Parliament on August 29th 2019. Formally, this reform has been pending ever since, after having been sent to the permanent commission on constitutional laws of the National Assembly the next day. Even if the bill has not been retired yet, it seems plausible that it will never be examined, given that no session has been scheduled by the commission during the entire year 2019-2020. This attempt of a constitutional reform, the content of which will be analyzed in the next paragraph, takes into account the months of protests staged by the "*Gilets jaunes*" (Yellow vests). Starting November 2018, groups of protesters all around France had organized, initially to oppose a green tax on fuel, but then continued after the tax was eliminated to denounce social injustice and the lack of popular participation in French democracy. After a lengthy social movement, having effectively blocked the country every Saturday for almost three months, the President launched a "big national debate", a new mechanism of participation allowing citizens to go to city halls or online and make a contribution on four pre-selected topics (taxes, public services, climate change, democracy). Even if the concrete effects of this debate are uncertain and it has been criticized by many as being just a political communication operation, it appeared clearly that French representative democracy lacked mechanisms of direct participation. Referendums in France could only be initiated by the President until 2008; since the constitutional reform of that year, a new mixed initiative referendum has been added to the Constitution (article 11), but it has still failed to work, given the particularly strict conditions of the procedure (1/5 of MPs and 1/10 of the electoral body—more than 4.5 million citizens—have to support the initiative). As a result, the proposed constitutional reform concentrates on new participation mechanisms and democracy in general.

This new constitutional bill did not have an easy start either. A few months after it was introduced in Parliament, a legislative reform on retirement launched by Édouard Philippe's Government prompted a series of massive national strikes that monopolized the political attention and the parliamentary debate, until the beginning of 2020. Coronavirus crisis brutally interrupted both attempted reforms, the constitutional and the legislative one. The calendar of 2021 is still unclear on both subjects, but it seems unlikely that the constitutional amendment's procedure will advance so late in the presidential term. With 2022 presidential and legislative elections approaching quickly, it is probably not the time for Emmanuel Macron to engage in a large reform of the institutions. Also, the Senate has been steadily opposed to both constitutional reforms proposed by President Macron, given the different political majority of the Senate (conservative right). This might be the reason why the President decided to introduce a new constitutional bill with less ambition in January 2021. Composed of a unique article, the constitutional law project "completing article 1 of the Constitution and relative to the protection of the environment"[6] aims at drawing conclusions from the Citizens' Convention on Climate of 2019-2020. Created by the Prime Minister and composed by 150 randomly selected citizens, the Convention produced a report containing a great number of proposals, that the President had promised to adopt "without filter". One of the proposals was to amend the Constitution both in its Preamble and in article 1 in order to add action against climate change to the main principles of the French Republic (including secularism, democracy, equality, decentralization, equal opportunity). The amendment, presented by the Prime Minister and the Minister of Justice in the name of President Macron, ignores the Preamble and only concentrates on article 1, and is supposed to be ratified by referendum after the vote of the Parliament. After being examined by the permanent commission of the National Assembly and with no accepted amendments, the bill has been debated by both the National Assembly and the Senate between March and June 2021 and the discussion is ongoing at the time this report was written.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The scope of the proposed constitutional reforms can be summarized as aiming at a more accountable democracy. The changes concern four main topics: direct participation of the people (1); justice and accountability (2); electoral system (3); climate change (4).

1. DIRECT PARTICIPATION OF THE PEOPLE

The Executive tried to respond to the revendications of the *Gilets Jaunes* by opening the access to the mixt initiative referendum of article 11 of the Constitution. The *Gilets Jaunes* movement claimed the creation of a popular initiative for referendums, in a similar fashion to what exists

4 Article 49 par. 3 of the Constitution allows the Government to enact legislation by turning the vote on its bill into a vote of confidence.

5 Projet de loi constitutionnelle pour une démocratie plus représentative, responsable et efficace, n° 911 , May 9th 2018, https://www.assemblee-nationale.fr/dyn/15/dossiers/democratie_plus_representative_responsable_efficace

6 Projet de loi constitutionnelle complétant l'article 1er de la Constitution et relatif à la préservation de l'environnement, n° 3787 , presented on January 20th 2021, https://www.assemblee-nationale.fr/dyn/15/dossiers/pjlc_environnement.

in Italy or Switzerland. But France looks at referendums with mistrust because of the history of plebiscites used especially for reinstating the Empire and legitimizing *coups d'Etat* (such as Bonaparte did in 1851 and 1852). Emmanuel Macron has consistently been opposed to popular initiatives, but has tried to compromise by accepting to lower the number of signatures needed in order to initiate the existing referendum. Instead of 185 members of Parliament and 4.7 million citizens, only 1 million signatures would be required with the support of 93 members of Parliament. Also, the citizens would be able to start the process, which is now exclusively in the hands of their representatives. If it is still far from direct democracy, this system would have permitted to the only previous attempt of such a mixt referendum to pass: in 2019-2020, an initiative against the privatization of *Aéroports de Paris*, the company in charge of Charles de Gaulle et Orly airports, had reunited 1.09 million signatures over 9 months.

Another amendment contained both in the 2018 bill and in the amended version of 2019 is the reform the Economic Social and Environmental Council (CESE). In order to develop the rare existing mechanisms of participatory democracy, this institution—poorly known and seldom taken into account in French separation of powers—was supposed to be transformed into a third chamber, representative of civil society and in charge specifically of citizens' participation. Its new functions were inspired by the success of the Citizens' Convention on Climate of 2019 (see *supra*, II): the new chamber would have the power to organize popular consultations of citizens chosen randomly. This reform, after the delay and possibly the abandonment of the comprehensive constitutional amendment of 2019, has been partly adopted by choosing a procedural way around the blockage. In fact, not all aspects of the CESE are inscribed in Title XI of the Constitution, some are referred to an organic law that completes the constitutional text. To change the organic law, ordinary legislative procedure is sufficient, the only specificity being a mandatory control by the Constitutional Council. A new organic law reforming the CESE has been adopted in January 2021 after a few months of parliamentary debate. Even if this reform cannot be considered as a constitutional amendment formally, it is a way to follow up on some of the promises made by President Macron for his first term. The procedure has been criticized for being a constitutional amendment that does not say its name: from a strictly constitutional point of view, this process has been approved (both by the *Conseil d'Etat* and the *Conseil constitutionnel*); however, it has been pointed out how that it is an unhealthy diversion of the procedure for constitutional amendments, especially when it concerns a constitutional organ that is being modified in its scope[7].

2. JUSTICE AND ACCOUNTABILITY

The proposed reform aimed at the independence of the judiciary. The composition of the Constitutional Council—the quasi-court in charge of constitutional review of legislation—is an exception from a comparative point of view, as former Presidents of the Republic become members for life by right. If the 9 nominated members (3 by the President of the Republic and 3 by each President of the two chambers of Parliament) do not raise any particular question, other than the lack of professional requirements for their nominations, the presence of former Presidents for a potentially long period of time presents a real issue for the impartiality of the Council. Many voices have expressed the quasi-unanimous wish of eliminating the members by right from the Constitution, but this amendment has still not been adopted.

A more independent justice is also at the core of another proposed change: the end of special justice for the members of Government and their justiciability by ordinary courts. In the current Constitution, ministers are criminally responsible in front of a special court, the Court of Justice of the Republic, composed by magistrates as well as members of Parliament, for crimes and offences related to their public activity. This special court, often criticized as being complaisant and guaranteeing a *de facto* immunity to ministers, would be eliminated and the Court of appeals of Paris would be competent instead.

3. ELECTORAL SYSTEM

French representative democracy was also the subject of a proposed change. Specifically, the 5th Republic is based on a two-rounds majoritarian electoral system for both presidential and legislative elections. Inserted in the Constitution as a reaction to the previous regimes (3rd and 4th Republics) and their instability, attributed (wrongly) to the proportional electoral system, the majoritarian system has long been criticized as being unrepresentative, especially since the political situation in France is no longer based on two opposing sides as it was at the beginning of the 5th Republic, the Socialist left, and the Gaullist right. The discussion about the possibility of compensating the majoritarian effect of this system with the introduction of a "quota of proportional system" for the elections of the National Assembly has long existed in France. President Macron has put this idea into his program as well. As a result, the constitutional reform was correlated with a proposed ordinary law (the electoral system for the National Assembly is not inscribed in the Constitution) making so that 20% of the seats in the Assembly are elected with a proportional system. This change was to be associated with a reduction of the total number of members of Parliament which is inscribed in the Constitution and had to pass through the constitutional reform procedure.

4. CLIMATE CHANGE

Last, the constitutional reform aimed at consolidating the environmental principles contained in the Charter for the environment, added to the French Constitution in 2005. By adding the action against climate change to article 1 of the Constitution, but refusing to re-write the Preamble in light of the Convention on Climate, this amendment does not overturn the hierarchy of values of the French constitutional system. Human rights, as defined in the first-generation Declaration of 1789 and the second-generation Declaration of 1946, are not reorganized in order to add environmental rights (often identified as the third generation of rights) at the same level as the ones contained in the Preamble.

All the amendments analyzed above are best described as amendments instead of dismemberments. In fact, from a content-based approach, the scope of the proposed changes is in continuity with the

7 See Denis Baranger, "Démocratie participative : l'inopportune réforme du CESE", JP Blog, September 5th 2020, https://blog.juspoliticum.com/2020/09/05/democratie-participative-linopportune-reforme-du-cese-par-denis-baranger/#_ftnref3.

pre-existing Constitution of 1958. By systematically refusing to take the more extreme approach to each of the described problems of the regime—mixed initiative referendum instead of popular initiative, 20% of proportional vote instead of totally changing the majoritarian system, eliminating members by right from the Constitutional Council, but not reforming the lack of professional requirements for the remaining members, etc.—the proposed constitutional reform of 2019 was largely conservative. It did not attain the core of the system nor "altered one or more of the constitution's essential features"[8].

Furthermore, those reforms, even though they were supposed to deeply modify the balance of powers of the 5th Republic and some of its main institutions, were not in any way at risk of touching the unamendable characters of the eternity clause of article 89. In fact, only a few limitations are imposed on the constituent power by the Constitution of 1958: a substantive limitation—the republican form of government cannot be modified—and a temporal limitation—no amendment can be adopted in case the integrity of the territory is threatened. Even with an extensive interpretation of the temporal limitation, that the constitution cannot be amended in times of war (this interpretation appeared right after the terrorist attacks of 2015), and even if President Macron has adopted a commander-in-chief approach towards the "war" against coronavirus, it is doubtful that the health emergency would have been considered as a constitutional obstacle to the reform.

But even if a doubt about the unconstitutionality of the amendments had been raised, no judicial control over constitutional reform would have been possible. In fact, the French Constitutional Council has consistently refused to control constitutional amendments. Since 1962, and twice afterwards (1992 and 1997), the Council has considered that the Constitution puts it in charge of constitutional review of the acts of the legislative power, but not of the constituent power, albeit the "*pouvoir constituent dérivé*" or the power of constitutional amendments. In the 1962 case, the amendment regarded the electoral system of the presidential elections, and it had been adopted by referendum. The Constitutional Council considered that the amendment constituted the direct expression of the sovereignty of the people, and as such could not be subjected to the control of an institution created by the Constitution ("*pouvoirs constitués*" in the famous Sieyès' distinction). Even when the constitutional amendment was not approved by referendum, but by Congress, the Council concluded rapidly that no article of the Constitution justified the power of controlling constitutional amendments. Successive reforms were not even addressed to the Constitutional Council, and constitutional scholars agree that the debate on constitutional control of constitutional amendments is at least for now virtually closed[9].

This does not mean that analyzing the justifications of the refusal of any control over constitutional amendments in uninteresting, on the contrary. In fact, if compared with other European systems, this debate shows the specificities of France when it comes to constitutional review of legislation. The French Constitutional Council was created only in 1958, later than most Western democracies created their constitutional courts, and it was not until 2008 that the possibility of controlling laws after their enter into force was introduced[10]. From a substantial point of view, the French model of constitutional review is strictly limited by the Constitution on one side and by the large margin of appreciation of the legislative power, to which the Council is often explicitly deferent[11] on the other side. Born into an environment hostile to judicial power[12] especially if compared to the democratically elected parliament, the Council has long lacked legitimacy to assume a more active role in French constitutional politics. The *ex ante* constitutional review, that has been the only form of review in France for the first 50 years of the 5th Republic, does not authorized the Council to review legislation but only bills adopted by Parliament and still not promulgated as laws, in order to reduce the limitation of parliamentary sovereignty. In this context, the possibility for the Council of controlling the constituent power—the national sovereign—is unthinkable.

The French Constitution Council was certainly created as an organ supposed to control another branch of government, but not necessarily in the sense that is intended while referring to the counter-majoritarian role of a court[13]. In fact, the initial function of this new organ was to be "a cannon aimed at Parliament"[14] to protect the Executive and ensure its stability, as opposed to the instable history of French Governments under the 3rd and 4th Republics. But the Council's role evolved with its jurisprudence: by extending the sources of constitutional review to the Preamble of the Constitution[15], which was not initially intended to have normative force by the framers, the Council fully embraced its counter-majoritarian role.

However, The self-restraint of the Constitutional Council does not make it an easy task of identifying a potential representative role of its constitutional decisions. The Council is not a very well-known institution by the general public, as it was recently underlined by its President Laurent Fabius in the occasion of the 10th anniversary of the new mechanism of constitutional review (the priority ruling on constitutionality or QPC in the French acronym). Furthermore, the constitutionality of legislation has often been contested by companies on the basis of their economic rights (property, equality, freedom of commerce) so that rulings of the Constitutional Council do not necessarily interpret the will or the interests of the larger population[16].

Nonetheless, a recent case could contribute putting the French constitutional judge on the map of representative courts in a limited sense. On January 31st 2020, the Constitutional Council admitted for the first time that the Preamble of the Charter for the environment can be considered a constitutional objective that can justify the limitation of some

8 Richard Albert, *Constitutional Amendments*, Oxford University Press, 2019, p. 95.

9 Armel Le Divellec, Anne Levade, Carlos Migues Pimentel, "Le contrôle de constitutionnalité des lois constitutionnelles—Avant-propos", *Cahiers du Conseil constitutionnel*, n. 27, 2010, https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-controle-de-constitutionnalite-des-lois-constitutionnelles-avant-propos.

10 See Federico Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation", *German Law Journal*, vol. 9, no. 10, 1297-1312.

11 The French Constitutional Council is then best defined by "self-restraint" as defined by Luís Roberto Barroso, "Counter-majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies", *The American Journal of Comparative Law*, vol. 67, issue 1, Marche 2019, 109-143, fn. 33.

12 Arthur Dyevre, "The French Constitutional Council", in A. Jakab, A. Dyevre, G. Itzcovich (eds), *Comparative Constitutional Reasoning*, Cambridge University Press, 2017, 323.

13 Which can be defined as the "status of sentinels against the tyranny of the majority", see Luís Roberto Barroso (11), 126.

14 See ibid. p. 324.

15 Constitutional Council, Decision no. 71-44 DC of 16 July 1971, Law completing the provisions of Articles 5 and 7 of the Law of 1 July 1901 on association agreements.

16 Stéphanie Hennette-Vauchez, "« ...les droits et libertés que la constitution garantit » : *quiproquo* sur la QPC ?", *Revue des droits de l'homme*, n. 10/2016, https://journals.openedition.org/revdh/2481.

economic rights such as freedom of commerce. If the Council seems to interpret the will of the majority of the population in this time when the interest of civil society is to better preserve the environment, it does not do so against the legislator, which had gone in the same direction with the challenged legislation. So, to use Barroso's terms, this decision cannot be considered counter-parliamentary.

The question remains if the Constitutional Council could be seen as an enlightened court. Given the difficulty of finding its legitimacy and despite its evolution towards the status of an actual constitutional court, it seems that the French Council would not fit the description. Nonetheless, one recent case could be seen as a counter-majoritarian decision in the direction of social progress. In 2018, a French farmer who had helped and sheltered illegal immigrants who had crossed the border from Italy to France was condemned in criminal court on the grounds of the Criminal Code, that punished assistance to illegal immigration even without any retribution. The Constitutional Council interpreted for the first time the principle of fraternity in the French national devise to be a constitutional right and concluded that "it follows from the principle of fraternity the freedom to help one another, for humanitarian reasons, without consideration as to whether the assisted person is legally residing or not within the French territory"[17].

IV. LOOKING AHEAD

Even though the 2019 project of constitutional reform is at a full stop at the moment, and it is not likely to regain momentum before the end of this presidential term (as the first few months of the presidency are more likely to see a successful reform), many fundamental questions remain to be addressed.

First of all, the role of the Parliament in the French separation of powers. Government possesses many constitutional tools to intervene in the legislative process, which undermines the role of Parliament.

Secondly, the question of the direct participation of citizens to French democracy will likely have marked Emmanuel Macron's presidential term. Even with the new role of the CESE, French participatory democracy is still at a minimum, and given the current crisis of representative democracy, this issue is likely to appear on the political agenda again after the health emergency will end.

Lastly, the electoral system is considered to have influenced the political practice of the last 70 years. Many criticisms have appeared against this system that is considered to be no longer adapted to the current political situation of France. As a result, a member of the National Assembly has initiated a new bill introducing a part of proportional system for the legislative elections in March 2021. But this proposal, even without being a constitutional amendment, does not reach a consensus inside the majority and could very well never be inscribed on the parliament agenda.

V. FURTHER READING

Florian Savonitto, "Vers une chambre du futur ?" (2019/4), 44 Revue juridique de l'environnement, 725-750.

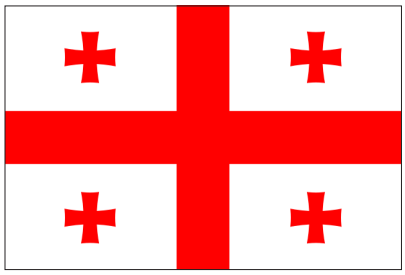
Charles Devellennes, *The Gilets Jaunes and the new social contract* (Bristol University Press 2021).

Philippe Claret, Florian Savonitto, *La réforme institutionnelle sous le quinquennat d'Emmanuel Macron. Les projets de loi pour une démocratie plus représentative, responsable et efficace* (L'Harmattan 2020).

Louis-Gaëtan Giraudet, "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", 2021, https://hal-enpc.archives-ouvertes.fr/hal-03119539/document.

17 Constitutional Council, decision n. 2018-717/718 QPC of 6 July 2018 (M. Cedric H.).

Georgia



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I. INTRODUCTION

The Constitution of Georgia has been amended 36 times in 25 years, since its adoption. On average, that is more than 1 amendment per year. It should not come as a surprise that the Constitution was changed in 2020 once again. This review aims at analyzing the political context as well as the legal aspects of last year's constitutional change. An amendment concerns the electoral system, which has always been in the center of political discussions in Georgia over the years.[1] The reader will discover what type of constitutional amendment rules are in place in the Constitution and how they have been used to modify it. The text also touches upon the scope of a change. With use of theoretical sources, I will demonstrate where the constitutional change in question sits. The review also deals with possibilities of constitutional control of constitutional amendments. It analyzes the practice of the Constitutional Court and the criticism it faced from legal scholars. The document also shows the role the Court plays and discusses the chances of future constitutional reforms.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

2020 has been consequential both regarding constitutional amendments and political environment. That year the parliament only passed one constitutional amendment bill. However, in order to understand the need for that constitutional change, it's essential to look over the political context and a failed amendment of 2019.

In 2019, following the street protest of many Georgians, the government agreed to hold the 2020 parliamentary elections in fully proportional system.[2] An appropriate constitutional bill was drafted and the parliament started procedures for its adoption.[3] However, the same parliamentary majority who proposed the bill was the one, who failed to accumulate the necessary votes[4] to pass it.[5] The Chairman of the Parliament later acknowledged, that the proposal aimed at easing the political tension.[6] In reality, having broken its word, the government aggravated the street protest, culminated with the opposition blocking the entrance of the parliament.[7] This prompted the government to use water cannons and special police forces to disperse the protesters.[8]

In December 2019, Georgian Dream (hereinafter GD), the governing party, proposed to the opposition the new electoral system for the 2020 parliamentary elections in which 100 members of Parliament (hereinafter MPs) would be elected through the proportional and 50 MPs through the majoritarian systems.[9] Such allocation of parliamentary seats was unacceptable for the opposition. On their part, they proposed 130/20 system.[10]

In February 2020, after sentencing one of the leaders of the opposition, the rest decided to discontinue any dialogue with GD.[11] However, the communications between the parties have been reinstated by the active participation of the international community.[12] In the beginning of March 2020, the governing party compromised by suggesting so called "110/40" system,[13] with a special mechanism. The political party would only be able to form a government, if it accumulated at least 40% of votes at the election.[14] Both 100/50 and 110/40 systems put forward by GD were unacceptable for the opposition.[15] Due to the enormous effort of international facilitators, both parties came to an agreement on March 8, 2020.[16] According to the document, the 2020 parliamentary elections would be held based on a mixed system, in which 120 MPs would be elected through the the proportional and 30 MPs through the the majoritarian systems, with 1% threshold for the former and the 40% capping mechanism.[17]

1 Vasil Gonashvili, Ketevan Eremadze, Giorgi Tevdorashvili, Giorgi Kakhiani, Giorgi Kverenchkhiladze, Nana Chigladze, *Constitutional Law of Georgia* (Meridiani 2017) 198-203.
2 Georgian Dream has an initiative to hold 2020 elections with 0% threshold <https://tinyurl.com/y4z75qua> accessed 11 January 2021.
3 Constitutional Bill on Amending the Amendment to the Constitution of Georgia, 2019 <https://info.parliament.ge/#law-drafting/18526> accessed 11 January 2021.
4 It's worth noting, that the governing party itself had enough MPs to adopt a constitutional bill without the need of the opposition.
5 Constitutional Bill on Amending the Amendment to the Constitution of Georgia, 2019 <https://info.parliament.ge/#law-drafting/18526> accessed 11 January 2021.
6 Georgian Dream plans to introduce 100/50 electoral system forever <https://formulanews.ge/News/20027> accessed 11 January 2021.
7 Picketing started: one of the gates of the parliament was locked <https://www.radiotavisupleba.ge/a/30276575.html> accessed 11 January 2021.
8 Water cannon - when, how and for what it can be used < https://tinyurl.com/y5gvtxh2> accessed 11 January 2021.
9 Georgian Dream plans to introduce 100/50 electoral system forever <https://formulanews.ge/News/20027> accessed 11 January 2021.
10 What is the opposition considering in response to the 100/50 offer of the government <http://go.on.ge/1f0j> accessed 11 January 2021.
11 Opposition suspends dialogue with ruling party over Ugulava's detention <https://civil.ge/ka/archives/338086> accessed 11 January 2021.
12 Georgian Young Lawyers' Association, Newsletter 5 <https://tinyurl.com/ybs6qu5e> accessed 11 January 2021.
13 This proposal suggested 110 MPs elected through proportional system and 40 MPs through majoritarian.
14 Georgian Dream with an unacceptable offer for the opposition <https://tinyurl.com/y7hcr4e7> accessed 11 January 2021.
15 ibid.
16 Statement of the facilitators on the political dialogue in Georgia (March 8) <https://tinyurl.com/yyfmwnng> accessed 11 January 2021.
17 Memorandum of Understanding <https://tinyurl.com/y6mp7v63> accessed 11 January 2021.

The Constitution establishes an exceptional multitrack framework of the constitutional amendment rules.[18] It entrenches two routes for a comprehensive change. One includes adoption of a bill with at least two thirds of the total number of MPs and the members of the next elected parliament must again approve it, without any amendments, by two thirds of majority. Afterwards it's sent to the President for the promulgation.[19] The other implies adoption of a bill with at least three fourths of the total number of MPs. Only in this case, it's sent to the president immediately, without waiting the next parliament for its approval.[20] Consequently, the second rule offers a fast track for a change. Any amendment can be deployed by using either of these two methods. However, there is an exception. If the issue concerns the restoration of territorial integrity of Georgia, then the constitutional law related thereto shall be adopted by two thirds of the MPs, with an exception, without the need of approval of the next parliament. Instead, it's submitted immediately to the President for the promulgation.[21]

On March 11, 2020 a constitutional amendment bill containing the agreed upon issues was registered in the Parliament.[22] Since the substance of the bill concerned the 2020 parliamentary elections, it was only logical to pass it using a fast track option with a higher threshold. The amendment rules in the Constitution provide for a deliberation floor.[23] It's mandatory to hold public debates about any amendment for a month.[24] On March 17, 2020 the Parliament set up a special commission for that purpose.[25] Due to the Covid-19, the commission decided to have television discussions.[26] However, shortly afterwards, on March 21, the President of Georgia declared a state of emergency for one month because of pandemics.[27] On April 22, the President prolonged it for another month.[28] The Constitutional amendment process was halted during that period. In constitutional law this is not a strange scenario. Usually, constitutional designers to disable the formal amendment process during a national emergency, martial law, or a state of siege or war.[29] So, some basic laws of various nations entrench defense mechanisms.[30] They disable the formal amendment process altogether.[31] Good examples would be Spanish and Estonian constitutions.[32] In addition, amendment rules in Georgian Constitution also consider martial law as an impediment to a constitutional change.[33]

After the state of emergency expired, public discussions resumed. In the end of June 2020 the Parliament passed the constitutional bill.[34] It's noteworthy that this change wasn't introduced into the master text of the Constitution, but into a separate constitutional law. The master text of the Constitution prescribes general rules for the parliamentary elections. However, in 2017,[35] as a political compromise, unique law was adopted especially for 2020 parliamentary elections. It was intended to be for one-time use only. Thus, the Parliament modified this very law, which it did 5 months before the elections.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Constitutional changes are not always the same in terms of importance. Some are mere additions to the constitution to improve it, whereas others pierce through the core of the basic law and transform it. Legal scholars have tried to draw a line between the sizes of constitutional modifications. For Thomas M. Cooley an amendment must have been in harmony with the thing amended, so far at least as concerned its general spirit and purpose.[36] If a change was entirely incongruous, for him, it would amount to a revolution.[37] John Rawls had the same understanding. For Rawls, an amendment is to adjust basic constitutional values to changing political and social circumstances, or to incorporate into the constitution a broader and more inclusive understanding of those values.[38]

Professor Richard Albert devised a theory to distinguish small and big changes from one another. He coined the term "dismemberment" to denote transformational modifications to the constitutions. For Professor Albert, the key feature of an amendment involves its scope.[39] According to him, an amendment is a constitutionally continuous change to higher law— a change whose content is consistent with the existing design, framework, and fundamental presuppositions of the constitution.[40] Professor Albert suggests that an amendment may have one of 4 distinct purposes, namely corrective, elaborative, reformative, or restorative.[41] They will be useful to correctly identify a change to the Constitution of Georgia.

Dismemberment is a constitutionally continuous transformation that can occur suddenly in a big bang moment of constitution-unmaking or gradually by erosion or accretion; it can occur to constitutions both codified and uncodified; and it can occur with the effect of either enhancing or deteriorating liberal democracy.[42] The theory of

18 Richard Albert has designed 6 frameworks for constitutional amendment rules. To learn more, see: Richard Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 Wake Forest Law Review 913.
19 Constitution of Georgia, art 77 (3).
20 ibid art 77 (4).
21 ibid art 77 (5).
22 The draft constitutional law of Georgia "On Amendments to the Constitution of Georgia" has been registered in the Parliament <https://tinyurl.com/yc93oosk> accessed 11 January 2021.
23 To learn more about deliberation floors, see: Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (Oxford University Press, 2019) 204.
24 Constitution of Georgia, art 77 (2).
25 The decree of the Parliament of Georgia 2020 < https://info.parliament.ge/file/1/BillReviewContent/246355?> accessed 11 January 2021.
26 The Organizing Commission for the Public Discussion of the Draft Constitutional Law held its first session <https://tinyurl.com/yxzw6rd4> accessed 11 January 2021.
27 The edict N1 of the President of Georgia on declaring the state of emergency on the whole territory of Georgia 2020 < https://www.matsne.gov.ge/ka/document/view/4830390?publication=0> accessed 11 January 2021.
28 The edict N2 of the President of Georgia on declaring the state of emergency on the whole territory of Georgia 2020 < https://matsne.gov.ge/ka/document/view/4853172?publication=0> accessed 11 January 2021.
29 Richard Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 Wake Forest Law Review 913, 955.
30 ibid.
31 ibid.
32 ibid.
33 Constitution of Georgia, art 77 (7).
34 The adoption of the Constitutional Law on Amending the Amendment to the Constitution of Georgia 2020 <https://info.parliament.ge/#law-drafting/20139> accessed 11 January 2021.
35 To learn more about 2017 constitutional reform in Georgia, see: Malkhaz Nakashidze, 'Georgia—Constitutional reform: From semi-presidentialism to parliamentarism' (Presidential Power, 3 October, 2017) <https://presidential-power.net/?p=7010> accessed 5 January 2021; Malkhaz Nakashidze, 'Georgia' [2018] 2017 Global Review of Constitutional Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215613> accessed 5 January 2021; Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (Oxford University Press, 2019) 189-190.
36 Thomas M. Cooley, 'The Power to Amend the Federal Constitution' (1893) II Michigan Law Journal, 109, 118.
37 ibid.
38 John Rawls, *Political Liberalism,* (Columbia University Press, 1993) 238.
39 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (Oxford University Press, 2019) 79.
40 ibid.
41 ibid 80.
42 Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale J. Int'l L., 1, 39.

constitutional dismemberment accordingly does not recognize a new constitution until it is in fact self-consciously adopted by the relevant political actors choosing to launch and successfully complete the formal constitution-making process for that purpose.[43] The heart of the theory of dismemberment is a careful evaluation of the substantive implications of the change for the constitution.[44] It's worth noting that the theory of constitutional dismemberment isn't limited to a scope of a change, its domain is far-reaching.[45]

Having covered the theoretical ground, it is crucial to analyze the modification to the Constitution of Georgia and apply the above-mentioned approaches for its classifications. The rules for 2020 parliamentary elections were designed during the third major constitutional reform.[46] According to the initial rules, the Parliament elected in 2020 would consist of 77 members elected through the proportional and 73 members through the majoritarian systems.[47] Thus, initially the Constitution envisioned a mixed electoral system, comprising of both proportional and majoritarian framework. This rule was for one-time use only, specifically designed for one parliamentary elections. The 2020 constitutional change modified the distribution of seats. Instead of having 77 members through the proportional and 73 members through the majoritarian systems, the final allocation of the parliamentary seats was 120 and 30, respectively. The change also lowered a threshold in the proportional system from 3% to 1%.[48] The core principle in the Constitution before and after the change stayed intact. The modified norm stayed in line with the previous structure of the Constitution. The mixed electoral system hasn't been altered. Therefore, the content of a change is consistent with the existing design, framework, and fundamental presuppositions of the constitution.[49] As a result, the change introduced into the Constitution of Georgia is an amendment. After identifying the change as an amendments, it's important to ascertain which purpose it serves. As already mentioned, an amendment has one of the 4 purposes. In this case, the amendment to the Constitution is a reformative one, because it revises an existing rule in the Constitution but without undermining the Constitution's core principles.[50]

The constitutional amendment in question has not been challenged in the Constitutional Court. Even if one wanted to do so, that endeavor would be in vain. The reason is that the Court rejects the unconstitutional constitutional amendments doctrine. It had only 3 cases[51] concerning the constitutionality of constitutional amendments and in all of them the Court used the same arguments to refrain from reviewing them. Therefore, I'll cite from the latest decision. However, before presenting the Court's position, it's important to discuss legal framework of normative acts in Georgia. The organic law on Normative Acts regulates the relationship between different laws in Georgian legal system. On the apex sit the Constitution and a constitutional law.[52] Any change into the Constitution is introduced using a constitutional law. It's an integral part thereof.[53] Such status of a constitutional law is defined not by the Constitution itself, but by the inferior - organic law.[54] Thus, the Constitution is silent on the status of a constitutional law in legal framework of normative acts. According to the decision "the Court can't assess the substance of a constitutional law, because it forms an indivisible and organic part of the Constitution, therefore, it itself creates a constitutional order, it has the same judicial power as any other norm of the Constitution."[55] The Court reached this conclusion basing its arguments not on the Constitution but the inferior law, which defined the status of a constitutional law. This was one of the reasons the decision came under harsh criticism.[56] Even in these circumstances, the Court could have ruled otherwise, drawing from the practice of Taiwanese Council of Grand Justices. The Council held that although an amendment to the Constitution has equal status with the constitutional provisions, it would still check its constitutionality, if it destroyed the integrity and fabric of the Constitution.[57] The Constitutional Court of Georgia also discussed the lack of perennial norms in the basic law. The Constitution does not entrench anything against amendment. The Court reckoned it would be incorrect to create perennial, unamendable constitutional norms.[58] But it failed to pay attention to implicit unamendable clauses in the Constitution. The discussions about the notion of implicit unamendability dates back to the 19th century United States.[59] However, the real practical use of the phenomenon can be seen in the Indian Supreme Court's case law.[60] Professor Yaniv Roznai demonstrates how Indian Basic Structure Doctrine influenced many high courts in various countries to locate implicit unamendable principles in their respective constitutions.[61] Georgian Professor Dimitry Gegenava argues that the Constitution of Georgia contains certain principles,[62] which cannot be

43 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (n 39) 85.

44 Albert, 'Constitutional Amendment and Dismemberment' (n 42) 66.

45 ibid 52-82.

46 To learn more about the reform, please see: Malkhaz Nakashidze, 'Georgia—Constitutional reform: From semi-presidentialism to parliamentarism' (Presidential Power, 3 October, 2017) <https://presidential-power.net/?p=7010> accessed 5 January 2021; Malkhaz Nakashidze, 'Georgia' [2018] 2017 Global Review of Constitutional Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215613> accessed 5 January 2021; Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (Oxford University Press, 2019) 189-190.

47 Constitutional Law on Amending the Constitution of Georgia, 2017, art 2 (9). In 2018, this law was slightly modified to allow political blocks to participate in the elections. Constitutional Law on Amending the Amendment to the Constitution of Georgia, 2018, art 1 (2).

48 Constitutional Law on Amending the Amendment to the Constitution of Georgia, 2020, art 1 (2).

49 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (n 39) 79.

50 ibid 81.

51 Ruling N2/2/486 of 12 July 2010 of the Constitutional Court of Georgia on the case*: Non-Entrepreneurial (non-commercial) legal entity "National League for protection of the constitution" v the Parliament of Georgia;* Ruling N1/3/523 of 24 October 2012 of the Constitutional Court of Georgia on the case: *Citizen of Georgia Geronti Ashordia v the Parliament of Georgia;* Decision N1/1/549 of 05 February 2013 of the Constitutional Court of Georgia on the case: *Citizens of Georgia—Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze v. the Parliament of Georgia.*

52 Organic Law of Georgia on Normative Acts, art 7 (3).

53 ibid art 10 (2).

54 ibid.

55 Decision N1/1/549 of 05 February 2013 of the Constitutional Court of Georgia on the case: *Citizens of Georgia—Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze v. the Parliament of Georgia* II-9.

56 Dimitry Gegenava, 'Unconstitutional Constitutional Amendment: Three Judgments from the Practice of the Constitutional Court of Georgia' (2014) 5 SCLJ, 396, 401-403.

57 Yaniv Roznai, *Unconstitutional Constitutional Amendments: the Limits of Amendment Powers,* (Oxford University Press, 2017) 54.

58 Decision N1/1/549 of 05 February 2013 of the Constitutional Court of Georgia on the case: *Citizens of Georgia—Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze v. the Parliament of Georgia* II-11.

59 Roznai (n 57) 41.

60 ibid 43.

61 ibid 47-70.

62 According to Dimitry Gegenava, these principles are the unity and indivisibility of Georgia, prohibition of the alienation of the territory of the state, people as the source of the state authority, public representation, prohibition of usurpation of the state authority, separation of the state authority, the supremacy of the

in any way deemed as "regular," ordinary norms.[63] He views them as perennial norms, which are, by nature, unamendable. Therefore, Gegenava believes the Constitution provides the legal bases for the Court to review the constitutionality of constitutional amendments.[64]

It's been argued that Supreme and Constitutional Courts when deciding cases may play countermajoritarian, representative and/or enlightened role.[65] Countermajoritarian role entails deciding the constitutionality of legislative and executive acts and invalidation thereof.[66] In Georgia, the Constitutional Court possesses the power to invalidate any normative act, be it legislative or executive, should it violate the Supreme Law. Therefore, the Court has a countermajoritarian role. I will illustrate that it also plays the two other roles giving examples from its case law. By assuming a representative role, a court reflects the social expectations and desires.[67] A quintessential example would be a case related to the drug policy. By holding unconstitutional the jail time as a criminal punishment for the possession of weed for personal use,[68] the Court mirrored the opinions of many. From then on, the Court annulled many norms regarding criminal and administrative liability for possession and consumption of the mentioned drug.[69] If a court plays an enlightened role, it produced a decision, which is still seen as correct, fair and legitimate,[70] notwithstanding the political context.[71] The blood donation case would serve as an example of an enlightened role of the Constitutional Court. It concerned a blanket prohibition for the homosexuals to donate blood or its components. The Court held the prohibition unconstitutional, because it indefinitely ruled out any homosexual from being a blood donor.[72] As a result, the Georgian Constitutional Court played all three roles on different stages of its existence.

IV. LOOKING AHEAD

After 2020 parliamentary elections, the opposition refused to hold the allocated seats, claiming that the elections have been rigged.[73] Majority of opposition parties signed an agreement to waive their seats.[74] However, the Parliament did not terminate their mandates,[75] which, according to some professors, is unconstitutional.[76] In the wake of a boycott, ambassadors mediated between the parties. After 4 rounds of communications, the opposition demanded *inter alia* extraordinary parliamentary elections with fully proportional system.[77] The 2020 constitutional amendment introduced an exception that any extraordinary elections before 2024 shall be held using the system designed for the 2020 elections.[78] Therefore, meeting this demand entails constitutional amendment. Since it has to do with extraordinary elections, it's urgent and a fast track option of amendment rules must be used. However, it includes very high threshold - 3/4 of MPs. GD alone does not possess enough votes to pass a constitutional change. It would take opposition's participation to do so. Two out of 7 opposition parties agreed to enter the Parliament.[79] One of them signed a memorandum with GD, which includes lowering the threshold for 2024 parliamentary elections and modifying the number of deputies to create a faction.[80] Nevertheless, as part of the opposition continues to boycott, it's impossible to adopt any constitutional amendment. Therefore, it's unclear how this request could be fulfilled. For now[81] no draft of a constitutional bill has been put forward.

V. FURTHER READING

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Constitution, basic human rights as eternal and supreme values and binding the state authority by basic human rights.

63 Gegenava, (n 56) 403.

64 ibid.

65 Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' 67 (2019) the American Journal of Comparative Law, 109, 125-142.

66 ibid 125.

67 ibid 127-133.

68 Decision N1/4/592 of 24 October 2015 of the Constitutional Court of Georgia on the case: *Citizen of Georgia Beka Tsikarishvili v the Parliament of Georgia*.

69 Decision N1/13/732 of 30 November 2017 of the Constitutional Court of Georgia on the case: *Citizen of Georgia Givi Shanidze v. the Parliament of Georgia*. Decision N1/3/1282 of 30 July 2018 of the Constitutional Court of Georgia on the case: *Citizen of Georgia Zurab Japaridze and Vakhtang Megrelishvili v. the Parliament of Georgia*. The consumption of marihuana in public places is still punishable.

70 Barroso, (n 65) 137.

71 ibid 133-142.

72 Decision N2/1/536 of 4 February 2014 of the Constitutional Court of Georgia on the case: *Citizens of Georgia Levan Asatiani, Irakli Vacharadze, Levan Beri-anidze, Beka Buchashvili and Gocha Gabodze v Minister of Labor, Health and Social Affairs of Georgia* II-76.

73 2020 Elections - One-Party Parliament <https://tinyurl.com/nwbw2wmc> accessed 21 January 2021.

74 Rejection of parliamentary seats - Members of the opposition signed a public statement <https://publika.ge/uari-saparlamento-mandatebze-opoziciis-wevre-bis-sajaro-khelmowera/> accessed 21 January 2021.

75 Parliament did not terminate the mandate of 51 opposition MPs <https://tinyurl.com/22wequdf> accessed 6 February 2021.

76 "Dream" at a crossroads? An illegitimate parliament or a violated Constitution <https://www.radiotavisupleba.ge/a/31080589.html> accessed 6 February 2021.

77 Formula's exclusive: what does the opposition offer to the government—document <https://tinyurl.com/y5awowja> accessed 21 January 2021.

78 Constitutional Law on Amending the Constitution of Georgia, 2020, art 1 (2).

79 Four MPs enter Parliament through Patriots Alliance list and leave the party <https://civil.ge/ka/archives/390062> accessed 31 January 2021. Aleko Elisashvili and Levan Ioseliani decided to enter the parliament <https://tinyurl.com/y58kq27w> accessed 31 January 2021.

80 What memorandum did the "Citizens" sign with the government? <https://publika.ge/ra-memorandumi-gaaformes-moqalaqeebma-khelisuflebastan/> accessed 31 January 2021.

81 Before February 12th 2021.

Ghana

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I. INTRODUCTION

2020 was a constitutionally interesting year in Ghana. After the abandoned referendum of 2019, we did not expect to see much by way of constitutional reform efforts from this government. But the exigencies of the pandemic brought uncharted constitutional territory and put into sharp focus what the 1992 Constitution provides by way of emergency powers as well as the nature and limits of the legislative authority it bestows on Parliament. It was a year of both amendment and dismemberment. In the main, they were initiated by executive action, though the Supreme Court had occasion to review some of those actions. Generally, it sided with the executive. Is the Ghanaian constitution the better for the changes it has seen? As far as the dismemberments go, the answer, sadly is no. The changes to the constitutional text itself, and, as well, to the small-c constitution wrought by the executive and Supreme Court in 2020 will continue to impede the country's constitutionalism efforts long after the pandemic that generated them has passed. The amendment it saw on the other hand causes little complaint. In truth however, it is of so little consequence that no celebration is inspired by its success.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

It is appropriate to start this discussion with the most impactful of all the constitutional reform efforts of 2020. In March 2020, under a certificate of urgency—a methodology which till then had only ever been used for state contracts and other financial matters—the Imposition of Restrictions Act was passed by Parliament for the purpose of equipping the president with the powers needed to combat the coronavirus pandemic which by that time had made its way into Ghana. There was much debate within the academy as to the necessity of the legislation. Some scholars—myself included—considered the pandemic to fall within exactly the kinds of circumstances the framers envisioned when they crafted the emergency powers regime article 33 contains. Scholars on the other side of the debate maintained that a separate Act, being specific to the circumstance was preferable to the more general provisions of the article 33. But even they were hard pressed to explain the staggering breadth of powers conferred on the president by the Act. Passed literally overnight, the Act allowed the president to impose such restrictions on the freedoms of movement, association, and assembly as he thought necessary on the advice of the 'relevant person.' As a description of the only fetter on the president's power to decide how, where, and when Ghanaians may be physically located, 'relevant person' is woefully inadequate. No detail as to what makes this critical advisor relevant is provided. Even a goddaughter of the president could well fit this bill by virtue simply of being beloved.

But ever more worryingly, the Act allowed the president to impose restrictions on these rights for—public health or safety, national defence or the running of essential service or to protect Ghanaians against unpatriotic teachings (defined therein as such as denigrate the national symbols or flag). One might ask what is left beyond the reach of the president's power now? Essential services are undefined. Public health and public safety are extremely wide parentheses to operate in. Even a desire to reduce the amount of tobacco consumed in the country is a public health concern. The safety of children standing at a pedestrian crossing falls squarely within public safety and as for national defence, who but the government can know what it requires at any point in time. These are extremely protean parameters. A malicious president could fit all manner of dissent-stifling measures into them. As to that last permissible circumstance, it can only be said that if there is a straight line from unpatriotic teachings to pandemic response, it is almost impossible to see.

Furthermore, because there is no sunset clause on the Act, which means that these powers are now permanently part of a Ghanaian president's arsenal and he need only issue an Executive Instrument (EI) to exercise them. It has thus removed from the control of Parliament legislation that impacts these freedoms.

The Act underwrites this opportunity for executive abuse with a blanket criminal offence of failing to comply with a restriction. The offence carries a punishment of an impoverishing fine and/or a four-to-ten-year custodial sentence. The draconian penalties all but ensure that opposition to presidential impositions will either not exist or will be swept away. It converts the already overpowerful president into a near-invincible deity.

Unsurprisingly, the EIs issued pursuant to this terrible Act have had highhanded and, oppressive (or at least inconsiderate) tones. EI 63 obligated the country's telecom providers to hand over user data including data about who a user contacted and when. According to the office of the President this data was necessary for contact tracing to be effective. Given the entirely murky situation with the coronavirus pandemic, it did not sound like an implausible explanation. Nevertheless,

the plausibility did not diminish how authoritarian and abusive it felt. EI 64, in its initial operation, closed the borders of Ghana including to citizens abroad. It was not until several scholars pointed out the unconstitutionality of keeping citizens locked out that efforts were eventually made to repatriate Ghanaians stuck abroad due to the border closure. EI 63 was challenged but the court did not respond to the invitation to strike down the sections compelling telecoms to hand over user data as violating the right to privacy. The action was unsuccessful.

Despite all the resistance, the IRA continues in force and whether because the pandemic intensified or because Ghana has had relative success in containing it, the opposition to the Act has died down. It is safe to say these powers are now firmly vested in the executive wing of government such that it may require express amendment to repeal.

Also, of note on the constitutional reform front was the decision in Ayine v Attorney-General in which the court answered, albeit in an unnecessarily longwinded way, the question of whether the Constitution allowed Parliament to provide a later retirement age for a statutorily created public office than the constitution provided for the public services generally.

The final reforming event I dwell on is the disturbing incident of the president instructing the Auditor-General to proceed on accumulated leave and refusing to permit him to waive this right. This would hardly be a constitutional matter, let alone a constitutional reform event. However, the auditor-general is by article 187(7) of the Constitution independent and 'not subject to the direction or control of any other person or authority.' The auditor-general, following the rejection of his waiver, was locked out of his office and so he proceeded on the decreed 167 day leave. The fact that the president can decide not only when the auditor-general appointed in line with the constitution can be at post and when he must be on leave is an addendum to article 187(7) that the Constitution certainly did not envision.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The IRA by elevating the president beyond parliamentary control in respect of the freedoms of association, assembly and movement have tampered substantially with the configuration of power in the 1992 Constitution and defeats the mechanisms of separation of powers written into the constitution. It is an indisputable and, sadly, unprofitable dismemberment of the 1992 Constitution.

As Richard Albert shows, some kinds of dismemberments can be beneficial to a small-c constitution's growth. The IRA's dismemberment of the 1992 Constitution is not one of those. The EIs issued pursuant to it demonstrate exactly the ways in which IRA-powers can erode the affected rights into nothing. There is now a marked contraction in the scope of the freedoms of movement, assembly and association when compared for example with academic freedom. A dismemberment that expands executive authority poorly assists the quest to create and maintain a liberal democracy with tangible rights for citizens, which is both reason and purpose of the 1992 Constitution. The IRA is a successful, but unhelpful rearrangement of the constitution.

Though EI 63 was subjected to judicial review, the parent Act itself was not. It is unlikely that the Act would have been struck down. The pandemic was newly arrived in Ghana and the frightening happenings in other countries ensured that no person or authority was keen to be responsible for imposing a restraint on the president which later comes to prove a cause for greater devastation from COVID. Thus, it is unlikely that a challenge against the Act back in March 2020 would have been successful. Indeed, the failure of the action against EI63 was for this exact reason.

The decision about the retirement age is less problematic. It is easily identified as a constitutional amendment. It serves to add detail and clarity to the retirement provisions in the constitution. There is little to complain about regarding its existence. It is submitted that the presence of a retirement age for public officers in the Constitution in the first place is unfortunate. So, the effort to compound its effect was not helpful. Moreover, it would be strange for something as constitutionally unimpactful as the age at which a public officer retires to be able to permanently deprive us of the benefit of seasoned hands when the needs of the time require the expertise of (an) older citizen(s). As the court rightly noted, some countries have had to recall retired medical workers to assist in the pandemic response. It is unnecessary for such a situation to be unconstitutional or even problematic.

IV. LOOKING AHEAD

2021 is looking to be an eventful year on the constitutional reform front as well. Several election-related cases are at the time of publication pending before the Supreme Court with implications for the scope of the Electoral Commissioner's powers. The outcomes will be interesting whether or not they effect amendment by judicial review. Of particular note is the case of Prof. Margaret Kweku & Ors v. EC, AG & Peter Amewu. The plaintiffs here are challenging the parliamentary elections in which Peter Amewu was victor as by an administrative directive, citizens in a number of towns were not allowed to vote in the parliamentary elections on the grounds that the constituency had been re-demarcated when a new region was carved out of the Volta Region, as per the requirements of article 47(2). But for some reason, the excluded towns were not included in any other constituency and so the citizens therein were simply left out of the election and currently have no representative in Parliament. The court's decision is eagerly awaited.

The continued fight against the pandemic may generate more restrictive EIs—though it is hoped this will not be the case. It is possible however, that the relatively low infection and mortality rates thus far experienced will revive resistance to further expansion of executive powers under the IRA.

V. FURTHER READING

Addadzi-Koom ME Quasi-state of emergency: assessing the constitutionality of Ghana's legislative response to Covid-19, (2020) 8(3) Theory and Practice of Legislation 311

Greece

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I. INTRODUCTION

The year 2020 was a very difficult and challenging year for the world as the covid-19 pandemic left its indelible mark on every aspect of human activity. Emergency-related legal measures taken due to covid-19, led to major constitutional changes in Greece and elsewhere.[1] Deep concern arises with regard to the contingent multifaceted negative impacts of the pandemic on democracy, human rights protection and the rule of law as constitutional normality has been proven fragile. A new form of constitutional amendments, through a clash of rights, has emerged with the pandemic.

The intent of this report is to examine the different aspects of this new dystopic paradigm of constitutional changes that characterized the Greek constitutional praxis. Particular measures that limited certain fundamental rights will be examined and the position of the Courts towards the pandemic crisis will be reviewed. In addition, the report will underline the outcome of the recent constitutional amendment of November 2019, which also affected the Greek constitutional praxis in 2020. At the end, the aim of the report is to provide a brief, yet interesting narrative of the constitutional reality in Greece for the year 2020.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The year 2020 has been marked by the covid-19 pandemic to such an extent that triggered the constitutional debate on several aspects. First, in terms of the legislative procedure, measures to combat the pandemic were taken through the emergency constitutional framework. The Greek Constitution contains two fundamental instruments to tackle emergency situations. A more specialized provision, article 48 of the Constitution covers cases of war or other imminent threats against national security, as well as cases of armed coups aiming to overthrow the democratic regime. Under the aforementioned circumstances, the Parliament issues a resolution upon a proposal of the Cabinet and puts into effect throughout the State or in part of it, the statute on the state of siege which establishes extraordinary courts and suspends certain rights. Moreover, article 44, para. 1 contains a more general provision; the President of the Republic may, upon the proposal of the Cabinet, issue "acts of legislative content", legal norms essentially equal to ordinary laws, under extraordinary circumstances of an urgent and unforeseeable need. Since the President of the Republic has no discretionary power, the Cabinet essentially replaces the Parliament in law making.

The necessary constitutional balance to the extensive power vested to the Cabinet under this process, is provided in the same provision. Thus, the acts of legislative content shall be submitted to the Parliament for ratification within forty days of their issuance or within forty days from the convocation of a parliamentary session and should be ratified by the Parliament within three months of their submission; otherwise, they cease to exist, but only henceforth.

The measures to prevent the spreading of covid-19 fall under the scope of article 44, para. 1 of the Constitution. Since February 2020, nine acts of legislative content have been issued for taking measures to tackle the spreading of covid-19, covering all aspects of public life; hence it would not be exaggerative to argue that through 2020, the application of emergency law has gradually become the normality.

Regarding substantive measures, the constitutional debate has focused on the balance between fundamental rights and the protection of public health as a legitimate constitutional aim. Based on articles 5, paras. 2, 5 and 21, para. 3 of the Constitution, the State is obliged to take all necessary measures to prevent the spreading and combat infectious diseases that constitute a serious threat to public health. On the other hand, several fundamental rights have been limited due to those measures, opening the discussion on whether the measures comply with the principle of proportionality.

A first pivotal limitation is of general nature. Since March 2020, Greece is facing a countrywide lockdown on several scales of severity. The restrictions on the freedom of movement and the closure of certain businesses and venues certainly affect economic freedoms and establish a new economic paradigm. The extended lockdown period has led to a recession rate ranging from 8% to 10% in 2020[2] that affects several people's lives. Hence, the decreasing quality of life due to severe measures shall be discussed as a parameter for the adoption of further measures on economic transactions.

1 Vasileios G. Tzemos, "The Day became Night. The Pandemic, Life as the Ultimate Commodity and the two Faces of Proportionality (2020) 5 (1-2) Public Law Journal <http://www.publiclawjournal.com/docs/2020/1_2/2020_5_1_2_tzemos.pdf> accessed 4 February 2021.

2 European Commission, Directorate-General for Economic and Financial Affairs, Economic Forecast for Greece, <https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-performance-country/greece/economic-forecast-greece_en> accessed 4 February 2021; IMF, World Economic Outlook Database, <https://www.imf.org/en/Publications/WEO/weo-database/2020/October/weo-report?c=174,&s=NGDP_RPCH,NGDPD,PPPGDP,NGDPDPC,PPPPC,PCPIPCH,&sy=2017&ey=2021&ssm=0&scsm=1&scc=0&ssd=1&ssc=0&sic=0&sort=country&ds=.&br=1> accessed 4 February 2021.

Furthermore, throughout the pandemic crisis, specific measures have been adopted that restrict the right to outdoor assembly, guaranteed in article 11 of the Constitution. Article 11 also includes limitations to the right to outdoor assembly; in particular, outdoor assemblies can be prohibited in general, if a serious threat to public security is imminent and in a specific area, if a serious disturbance of social and economic life is threatened, as specified by law. On the basis of article 68, para. 2 of the act of legislative content issued on 20.3.2020, the right to assembly has been prohibited countrywide from November 15 until November 18, 2020 and on December 6, 2020.

The abovementioned dates were not randomly selected. During the first period, commemorative services, including a large demonstration, traditionally take place, in remembrance of the Athens Polytechnic Uprising, a massive student riot against the military junta in Greece, held from 14 to 17 November 1973. Similarly, December 6th has been socially emerged as an unofficial Remembrance Day of a student killed by a police officer on December 6, 2008; consequently large demonstrations take place in various cities of Greece. Since, both cases were considered dangerous for the spreading of covid-19, a total prohibition of outdoor assemblies of more than four people was ordered.

Another issue of constitutional value refers to the mandatory vaccination debate and possible violation of personal integrity and the right to consent to medical treatment. Given the severity of the situation, the Parliament passed Law no. 4675/2020,[3] which provides the possibility for mandatory vaccination under circumstances of spreading of a serious transmissible disease that may seriously affect public health. The Minister of Health may take the decision after having the opinion of the Experts' Committee on Public Health. The mandatory nature of vaccination shall always be urgent and temporary. Covid-19 vaccinations began in Greece on December 27, 2020.

More issues affected by the pandemic, worth mentioning are e-government, e-learning and the regulation of the relations between the Greek State and the Orthodox Church. Regarding the first, e-government is a positive legislative development, which is collectively valid, for the first time, during the covid-19 pandemic. Characteristically, under the act of legislative content of 20.03.2020, regulations were adopted for the digital operation and the treatment of urgent needs for the public administration. In this context, interesting issues are the operation of the Single Digital Gateway, the electronic documents and in particular, the electronic declaration and authorization, the electronic prescription system,[4] the possibility of teleconferences in the public sector and the new law on Digital Governance (Ordinary Law no. 4727/2020), which collectively regulates for the first time in Greece matters of digital democracy.

Regarding e-learning, the Greek State imposed it as an alternative to education during the pandemic. More specifically, article 63, para. 1 of Law no. 4686/2020 provides the opportunity of offering distance learning education with the use of technology, to primary and secondary education students who are not able to attend classes under specific circumstances. Simultaneous learning with physical presence and at the same time from distance is also provided only in case of epidemic diseases. Moreover, the Hellenic Data Protection Authority considered that this legislation complies with the legislation on personal data protection and that it is proportional (opinion 4/2020).

During the period of the pandemic, important issues arose regarding religious worship. More specifically, under the act of legislative content of 25.02.2020, the temporary pause of religious services was regulated as an emergency measure to deal with the pandemic. Initially, until May 2020, a general and strict lockdown was applied, while afterwards, the measures were loosened. Since November 2020, the measures for the operation of places of worship differ as to the number of believers who could attend the masses. A characteristic moment of the state-church relations was the prohibition of the celebration of Epiphany with the participation of believers and the refusal of the Orthodox Church to comply with aspect of this decision.

In addition to the above, a minimal yet interesting and useful constitutional amendment took place in Greece on 25 November 2019. This was the fourth constitutional amendment to the Greek Constitution of 1975, which had been previously amended in 1986, 2001 and 2008. The constitutional revision process was initiated by the previous SYRIZA administration in 2018 and was concluded by the New Democracy administration on 25 November 2019. Nine major constitutional changes were approved by the Greek Parliament - out of a total of 49 - proposed by the parliamentary political parties during the procedure. The changes concern 28 articles of the Greek Constitution. In brief, the amended provisions are the following:

Under article 21, a minimum guaranteed income system was added. According to the new provision, a minimum income "to ensure dignified living conditions for all citizens" is constitutionally regulated. The level of income is decided via ordinary law. Article 32 sets forth the decoupling of the election of the President of the Republic from the dissolution of the Parliament. A simple majority of the members of the parliament can now elect the President of the Republic. On January 22, 2020, the new President of the Hellenic Republic, Katerina Sakellaropoulou, was elected by a vast majority of 261 members of the parliament, out of a total of 300. The new President is the country's first female head of state. In article 54 the vote of expatriates was explicitly enacted. In article 63 parliamentary immunity was rationally limited. In article 68 the right of the parliamentary minorities to decide the establishment of investigative committees was provided. In article 86, para. 6 the ministerial immunity was rationally restricted. In article 96, para. 5 Military Courts were assimilated with ordinary courts. Article 101a regards the election of the members of independent authorities. Finally, articles 112, 113, 114, paras. 1, 2, 115 paras. 1, 2, 3, 4 and 119 paragraph 1 were completely abolished.

The enactment of the citizens' legislative initiative is a major constitutional innovation. According to article 73, para. 6 citizens will be able to submit up to two legislative proposals for discussion in the Parliament, provided that they collect/present a minimum of 500,000 signatures backing the said proposals. These bills, however, cannot pertain to issues of defense, fiscal or foreign policy. Although the necessary implementing legislation has not passed yet, the first imitative started in 2020 under the name "Klima500" regarding the climate change.

A final matter worth addressing, is the conviction of several members of the far-right political party, Golden Dawn, for establishment of a criminal organization, including its leader and several prominent members.

3 Article 4, para. 3, part. A, section iii, subsection b.

4 E-Prescription helps modernizing Greece's medical care network, <https://ec.europa.eu/regional_policy/en/projects/greece/e-prescriptions-helps-to-modernise-greece-s-medical-care-network> accessed 4 February 2021.

The decision opened the discussion on how tolerant the Constitution shall be to political parties that could pose a threat to the republic.[5]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. In the year 2020, the shortcomings that characterized the constitutional revision of the year 2019 were publicly discussed. For example, it can be argued that the excessive obstacles of electability were not limited in article 56 of the Greek constitution. In addition, the unnecessary procedural gap of 5 years among revisions, under article 110, was not abolished. The provision on the main shareholder, article 14, para. 9 of the Constitution, which states, among others, that "the status of owner, partner, main shareholder or management executive of a media undertaking shall be incompatible with the status of owner, partner, main shareholder or management executive of an undertaking which undertakes with the State or a legal person in the public sector in the broad sense to perform works or provide supplies or services", a provision that is contrary to EU law,[6] was not repealed and the relationship between the Constitution and EU law was not regulated.

In general, the nine constitutional changes that took place were mature. More specifically, six changes contain regulations for the Parliament and its relations with other institutions. A very important fact regarding the essence of the revision both for the State and the citizens was the revision of the article 73 of the Greek Constitution with the addition of a paragraph 6 which provides the legislative initiative to the citizens even if demanding 500,000 signatures.[7] The necessary consent for the revision was reached despite the fact that the main political parties strongly disagreed in the Proposing Parliament. However, without this change the revision would be "dry" and "limp". On the contrary, now it is "modestly interesting".

The election of the President of the Republic has always been a difficult topic of discussion in the Greek public debate. The political system and society convincingly agree that the Parliament should not be dissolved due to non-election of the President of the Republic. However, beyond that, no solution seemed sufficient in the constitutional dialogue. Finally, the election by the same Parliament with a smaller majority (although the parliamentary majority-government can formally elect the President of the Republic alone, in fact the Prime Minister himself) was preferred from the direct election and the involvement of non-parliamentary persons in the election.

According to Albert's criteria,[8] based on the aforementioned, the constitutional revision of 2019 can be described as amendment. The necessary, yet draconian national pandemic measures lead to a new era of constitutional changes. This new third type of constitutional changes that mainly restricts fundamental rights via acts of legislative content (in Greece mainly through the act of 20.3.2020) has similarities with the constitutional dismemberment.

2. Taking James Bryce's classification,[9] the Constitution of Greece is a rigid constitution and thus is amended under a specific procedure described in article 110. The same article also includes provisions that cannot be amended under any circumstances. Article 110, para. 1 clearly exempts the provisions that determine the form of government as a Parliamentary Republic and certain particular provisions from the revision procedure. The form of constitutional challenges described in Part II did not raise any tension with the unamendable rules of the Constitution.

3. The constitutional control over the constitutional amendment is principally bestowed on the Revisionary Parliament, with the courts having no power to intervene. The rationale is based on the democratic legitimacy of the Revisionary Parliament. The Revisionary Parliament occurs after elections on the ground of the proposals for amendment of the Proposing Parliament, a necessary intermediate step for the completion of the amendment procedure, with a special role to completing it. The only exemption derives from article 87, para. 2 of the Constitution which empowers the judges not to apply provisions enacted in violation of the Constitution. Although never applied in practice, a judge should abstain from applying any revised constitutional provision that amends unamendable constitutional rules. At supranational level, any constitutional provision can be reviewed for compliance with EU law under the principle of supremacy, from the CJEU.[10] In such case, the constitutional provision is not repealed, but should be set aside when conflicts with EU law arise.

However, the changes presented in Part II fall under the traditional constitutional review mechanism which can be found in article 93, para. 4 of the Constitution. According to that provision, the courts shall be bound not to apply any statute whose content is contrary to the Constitution. Constitutional review in Greece can be classified as diffused since all courts can potentially be engaged in the constitutional review procedure, ex post since courts can exercise this power only after the law has taken effect and concrete as the courts incidentally resolve matters of constitutionality, when examining a particular case. The judicial interpretation of the measures discussed in Part II is following.

1. COUNCIL OF STATE (SUSPENSIONS COMMITTEE) DECISION 263/2020

The case concerned the application of a political party for the suspension of the decision that prohibited outdoor assemblies, as an interim measure, before the hearing of its application for annulment. The Court dismissed the application on the reason that the measure, although strict, was necessary for the protection of public health. The Court analyzed its reasoning on the basis of three facts: a) the measure was taken after the unanimous opinion of the Experts' Committee on Public Health, which recommended a general lockdown in view of the second wave of the pandemic; b) the National Health System is under severe pressure, especially

5 Ioannis A. Tassopoulos, "The Golden Dawn case: An Exercise in "Constitutional Dismemberment" and Constitutional Continuity" (*Constitution Making & Constitutional Change*, 1 February 2021 <https://www.constitutional-change.com/the-golden-dawn-case-an-exercise-in-constitutional-dismemberment-and-constitutional-continuity/> accessed 5 February 2021.

6 CJEU found that article 14, para. 9 is in conflict with provisions of the Directive 93/37/EEC in C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [2008] ECLI:EU:C:2008:731. See among others Vasileios G. Tzemos, "The Basic Shareholder and the Principle of Proportionality" [2008] Media and Communication Law 531.

7 Konstantinos Margaritis, "The Citizens' Legislative Initiative in the Greek Constitution: a First Approach" (2020) 5 (3-4) Public Law Journal <http://www.publiclawjournal.com/docs/2020/3_4/2020_5_3_4_margaritis.pdf> accessed 4 February 2021.

8 Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (OUP 2019).

9 James Bryce, *Studies in History and Jurisprudence* (OUP 1901).

10 C-213/07 Michaniki (n 5).

after November 4; c) in the context of this extraordinary situation, several measures restricting the free movement have been adopted, including the closing of educational establishments. Plus, the prohibition of outdoor assemblies was a temporary measure applied for a reasonable length of time.

2. OF STATE (4TH CHAMBER) DECISION 2387/2020

The case concerned the vaccination of pupils in order to enroll at nursery school. Although the case is not directly relevant to measures adopted due to the pandemic crisis, useful conclusions can be drawn regarding the position of the Council of State towards mandatory vaccination in general. First, the Court underlined the obligation of the State to take all precautionary measures for avoiding spread of any infectious disease that constitutes a serious threat to public health, in accordance with articles 5, paras. 2, 5 and 21, para. 3 of the Constitution. The Court acknowledged that vaccination constitutes an interference with the free development of personality and private life, especially with the physical and mental integrity, albeit constitutionally allowed under two prerequisites that the Court set: a) it is prescribed by law based on genuine scientific evidence; b) the law allows for exceptions in cases of contraindication. What is more interesting is the Court's stance in the light of the principle of equality. In that perspective, the Court ruled that a person's demand not to be vaccinated since he/she is not personally vulnerable because of living in a safe environment, due to the fact that other people have been vaccinated, violates the principle of equality.

3. COUNCIL OF STATE (SUSPENSIONS COMMITTEE) DECISION 60/2020

During the pandemic, the Council of State had the opportunity to apply the proportionality principle in the church and state relations. The measures taken by the government on the operation of churches and on collective worship in general, brought several cases before the Council of State, on the ground of proportionality. For example, on decision 60/2020, the Suspensions Committee ruled on the measure of the temporary prohibition of the operation of places of worship, as a measure to deal with the spread of the pandemic. More analytically, the Court took into account the temporary nature of the measure and its reasonable validity. In this context, the Court concluded that there were not more appropriate measures that could be taken in order to effectively protect public health. Therefore, the Suspension Committee decided that the execution of the temporary ban on the operation of the places of worship should not be suspended, due to reasons of substantial public interest. Finally, the Court pointed out that the State is obliged to explain the necessity of a measure, which restricts human rights, such as religious freedom and specifically freedom of worship. This obligation is in the context with the principle of proportionality as guaranteed in article 25, para. 1 of the Greek Constitution.

4. Although Greece applies a diffused system of constitutional review, the Council of State has emerged as a key court in delivering constitutional justice. In this perspective, it has been accurately argued that the Council of State functions as a quasi-constitutional court. Under the three Weberian types,[11] the Council of State mostly plays a countermajoritarian role. According to its well-established case law, the Court abstains from judging on political matters, unless fundamental rights violations or other abuse of power matters are at stake, in line with its constitutional competences. The cases discussed above are perfect examples of its role; the Court identified the situation and ruled on human rights issues without interfering in principle with the decisions of the Government.

IV. LOOKING AHEAD

As the new coronavirus has invaded a country, the State authorities should take measures to deal with its consequences primarily in the field of public health, as a constitutional obligation deriving from articles 5, paras. 2, 5 and 21, para. 3. In this context, in order to fulfil this obligation, the State must act quickly, proactively and effectively, in ways that sometimes restrict other fundamental rights.

At the same time, the State must guarantee the best possible protection of other fundamental human rights. Taken this parameter into account, one may argue that two constitutional rules are developed in parallel that are complementary to each other, radiating the pattern of the appropriate legal treatment of the ongoing global health crisis. First, the State's obligation to restrict fundamental rights only to the extent necessary to protect life and public health, under the principle of proportionality. Second, the obligation to guarantee a minimum of constitutional protection of fundamental rights, mainly the right to life and health, but also of all fundamental rights.

The covid-19 pandemic is a unique situation, unprecedented to contemporary society. Naturally, transnational and State mechanisms of fundamental rights protection were not very well prepared. The drastic measures that were taken, although unacceptable in periods of normality, have been declared necessary in those exceptional circumstances. Moreover, it was extremely necessary to adopt these measures during the early stage of the pandemic, before cases and deaths swelled to a nightmarish degree. In this context, personal hygiene measures and personal care in general, albeit necessary, are not by themselves sufficient weapons to deal with the pandemic. This fact is the half, depressing truth of the pandemic crisis.

The other half is that, there are at the same time other serious diseases besides covid-19, which bring equally serious risks to fundamental rights, as the pandemic has been going on, with breaks, for almost a year now. For example, mental health problems of people who constantly stay at home without contact with other people, the conversion of houses into workplaces and children's education, problems in poor large families living in very small houses, financial ruin of entrepreneurs and workers due to business closures (for example restaurants and small businesses). At last, this cruel health crisis obliges all of us to reconsider within this new unpleasant experience the basic features of the general theory of fundamental rights: e.g. human value, life, health, core rights, proportionality and state of emergency. Current reality and

11 Luis Roberto Barroso, "Countermajoritarian, Representative and Enlightened: the Roles of Constitutional Courts in Democracies" [2019] Am. J. Comp. Law 109.

especially the risks to the life and health of the citizens are dynamically confronted with our standing notion of fundamental rights, principally confirming it, but at times leading it under a new spectrum. In addition, the mapping of the constitutional risk is difficult to balance between fear and realism on the one hand, and the solid legal acquis, which must be kept finally intact.

In conclusion, we have major constitutional changes because of the national pandemic measures, a new era of constitutional changes. Even more, when those constitutional changes tend to become the normality, a new type of balance must be achieved. That pushes the margin of State discretion to its limits; through a variety of parameters, the State must constantly reconsider the principle of necessity, in order to take the most beneficial measure for society. Ultimately, as the measures adopted tend to limit certain rights largely, the State is put in the peculiar position of choosing those rights that are less effective to the spreading of the virus. Finally, since it seems likely that this new constitutional reality will remain for a while, the essence of the principle of proportionality becomes more important than ever.[12]

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Guatemala

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I. INTRODUCTION

In 2020 Guatemala experienced a constitutional crisis due to serious accusations of undue influence amid the process of selection of magistrates for Courts of Appeals and Supreme Court. The mandate for all Court of Appeals and Supreme Court justices is renewed every five years[1].

This judicial selection process is a result of the constitutional amendments enacted in 1993 after a failed attempt of self-coup[2]. The reform expanded a mechanism of a corporativist body called Nominating Commissions[3] (*Comisiones de Postulación*) that provides a shortlist of eligible candidates[4] to Congress.

In February 2020, the Prosecutor General of Guatemala opened an investigation alleging that some members of the Nominating Commissions, congresspersons and aspiring judicial candidates held secret and unofficial meetings[5] to lobby results. These meetings took place while the Nominating Commissions were sending the shortlist of aspiring judicial candidates to Congress[6].

As a result of the investigation, the Prosecutor General of Guatemala also filed a petition to the Constitutional Court demanding the suspension of the judicial selection process. It argued that the concerns over influence peddling threatened the independence of the election. The Constitutional Court granted an injunction and immediately ordered the suspension of the process[7].

Amid the crisis, the President of Guatemala made a public statement in March 2020 announcing a plan to amend the Constitution to change the judicial appointment procedures[8]. An official proposal was never presented to Congress[9].

In the meantime, in May 2020, the Constitutional Court issued a decision on a roadmap for the appointment of magistrates. It directed Prosecutor General office to deliver a report on the investigation of possible undue influence in the judicial selection process to Congress.

Then it directed Congress to evaluate in detail if the aspirants are eligible or have conflict of interest given the Prosecutor's General report[10]. In the same ruling, the Constitutional Court exhorted Congress to discuss a constitutional reform in order to change the rules for judicial selection[11].

Congress has not complied with the ruling, and it consistently delayed the appointment of magistrates of high courts. Some congresspeople have attacked the Constitutional Court and its members[12]. The UN Special Rapporteur on the independence of judges and lawyers expressed his concern in November 2020[13] as well as the OAS Special Mission that visited Guatemala in November 2020[14]. 2020 was marked by this constitutional tension and the unfinished constitutional reform to solve the judicial crisis.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In March of 2020, President Giammattei discussed with civil society a document that proposed to change 7 articles of the Constitution[15]. The proposed reforms were all directed towards the judicial branch of the government and can be summarized in five points[16]:

- The suppression of the Nominating Commissions as an intermediate body that proposes a shortlist of eligible judicial candidates to Congress.

1 Constitution of the Republic of Guatemala, articles 208 and 215.
2 Tim Golden, 'Guatemala's Counter-Coup: A Military About-Face' New York Times (New York, 3 June 1993) https://www.nytimes.com/1993/06/03/world/guatemala-s-counter-coup-a-military-about-face.html
3 Míchel Andrade, 'Nomination Commissions and Judicial Independence in Guatemala' (Netherlands, November 2014) https://static.wixstatic.com/ugd/f3f989_95f87182a0fe4b08bf820f6bff1af436.pdf
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5 Edwin Pitán, 'MP investiga elección de magistrados de cortes 2020' Prensa Libre (Guatemala, 19 February 2020) https://www.prensalibre.com/guatemala/justicia/mp-investiga-eleccion-de-magistrados-de-cortes-2020/
6 Manuel Hernández Mayén, 'Comisión define lista de 26 aspirantes a la CSJ y al entrega al Congreso' Prensa Libre (Guatemala, 19 February 2020) https://www.prensalibre.com/guatemala/justicia/postuladora-de-magistrados-para-csj-empieza-a-integrar-nomina-de-26-candidatos/
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9 'Guatemala: Presidential Proposal for Constitutional Reform under Discussion' Periódico Digital Centroamericano y del Caribe (Guatemala, 7 June 2020) https://newsinamerica.com/en/headlinenews/2020/guatemala-presidential-proposal-for-constitutional-reform-under-discussion/
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14 Misión Especial en Guatemala' OAS (12 January 2021) https://www.minex.gob.gt/userfiles/Informe_Mision_Especial_OEA_en_Guatemala_12_2021.pdf
15 Editorial board. 'Corre y va de nuevo' El Periódico (Guatemala, 13 March 2020) https://elperiodico.com.gt/opinion/opiniones-de-hoy/2020/03/13/corre-y-va-de-nuevo-6/
16 María Reneé Rendón. 'Así buscaría Alejandro Giammattei eliminar las Comisiones de Postulación para la elección de magistrados a Cortes' Con Criterio (Guatemala, 3 June 2020) http://concriterio.gt/reformas-constitucionales-alejandro-giammattei/

- The extension of the scope judicial career. The proposal includes to extend the judicial career to Magistrates of Courts of Appeals that are currently appointed by Congress by a shortlist provided by the Nominating Commissions.
- Extending the term office for judges and magistrates from 5 to 10 years.
- Expanding the Supreme Court from 13 to 15 magistrates and a new system for appointing Supreme Court magistrates. By suppressing the Nominating Commissions, the proposal intended to give the power to appoint Supreme Court magistrates to the President, the Bar Association, the universities, and the Courts of Appeals magistrates.
- A renewal of the magistrates of the Supreme Court mandate by thirds. Currently, the 13 magistrates of the Supreme Court are all appointed every five years. It is rare for seating magistrates to be renewed in office.

The Constitution gives the President the initiative to propose reforms to the Constitution, but he failed to do so[17]. The President's party lack a majority in Congress, there they only managed to build a weak coalition to get the approval of a "State of Public Calamity", and to procure funds for his emergency and economic recovery plans amid the pandemic of COVID-19.

The constitutional reforms required a two third majority in Congress and to enter into force they must be ratified through a popular consultation process[18]. Prior judicial reforms have failed and that may explain why the President overshadowed the effort[19].

Back in 2016 the UN-backed anti-corruption body, CICIG[20], lead an effort to promote a constitutional change to reform Guatemala's judiciary[21]. The project made its way into Congress, where it was dismissed by the majority of representatives. The reform addressed topics such as indigenous justice and judicial selection[22].

According to the last national census, 43.75% of the inhabitants of Guatemala self-identify as indigenous[23]. Although the Constitutional Court recognized legal pluralism and the validity of the indigenous legal system in Guatemala in a landmark case in 2016[24], it is still a very divisive topic[25].

The constitutional reforms were not conducted, and the judicial crisis remains. Congress has the legal duty to appoint Supreme Court magistrates but has consistently chosen not to do it. The replacement of the Constitutional Court' judges that will take place in April 2021, will certainly be another source of potential constitutional crisis[26].

The term of the Supreme Court magistrates was exceptionally extended by a ruling of the Constitutional Court[27] and the same court in another ruling[28] order Congress to discuss in detail the profile and possible conflict of interest of the candidates to magistrates.

In November of 2020, a series of protest took the streets in Guatemala in a show of anger over a budget bill passed by Congress[29]. The budget bill cut money for health care, the judiciary and malnutrition programs and funneled funds for legislator's stipend for meals and expenses[30].

During the crisis in November 2020 the Guatemalan president requested the assistance of the Organization of American States (OAS)[31]. He invoked the Inter-American Democratic Charter, and the OAS sent a mission to Guatemala[32].

In his report, the Special Mission from the OAS expressed his concern over the failure by Congress to appoint the Supreme Court and Courts of Appeals magistrates[33]. It also made clear that a transparent process for the judicial selection was needed.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Constitutional reform of the justice system is a long-forgotten topic in Guatemala. It was the main purpose of the failed reforms of 2016 mentioned before. In 2011 a think tank and two universities presented a project of constitutional reform in the areas of security and the justice system[34]. Even the ambitious attempt of constitutional reform of 1999 that was defeated in a referendum included reforms to the justice system[35].

The constitutional reforms of the judicial system imply a dismemberment in the sense that it entails a fundamental transformation of one of the core aspects of both the original text of the Constitution of 1985 and the reforms of 1993: its corporativist character[36].

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19 Margarita Girón. 'Giammattei saca de sus prioridades reforma constitucional' La Hora (Guatemala 30 July 2020) https://lahora.gt/giammattei-saca-de-sus-prioridades-reforma-constitucional/
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24 Corte de Constitucionalidad de la República de Guatemala, Expediente 1147-2014, resolución de 10 de marzo de 2016.
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31 Reuters Staff. 'Guatemala seeks OAS support after violent protests over budget' Reuters (22 November 2020) https://www.reuters.com/article/us-guatemala-protests-idUSKBN28307L
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33 'Misión Especial en Guatemala' OAS (12 January 2021) https://www.minex.gob.gt/userfiles/Informe_Mision_Especial_OEA_en_Guatemala_12_2021.pdf
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36 María Alejandra Morales, 'Constitucionalismo en Guatemala: patrimonialismo y corporativismo' in Carlos Arturo Sandoval Villagrán (ed), *El constitucionalismo guatemalteco frente a lo global: Estudios de una nueva generación de voces* (Universidad Rafael Landívar 2020).

Historically in Latin America the Executive branch tends to concentrate a high degree of power[37]. Therefore, the constitutional assembly justified the existence of the nominating commissions as a way of preventing the executive branch from controlling appointments and also to prevent any faction of the legislative from naming friendly magistrates[38].

The Nominating Commissions are composed by law school deans, the Bar Association, and representatives of the Judicial Association[39]. The Nominating Commissions were introduced in 1983 during the transition to democracy to appoint the first Supreme Electoral Court[40].

In 1993, after a failed attempt of self-coup, Guatemala's young democracy entered in a constitutional reform process. Those amendments extended the scope of Nominating Commissions. Before the reform they did not have a role in the appointment of magistrates of Courts of Appeals, the Prosecutor General or the General Comptroller.

Even in the Supreme Court the influence was limited. Before 1993 the Nominating Commissions only had influence in the appointment of four out of the 9 magistrates. The other 5 magistrates were directly appointed by Congress. Some saw these changes as strengthening the influence of traditional sectors of Guatemalan society.[41]

The judicial reform at the constitutional level is hard to achieve precisely because it implies a dismemberment in the sense that "...entails a clear break from how the constitution organizes the allocation of power..."[42].

Even though the Constitutional Court, in an "exhortative decision",[43] exhorted Congress to carry out a constitutional reform process we have not seen any action. The Constitutional has exhibited a marked counter-majority role in recent years[44].

For example, in 2020 the Constitutional Court provisionally suspended enactment of a controversial bill[45] approved by Congress that gave wide powers to government to control over NGO's operating in Guatemala[46]. In 2021 in an innovative ruling, it suspended the legislative process of a bill that intended to give amnesty to crimes such as genocide and other atrocities in clear violation of *ius cogens*[47].

The active role of the Constitutional Court started in 2009[48] and 2010[49] in rulings concerned with the appointment of Supreme Court magistrates and Prosecutor General. In such rulings the Court admitted the possibility of a sort of "popular action". This opened the possibility for any citizen to have "standing" in extraordinary cases to request a petition of *amparo* in cases in which the "general interest" was at stake as it was described in a later ruling[50].

The constitutional reform of 1999 was approved by two thirds of Congress but was defeated in a referendum[51]. The Constitutional Court played a role in February 1999 when it ruled[52] unconstitutional the decision of Congress to ask a sole question for the referendum. The Court ruled that given the diversity of topics, Congress needed to be more precise in the asked questions. Finally, the referendum included four questions, and all were rejected by the majority of Guatemalan voters.

The Constitutional Court does not exercise constitutional control over constitutional reforms. In 2012 Congress discussed a constitutional reform project proposed by former President Otto Pérez Molina[53]. A group of lawyers requested a petition to the Constitutional Court. They argued that constitutional control was required. The Court rejected the petition. It argued that no prior constitutional control was required[54], since the ratification must be approved in a referendum.

IV. LOOKING AHEAD

The protest and unrest seen in November 2020 because of the budget bill approved by Guatemalan Congress gave rise to new demands such as a Plurinational Constituent Assembly[55]. Even though the request for a Constituent Assembly is not currently a majoritarian demand, the deterioration of the institutional apparatus could feed the necessity for radical changes in the political system.

The electoral reform is also a permanent topic of discussion in Guatemala. The Special Mission of OAS also mentioned it on their report[56]. Although in 2016 an ambitious electoral reform was passed by Congress, there are important topics that need to be addressed[57].

Electoral reforms of 2016 sought to increase accountability, to expand the Supreme Electoral Court's authority and to change the governance scheme of the political parties. They also limited private funding but were unable to solve the problem of illicit money in political campaigns[58].

There are other demands of the electoral reform that require a constitutional reform. For example, some have proposed to modify the size of the electoral districts or to create electoral sub-districts, but the Constitutional Court has ruled that it is not possible to do it without reforming the Constitution[59].

37 Roberto Gargarella, *Latin American Constitutionalism: 1810-2010, The Engine Room of the Constitution* (OUP 2013) 206.
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42 Richard Albert, *Constitutional Amendments. Making, Breaking and Changing Constitutions* (OUP 2019) 85.
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46 Constitutional Court of Guatemala, Expedientes acumulados 859-2020, 860-2020, 879-2020, 895-2020, 896-2020, 904-2020, 905- 2020 y 1029-2020.
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59 Constitutional Court, Expediente 642-2018.

By now the conflict is concentrated in the judicial selection process. It is expected that challenges will come at the moment of selecting the magistrates of the Constitutional Court as well.

In two opportunities the Constitutional Court has ruled in cases related to appointment of magistrates of the Constitutional Court itself. Back in September 2020 it invalidated the appointment of a magistrate by the Supreme Court[60].

In January 2021, the Bar Association voted for a judge under investigation for obstruction of justice to join the Constitutional Court of Guatemala[61]. Several people contested the election at the Bar Association.

Congress decided to swear in this polemic judge and the Constitutional Court in a ruling decided to invalidate Congress's actions[62]. The appointment of the polemic judge was suspended and an arrest warrant against him was issued[63].

This deterioration of the justice system will inevitably conduct the country to a deeper constitutional crisis. It remains uncertain if the outcome will lead to a constitutional reform or the collapse of the entire political system.

One possible result is that the corrupt political class and organized crime succeed and manage to appoint judges and magistrates related to their interests both in the Supreme Court and in the Constitutional Court. In that case we will experiment a regressive process in which the Constitutional Court will be the guardian of an authoritative political class and not the counter majoritarian force that has been during the last years.

The problems of the justice system and pandemic-related problems have deepened the crisis in Guatemala. According to the Democracy Index published by The Economist, Guatemala's score worsened in 2020[64].The country's current events mark a turning point for the future of democracy and the constitutional framework of Guatemala.

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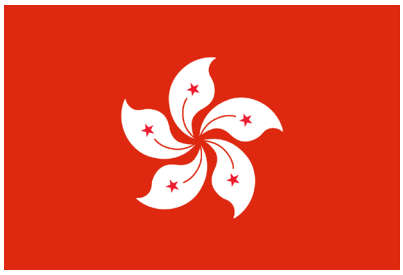
62 Constitutional Court of Guatemala, Expedientes acumulados 426, 430, 436 y 455-2021.

63 César Pérez. 'Ordenan la captura de Mynor Moto, magistrado electo de la Corte de Constitucionalidad' Prensa Libre (Guatemala, 1 February 2021) https://www.prensalibre.com/guatemala/justicia/ordenan-la-captura-de-mynor-moto-magistrado-electo-de-la-corte-de-constitucionalidad-breaking/

64 Democracy Index, The Economist. https://www.eiu.com/n/campaigns/democracy-index-2020/

Hong Kong



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I. INTRODUCTION

Hong Kong is a Special Administrative Region (SAR) of the People's Republic of China (China). A Basic Law, adopted by the National People's Congress of China (NPC) pursuant to the Chinese Constitution, provides for Hong Kong's separate political, economic, legal, and judicial systems, and serves as the HKSAR's constitutional document. In 2020, the Chinese Central Authorities enacted the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HKNSL) for implementation in the HKSAR a system and enforcement mechanism for safeguarding national security. This Report discusses the terms and effect of the HKNSL and how it transforms the constitutional, political, legal and judicial systems of the HKSAR, and considers whether the introduction of the HKNSL diminishes the 'high degree of autonomy' that Hong Kong has under the Hong Kong Basic Law, China's basic policies regarding Hong Kong recorded in the Sino-British Joint Declaration 1984, and the principle of 'One Country, Two Systems' that China adopts for national reunification.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2019, Hong Kong was embroiled in civil unrest. Protests to oppose legislative amendments proposed by the HKSAR Government to remove the prohibition, which had existed since the establishment of the HKSAR on 1 July 1997, against renditions of fugitives to other parts of China (including Taiwan and Macao) led to violent confrontations between the police and protestors and escalating tactics of resistance by the protestors against the governmental authorities.[1]

Protestors stormed into the Legislative Council chamber on July 1, 2019, causing much damage to the building and the facilities there. Protestors besieged the office of the Liaison Office of the Central People's Government in the HKSAR on July 21, 2019, and, in the course of the event, defaced the national emblem displayed on the façade. Even though the Hong Kong Government acknowledged on July 9, 2019 that the legislative process was as good as 'dead', hundreds and thousands of Hong Kong people continued to participate in street battles, vandalism, strikes, and obstruction of the operation of vital infrastructure including the Hong Kong International Airport, the metro system, and the cross-harbour tunnel. The protests divided Hong Kong society; there were occasions of lynching of individuals, damaging, and looting of shop premises. Thousands were arrested, and hundreds are being prosecuted for rioting and other public order offences.[2]

The Hong Kong Basic Law provides that the HKSAR 'shall' enact, 'on its own', legislation to prohibit specified categories of acts endangering national security,[3] but no such legislation was enacted by its legislature to date.

The 19th Central Committee of the Communist Party of China held its fourth plenary session from October 28 to 31, 2019. The 19th Central Committee adopted on October 31, 2019 the Decision of the Central Committee Plenary Session on several important questions on upholding and improving the Socialist System with Chinese Characteristics and advancing the modernization of the national governance system and governance ability. Section 12 of the Decision concerned the system of 'One Country, Two Systems'. It elaborated on how the system for the Central Authorities to exercise comprehensive jurisdiction over the SARs in accordance with the Constitution and the Basic Law may be improved for the purposes of staunchly safeguarding national sovereignty, security and development interests and safeguarding the long-term prosperity and stability of the SARs, and ensuring no tolerance of any act that challenges the bottom line of 'One Country, Two Systems' or undermining national unification. Such improvements would involve, among others, establishing and improving the legal system and the enforcement mechanism of the SARs for safeguarding national security; supporting the strengthening of the power of law enforcement of the SARs, strengthening education on the Constitution, the Basic Law, the national condition, Chinese history and Chinese culture in Hong Kong society (particularly in relation to public servants and young people) so that the national awareness and patriotism of Hong Kong compatriots would be enhanced; and resolutely preventing and restraining external forces from interfering in Hong Kong affairs and

1 For the legal issues related to the proposed legislative amendments, see PY Lo, 'The Unprosecuted Taiwan Homicide, the Unaccepted Extradition Law Amendment Bill, and the Underestimated Common Law' (2020) 50 HKLJ 373-393.

2 For chronologies of the 2019 Hong Kong Protests prepared by news media and NGOs, see, for example, *The New York Times* <www.nytimes.com/interactive/2019/world/asia/hong-kong-protests-arc.html>; and *Human Rights in China* <www.hrichina.org/en/2019-hong-kong-protests-timeline> accessed December 29, 2020. The Hong Kong Court of Final Appeal (HKCFA) has also summarized 'the degeneration of law and order in Hong Kong and the ever-increasing violence and lawlessness' in Hong Kong between June and November 2019 in its judgment in *Kwok Wing Hang & Ors v Chief Executive in Council & Anor* [2020] HKCFA 42 (December 21, 2020) [87]-[97].

3 Hong Kong Basic Law, Article 23 <www.elegislation.gov.hk/hk/A101> accessed December 29, 2020.

conducting separatist, subversive, infiltrating and sabotage activities, so that Hong Kong would have long-term governance and order.[4]

On May 28, 2020, the NPC Session, which was delayed by the COVID-19 pandemic, adopted a decision to establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security, which, among others, instructed the HKSAR to complete the national security legislation stipulated in the Hong Kong Basic Law at an earlier date, required the HKSAR's administrative, legislative, and judicial organs to effectively prevent, stop and punish acts and activities endangering national security in accordance with relevant laws and regulations, commanded the HKSAR to strengthen the enforcement forces for safeguarding national security and step up enforcement to safeguard national security, and entrusted the Standing Committee of the NPC (SCNPC) with the formulation of laws for the HKSAR for the purpose of effectively preventing, stopping and punishing acts that seriously endanger national security and activities of foreign or external forces interfering in the affairs of the HKSAR.[5]

On June 30, 2020, the SCNPC, in accordance with the Chinese Constitution, the Hong Kong Basic Law, and the Decision of the NPC of 28 May 2020 (above), enacted the HKNSL and then decided to add the HKNSL to the list of national laws that would have effect in the HKSAR pursuant to Article 18 of the Hong Kong Basic Law. The Chief Executive of the HKSAR promulgated the HKNSL by notice on the same day for the HKNSL to apply to Hong Kong.[6]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The HKNSL is a national law that overrides any HKSAR local law that is inconsistent with its provisions. It was drafted in the lexicon of law-making in China.[7] It serves the following functions: (1) Establishing general principles and duties in relation to safeguarding national security for the HKSAR and its residents; (2) Establishing institutions of the HKSAR for safeguarding national security; (3) Establishing the Office of the Central People's Government in the HKSAR for safeguarding national security (CPGNSO);[8] (4) Prescribing criminal offences of secession,[9] subversion,[10] terrorism,[11] and collusion with a foreign country or external elements to endanger national security;[12] and (5) Prescribing the framework for the investigation, prosecution and punishment of those offences in the HKSAR, as well as the circumstances and framework for the CPGNSO to exercise jurisdiction in the HKSAR and the subsequent prosecution and adjudication of the relevant case by the Chinese procuratorate and court respectively.

Article 2 of the HKNSL interprets the Hong Kong Basic Law to indicate that its provisions on the legal status of the HKSAR as an inalienable part of China and a local administrative region coming directly under the Chinese Central People's Government (CPG) are 'fundamental provisions' of the Basic Law and directs that no institution, organization or individual in the HKSAR shall contravene these provisions in exercising their rights and freedoms. Article 3 of the HKNSL repeats the NPC's instruction on the executive authorities, legislature and judiciary of the HKSAR to *effectively* prevent, suppress and punish any act or activity endangering national security in accordance with applicable laws, and Article 8 further requires the law enforcement and judicial authorities of the HKSAR to *fully* enforce the HKNSL and other applicable laws. Article 6 of the HKNSL imposes on everyone in the HKSAR the duty to abide by the HKNSL and the laws of HKSAR that safeguard national security and requires a resident of the HKSAR who stands for election or assumes public office to confirm in writing or take an oath to uphold the Hong Kong Basic Law and swear allegiance to the HKSAR in accordance with the law.

The HKNSL makes provision in Chapter II for the duties and institutions of the HKSAR for safeguarding national security. The centrepiece institution of the HKSAR for safeguarding national security, established under the HKNSL, is the Committee for Safeguarding National Security (CSNS), which shall be responsible for affairs relating to and assume primary responsibility for safeguarding national security in the HKSAR, under the supervision of, and being accountable to, the CPG. The CSNS is chaired by the Chief Executive of the HKSAR, and is assisted by a National Security Adviser designed by the CPG.[13] The CSNS is tasked with analyzing and assessing the situation of Hong Kong relating to safeguarding national security for making work plans and formulating policies; advancing the development of the legal system and enforcement mechanisms of the HKSAR for safeguarding national security; and coordinating major work and significant

4 See 'The Decision of the Central Committee of the Communist Party of China on Several Important Questions on Upholding and Improving the Socialist System with Chinese Characteristics and Advancing the Modernization of the National Governance System and Governance Ability (Adopted by the Fourth Plenary Session of the Nineteenth Central Committee of the Communist Party of China on October 31, 2019) (*Xinhuanet*, November 5, 2019) <www.xinhuanet.com/politics/2019-11/05/c_1125195786.htm> (in Chinese) accessed 29 December 2020. For an early pointed discussion of the dire implications of Section 12 of the said Decision for Hong Kong, see Minxin Pei, 'China's Risky Endgame in Hong Kong' (*Project Syndicate*,November 13, 2019) <www.project-syndicate.org/commentary/china-hong-kong-crackdown-security-by-minxin-pei-2019-11> accessed December 29, 2020.

5 See 'Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security (Adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020)' <www.elegislation.gov.hk/hk/A215> accessed December 29, 2020.

6 See 'Promulgation of National Law 2020' <www.elegislation.gov.hk/hk/A406> accessed December 29, 2020. For an unofficial English translation of the HKNSL, see *Gazette of the Hong Kong Special Administrative Region* (GN (E) 72 of 2020) <www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf> accessed December 29, 2020.

7 Article 64 of the HKNSL is a glossary provision that translates some of the penal terms used in the HKNSL to refer to specified terms used in the criminal law and criminal procedure legislation of the HKSAR.

8 HKNSL, Chapter V. The CPGNSO is staffed with officers of the Chinese Public Security Ministry and State Security Ministry and performs the functions of analysis and assessment of the Hong Kong situation for providing opinions and making proposals on strategy and policy for safeguarding national security in the HKSAR, overseeing, guiding, coordination and supporting the HKSAR in performing its duties for safeguarding national security, collecting and analyzing intelligence and information concerning nationals security, and handling cases concerning an offence endangering national security upon the approval of the CPG.

9 HKNSL, Chapter III, Part 1, Articles 20 to 21. Use or threat of force is not an element of the offences of secession.

10 HKNSL, Chapter III, Part 2, Articles 22 to 23. The offences include seriously interfering in performance of duties and functions in accordance with the law by the authorities of the HKSAR or attacking or damaging their premises and facilities, by force or threat of force or other unlawful means.

11 HKNSL, Chapter III, Part 3, Articles 24 to 28.

12 HKNSL, Chapter III, Part 4, Articles 29 to 30. The offences are of two types: spying; and requesting or conspiring with a foreign or outside element to commit five categories of acts, including rigging elections in the HKSAR and imposing of sanctions against the HKSAR or China.

13 The present National Security Adviser is Luo Huining, the Director of the Liaison Office of the CPG in the HKSAR, a deputy director of the State Council Office on Hong Kong and Macao Affairs, and a member of the Central Committee of the Communist Party of China.

operations for safeguarding national security in Hong Kong. The CSNS works in strict confidentiality and information relating to its work is not subject to disclosure. The decisions of the CSNS are not amenable to judicial review. Nobody in the HKSAR shall interfere with its work.[14] Enforcement of the NSL in Hong Kong is primarily vested with the police force (which is vested under the HKNSL with wide powers of investigation pursuant to implementation rules made by the Chief Executive in conjunction with the CSNS)[15] under the supervision of the CSNS.[16] Prosecutions of offences endangering national security and other related legal work are to be performed by officers of a specialized division of the Department of Justice, all of whom are appointed by the Secretary for Justice after obtaining the consent of the CSNS.[17] Court proceedings of prosecutions for offences under the HKNSL are to be handled by judges and magistrates who are designated by the Chief Executive following consultation with the CSNS and the Chief Justice of the HKCFA.[18]

It can be seen from Section II that for a prolonged period of time, the HKSAR had not discharged the duty to enact legislation safeguarding national security, a matter that the Chinese Central Authorities have sovereign interests and constitutional competence, and one that is arguably outside the limits of the autonomy of the HKSAR and only delegated to the HKSAR specially and non-exclusively by virtue of the Hong Kong Basic Law.[19]

Yet, while the HKNSL was introduced pursuant to a mechanism, provided in the Hong Kong Basic Law, for national laws to apply to the HKSAR, the HKNSL is quite unlike any of the national laws previously introduced, as the HKNSL expressly and directly establishes government bodies of the HKSAR, and also a CPG body in Hong Kong, for safeguarding national security, and stipulates that these bodies are answerable to the CPG and not subject to any form of check, scrutiny and accountability under the systems of the Hong Kong Basic Law. The HKNSL also provides for a self-contained penal code for safeguarding national security that the HKSAR and Chinese authorities specified under it would apply according to its language and the particular context doubly emphasized in Articles 3 and 8 stated above. By now, scores of arrests and wanted notices have been made, including of those who organized and participated in 'primaries' run in July 2020 for selecting candidates to the now delayed Legislative Council elections,[20] those who displayed certain slogans, and those who lobbied on Hong Kong related issues in foreign countries.

The HKNSL is an additional and comprehensive system that China introduces into the HKSAR for safeguarding national security. Its operation impacts upon and raises tension with the existing political, legal, and judicial systems of the HKSAR provided under the Hong Kong Basic Law. In relation to the political system, there is installed the national security apparatus of the CSNS and the investigatory and prosecutorial bodies under its oversight, as well as the CPGNSO, with the latter serving as the 'back-up' enforcement body. The chairmanship of the Chief Executive of the HKSAR of the CSNS, and the other functions she discharges under the HKNSL put beyond doubt any query that HKSAR's political system is or is not 'executive-led', as opposed to one that practices 'separation of powers'.

In relation to the legal system, there is raised the possibility of 'duality'. Conduct of politically active individuals can be assessed under the local laws of the HKSAR and under the HKNSL. It is at the discretion of the investigator and the prosecutor to decide which set of rules would apply.

In relation to the judicial system, it is apparent that the primary role intended of the courts of the HKSAR is the strict enforcement of the HKNSL. However, in an early case involving bail of a person accused of a crime endangering national security under the HKNSL, the Hong Kong Court of First Instance (HKCFI) opined that it would construe the HKNSL using the common law approach, pointing out that Article 4 of the HKNSL expressly acknowledges the respect and protection of human rights in safeguarding national security in the HKSAR and Article 5 of the HKNSL expressly requires adherence to the principle of rule of law, including the presumption of innocence until conviction, in preventing, suppressing and punishing offences endangering national security. Thus, the court suggested that the HKNSL ought to be construed and applied in a manner consistent with the protection of human rights.[21] However, as to whether the courts here have the power to judicially review, per *Marbury v Madison*, on the validity of the provisions of the HKNSL for compatibility with protected human rights, say, by applying proportionality analysis,[22] the HKCFI did not express an opinion, save as to note the submission on behalf of the government that courts might not have the jurisdiction to pronounce on such a question, since the courts may exercise review *only* by virtue of its power to interpret the Hong Kong Basic Law and the HKNSL is *another* national law of at least the same rank as the Hong Kong Basic Law.[23] No suggestion has yet been made for power of judicial review by reference of a potential feature of the Hong Kong Basic Law precluding changes to its systems by the Central Authorities, notwithstanding the provision in the Article governing 'amendments' that no 'amendments' (which may only be made by the NPC) shall 'contravene the established basic policies of the People's Republic of China regarding Hong Kong'. A suggestion along this vein will attract the criticism of seeking to place the HKSAR courts above the NPC and the SCNPC, a heretical proposition in the Chinese socialist unitary state of democratic centralism.

14 HKNSL, Articles 12 to 15.

15 These implementation rules made under Article 43 of the HKNSL are in addition to the powers the police force has under the existing laws of the HKSAR.

16 HKNSL, Articles 16, 43. The police force carries out its duties under the HKNSL through a dedicated National Security Department.

17 HKNSL, Article 18. The head of the specialized division, on the other hand, must be appointed by the Chief Executive of the HKSAR, who must seek the opinion of the CPGNSO before making the appointment.

18 HKNSL, Article 46. The designation is for a duration of one year and a designated judge must be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the duration of this office.

19 See Albert HY Chen, 'Constitutional Controversies in the Aftermath of the Anti-Extradition Movement of 2019' (2020) 50 HKLJ 609-632 and 'Press Release: SJ's speech at Ceremonial Opening of the Legal Year 2021' (11 January 2021) <www.info.gov.hk/gia/general/202101/11/P2021011100565.htm> accessed on 11 January 2021.

20 See Viola Zhou, 'Hong Kong Has Arrested Almost All the Political Opposition', (*Vice*, 6 January 2021) <www.vice.com/en/article/3an55v/hong-kong-has-arrested-almost-everyone-in-the-political-opposition> accessed on 11 January 2021.

21 See *Tong Ying Kit v HKSAR* [2020] HKCFI 2133 (21 August 2020).

22 See *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4 (HKCFA) and *Hysan Development Ltd v Town Planning Board* (2016) 19 HKCFAR 372 (HKCFA). See also Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015) 574-576.

23 For a discussion, see Hualing Fu, 'A Note on the Basic Law and the National Security Law' (*HKU Legal Scholarship Blog*, 12 August 2020) <researchblog.law.hku.hk/2020/08/hualing-fu-on-relationship-between-hong.html> accessed on 29 December 2020.

From this analysis, the question of whether the HKNSL has diminished the HKSAR's 'high degree of autonomy' can be answered in the negative. The police powers of the HKSAR's Chief Executive and her executive authorities have been augmented, with the aspect of 'One Country, Two Systems' of 'Hong Kong people ruling Hong Kong' upheld. The same can be said of the courts, too, now that they must adjudicate cases of endangering national security in accordance with the applicable law.[24]

IV. LOOKING AHEAD

The United Kingdom has claimed the imposition of the HKNSL on Hong Kong as a 'clear breach of the [Sino-British] Joint Declaration'.[25] The United States has 'normalized' Hong Kong with the Chinese Mainland after the HKNSL came into effect in Hong Kong.[26] It is contended in Section III above that the enactment and introduction of the HKNSL did not, by itself, violate the 'high degree of autonomy' China granted to the HKSAR. The real test lies ahead in the adjudications of persons accused of crimes endangering national security under the HKNSL. An early indication on whether the HKSAR courts will enforce the HKNSL consistently with Hong Kong's protection of fundamental rights applying international human rights standards will emerge in February 2021, when the HKCFA hears an appeal from the decision of the HKCFI granting bail to Jimmy Lai,[27] notwithstanding that he has been accused of a crime endangering national security under the HKNSL, which appears to have reversed the presumption regarding bail. This and other legal proceedings will be watched by the Chinese Central Authorities, which, apparently, can intervene in accordance with law, including the HKNSL.

Another front in the implementation of the HKNSL involves the requirement that all public officers, holders, and candidates of elected offices shall take the loyalty oath stated in Section III above. Hong Kong's civil servants have been asked to confirm their loyalty. In the event that Hong Kong would have the delayed general elections of its legislature in 2021, the yardstick the Hong Kong electoral authorities would use to determine whether candidates would qualify, objectively, as having the true and genuine intention of taking the said loyalty oath, if elected, is likely to be that of the HKNSL. How the 'securitisation' of the civil service and elections transforms the institutions of the HKSAR will soon be known.

V. FURTHER READING

Cora Chan and Fiona de Londras (eds), *China's National Security: Endangering Hong Kong's Rule of Law* (Hart, 2020)

Michael C Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law* (Association of Asian Studies, 2020)

CL Lim, 'Hong Kong's new law' (2021) 137 LQR 11

Carole Petersen, 'The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong' (2020) 50 HKLJ 633

24 Johannes Chan expressed contrary views: 'Five Reasons to Question the Legality of a National Security Law for Hong Kong' (*Verfassungsblog*, 1 June 2020) <verfassungsblog.de/five-reasons-to-question-the-legality-of-a-national-security-law-for-hong-kong/> accessed 30 December 2020.

25 See UK Foreign, Commonwealth and Development Office, 'The Six-Monthly Report on Hong Kong 1 January to 30 June 2020' (23 November 2020) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937162/Hong_Kong_Six_Monthly_Report_January_-_June_2020.pdf> accessed December 29, 2020.

26 See 'The President's Executive Order on Hong Kong Normalization' (Executive Order 13936) (July 14, 2020) <www.whitehouse.gov/presidential-actions/presidents-executive-order-hong-kong-normalization/> accessed December 29, 2020.

27 See 'Hong Kong media tycoon Jimmy Lai ordered back to jail' (*BBC*, December 31 2020) <www.bbc.com/news/world-asia-china-55496039> accessed on January 11, 2021.

Hungary

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I. INTRODUCTION

Hungary's new constitution, the Fundamental Law, was adopted in 2011 by the two-thirds parliamentary majority of the Fidesz government led by Viktor Orbán. Since then, two general parliamentary elections took place in 2014 and 2018, with the same political power's two-thirds victory. According to the constitution, the two-thirds parliamentary majority can adopt and amend the constitution without any further procedure as a constituent power. As part of the political agenda, the constitutional project was accomplished by nine amendments to the Fundamental Law, transforming the entire constitutional order step by step in the past ten years. As part of this constitutional project, the Constitutional Court's role changed by transforming its competencies, and it became the watchdog of the ordinary judiciary rather than the political branches of power. In December 2020, the Ninth Amendment of the Fundamental Law, among others, added further essential elements to the constitutional order such as the normative concept of family and gender, on education in accordance with Christian culture and the constitutional identity, and the exemption of specific public financial sources from usual public scrutiny in the form of special public trust regulations. Hungary took further steps to establish an alternative statehood to western liberal constitutionalism.

Our report will focus on explaining the constitutional system, the amenability of the Hungarian constitution, and its practice since the democratic transformation in 1989 from Socialism to constitutional democracy. We will describe furthermore the review of the constitutional change, primarily by explaining the role and the competence of the Constitutional Court. We will conclude by analyzing shortly the change brought in 2020 into the constitutional order and the tendencies in this new statehood design.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

To present the context of actual constitutional reforms comprehensively, in this section, we summarize the Hungarian constitution's particularities and the critical aspects of the constitution-making and amending practice.[1]

The Hungarian constitution, called Fundamental Law (FL), entered into force on January 1, 2012. The FL was enacted based on the previous constitution's provisions, with the two-thirds majority of the National Assembly (the Parliament). The FL's drafting process lacked transparency and inclusiveness, the parliamentary debate on the proposed text lasted only for a month. As a result, the FL was approved by the governing majority's unilateral votes (having two-thirds of the seats in Parliament) in Spring 2011. Regarding its amenability, the FL contains explicit rules on the formal amendment procedure and contains no eternity clauses or otherwise entrenched procedures. The FL can be amended by the two-thirds majority of the National Assembly, and popular vote is explicitly excluded from the possible procedures. The FL was altered nine times between 2012-2020: three times in 2012, twice in 2013, and once in 2016, 2018, 2019, and 2020. Some of these changes were reactions to Constitutional Court's (CC) decisions against the government; others implemented different political purposes or deregulated provisions that had become superfluous. These nine amendments were supported exclusively by the governing (super)majority. The only exception is the Eighth Amendment (2019) on repealing the provisions related to the heavily criticized and therefore discarded idea on the administrative court system, which was also supported by opposition MPs. In practice, the provisions of the FL were also supplemented by the Transitory Provisions (TP), right before entering into force of the FL—however, the CC expressed that the concerned legal act has an uncertain legal status and it cannot be considered as part of the constitution. As a result, formal amendments included these provisions into the text of the FL.

The CC is not authorized for substantive review of constitutional amendments. However, the Fourth Amendment to the FL introduced significant changes in this regard: the CC can review constitutional amendments before or thirty days after its enactment—but only on a procedural basis. Even before this Amendment, it was generally accepted that if procedural rules are violated, the constitutional amendment could be considered unconstitutional on formal grounds. As we will unfold it in the next section, it was precisely one of the CC's decisions that led to adopting these rules, explicitly excluding the possibility of a substantial revision.

Before the FL, Hungary's constitution was adopted in Act XX of 1949 on the Constitution, drafted under Soviet influence. In the course of the transition process in Hungary, the multilateral National Round Table consented to each significant political decision intending to introduce

1 Certain findings are based on Tímea Drinóczi—Fruzsina Gárdos-Orosz—Zoltán Pozsár-Szentmiklósy, 'Formal and Informal Constitutional Amendment in Hungary' (2019) 18 MTA LWP < https://jog.tk.hu/uploads/files/2019_18_Drinoczi_GardosOrosz_PozsarSzentmiklosy.pdf>

the rule of law and democracy. The Roundtable did not have any power rooted in positive law, but it was considered as a legitimate body in light of its diverse members, such as the Hungarian Socialist Workers' Party, the opposition, trade unions, and other civic movements. During the transition, the Parliament acted only as a rubber stamp: it adopted every law and amendment, including the comprehensive constitutional amendment in 1989. (Constitutional amendments passed by two-thirds majority votes in the National Assembly, according to the provisions of the 1949 Constitution.) As a result, a new constitutional system was built, and the Republic of Hungary was proclaimed through an extensive amendment that created the Constitution of 1989. In 1990, after the first democratic elections, the Parliament became a democratic legislature. The Kelsenian-type, centralized Constitutional Court, which was established by the 1989 constitution, started its activity in 1990 and—by exercising its powers related to norm control and interpretation of the provisions of the Constitution—played a crucial role in the transition to the constitutional democracy based on the rule of a law.

The National Round Table may be regarded as an organ functioning as a 'special pouvoir constituant', as it did not replace the Constitution of 1949 formally, but it prepared it for a full and substantive reform. The 'National Round Table' may also be deemed a self-created special constituent assembly, as its decisions were formally adopted by Parliament. It is also important to note that national referendums played no role in the constitution-enacting or amending processes (neither in 1989 nor in 2011). According to the interpretation of the CC, national referenda can be organized only in questions that fall under the legislature's competence. No referenda can take place related to the constitution as that is the competence of the constituting or constitution-amending power (paradoxically, from the formal point of view, that function is exercised by the National Assembly as well). Accordingly, in the Hungarian constitution-making and amending processes, the Parliament played a key role by its supermajority decisions.

After the democratic transition, formal replacement of the previous Constitution was from time to time on the political agenda. In the parliamentary cycle 1994-1998, when the governing coalition (socialists and liberals) had a two-thirds majority in Parliament, an inclusive drafting process of the new constitution started, which finally failed due to political reasons. In the next parliamentary cycle (in the absence of two-thirds majority), a governmental proposal was created to implement a new preamble to the Constitution and rename it as Act I of 2000—a project that also failed. In the parliamentary cycle 2010-2014, when the governing majority (Fidesz) had two-thirds of the parliamentary seats, the new constitution (FL) was enacted unilaterally by the governing parties.

The 1989 Constitution was just as flexible as the FL: two-thirds majority votes could amend it in the National Assembly, and it contained no eternity or entrenched clauses. Accordingly, the 1989 Constitution was amended 25 times between October 23, 1989 (its entering into force) and the end of 2009 (the last year before the parliamentary term 2010-2014 when the FL was enacted). The most important amendments related to the judicial administration reform, NATO accession (1997) and the EU accession (2003). In 2010-2011 (in the new parliamentary cycle, before the FL entered into force), the 1989 Constitution was amended 12 times—amendments designed to support the constitutional and political system's restructuring. One of the most problematic amendments from this period is the one related to the limitation of the competence of the CC: according to this Amendment, the Court cannot review the constitutionality of fiscal laws in posterior norm control procedures, only in exceptional cases—the FL sustains this problematic provision as well.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. There have been various constitutional amendments in the Hungarian constitutional system both during the first twenty years of its democratic history and after adopting the FL in 2010. Looking at the most relevant revisions under the actual constitutional design, it would be fair to say that the central issue from both a dogmatic and practical perspective was to differentiate between functional and dysfunctional amendments. The Hungarian constitution-making process in 2011 was followed by international attention from the very beginning and made its way to an independent category within "abusive constitutionalism".[2] It may appear as no surprise that the abusive use of amendment power would not be brought to an end after the new FL, but similar dysfunctional patterns would continue. However, it is far from being evident which amendments are considered classical and which ones intend to undermine the core values of the constitutional system.[3] One of the peculiarities of the Hungarian constitutional system and its constitutional amendments is that it is complicated if not impossible to identify the elements of constitutional malice based on one single provision, act, or amendment. However, instead, it is the interplay of the normative text, the institutional practice, and the narrative of the governing political regime that leads to abusive constitutionalism.[4] For instance, it could be argued that the First Amendment to the FL was about clarifying the normative character of the Transitory Provisions of the FL but looking at the actual application, it could easily be an abusive amendment or a constitutional dismemberment. Another challenge to the categorization is that one might argue that the FL itself introduced a rupture in the deep structure of Hungarian constitutional identity.[5] After a new constitution, further alterations could be simple corrections or improvements to this new constitutional structure, as the government often argues it. While for those who disagree with them, they are entirely incompatible with the idea of constitutionalism. Perhaps except for the Fifth[6] and the Eighth[7] Amendments to the FL, all the other amendments discussed in this chapter carry this ambiguity and two-sidedness.

The most controversial amendments to the FL are the Fourth, the Seventh, and the Ninth Amendments. Let us concentrate on the Seventh and the Ninth first. The government's rhetoric mainly rules the

2 David Landau, 'Abusive Constitutionalism' (2013) 47 U.C. Davis L.Rev. 189

3 Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale J. Int'l L. 1

4 András Jakab, 'What's wrong with the Hungarian Legal System and How to Fix it' (2018) MPIL Research Paper 13.

5 Gábor Attila Tóth, *Constitution for a Disunited Nation: On Hungary's Fundametal Law* (CEU Press 2012); András Jakab—Pál Sonnevend, 'Discontinuity with Deficiencies: The New Basic Law of Hungary' (2013) 9 Eur. Const. L. Rev. 1

6 The Fifth Amendment was adopted as a symbolic gesture to dispel the fear of the European and international community from an autocratic regime. According to this amendment, the Parliament made some basically technical corrections to some of those rules that had been heavily criticized and later annulled by the CC.

7 The Eighth Amendment was adopted to undo the creation of a separate administrative high court introduced by a previous amendment.

Seventh Amendment's social-political context against illegal migration and the refusal of the European Union's policies on this matter. The Seventh Amendment[8] contains several rhetorical elements, such as the obligation to protect the national identity rooted in the Hungarian constitutional traditions or the protection of the country's constitutional identity and Christian culture as the duty of all state organs. Provisions with a lesser degree of oratory are those that pertain to the rules on Hungary's participation in the European Union, which now points out that the "[e]xercise of competences (…) shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure." (Art. E sec. 2.) The rhetoric nature of these rules seems to be confirmed by the fact that these provisions are practically the codifications of a previous CC decision from 2016, in which the CC already interpreted and defined the relationship between the national and European levels. Furthermore, Article XIV of the FL lays down that "[n]o foreign population shall be settled in Hungary." The other two elements of this Amendment are overrulings of previous CC decisions, such as the prohibition of "using a public space as a habitual dwelling" (Art. XXII sec. 3.), and restriction of freedom of assembly by stating that it "shall not impair the private and family life and home of others." (Art. VI sec. 1.)

The Ninth Amendment to the FL further extends the series of hot-button issues that provokes controversy. This last Amendment, adopted in December 2020, declared that "the mother is a woman, and the father is a man," and that marriage is the foundation of family relations. Furthermore, it complements the provisions on the protection of children with the statement according to which Hungary defends children's rights for a self-identity corresponding to the sex at birth.[9] Finally, the Amendment introduced the definition of public money and redesigned the categories of the emergency powers.[10]

2. The Hungarian FL does not contain any explicit eternity clauses. However, it is less clear if there are any implicit limits to amendments derived by the CC. The eminent story of constitutional control of constitutional reforms in Hungary is precisely an attempt of the CC to demonstrate the existence of such limitations, even if, until now, these constraints could never be put to practice.

Before adopting the new FL, the jurisprudence of the CC was unambiguous on excluding the possibility of the substantial review of constitutional amendments from its competencies [Decisions 293/B/1994., 23/1994 (IV. 29)]. According to the CC's arguments from 1994, "the Constitutional Court cannot annul (…) any of the provisions of the Constitution. If a provision was enacted into the Constitution by the two-thirds majority of the members of the Parliament, that became part of [the constitution], conceptually it cannot be considered as unconstitutional." [Decision 293/B/1994. AB, ABH 1994, 862.] A slight turn towards a broader possibility of revision was made in Decision 61/2011 (VII. 13.), when the CC—in line with its settled jurisprudence—extended the doctrine's application on invalidity of laws to constitutional amendments. Following this line of argument, as amendments are binding laws of the land, they must comply with all the formal conditions of a valid law posed by the Hungarian legal system. Therefore, if an amendment was adopted with less than the two-thirds majority of the Parliament or the Head of State did not promulgate it, it can be treated as null and void; therefore, it can be unconstitutional.

In 2012, the CC—for the petition of the Ombudsman—had to decide whether the Transitional Provisions of the FL (TP) adopted in a separate document but self-proclaimed as "part of the FL" actually shares the nature of the supreme law or should instead be treated as an infra-constitutional norm. Again, in this case, the Janus-face nature of Amendment dysfunctionality appears, as in itself adopting a separate document to manage the technicalities of a constitutional transition should not necessarily threaten the core values of constitutional democracy. Nevertheless, the TP's actual practice was to use it as a parallel constitution with an ever-growing content to overrule the CC's decisions and grant a constitutional status for those provisions, the conformity of which was highly dubious from the rule of law/constitutional perspective. The practice of intensive use of amendments started before adopting the FL when the Parliament ratified eleven modifications to the Constitution of 1989 only in 2011. There was no reason to think this practice would change after creating the TP when its modifications were adopted as constitutional amendments (see, the Second Amendment to the FL). To illustrate the kind of norms the TP contained, we can mention the obligation of voters' registration, the restrictive notion of the family, the conditions of registration of churches, the definition of hate speech, or the criminalization of homelessness—all these attempts previously declared as unconstitutional and annulled by the CC.

In its Decision 45/2012. (XII. 29.), the CC decided to annul the entirety of the TP on the grounds of "formal invalidity" and announced various substantial requirements for constitutional amendments. Strategically, the CC tried to maintain its previous jurisprudence and hold on to the precepts of a formal revision of constitutional reforms to guarantee a higher legitimacy for its decision, but simultaneously set some boundaries to the amendment power to put an end to the abusive practice of the Parliament. The main line of argumentation of the CC was to question the constitutional character of the TP by arguing that its provisions are "not transitional," that it did not "become part of the FL," and its current state of normative uncertainty opens the door for a continuous withdrawal of the competences of the CC, which goes against the principles of the rule of law; therefore it is unconstitutional.[11] The CC even added that "constitutional legality" is not merely a set of formal requirements. However, it has substantial elements such as respect for basic fundamental rights and those core values of constitutionalism and democracy accepted by the international community. One might easily argue that by this reasoning, the CC went far beyond a merely formal revision of the TP, which is further supported by the concurring opinions stressing out the substantial conditions of an amendment "becoming part" of the constitution, for instance.

8 Tímea Drinóczi et.al., Formal and Informal Constitutional Amendment in Hungary (n. 1.).

9 The amendment was criticized on the basis of discrimination and implicitly rejecting LGBTQ rights. Eszter Polgári, Tamás Dombos, 'A New Chapter in the Hungarian Government's Crusade Against LGBTQI People' (2020) VerfBlog <https://verfassungsblog.de/a-new-chapter-in-the-hungarian-governments-crusade-against-lgbtqi-people/, DOI: 10.17176/20201118-190446-0.> 18 November 2020

10 Critical voices claim that both changes would further cement the power of the governing party. Viktor Z. Kazai, 'Power Grab in Times of Emergency' (2020) VerfBlog <https://verfassungsblog.de/power-grab-in-times-of-emergency/, DOI: 10.17176/20201112-200047-0.> 12 November 2020

11 Under the name 'shadow constitution', this line of argument was explicitly invoked recently by the Chilean Constitutional Tribunal in its decision about the unconstitutionality of the Transitional Provisions to the Chilean Constitution. See, ROL 9797-20-CPT (December 30 2020)

Unfortunately, this strategic incompleteness and under-determinacy left the CC without any possibilities when the Parliament adopted the Fourth Amendment and integrated—this time unequivocally—all the annulled provisions of the TP in the FL, together with a new restriction of the competencies of the CC according to which, amendments can be revised only from a procedural perspective. When the Fourth Amendment was sent to the CC for constitutional review, the previous margin of the majority was lost, and the newly derived principles of substantive limits on amendments could not be put to practice—the CC rejected the petition on the grounds of lack of competence [Decision 12/2013. (V. 24.)].

3. Based on the CC's approach to the revision of constitutional reforms, we could say that its attitude changed in light of its actual composition, the current fragmentation of the political power,[12] and the level of threat of their de facto independence, in the form of interruptions in the judges' constitutional mandates or institutional reforms. One might argue that the CC's counter-majoritarian role was more determinant before the court-packing in 2011. It was easier for reasons related to judicial dynamics inside the CC and external reasons related to the political climate to protect constitutional principles even against laws that were quite popular. After 2011, however, counter-majoritarian justifications and arguments of reason did not cease to disappear completely, and in several cases, they trumped over both government policies and popular demands. Although the tendency of a vanishing counter-majoritarian role,[13] and a growing attitude to have a popular take on constitutional adjudication seems to gain a growing relevance.

IV. LOOKING AHEAD

The future of the constitutional reforms is somewhat unpredictable. As we saw above, the last decade brought a new constitution that was meant to be steady in time, but it has been amended nine times in nine years. Some of the changes were reactions to actual political questions, including overriding the Constitutional Court's decisions. Other changes overburdened the text with provisions that usually belong to the statutory level. This patchwork text opens up a broad margin of interpretation for the Constitutional Court. However, the institution, filled with judges elected by the governing political party, instead avoided conflict with the legislature in recent years and used mostly soft instruments (e.g., constitutionally conform interpretation or declaration of constitutional omissions).[14]

Approaching the tenth anniversary of adopting the new constitution, issues related to its legitimacy still do not seem to be settled, stemming from its non-consensual adoption and partly from its content that emphasizes one-sided values, decreases the level of separation of power, and restrains fundamental rights. The Amendment of the constitution demands a two-thirds majority of the Parliament members. In addition to this, the FL also binds the regulation of basic policy issues as taxes and pension system to a cardinal act form (i.e., statutes adopted by the two-thirds majority of Members of Parliament present). As the Council of Europe's constitutional advisory body, the so-called Venice Commission stated in its report on the FL that too wide use of cardinal laws is problematic because „parliaments should be able to act flexibly in order to adapt to new framework conditions and face new challenges within society. A democratic system's functionality is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of a simple majority, the less significance will future elections have, and the more possibilities does a two-thirds majority have of cementing its political preferences and the country's legal order."[15] This practice can have the potential to reduce the impact of the elections that should in fact guarantee that the people's voice in terms of their policy choices be heard. Therefore, the main question in the field of constitutional reforms will be how a new government, coming from a different political side and having only a simple majority in the Parliament, will react to the phenomenon of bound hands and how it can fulfill its democratic tasks.

V. FURTHER READING

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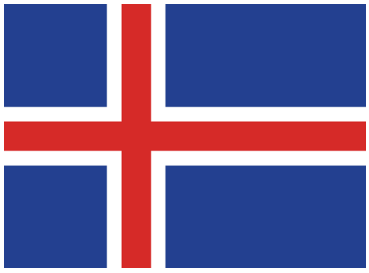
12 John Ferejohn , 'Judicializing politics, politicizing law' (2002) 65 Law & Contemp. Probs. (3), 41-68.

13 Luis Roberto Barroso, 'Countermajoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 Am. J. Comp. L.

14 See e.g. the Hungarian chapter in the recent years' Global Review of Constitutional Law.

15 Opinion on the new Constitution of Hungary. Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011). Opinion no. 621 / 2011, point 24.

Iceland



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I. INTRODUCTION

No formal constitutional amendments were adopted in Iceland in 2020. However, the year was interesting from an amendment point of view; there was robust discussion of constitutional amendments and four proposed amendments were introduced to the public, two formally in Parliament.

The constitutional process which took place from 2009-2013, continued to form a background to the debate. On the one hand, advocates for the draft constitution stemming from that process were very active in reminding the public of the plebiscite of 2013. On the other hand, a working group comprised of the leaders of all political parties in government met regularly to try to negotiate new constitutional amendments. At the behest of that group, constitutional lawyers drafted amendments and incorporated ideas and phrases from the 2013 draft, as well as from more recent experiments in public consultation. It seems likely, that the discussion in the coming months and years will continue to take place in the no-man's-land between the emphasis on the constitutional process of 2009-2013 and the political compromises necessary to make any constitutional amendment viable.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

IN GENERAL

In the year 2020, four Constitutional amendments were proposed. The Prime Minister introduced two draft bills to the public via the government's consultation web portal, with the intention of formally submitting them to Parliament in the beginning of 2021. Additionally, two bills were submitted to Parliament by opposition members of parliament. The four proposals for constitutional reform are as follows:

THE PRIME MINISTER'S BILLS

A draft constitutional bill adding new provisions to the Constitution on the status of the Icelandic language was published by the Prime Minister in May 2020 in the government's consultation web portal. Its main aim is to strengthen the position of the Icelandic language and to emphasize its importance. Furthermore, it aims to provide support for governmental action to strengthen and preserve both the Icelandic language and the Icelandic sign language.

A draft constitutional bill amending the provisions of the Constitution on the President, the Government, the tasks of the executive branch and various other matters was published by the Prime Minister in June 2020 in the government's consultation web portal. The main substantive changes being proposed are the following:

1. Presidential elections will take place according to a prioritization method (ranked choice) instead of the winner being elected by a simple vote (s/he who gets the most votes, irrespective of the number of candidates and hence of proportion of the votes cast—wins). The term of office of the President of Iceland shall be extended from four years to six years and the same person may not hold the office of President for more than two consecutive terms, or a total of 12 years (no term-limits apply currently).
2. The current blanket provisions providing that the President of Iceland is not responsible in any way for acts of Government will be amended to state that the President is not responsible for official acts that s/he performs on the proposal and under the responsibility of a Cabinet Ministers. The Office of the Attorney General will be entrusted with the power to prosecute alleged offenses committed by Cabinet Minister, replacing the current rule under which Parliament issues the indictment. It is also proposed that a provision on a special impeachment court (*Landsdómur*) be removed from the Constitution, which would allow Parliament to decide that the general courts should adjudicate such cases.
3. The provisions on the formation and role of the cabinet are made clearer and brought into line with years of practice.
4. Provisions on cabinet meetings are made more detailed and the leading and co-ordinating role of the Prime Minister spelled out more clearly.
5. The parliamentary principle will be set out in the text of the Constitution, having had an unclear footing in the text, but clearly been an unwritten constitutional custom for over 100 years. An explicit provision on the resignation of a government or a specific minister in the event of a vote of no confidence by Parliament are added.
6. The role of an acting governments, after a government has resigned, is clarified and limited compared to the status quo.
7. Provisions on the appointment of civil servants are brought into line with developments in the sub-constitutional law on civil servants, including the principle that professional considerations must prevail in appointments to public office.

8. The current role of the Executive, i.e. the cabinet and the President, in convening Parliament and postponing the meetings of Parliament will be fundamentally changed with the aim that Parliament will have full control over its own functions and schedule.
9. A new provision is added under which the President must, prior to accepting a proposal by the Prime Minister to dissolve Parliament and call elections, seek the opinion of the Speaker of Parliament and the chairperson of each parliamentary party.
10. Parliament will have explicit authority to repeal a law that the President refuses to ratify pursuant to Article 26 of the Constitution, with the result that no referendum will take place concerning the fate of the relevant law. This is in line with practice.
11. The President's obsolete authority to cancel prosecutions and grant exemptions from the law will be abolished. The provision granting this authority to the President is, along with the provision on the President not bearing any legal responsibility for executive actions,
12. The Office of the Attorney General will be mentioned in the Constitution itself, in a provision aiming to ensure the independence of the office comparable to the judiciary.

In addition, it is appropriate in this context to note that in 2019 the Prime Minister published, in the government's consultation web portal, two other draft constitutional bills proposing to add new provisions to the Constitution on environmental protection and natural resources. The Prime Minister's intention is to formally submit the substance of all four draft bills to Parliament after taking into consideration suggestions and/or comments from the public. Extensive suggestions and comments were received from the public on the Prime Minister's four bills. The vast majority of comments criticize the process used in the preparation of the bills, in particular that the 2011 proposals of the Constitutional Council were not sufficiently taken into account. This will be discussed in more detail below.

THE "NEW CONSTITUTION"

A constitutional bill setting out an entirely new constitution was submitted for the fourth time by opposition members of Parliament (same bill as was first presented in 2012). The bill is based on a Constitutional Bill drafted by the Icelandic Constitutional Council from 2011 (referred to as "the New Constitution" by many of its supporters). The bill proposing the adoption of the draft Constitution was distributed in the Parliament in October 2020, it has been formally proposed on the floor of the Parliament and received some substantive review by members of Parliament. By the end of the year 2020 the bill was still pending before the Parliament and currently being considered by the Constitutional and Oversight Committee (one of the Parliament's standing committees).

VOTING AGE

A fourth constitutional bill proposed to amend the provisions on the minimum voting age. It proposes that the voting age for Icelandic parliamentary elections be lowered from age 18 to age 16. The bill was distributed in the Parliament in October 2020, by members of the opposition. It has not been formally considered by the Parliament and therefore has not been discussed substantively. By the end of the year 2020 the bill was still pending before the Parliament.

SUCCESSFUL OR A FAILURE?

None of the four proposals discussed can be classified as Successful Constitutional Reforms yet, but neither can they be said to have failed. Strictly speaking, the bill on a new constitution and the bill on voting age are still being considered by the Parliament. It is, however, unlikely that they will succeed as they come from opposition members of parliament and only a minority of MPs appear to support them. The Prime Minister plans to formally submit the other two proposals to Parliament in early 2021 and these are more likely to succeed, while far from being undisputed, since they originate from the leader of the majority coalition government in consultation with other political leaders. No other Constitutional Reforms seem to have been proposed, textual or otherwise, in Iceland in 2020.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

THE PRIME MINISTER'S BILLS

Since the Prime Minister took office in 2017 it has been clear that she intends to formally submit a draft amendment to Parliament before the end of the current term. Her entire term of office has in fact been marked by efforts to reach a consensus between all political parties and the public on constitutional changes. As has been stated, four drafts constitutional bills have been published in the government's consultation web portal and the Prime Minister's intention is to formally submit all the draft bills to Parliament in early 2021.

The Venice Commission (European Commission for Democracy through Law) offered comments on all four bill drafts in October 2020. The Commission noted that it welcomes the efforts being made to consolidate and improve the Icelandic Constitution in order to reflect the common fundamental values of the people and to lay a solid foundation for a democratic state based on the rule law and protection of human rights. The Commission offers comments and recommendations on the draft bills and notes that in general the amendments are positive and in line with the international standards. Furthermore, the Venice Commission notes that after the attempt of drafting a new Constitution in the aftermath of the 2008 economic crisis in Iceland, authorities have changed their approach to the constitutional reform and have opted for a more cautious method by introducing partial amendments to the Icelandic Constitution.

It is fair to say that the Prime Minister's four draft constitutional bills are one of the most progressive and comprehensive proposals for constitutional change that have emerged from the government. It is arguable that only the 1995 changes of the Icelandic Constitution, when the human rights chapter was completely overhauled based on the European Convention on Human Rights, are on the same scale.

CONNECTION BETWEEN THE "NEW CONSTITUTION" AND THE PRIME MINISTER'S BILLS

As the Venice Commission realizes, the largest underlying reason for the Prime Minister's emphasis on Constitutional changes and what likely drives the matter forward is the Draft Constitution, arising out of the constitutional process of 2009-2013.

That process is well-known. In 2008-2009 thousands of Icelanders took to the streets to demonstrate the government's handling of the crisis and the policies enacted in the years leading up to the crash. The crisis led to a severe economic recession and significant political unrest. Among other things, the government took over all three of Iceland's major commercial banks in an effort to stabilize the financial system and entered into a bailout program with the International Monetary Fund. In the wake of the political unrest and a report by an independent Parliamentary Commission into the developments leading to the crisis, a majority in Parliament determined that the Constitution needed revising.

In June 2010 an Act on a Constitutional Assembly was adopted by the Parliament. The Assembly was composed of 25 delegates, elected by direct personal election. The Supreme Court invalidated the result following complaints about several technical flaws in how the election was conducted and in April 2011 the members elected in the invalid elections were instead appointed by Parliament to take a seat in a Constitutional Council. However, the formal authority to amend the Constitution remained (according to its provision 79) in the hands of two successive Parliaments.

A bill drafted by the Icelandic Constitutional Council and unanimously approved by all its delegates was delivered to Parliament in July 2011. In 2012, a bill based on the Council's proposals with some revisions was submitted to Parliament but was never subject to a final substantive vote, in spite of a majority of participating voters having given their support in a referendum. It must be noted, that while the process was experimental and progressive and much admired by many, the draft Constitution was the subject of serious substantive criticism, including from the Venice Commission. Since then and particularly in the couple of years up to 2020 organizations and opposition members of parliament supporting the so-called New Constitution, as well as some in the majority, have advocated strongly for adopting the draft. A milestone in this advocacy was the presentation of a petition to the Government in October 2020 backed by the verified signatures of 17%of registered voters. The draft has been submitted to the Parliament by members of the opposition four times, last time in October 2020, without success.

VOTING AGE

The proposed constitutional bill on voting age argues that the voting age for Icelandic parliamentary elections be lowered from age 18 to age 16. The bill reflects on increased participation of young people in politics both in Iceland and worldwide. Young people seem to be more involved and outspoken in matters such as environmental protection, sexual harassment and sexual abuse. In this context the bill refers to, among other things, the work of Swedish environmental activist Greta Thunberg and the #MeToo movement (social movement against sexual abuse and harassment towards women, where allegations of inter alia sex crimes are publicized).

MORE ON CONSTITUTIONAL REVIEW

All the four proposals discussed above are best described as amendments rather than dismemberments, i.e. following the amending procedure of the existing constitution. This applies even to the proposal for the "New Constitution", which proposes to follow the existing amendment procedure to entirely replace the current constitution. There has been no serious suggestion to deviate from that amendment procedure in that context. None of the four proposals raise a tension with unamendable rules in the Constitution since the written Icelandic Constitution does not contain any unamendable rules. Icelandic constitutional law does acknowledge unamendable constitutional principles; chief of which are equality and proportionality, but none of those proposals touch upon those.

In general, there is no constitutional control of constitutional reforms in Iceland. Leading commentary suggests, for example, that even drastic reforms of the Constitution (e.g. repealing the entire human rights chapter) would be within the scope of acceptable reforms as far as the Constitution is concerned. The Courts would not strike down such reform as unconstitutional constitutional amendments, although they might find other ways to address the issue, perhaps through the application of the European Convention on Human Rights. There are no precedents for such role for the Courts or any other institution, but the courts have repeatedly acknowledged and formulated unwritten constitutional principles.

In general, as to the role of courts in Iceland regarding constitutional control, all courts in Iceland have the power to control the constitutionality of legislative and executive acts (decentralized constitutional review). The review is ex post and concrete, i.e. tied to the facts of specific case or controversy where a suing party is able to prove legitimate interest in the outcome of the case. Constitutional review is also generally thought to be applicable only when a party raises the argument before the Court, although some argue that the Courts may raise constitutional issues ex officio. The authority for constitutional control of legislative acts is based on constitutional custom and not on any particular provision in the Constitution. Compared to other Nordic countries, the Icelandic courts use this authority relatively liberally. Overall, constitutional review by the Courts is a well-accepted and uncontroversial practice, while occasionally the opinion is raised that the Courts have overstepped their authority vis-à-vis the separation of powers.

There are no examples of constitutional control of legislative acts by the Icelandic Courts that could be described as the Court unequivocally playing an enlightened role, nor a representative role. The decisions where the Supreme Court has held that a law is unconstitutional in the last 25 years are perhaps best described as counter-majoritarian, and the Court seems to take pains to cast its role in this matter in a legalistic and technical light. This has served to counter-act worries that the (relatively active) review is overtly counter-majoritarian or political.

IV. LOOKING AHEAD

As per the Constitution's article 79, the amendment process is such that two Parliaments—with elections in between—have to adopt a constitutional amendment for it to become law. This relatively easy amendment process means that constitutional amendments are frequent in Iceland. It also means, however, that only the first Parliament after general elections adopts constitutional amendments.

As general elections will be held in 2021, that year will be decisive for the amendments that have now been introduced. Those that are not passed in the spring term of Parliament stand no chance of being

passed until the next general election. Most observers agree that the Bill incorporating the 2013 draft stands little chance of being passed. It has been introduced three times before and never adopted and that history, along with the substantive problems with the draft, raised amongst others by the Venice Commission in 2013, likely seal its fate.

It is much less clear what will happen to the other three proposed amendments; the two introduced by the Prime Minister and the one on the minimum voting age. The Prime Minister's bills arise from the working group of the heads of all political parties, including the government coalition. Constitutional amendments in Iceland have often been introduced by MPs from all political parties, but in spite of the extensive work in the group and on behalf of the group, the Prime Minister has chosen to introduce the Bills herself, suggesting that there is no consensus within the group. However, the governing coalition is strong, and the Prime Minister enjoys a strong standing. While there is public debate about the proposed bills, they focus on areas on which there is broad consensus about the need for reform; they build on the draft Constitution of 2013 to a degree and they appear sound from a purely legal perspective. However, the tradition of amending the constitution only by consensus and a certain conservatism regarding the constitutional text run deep in Iceland, so it remains to be seen what the fate of those bills will be. If passed by Parliament in the spring session, they will need to be introduced and passed again in the Fall, after the general elections.

Substantively, perhaps the most conspicuous absence in the whole debate on constitutional amendments is a provision regulating Iceland's participation in supra-national organizations. Constitutional experts have pointed to the lack of any such provision as problematic for the last two decades. However, the issue of such participation, and in particular of the European Union, is immensely divisive and the introduction of any such provision has been assumed to be fatal to any constitutional draft. On a historical note, the constitutional draft of 2013 suggested a more stringent procedure for determining such participation than for amending the constitution itself. This is not addressed in the bills introduced by the Prime Minister and is thus likely to remain a problem, irrespective of their fate.

V. FURTHER READING

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India

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I. INTRODUCTION

The years 2019 and 2020 have seen various shifts, growth and progress in all different fields of humanity. One such progress has been observed by numerous constitutional amendments experienced by the People of India. The amendments implemented in India's Constitution during the period of 2019 and 2020 had an effect on the people of India and the basic constitutional structure.

The dismemberment of Articles 370 and 35A of the Constitution was the very first constitutional amendment that occurred during the period of 2019 and 2020 to create a sequence of various planned developments. Initially, different sets of challenges were faced, which then set a pace for India's people to see numerous potential constitutional reforms that were all very impactful. In addition to the changes observed in the Citizenship Amendment Act, 2019 and the Farmer's Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020, which had an indirect effect on the fundamental framework of the Constitution of India, the paper further explores the impact of these impactful dismemberments of Article 370 and Article 35A.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

One of the most prominent constitutional reforms that played a significant role the past year has been the revocation of Article 370 of the Indian Constitution, the Citizenship Amendment Act, 2019, and the Farmer's Bill introduced in late 2020.

The Article 370 and Article 35A of the Indian Constitutions was scraped off by the Government of India on 5th August 2019. The government decided to revoke the special status or the limited autonomy that was granted under Article 370 and elaborated under Article 35A of the Indian Constitution to Jammu and Kashmir. The articles provided the state with a certain amount of autonomy as it gave the state the provision to constitute its own constitution, a separate flag, and the freedom to make laws. Whereas, among these provisions and freedoms the matter of foreign affairs, defense, and communications stilled remained within the preserve of the central government. The Article 370 and Article 35A gave Jammu and Kashmir the freedom to make their own rules relating to matters like permanent residency, ownership of property, and fundamental rights. However, this all changed when the Government of India decided to revoke the article on 5th August 2019.

As the new developments were introduced, the step of revoking the Article 370 and Article 35A of the Indian Constitution was met with quite a bit of resistance from the general public of Jammu and Kashmir. The proposed reform was not immediately accepted by the people residing in the state however, this situation gradually took a different and positive turn when the various factors of taking this step were examined. The Government of India's main aim to scrap off the article was to integrate Kashmir with the rest of the country and to bring it on the same grounds as the rest of India. Along with this, one of the prominent reasons for the revocation of Article 370 and Article 35A of the Indian Constitution was to increase the overall development of the state. The revocation will not only help and integrate the state of Jammu and Kashmir but will pave way for its economic growth and development. As the abrogation aims to change the investments and employment situation it also gives a new array of hope for tourism, better health, and education opportunities for the general public of Jammu and Kashmir. The freedom of opportunities and exploring various avenues by the general public of the state would not only benefit the state itself but will be fruitful for the entire nation as a whole. Jammu and Kashmir being a state of conflict, violence, and distress for the past few decades will finally have the opportunity of acquiring peace, harmony, and economic welfare for its people by evolving its parameters to the rest of the citizens of India.

With a gradual overall change and evolution, the steps taken by the Government of India for the welfare of Jammu and Kashmir were steadily accepted by the general public of the state as well as the citizens of India. The successful abrogation of Article 370 and Article 35A from the Indian Constitution was a bold and pathbreaking move whose effects will be observed in a gradual and paced manner.

However, the situation of The Citizenship Amendment Act of 2019 and the Farmer's Bill 2020 is entirely different than the successful abrogation of Article 370 and Article 35A of the constitution.

The Citizenship Amendment Act of 2019 received its assent from the President of India on 12 December 2019 and assumed its status of an act on 10 January 2020. The act provides a pathway to Indian citizenship for refugees from Afghanistan, Bangladesh, and Pakistan who are Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians and who arrived in India before the end of December 2014 by amending the Citizenship Act of 1955. The act further seeks to amend the definition of illegal immigrants for the said religions from Afghanistan, Bangladesh, and Pakistan who have lived without any documentation

in India. However, these provisions do not grant such liberty and eligibility to the Muslims from and residing in these countries.

The Citizenship Amendment Act of 2019, received quite a resistance from all over the country as it was the first act that overtly used religion as a criterion for citizenship under Indian Law.

The Upper House adopted the Farmer's Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020, by voice vote, and the Price Guarantee and Farm Services Bill Agreement for Farmers (Empowerment and Protection), 2020, in the light of the reforms in the Farmer's laws. The bills have already been passed by Lok Sabha and have since been notified as legislation on 27 September 2020.

Such laws will transform Indian agriculture and attract private investment, the government argues. The Price Assurance and Farm Services Act, 2020 Agreement on Farmers (Empowerment and Protection) provides for contract farming in which farmers will grow crops according to contracts with corporate investors for mutually agreed remuneration. However, the protesting producers fear that powerful corporations will bind them to unacceptable establishing partnerships with large corporate law firms, including liability provisions that would be beyond the understanding of poor farmers in some cases. Farmers believe it could contribute to the commercialization of farming, with demand, along with the monsoon, being an unpredictable determining factor of the fate of farmers. They suggest that even now, farmers can sell outside the Agricultural Produce Market Committee, and they do so most frequently, even after paying the requisite fees or cessation fees. Experts claim that the market tax, rural development fee, and Arhatiya's commission are 3 percent, 3 percent, and 2.5 percent; and 2 percent, 2 percent, and 2.5 percent, respectively, in the states of Punjab and Haryana, the epicenter of the protests. With states not allowed to levy market fee/cess outside Agricultural Produce Market Committee, regions under the new rules, Punjab and Haryana could lose an estimated Rs 3,500 crore and Rs 1,600 crore per year respectively. These are major sources of state revenue.

Over 60 percent of the total of India's 1.3 billion population still primarily focus on agriculture for their livelihoods, while only about 15% of the country's economic production is accounted for by the sector. Only after the coronavirus pandemic badly hit the urban economy and sent millions of labourers back to their villages did their dependency increase. Debts and bankruptcies have pushed farmers to high levels of suicide for years. Therefore, if the requisite measures are not taken into consideration while legalizing the bill into an act, it becomes all the more rational to understand the issue that the farmers of India will face in the forceable future.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

It is best to recognize and explain the revocation of Article 370 by an Indian Constitution as a dismemberment. The Government of India had agreed to scrap most of the components of Article 370 of the Indian Constitution and also to strike Article 35A of the Constitution. The President of India abolished the special protections provided pursuant to Articles 370 and 35A of the Constitution by waiving his powers under Article 370 of Clause 1.

Whereas, the 2019 Citizenship Amendment Act is best defined as an indirect amendment to the Indian Constitution and an infringement of it. It is specifically stated in Article 5 that citizenship is conferred purely on the basis of the principles of jus soli, or of citizenship established at birth. This implies that any person born in India on or around January 26, 1950, but before the Citizenship Act of 1986 on 1 July 1987, is, by definition, a citizen of India. Passed by both houses of Parliament, the Citizenship (Amendment) Bill, 1986, specifies that it is no longer appropriate to be born in India to be granted Indian citizenship. One of the parents should be an Indian citizen at the time of birth for the person to become a citizen of India. Therefore, the Citizenship Amendment Act, 2019 deals with the law of Indian descent.

So far, the Indian Citizenship Law has already seen six changes, with the newest being the Citizenship Amendment Act in 2019. In the first amendment in 1986, children born to at least one Indian parent were restricted to nationality by birth. None of the five amendments, however, have, so far, stressed an individual's conviction as a requirement for nationality. The Citizenship Amendment Act, 2019 seeks to alter the notion of illegal migration, as contained in the Citizenship Act. There is also a supposedly admirable intention to speed up the granting of citizenship in their home country to individuals suffering persecution. An unconstitutional religious classification has indeed been introduced by the government through its Citizenship Amendment Act, 2019.

While including Hindus, Christians, Jains, Sikhs, and Buddhists from these countries, the Act prohibits Muslims from Afghanistan, Bangladesh, and Pakistan. The central government has codified its anti-secular biases by prohibiting solely the Muslims population from the chance to receive Nationality, thus jeopardizing the social fabric of India's 70-year-old democracy. Not only does the Citizenship Amendment Act, 2019 neglect the Indian Constitution and violate Articles 5 to 11, but it also incites communal disharmony that has triggered further friction among India's people.

There are six fundamental rights for people, as specified in the Indian Constitution, namely the right to equality, the right to freedom of religion, the right to cultural and educational rights, the right to freedom, the right to constitutional redress, and the right to resist exploitation. The Citizenship Amendment Act, 2019 has enforced the legalization of the infringement of the constitutional right to equality (Article 14) and the right to life and freedom (Article 21), as Muslim illegal migrants from the neighboring countries of Afghanistan, Pakistan, and Bangladesh were strategically exempted from the prospect of seeking citizenship in India. This also violates fundamental rights because, as strengthened under the Indian Constitution, the government cannot arbitrarily produce arbitrary classification among equally placed classes.

The Citizenship Amendment Act, 2019, compromises the human rights with both the strongest constitutional obligations to the honor, fraternity, and honesty of the country that breathes life.

India's was drafted alongside the Universal Declaration of Human Rights, just like Germany's constitution (UDHR). In two books, Christopher Morsink, the UDHR's foremost historian, clarified how intrinsic integrity and universality for the drafters are peaks of agreement. Though its Irish Constitution was India's textual inspiration for dignity, the references to dignity and fraternity cannot be extracted from the UDHR spirit that swept through liberal constitutional

democracies. It is no coincidence that distinction has already been made in the preamble where some values are applicable to citizens alone than those which apply universally to all persons.

The preamble starts with the principles which are the very pillars of India: autonomy, democracy, socialism and republicanism. Subsequently, freedom of speech, belief, worship and religion and equality of status and opportunity ensure social and political justice for its people. These special duties towards people are fleshed out by unique provisions of the constitution. The freedoms under Article 19, for instance, are for people only. Articles 15 and 16 provide the people with equality related to socio-economic and political justice. The constitution identifies special responsibilities emerging between states and citizens through these articles, just as they emerge between spouses or employees, or players in a team.

By comparison, the Universal Rights of all persons were acknowledged in Articles 14, 17, 21-25, 27, and 32. Equality before the law, life and liberty, preventive imprisonment, untouchability, self-incrimination, schooling, child labor, and the right to constitutional remedies are what they are all about. They were logically focused on the declaration of the preamble to encourage the fraternity of its people to ensure the dignity of the individual and the nation's unity and honesty. With moral and political importance, each of these terms is expecting and requires careful planning and not merely rhetorical prosperity.

It is no accident that when dignity and fraternity are asserted by the constitution, the person, not the citizen, is the target. Illegal immigrants are just as human as they are citizens. They might well be selected for special consideration, but not in a way that undermines their integrity as human beings. It is only through assuring the intrinsic integrity of illegal immigrants that fraternity could be upheld. However, by classifying illegal immigrants based on religion, the Citizenship Amendment Act, 2019 sacrifices fraternity, thus violating the intrinsic connection between fraternity and secularism.

In declaring some persecuted persons to be preferred over others even though they are equally persecuted, the Citizenship Amendment Act, 2019fails to take into account this fraternal relationship between the individual. Discrimination on the grounds of one's religion, faith, and national origin is not only unconstitutional, and furthermore injures fraternity, that forbids, not assures, individual integrity. In refusing to acknowledge the common human suffering induced by social and political persecution, brotherhood is damaged. It destroys integrity because it judges people on immutable features over which they have little to no power. However, their liberty, i.e., the right to enforce rules on themselves or to self-determine the course of their lives, is denied.

The fundamental rights granted under the Constitution of India must be rectified by any amendments to any legislation, but the changes implemented by the new agricultural laws appear to breach the basic fundamental rights of farmers. Therefore, the adoption of these new agricultural laws seeks to breach and disrupt the constitution's basic framework, and this could be seen as an indirect amendment to the Indian Constitution.

Under the Seventh Schedule, the Constitution of India separates various subjects between the Union and the state governments. Although they separately have exclusive legislative jurisdiction over subjects in their lists, in subjects specified under the Concurrent List, both the Union and State governments may pass laws. In the event of a dispute under the Concurrent List between Union and State laws, however, the rule of the central government will prevail. The Central Government justified its decision to enact such current farm laws by invoking its power to legislate on aspects of "trade and commerce" under the Concurrent List. Moreover, according to the Indian Constitution, the agricultural sector has been referred to in the State List under the Seventh Schedule and, thus, the Union would be unable to take any important decisions and, if so, violates the constitutional provisions and creates conflict between the unbendable provisions of the Constitution.

However, under the Indian Constitution process, the Supreme Court of India has the power to review any constitutional amendments passed by parliament if the reforms compromise any fundamental rights granted under the constitution. This power has been established in accordance with Article 13 of the Constitution and may be exercised by the Supreme Court by reading Article 13 along with Article 142 of the Constitution. However, both the Citizenship Reform Act passed in December 2019 and the new Farmer's Produce Trade and Commerce (Promotion and Facilitation) Bill introduced in September 2020 are still being reviewed by the Supreme Court. The status of both laws is, therefore, still pending. However, the decision was adopted and approved by the people of India in the case of the dismemberment of Articles 370 and 35A.

IV. LOOKING AHEAD

With regard to the dismemberment or revocation of Articles 370 and 35A from the Indian Constitution in August 2019, no jurisdiction is awaited, as the Apex Court of India has announced its approval of the decision taken by the Government of India. The people of India however have eventually embraced it, thus concluding any tension and distress that the decision was initially faced with.

The Citizenship Amendment Act, 2019 and the Farmer's Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020, however, may not be the case. The Supreme Court of India is now reviewing and scrutinizing all constitutional amendments. The Supreme Court continues to consider the different aspects of both the proposed constitutional amendments that have raised questions about the infringement of fundamental rights and the fundamental framework of the Indian Constitution. These reforms have generated undesirable anxiety and controversy among the people of India. There have been numerous acts of violence and distress throughout the country, threatening and endangering the lives of the people of India. The peaceful protest against these reforms has indeed been met on numerous occasions by an incongruous act that further depletes the citizens' confidence and patience in the constitution.

Therefore, the Supreme Court has yet to make a decision on both these reforms. Nevertheless, if appropriate measures are not taken to take into account the danger that all these changes pose to India's Constitution and democracy, then India's ever-evolving humanity and stability may be jeopardized.

V. FURTHER READING

Arun K. Thiruvengadam, 'Constitutional Faith Or Constitutional Idolatry? Insights From Recent Mass Protests In India' (*IACL-IADC*

Blog, 2021) <https://blog-iacl-aidc.org/cili/2021/1/28/constitutional-faith-or-constitutional-idolatry-insights-from-recent-mass-protests-in-india> accessed 15 February 2021

Faizan Mustafa, 'An Expert Explains: The Arguments For And Against The Three Central Farm Laws' *The Indian Express* (New Delhi, September 29, 2020)

Anilesh S Mahajan, 'Article 370 Revoked: Gas Line, Free Trade, Industrial Estates Immediate Benefits To J&K's Integrated Economy' *Business Today* (August 5, 2019)

Indonesia

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I. INTRODUCTION

The first Indonesian Constitution was enforced on August 18, 1945. After, there were several constitutional successions (the 1949 Federal Constitution and the 1950 Interim Constitution). The first ever Indonesian Constitution was re-enforced in 1959. From the period of the re-enforcement, the Indonesian Constitution had been amended four times from 1999 to 2002 as part of a political reform in Indonesia after the fall of the Soeharto regime in 1998. From 2002 until 2020 there has been no constitutional reform in Indonesia—no constitutional amendment to the current Indonesian Constitution. This report offers an overview of constitutional reform after the last amendment of the Indonesia Constitution in 2002 until 2020.

This report consists of the current efforts and debates on constitutional reform in four aspects, namely: substance, impetus, process, and political stakeholders demanding the constitutional amendment. From the perspective of substances, the debates on the constitutional reform are focus on the institutional and political aspects such as strengthening the authority of the Regional Representative Council (the *Dewan Perwakilan Daerah*—DPD) as one of the chambers in the Indonesian parliament, strengthening of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* - MPR) in terms of power, especially to restore the authority of the MPR to issue the defunct National State Planning Policy (*Garis—Garis Besar Haluan Negara*—GBHN). On the substantial issues of constitutional reform, contested opinions may be classified into disputes of partial or comprehensive amendment, and the idea to re-enforce the first-ever Indonesian Constitution. From the momentum aspect, election is the impetus of initiation as well as debate on the constitutional reform brought up by the political parties.[1] On the other hand, with respect to the process, the effort to bring out constitutional reform through amendment was never worked out.

The most serious process of the proposal to the fifth constitutional amendment was in 2007, which was mostly proposed by the DPD. However, the amendment process failed since it never met the quorum required by the amendment rules in the Constitution. From the aspect of the process, proposal for amendment was coming solely from MPR. Therefore, with respect to political stakeholders, efforts and debates for the constitutional reform through formal amendment was dominated by the political parties in the People's Representative Council (the *Dewan Perwakilan Rakyat*—DPR). Meanwhile, the Constitutional Court has a significant role regarding constitutional reform by the Court's decisions. In this context, the Court has the power to interpret the Constitution through judicial review. Until now, there are several significant Court's decisions which are relevant to the constitutional reform by the Court such as the Constitutional Court's competence to review the emergency law (the PERPPU),[2] the Court interpretations on Article 22D on the DPD's power in the law making process,[3] and the Court's decisions on the interpretation to the constitutional provisions regarding to the general election and the presidential election.[4] To this extent, the constitutional reform in Indonesia is mostly by the Court's decision in the judicial review (changed by the Court). Whereas, the formal reform as to the amendment was never worked out even though it is always proposed and became a popular debate among academia and politician.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

This part would focus on three important aspects on constitutional reform in Indonesia, namely the Constitutional Commission, the Amendment proposal by the DPD, and the Amendment Agenda by the MPR.

Although it has been amended four times (1999—2002), the MPR as the Constitution maker realized that the amendment to the Constitution still leave some debatable issues. To this extent, on the annual session of the MPR in 2002, in the same period of the last series of constitutional amendments of 2002, the MPR decided to establish a Constitutional Commission which has the duty to make a comprehensive study on the Amendment to the Indonesian Constitution. The Commission is not a commission which has authority to propose an amendment to the Constitution, but only a commission consists of constitutional expert and public figure with the purpose to assist the MPR to review and recommend the amendment to the Constitution. In fact, the output of the Commission was a proposal to amend the

1 Zainal Arifin Mochtar, Snowbolling Issue of Fifth Constitutional Amendment, Kompas, 28 August 2019, <https://www.kompas.id/baca/english/2019/08/28/snowballing-issue-of-fifth-constitutional-amendment> accessed 5 January 2021.

2 The Constitutional Court Decision No. 138/PUU-VII/2009 (hereinafter *the Emergency law case*).

3 The Constitutional Court Decision No. 92/PUU-X/2012 and No.79/PUU-XII/2014 (hereinafter the *DPD case*)

4 The Constitutional Court Decision No. 50/PUU-XII/2014 (hereinafter *The Single round presidential election case*)

Constitution. However, the proposal was left off as an academic draft since the MPR did not follow up the Constitutional Commission draft. To this extent, the constitutional commission has never been a significant body when it comes to the constitutional reform in Indonesia. This is also because in terms of function and institutional, the commission fully depends on the MPR.

The proposal of amendment to the Constitution was institutionally filed by the DPD. The constitutional system in Indonesia consists of the representative body namely the MPR which consists of the DPR and the DPD. The DPD is a representative body based on territorial. Institutionally, the DPD was established as a result of the third amendment of the Constitution in 2001, which represents each province in Indonesia. The DPD members were firstly elected in 2004 as a result of the 2004 election. After two years of its establishment, the DPD formally submitted a proposal of constitutional amendment with the formal letter of the Chairman of the DPD Ginandjar Kartasasmita (Letter no. DPD/HM.310/295/2006 June 8, 2006). The letter was mainly on the main points of strengthening the DPD's authority within the framework of strong bicameral. Since then, the proposal of constitutional reform is always relevant to reorganize the structure of the DPD within the representation system in Indonesia, including the law making power as well as control and budgeting power. However, the proposal of constitutional reform raised critics from the beginning when it was proposed and never been supported by the large members of the MPR. It is because the proposal of the amendment was assumed only as a political interest of the DPD. Institutionally, the proposal from the DPD was considered as a way of the DPD's intention to expand the powers equally as the DPR. In the end, the proposal of amendment in 2007 has failed since it also did not meet the requirement as according to the formal amendment rules in Article 37 of the UUD NRI 1945. In this regard, the support for the amendment only proposed by 216 of the members of the MPR.[5] The failure of partial amendment to the Constitution on the DPD's power has made the DPD changed its strategy to the more comprehensive proposal of constitutional reform. The DPD proposed a constitutional reform not only for particular subject on the DPD but also to all subjects of the Constitution. On March 5, 2009, the DPD proposed a comprehensive draft of the Fifth Amendment to the Constitution. From the public legitimacy perspective, the comprehensive proposal on the constitutional amendment was filed by the DPD supported by constitutional experts from the universities and society groups.

However, the proposal of the Fifth Amendment by the DPD did not met the requirement quorum as according to the formal amendment rules since the DPD members are fewer than the member of the DPR. The DPD strategy on the constitutional reform through the amendment was never ended up. Not only through an institutional scheme of the formal mechanism as according to the formal amendment rules in Article 37 of Constitution, the DPD also used judicial approach by judicial review in the Constitutional Court. The DPD filed petition for judicial review against the constitutionality of the Law no. 27 of 2009 and Law no. 12 of 2011 on particular provisions of the law-making powers of the DPD. The Court decision gave the constitutional interpretation to the constitutional article that the DPD has the similar and equal authority in the law making as the DPR. However, the Court interpretation did not change any text of the Constitution. Even, after the Court decision, there were no changes in terms of the DPD competences as an implementation to the Constitutional Court's decision. The DPR and the President as the law maker never shows initiative to make or change the Law with regards to the DPD competences.

As an institution having the power to change the Constitution, the MPR has an agenda to amend the Constitution. The agenda is actually within the political agenda and mostly influenced by the political parties in Indonesia. At this point, the civil society movement and public engagement on the proposal of constitutional amendment has no significant influence on the constitutional reform. In general, from 2002 to 2020, there has been no constitutional reform within the scheme of formal amendment. However, in reality, the MPR actively encourages the discussion on the amendment to the constitution in various constitutional issues relevant to the constitutional provisions of the UUD NRI 1945.

The MPR (2009—2014) conveyed its recommendation to the MPR (2014—2019) to reform the constitutional system in Indonesia through the constitutional amendment of the UUD NRI 1945 with the term and conditions as follows: the amendment of the Constitution shall be based on state ideology of Pancasila, preserving the preamble of the Constitution and the unitary state of Indonesia, strengthening the presidential system, and addendum as the method of the amendment. However, the recommendation had not been followed up by the MPR (2014—2019). In the similar scheme, the MPR (2014—2019) conveyed recommendation in the form of the MPR Resolution no. 8 of 2019 which mainly giving recommendation to the MPR (office 2019—2024) on the seven issues including the main principles of state policy, strengthening the MPR's authorities, the DPD's authorities, clarifying the presidential system, the judiciary branch and powers, legal system and law making, and the embodiment of the Pancasila, the Constitution and the *Bhinneka Tunggal Ika* (unity in diversity) in society. The difference between the recommendation of the MPR (2009—2014) and the MPR (2014—2019) is on the output of the recommendation. The later suggests that the recommended issues may not always by a constitutional amendment but may be in the form of legislation, for example the recommendation on National State Planning Policy.

With regard to those recommendations, how does the MPR in this period response to the idea of constitutional amendment? As previously mentioned, the constitution reform by a formal amendment depends on and directed by political stakeholder in the MPR. It is meant that the political parties are the key to the political reform and the constitutional reform in Indonesia. The civil society and the pressure group are not that significant in terms of the role and the function to the constitutional reform. The political constellation responses to the idea of the amendment to the Constitution is influenced by political impetus. The 2019 election was the political momentum facilitating the exchange of idea and interest on the constitutional amendment in Indonesia. However, during the election, there was no political parties proposing amendment of the Constitution in a specific purpose of vision and mission in their campaign issues. Soon after the result of the election, the coalition of political parties brought the issue of amendment as a political bargaining. One of the issue was that the ruling party (*Partai Demokrasi Indonesia Perjuangan* - PDIP) let the *Golkar* party (the

5 "DPD Gagal Amademen Konstitusi Tahun ini" (DPD failed to amend constitution this year) <https://koran.tempo.co/read/nasional/108230/dpd-gagal-amendemen-konstitusi-tahun-ini> accessed 7 February 2021.

other big political parties) filled the post of the MPR chairman in order to propose the agenda of constitutional amendment in particular issue of the National State Planning Policy.[6]

At this point, the idea of constitutional reform is merely as a political agenda setting, to be precisely, on the basis of the political interest of the political parties or coalition and not as an exclusive agenda with the public participation. This provokes critics that the constitutional reform is not systematically and comprehensively proposed instead of only as a political bargaining among political stakeholders. After the 2019 election, there were two different groups which argue on the substantial issues of the amendment. The first group argues that the amendment to the Constitution is very important with the option of comprehensive amendment to the Constitution[7] or the option of partial amendment which focus on particular issues or partial amendment.[8] The second group believes that brings back the first-ever Indonesian Constitution is the best option because they argue that the amendment of the Constitution assumes to have no improvement for the state and welfare of society. The second group is supported by the Chairman of *Gerindra* party and some military general retirements.[9]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Series of amendment from 1999-2002 has made the Indonesian Constitution as the new Constitution introducing the new concept of sovereignty, separation of powers, and strengthening the presidential system. The strong character of presidential system in the Amended Constitution is reflected by direct presidential election and the limitation of two terms of office of the president. Furthermore, the DPR and the DPD as the representative body are directly elected in a general election. The Amended Constitution also established a Constitutional Court which has the judicial review competence. The Amendment of the Constitution also strengthen the commitment of the judicial independence by establishing a Judicial Commission. The Amended Constitution has shifted the previous Constitution (UUD 1945) which had character of "executive heavy" and had been used to constitutionally justify the previous regime of Soeharto presidency of 32 years (1967—1998).

After the last series of amendment in 2002, the aspiration or the demand on the constitutional amendment in Indonesia obviously categorized as an amendment, except for idea to create the Constitutional Commission as an independent organ to amend the Constitution (UUD) and the aspiration to bring back the very first UUD 1945 (the 1945 of the UUD 1945/ the first Indonesian Constitution). These two aspects may be counted as a constitutional dismemberment which will be described later in the next part.

The substance of the constitutional reforms in Indonesia may only be as "power map" or political game, which may be provoked as elite political issues. Some issue surrounding constitutional reform are including the ambition to bring back National State Planning Policy, the idea to strengthen the MPR's and the DPD's authority, the idea to restore presidential system, and the improvement of the judiciary.

The idea to bring back the National State Planning Policy is intended to provide direction for President in the development of policy. The MPR argues that such planning policy will create synergy among the state institutions to actualize the national development system in the framework of sustainable and integrated development. If the policy of development becomes the domination of the President, MPR argues that there would be a unilateral policy from the President in office which may result to the unsynchronized policy with the policy of the next president. The idea to revive the state planning or guidelines is in line with the idea to strengthen the authority of the MPR in the Constitution. Reformulation of the provisions on the MPR authority is believed to be in line with the nature of the MPR as the inclusive-representative body representing the people. Some believes that the MPR has to be the highest state institution having ideal competences and the highest authority to amend and ratify the Constitution, as the legislative to make the Direction of National Development Policy, having the authority to control other state institutions, and solving the dispute between state institutions. The idea to strengthen the MPR obtained critics since it will potentially bring back the previous system which makes the president responsible to the MPR. The situation indeed will not be in line with the idea of strong presidential system in Indonesia.

The amendment of the provision on the DPD is initiated by the DPD to strengthen its competence as the representative body. The DPD is expected to be the aggregator of the local provincial aspiration through the national legislation. In fact, as according to the Amended Constitution, the design of the DPD is not ideal as a representative body since it is not equal to the DPR as the representative of the people under the bicameral system of parliament. Therefore, the proposal of the amendment to the Constitution is addressed on the DPD and becomes the political agenda for the DPD. According to the current Constitution, the competences of the DPD are very limited in terms of legislative, control, and budgeting functions as well as representative function. Moreover, as the DPD is assumed as a weak state institution in the parliament, several academia as well as public urges to promote the representative system on the basis of affirmation such as minority representative group and indigenous representative group.

The constitutional reform on the advancement of the judiciary branch is the agenda to revitalize the judiciary branch of the Supreme Court (*Mahkamah Agung* - MA), the Constitutional Court (*Mahkamah Konstitusi* - MK), and the Judicial Commission (*Komisi Yudisial*—KY) with the purpose to nurture the judicial independence of the Court and empower the Court with judicial integrity. The reform issues are including the empowerment of Judicial Commission in terms of the appointment of judges on the basis of merit system which avoid the political mechanism and control against the judges including the constitutional judges. In the context of the Constitutional Court, judicial review is proposed to be broaden up not only reviewing the legislation

6 "Constitutional amendments move up MPR agenda" <https://www.thejakartapost.com/news/2019/10/04/constitutional-amendments-move-up-mpr-agenda.html > accessed 28 January 2021.

7 "Nasdem dan Gerindra Sepakat Amandemen UUD 1945 Secara Menyeluruh" (Nasdem and Gerindra Parties agree on comprehensive constitutional amendment) < https://nasional.kompas.com/read/2019/10/13/21464861/nasdem-dan-gerindra-sepakat-amandemen-uud-1945-secara-menyeluruh?page=all.> accessed 4 February 2021.

8 "PKB dan PDIP Dukung Amandemen Terbatas UUD 45" (PKB and PDIP support partial amendment of 1945 Constitution https://www.jpnn.com/news/pkb-dan-pdip-dukung-amandemen-terbatas-uud-45?page=2 accessd 4 February 2021.

9 "Setuju Amandemen, Prabowo: Kembali ke UUD 1945 Asli" (Agree to amend, Prabowo said return to original first constitution) < https://nasional.tempo.co/read/1237115/setuju-amandemen-prabowo-kembali-ke-uud-1945-asli/full&view=ok > accessed 5 February 2021.

but also the Government Regulation and the Presidential Regulation as well as other regulation such as the ministerial regulation and the regional regulation. As a consequence, the 'one roof system of judicial review' will reduce the Supreme Court competence of judicial reviews.

The other issue of the constitutional reform debates is about the presidential system. The design of the presidential powers in the Constitution is believed to have the character that the presidential powers are very much restrained by the DPR, particularly because some executive power has to undergo approval and consideration from the DPR. Other issues on the presidency are about the mechanism of the presidential nomination. It is argued that the provisions of the Constitution give loopholes for the law maker. For example, the issue of presidential threshold for the presidential nomination is much more becoming an issue to promote the amendment of the Constitution. As a consequence of the mechanism of the presidential nomination set up in the Constitution, the Election Law in Indonesia regulates the requirement of threshold and coalition of political parties in the presidential nomination process. In this context, the issue on the constitutionality of the presidential threshold becomes the most frequent issue for judicial review in the Constitutional Court. [10] Therefore, the Amendment of the Constitution is expected to clarify about this issue on the presidential threshold.

To sum up, the proposal for constitutional reform in Indonesia addresses on how to restore the powers in order to find a constitutional system, and that, it does not show any indication of dismemberment. In general, there is no proposal to reform the unamendable rules in the Constitution. The unamendable rules in the Constitution are including the prohibition to change the preamble of the Constitution and the unitary form of the state. Furthermore, the proposal of constitutional reform is neither addressed of the indication of the President's excessive power concentration, the weaken control of the parliament over the president's power nor of weakening the judiciary. In fact, in the current situation, the political system of oligarchy needs more serious attention in Indonesia.

The idea of constitutional reform which lead to the dismemberment may be on the establishment of the constitutional commission and the idea to bring back the first Constitution of the UUD 1945. Both ideas are not the formal agenda of the MPR, but merely as a public initiative and some political stakeholder ideas.[11] The first idea on the establishment of the Constitutional Commission was the early idea on 1999 when the MPR conducting the first amendment. The idea is still being promoted by the academia and civil society with the stressing on the Constitutional making by the MPR. However, it is merely an elite and an exclusive process of full of political setting. With regard to the establishment of the constitutional commission, it is important to establish a constitutional commission which independently has the duty to make the Constitution. At this point, the duty of the MPR would be only to ratify the Constitution. The drafter and the maker of the Constitution shall be the Constitutional Commission.

The idea to bring back the very first Indonesian Constitution is a dismemberment in terms that after 20 years of the Amended Constitution with the new constitutional system. It would be merely as a radical agenda and may not be accepted. The idea was mostly promoted by the military retirement figures who were not really that satisfy with the constitutional life after the Amendment to the Constitution. One of the figure is the Chairman of a political party (Gerindra), Prabowo Subianto who is now the defense minister under the President Jokowi.

From the perspective of authority and mechanism, according to Article 37 the Constitution, the Amendment to the Constitution is solely driven by the MPR. There is no institution and control mechanism against the process and the result of the amendment to the Constitution. This concept is embraced since the institutional design for the MPR was from the beginning as the representative of the people and house of the people. Furthermore, the Constitutional Court does not have authority to review the amendment of the constitution even though the Court has the competence to interpret the constitution in judicial review.

The constitutional court in several decisions shows the Court's role as the 'counter majoritarian', for example, the Court decision on the judicial review on the issue of presidential threshold for the elected president, as set forth in Article 6A par (3) and (4) of the Constitution, the Court decided there is no need to fulfill the requirement in Article 6A par (3) and (4), whenever there is only two presidential candidates[12].

IV. LOOKING AHEAD

After series of the 1999 - 2002 amendment, the Indonesian Constitution has not been amended yet even though the idea of constitutional reform is always promoted and being debatable issue even after the amendment of 2002. There are challenges and opportunities on the issue of constitutional reform in Indonesia: First, the agenda of constitution reform is always starting from the elite agenda setting. The issues on the amendment of the Constitution is the issue which mostly relevant to the state institution powers and competences, such as the institutional strengthen of the DPD, the reorganizing the MPR powers and competences which has the purpose to strengthen the MPR, the presidential system, threshold of presidential election, and the judiciary branch. These issues have consequences to that the agenda of the constitutional amendment is merely as a political agenda on the basis of the political party interest. For example, the issue on the reorganizing the judiciary branch which is offered by the Judicial Commission as to cut the tie of the political process of the Supreme Court justice appointment without the fit and proper test by the DPR. However, DPR as a political institution tends to defend its role in the appointment of Supreme Court judges.

Since the debate about constitutional reform is mostly on the issue of power within the Constitution, the grassroots issues or popular issues are not becoming concerns by the MPR in the proposal of the amendment to the constitution. For example, the issue on the economic governance and the natural resources which is under Article 33 of Constitution. This issue is not that a concern in the formal recommendation of constitutional reform by the MPR. Whereas, the issue is actually as the entry point to actualize the state welfare while in the today reality, the gap between economic situation and the monopoly of natural resources are being crucial.

Secondly, the design of the amendment rules which makes the

10 The Constitutional Court Decision No. 53/PUU-XV/2017 (hereinafter *The Single round presidential election case*) No. 53/PUU-XV/2017

11 **Bambang Widjojanto, Saldi Isra, Marwan Mas (eds.), Konstitusi baru melalui Komisi Konstitusi Independen,** Jakarta, Pustaka Sinar Harapan, 2002.

12 See *The Single round presidential election case*.

MPR holding the sole power to ratify and amend the Constitution are much more barrier for the effort to propose an amendment of the Constitution. According to Article 37 Section (1), the proposal on the amendment to the Constitutional provisions shall be made into an agenda in the MPR's session if is it proposed at least 1/3 from the total of the MPR's members. To this extent, it is impossible for the DPD to initiate and propose the amendment since all the members of the DPD are not enough to propose an amendment (it does not meet the required quorum). It is also because the MPR members consists of both the DPR members and the DPD members with the composition of the members of the DPD is not more than 1/3 of the DPR's members. The situation is also influenced by the fact that the members of the DPD is not independent from the political party but may have affiliation with the political parties. With regard to the process, the amendment of the UUD 1945 is entirely in the hand of the political parties in the DPR.

Third, since the Constitutional Court was established on August 13, 2003, the judicial interpretation to the Constitution (the UUD NRI 1945) has been developed. It is meant that the Constitutional Court of the Republic of Indonesia has an important and strategic role in terms of constitutional reform through interpretation. In this context, the constitutional reform by the Court decisions had significantly change the constitutional practices such as when the Court reviewed the emergency law, the Court's interpretation for Article 22D of the Constitution on the DPD powers and for the Article on specific issue on the threshold for elected president in the presidential election. The decisions which the Court did constitutional interpretation had a consequence of the changes the constitutional practices. At this point, the Court decisions shall be the basis for the MPR to do constitutional reform. In the reality, the reform is mostly made by the Law. This has been in line with the MPR's Resolution no. 8 of 2019 which the former MPR delivered recommendation to the successor MPR (MPR in office 2019-2024) about the seven main issues of Constitutional amendment. The recommendation suggests that the constitutional reform shall not always be done as an amendment to the Constitution, but also open to the possibility to be put in law making agenda specifically on the issue of the state policy guidelines.

V. FURTHER READING

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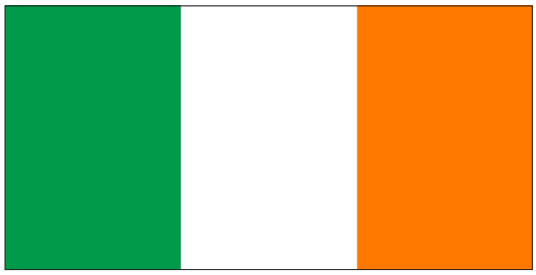
Ireland



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I. INTRODUCTION

The Irish Constitution of 1937 can only be amended by referendum, with a proposal endorsed by a simple majority of both houses of Parliament[1] and voted for by a 50% +1 majority of those voting on the day. Ireland has had a spate of referendums in recent years, from contentious matters such as abortion to less contested but symbolic matters like the abolition of blasphemy as constitutional crime. Compared to this, 2020 was quiet; the pandemic meant that planned referendums or reform processes were delayed, and no formal amendments were made. However, there have been several noteworthy moves and developments.

Generally speaking, the pandemic response itself has not led to direct called for constitutional change: though Ireland's constitutional emergency powers do not include public health crises, it is generally agreed that the ordinary legislative process has been sufficient to allow robust response, and no further powers are needed.[2]

It is likely that when the ongoing global pandemic subsides (whenever that may be) that proposals for constitutional change being mooted prior to the crisis will again emerge for debate. The most significant proposals include an amendment to a controversial provision concerning gender roles; an amendment to permit Irish citizens outside the State to vote; an amendment to provide for a right to housing; and an amendment to allow for politicians to vote remotely.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. REFORM OF CONSTITUTIONAL CLAUSE ON WOMEN

There has long been controversy about Article 41.2 of the Irish Constitution. Often known as the "women's place in the home" clause, it states:

> "1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
>
> 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

This clause, which has never had a substantive legal effect in Irish constitutional law,[3] is seen as embodying a patriarchal, traditional, and heteronormative view of gender, home and professional life. It has been the subject of many reports, and its augmentation to provide for a gender-neutral recognition of care was recommended by Ireland's Constitutional Convention in 2013.[4] A later government proposed putting simple removal and non-replacement of the clause to a referendum in 2018, but with objections from certain advocacy groups, agreed to put this matter to a Citizen's Assembly, a recent deliberative-democratic trend in Irish constitutional reform. It would consider more broadly the issue of gender equality rather than just this constitutional provision, but its recommendations would consider the holding of relevant referendums.

This Assembly on gender, composed of 99 citizens, met first on the weekend of 15-16 February 2020. It was due to meet in March, April, May and July. These meetings were all postponed due to the pandemic, and the Assembly met online on October 17th 2020, and again in November, December, and January 2021. If the Assembly's work had been completed on time, a proposal for constitutional reform would by now be on the table, and a referendum perhaps be in the offing. Unfortunately, this will have to now wait until 2021.

2. RIGHT TO VOTE FOR IRISH CITIZENS OUTSIDE THE STATE

Another constitutional change that was recommended by the Constitutional Convention was that Citizens resistant outside the State, including in Northern Ireland, should have the right to vote in presidential elections. Voting rights campaign groups seek much

1 In fact, lower house can override the upper house in the event that it votes down a referendum proposal, so only the lower support is really necessary in practice. This has happened once with respect to a referendum, on the only occasion the upper house voted down a referendum bill. See David Kenny, "The Failed Referendum to Abolish the Ireland's Senate: Rejecting Unicameralism in a Small and Relatively Homogenous Country" in Richard Albert, Antonia Baraggia, and Cristina Fasone (eds), *Constitutional Reform of National Legislatures: Bicameralism under Pressure*, (Edward Elgar, 2019) p163.

2 See Conor Casey, Oran Doyle, David Kenny, and Donna Lyons, *Ireland's Emergency Powers During The Covid-19 Pandemic*, Report Prepared for the Irish Human Rights and Equality Commission (2021) (forthcoming).

3 See Laura Cahillane, "Revisiting Article 41.2" (2017) 40(2) Dublin University Law Journal.

4 *Second Report of the Convention on the Constitution*, May 2013, available at https://cdn.thejournal.ie/media/2013/05/convention-on-the-constitution-role-of-women-report.pdf

broader reforms, including votes in referendums and in general elections.[5] Ireland's rules on voting outside of the State are very strict, with very few people entitled to vote unless resident and present in the State. In 2019, the government published a draft amendment Bill to enact this proposal, Thirty-ninth Amendment of the Constitution (Presidential Elections) Bill 2019. It proposed a series of textual changes—including some transitory provisions that would delay its effect until 2025—to effect the change.

A referendum commission—the ad hoc statutory body established to regulate referendums in Ireland—was formed for this proposal,[6] and referendum in 2020 was expected. However, a general election called in January 2020, with a long period before a government could form, and the onset of the pandemic, delayed this. The government has been encouraged to hold this referendum in 2021 if this possible, and it is included in the Programme for Government of the new coalition that formed in June 2020.[7] The Bill has restored to the Order Paper of the new parliament but has not yet progressed to debate in either house as of February 2021.

3. RIGHT TO HOUSING

Between 2011-2020, the then Fine Gael-Labour coalition government and Fine Gael minority governments faced a deepening homelessness crisis.[8] Both governments received considerable critique for their alleged lack of robust action. On at least a dozen different occasions, the government maintained that it faced very severe limitations on its scope for legislative action due to the Attorney General's (AG) advice on constitutional property rights.

Frustration with this perceived steep constitutional impediment to taking robust action to tackle homelessness and provide affordable housing, a diverse group of academics, politicians, and civil society groups have called for a constitutional amendment to provide for a constitutional right to housing. This amendment is broadly intended to place an affirmative legal duty on the State to take steps to progressively realize the goal of securing a right to housing for citizens and to dilute the ability of private property rights provisions to block State action.

Eoin O'Broin TD, the housing policy spokesperson for Ireland's largest opposition party Sinn Féin, has proposed a bill to amend the Constitution by inserting the following provision:[9]

> Article 43A
>
> 1° The State recognises the right to appropriate and affordable housing, essential for an adequate standard of living, for every person and family. The State accordingly, shall take appropriate steps to ensure the realisation of this right.
>
> 2° The State shall take reasonable steps to prevent and reduce homelessness, with a view to its gradual elimination.

However, O'Broin TD suggested Sinn Féin defer[10] in his proposed wording to the umbrella advocacy group 'Home For Good'—comprised of a diverse range of NGO's and legal experts - who proposed the following wording:

> Article 43A
>
> 1 The State recognises, and shall vindicate, the right of all persons to have access to adequate housing.
>
> 2 The State shall, through legislative and other measures, provide for the realisation of this right within its available resources.[11]

The current Finna Fáil/Fine Gael/ Green Party coalition governed have committed to establishing a Commission on Housing to provide legal advice to Government on demands for a right to housing being enshrined in law. There is reason to suggest this proposal might gain popular support. In 2014, for example a Constitutional Convention of citizens and politicians selected to deliberate and make recommendations on several proposals for constitutional reform, voted by an overwhelmingly margin of 80% to introduce justiciable economic, social and cultural rights into the Constitution.

4. REMOTE PARLIAMENTARY VOTING

In December 2020, a backbench member from one of the current governing parties introduced the Thirty-ninth Amendment of the Constitution (Remote Parliamentary Voting) Bill 2020. The Bill proposed to insert the following provision into the Constitution:

> 4° Each House may make its own rules and Standing Orders providing for special and limited circumstances in which members of the House concerned, who are not present in that House, may vote when any matter or any class of matter as so provided for, is to be determined by a vote of that House.

The impetus behind the Bill stemmed from a desire to allow members of the Oireachtas to vote remotely, to facilitate voting by deputies who are ill or who cannot be present due to emergencies. The Bill was also designed to enable deputies to take maternity leave and still be able to perform their representative function. The deputy proposing the Bill said reform was necessary due to the 'overly restrictive nature of the constitutional requirement to be present for every vote in every circumstance."[12]

The deputies view about the apparently restrictive nature of the Constitution stemmed from legal advice given to the Dáil (the lower

5 See the advocacy group, votingrights.ie.

6 See http://www.irishstatutebook.ie/eli/2019/si/484/made/en/print.

7 Suzanne Lynch, "Call for new government to prioritise referendum on Irish emigrants' votes" The Irish Times, 16th April 2020, available at https://www.irishtimes.com/news/world/us/call-for-new-government-to-prioritise-referendum-on-irish-emigrants-votes-1.4230783; *Programme for Government*, 2020, p. 113 available at: https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/.

8 Megan Nolan, "Homelessness in Ireland is at crisis point, and the vitriol shown towards homeless people is just as shocking" *New Statesman* (5th February, 2020) available at: https://www.newstatesman.com/politics/welfare/2020/02/homelessness-ireland-crisis-point-and-vitriol-shown-towards-homeless-people.

9 Thirty-ninth Amendment of the Constitution (Right to a Home) Bill 2020 (No 37 of 2020) available at: https://www.oireachtas.ie/en/bills/bill/2020/37/.

10 Eoin Ó Broin, "Government must clarify its intent on Housing Referendum", 3rd November 2020, available at: https://www.sinnfein.ie/contents/58685.

11 Home for Good, A Constitutional Referendum On A Stand-Alone Right To Housing, October 2020, available at: https://www.homeforgood.ie/assets/files/pdf/note_from_the_legal_sub-group_expanding_on_standalone_right__-_october_2020.pdf.

12 Jennifer Carroll MacNeill, "Remote voting bill removes barrier to maternity leave for politicians" December 8th, 2020, available at: https://www.finegael.ie/remote-voting-bill-removes-barrier-to-maternity-leave-for-politicians-carroll-macneill/.

house of the Oireachtas) that it is constitutionally impermissible to allow remote voting. The legal advice was sought in the early stages of the pandemic to determine if the Oireachtas could continue to exercise its functions virtually in order to minimise the risk of infection. There is strong reason to believe that this advice is based on a highly erroneous reading of the Constitution and, as such, a constitutional amendment based on its recommendations would be completely superfluous and unnecessary. It remains to be seen how the Government will act on the proposal.

5. ADOPTION RECORDS/INFORMATION

Ireland faced renewed controversy in 2020 around a long-running issue: access to adoption records for persons adopted in Ireland before there was proper statutory regulation of this. There is current no domestic law right to specifically access adoption records, and in some cases, adopted persons have not been able to acquire birth certificates etc. Previous proposals for regulating this area met with constitutional objections. This matter came to a head in late 2020 as a Bill was introduced surrounding the records of Ireland's Mother and Baby Homes Commission, investigating abuse in these homes, run by religious institutions, which accommodated single pregnant women for much of the 20th Century. It was suggested that allowing access to adoption records would be constitutionally problematic because of the privacy rights of the birth parents in question, and a constitutional amendment might be needed. This was again raised in the Mother and Baby Homes Commission Report, when it was published in January 2021; the Commission said that a referendum would apparently be required, and said this should be undertaken if necessary. This position—based on the advice of the previous Attorney General—was criticized from several quarters, saying that it was based on a misunderstanding of case law and that a referendum was not needed.[13] Eventually, the new Attorney General reversed the position of his predecessor, without disclosing detailed reasons, saying that legislation could be advanced without constitutional change, making a referendum now unlikely.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In this section, we draw out some important themes related to constitutional change in Ireland that are illustrated by the experience of 2020.

1. MODEST CHANGES

The vast majority changes proposed to Ireland's Constitution in the recent past are not constitutionally major. None are controversial constitutional dismemberments, or radical overhauls of the constitutional system. With one exception, they are unlikely to cause very major controversy. Though some, like housing rights, may be vigorously debated, few will question their legitimacy as proposed constitutional changes or oppose them very vociferously. This perhaps suggest that after a long period where major constitutional changes were proposed—notably on contentious social issues such as same-sex marriage and abortion, and major political reforms such as empowered parliamentary enquiries and abolishing the upper house—Ireland's constitutional changes in the near future may be more prosaic.

2. CONTROVERSIAL AMENDMENTS

There is one proposed change that may yet cause controversy because of a major aspects of Ireland's political context and culture: Northern Ireland. Under Irish citizenship law, and as promised in the Belfast/Good Friday Agreement, those in Northern Ireland are entitled to Irish citizenship if they wish to claim it. For obvious reasons, this is availed of by the Catholic/nationalist community in Northern Ireland and not by the protestant/unionist community. The proposal would give this community a say in electing the Irish President and this is seen, by some in the unionist community, as an "insidious proposal which will have the effect of promoting further division in Northern Ireland" and a violation, in spirit if not in letter, of the Belfast/Good Friday Agreement.[14] While expressing no opinion on this matter, we would note this controversy as an important facet of this proposal which, though not much discussed in Ireland in this debate at present, may come to the fore as a referendum approaches.

3. LAYERS OF PROCESSES FOR DEVELOPING PROPOSALS

As exemplified by the constitutional reform of Article 41.2, many constitutional reforms in Ireland must pass through several processes before they come to a vote. This clause has been the subject of many reports and now two deliberative bodies. When concluded, several additional steps will be likely. If the proposal is politically controversial (unlikely perhaps in this case), a special parliamentary committee may be convened to consider it. The government, if it accepts the broad outline of the proposal, will still have to agree a wording in consultation with the Attorney General, which can result in significant alterations to the proposal.[15] It must then be passed by the legislature, though changes at this point are very unlikely if the government has a majority.[16] As can be seen with this and with the Presidential voting change, this can cause long delays: even if they move expeditiously from there, it will be close to 10 years between these matters being considered by the Constitutional Convention and the people voting on them. It is also important to note that deliberate assemblies etc are not required, though a convention for their use may be developing. In practice, all formal power remains with the legislature, and given Ireland's tendency for government to have a strong majority in the legislature, in practice the government generally serves as gatekeeper for constitutional reform proposals.[17]

13 See eg David Kenny, "It's finally time to admit that the Government's legal advice on adoption is wrong" TheJournal.ie, January 15th, 2021.

14 J. Martin, "Unionists are again letting nationalists push at an open door" The Belfast News Letter, August 6th, 2020, available at: https://www.newsletter.co.uk/news/opinion/letters/unionists-are-again-letting-nationalists-push-open-door-they-change-belfast-agreement-time-over-irish-voting-rights-2934618

15 See David Kenny, "Abortion, The Irish Constitution, and Constitutional Change," (2018) 5(3) Revista de Investigações Constitucionais / Brazilian Journal of Constitutional Research p 257.

16 David Kenny and Conor Casey, "The Resilience of Executive Dominance in Westminster Systems: Ireland 2016–2019", (2021) Public Law (forthcoming).

17 See David Kenny, "The Risks of Referendums: 'Referendum culture' in Ireland as a solution?" in Maria Cahill, Colm O'Cinneide, Sean Ó Conaill, and Conor O'Mahony, *Popular Sovereignty and Populism in Ireland*, (Routledge, 2020).

4. ROLE OF JUDGES

Ireland's strong judiciary oversee the constitutional order with some rigor. However, they do not typically have much of a role in the amendment process. They have formally disclaimed reviewing the substance of amendments and rejected the idea of an unconstitutional constitutional amendment.[18] They do play some role in reviewing the process, and have created constitutional rules against government financing of partisan campaigns, but these interventions are on the whole modest. Judicial decisions can often form the context or impetus for a proposed reform—the right to housing is an example—and the courts can clarify the law in ways that are influential in framing referendum campaigns.[19]

In 2020, however, the most influential court intervention related to constitutional change was clearly the *Friends of the Irish Environment v. Ireland* [2020] IESC 49 case: after some decades of unwillingness to interpret the Constitution in novel and evolutive ways, we may be seeing tentative steps towards that changing, which could lead to judicial changes to Ireland's current constitutional law. On 31 July 2020, the Supreme Court of Ireland quashed the government's National Mitigation Plan, the centrepiece of the Irish government's climate mitigation policy, because the Plan failed to specify the manner in which it was proposed to achieve the "national transition objective," as required under the relevant statute mandating production of the plan.

The Court declined to recognise the argument that there was a specific unenumerated constitutional right to a healthy environment, as this was too vague to be a constitutional right. It would be too hard to specify what the right might contain or require. But the Court did show a willingness of the court to engage with already existing rights in future environmental litigation. This passage is particularly significant:

> "I would not rule out the possibility that the interplay of existing constitutional rights with the constitutional values to be found in the constitutional text and other provisions, such as those to be found in Art. 10 [relating to natural resources and state property] and also the right to property and the special position of the home, might give rise to specific obligations on the part of the State in particular circumstances."

What such rights or state obligations would look like exactly, and what effect that this would have on environmental policy, would have to be worked out in an appropriate case. But the case did show an interesting willingness to interpret the Constitution in novel and evolutive ways.

5. CONSTITUTIONAL CAUTION LEADS TO EXCESSIVE AMENDMENT FOCUS

Several of the current amendment proposals show a trend in Irish constitutional reform: for very many issues to eventually be "elevated" to constitutional level and require constitutional change. For example, as noted above, the right to housing referendum is largely motivated by a desire to overcoming legislative inertia brought on by arguably overly-conservative legal advice from the government's legal advisor, the Attorney General. Likewise, the adoption information proposal was mooted to circumvent a constitutional obstacle suggested by the AG but that others questioned. The need for constitutional change to allow remote sittings and voting in parliament is far from self-evident. There is no judgment of the courts that strongly suggests any of these measures are necessitated by the Constitution, but that is the understanding that has taken hold even without judicial commentary.

Other issues of political controversy—such as water, as we will see in the next section—are also raised to constitutional level and dealt with by referendum when ordinary politics should suffice. Should this trend continue, this "constitutionalisation" of politics could leave the Irish Constitution laden with a great many new clauses dealing with very specific issues, many of which may not be needed.

IV. LOOKING AHEAD

1. UNIFICATION OF IRELAND

Though not imminent, recent developments surrounding Brexit and Northern Ireland have made the issue of Irish unification under the Belfast/Good Friday Agreement be seriously discussed for the first time. That agreement provides that unification must be done by way of consent freely and concurrently given by the people of Ireland north and south of the border. Beyond this—and rules about when and why the Secretary of State for Northern Ireland can and must call a border poll in Northern Ireland—the Agreement is not specific about how there referendums would be conducted or what a united Irish state that came about from this process would look like. Recent academic work has examined in great detail how such a referendum process might work[20] and has begun to examine substantive constitutional dimensions of such a change,[21] but this vast change is not something on which the detail has been, in any sense, worked out.

2. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Ireland's Constitution protects few economic, social and cultural rights, and the courts have in the past ruled out mandatory orders to enforce such rights. Alongside the right to housing, discussed above, the protection of other ESC rights in the Constitution is discussed as a possible constitutional reform, as it was recommended by the Constitutional Convention in 2014. No government has committed to this, however. A private member's bill proposing such an amendment attracted some attention when it was debated in January 2021, though it is very unlikely to pass.[22] It is possible that some momentum around these changes should grow in the coming years.

The issue of public ownership of water has proven very politically controversial in recent years. Attempts by a public body to introduce graduated charges for water consumption led to extensive public anger

18 See In Re Article 26 and The Regulation of Information (Service Outside the State for Termination of Pregnancies) Bill 1995 [1995] 1 IR 1.

19 See Oran Doyle, "Clearing the Legal Decks for the Abortion Referendum: The Supreme Court, Constitutional Precedent and Legal Certainty" (2019) 1 Irish Supreme Court Review 223.

20 See *Interim Report of the Working Group on Unification Referendums on the Island of Ireland*, UCL Constitution Unit, November 2020.

21 See e.g. Oran Doyle, David Kenny, Christopher McCrudden, "The Constitutional Politics of a United Ireland" in Oran Doyle, Aileen McHarg, and Jo Murkins (eds.), *Constitutions Under Pressure: The Brexit Challenge for Ireland and the UK*, Cambridge University Press, 2021 (forthcoming).

22 See Thirty-Seventh Amendment Of The Constitution (Economic, Social And Cultural Rights) Bill 2018 (No 99 of 2018), available at: https://www.oireachtas.ie/en/bills/bill/2018/99/.

and protest. Some of the anger stemmed from a belief that the state introducing water charges was a step toward the privatization of water supply. Several political parties have called for a referendum to explicitly provide that the supply of water will remain under the control of the State. The current coalition Government's programme for government states that they will refer the question to a Joint Oireachtas Committee for consideration.

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I. INTRODUCTION

2020 in Israel is characterized by a fusion of three crises: a constitutional crisis, a political-governmental crisis, and COVID-19. These challenges have led, among other things, to two substantial constitutional amendments. Israel is a parliamentary democracy, with a flexible constitutional change mechanism, and basic laws that have a constitutional status. It also has a 'strong' model of judicial review although lacking a significant tradition of scrutinizing constitutional amendments.[1]

The COVID-19 crisis erupted when Israel was in the midst of a social, political, and constitutional process of an erosion of democratic values, institutions, and norms. Three elections were required to establish a government, and at the time of the pandemic's outbreak, a long-time caretaker government was still in office. The absence of an effective Knesset in the initial weeks of the COVID-19 crisis led to a democratic lapse in the Knesset's parliamentary oversight, particularly pertaining to emergency regulations that granted far-reaching powers to the government and were enacted without the possibility of subjecting them to a fundamental Knesset debate.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

This review of the formal amendments will focus on two key changes, both of which were passed after the outbreak of the COVID-19 crisis: First, an amendment to Basic Law: the government, which entrenches in a Basic Law a special model of power-sharing government. This amendment was enacted in May 2020; Second, a bundle of amendments to Basic Law: State Economy, which enabled the government to conduct without an annual state budget.

1. AMENDING BASIC LAW: THE GOVERNMENT TO ESTABLISH A 'ROTATING GOVERNMENT' MODEL

The March 2020 election did not lead to a clear result that would allow one of the two major parties vying to form a coalition independently. Despite a final agreement to form a unity government of the two in April, the establishment of a political partnership between the two parties was characterized by acute distrust. The lack of trust and the fear of breaking into further elections led to the circumstance in which the coalition agreements, with regard to the political arrangements concerning the formation of the government, required a very strong legal anchor - which eventually led to entrench it in a constitutional amendment.

Israel has a history of a power-sharing coalition in a situation of political tie.[2] However, current political polarization no longer allowed reliance on coalition agreement alone for the purpose of forming a government. This is the background to Amendment No. 8 to the Basic Law: The Government, which established the 'rotating government' model.[3]

As opposed to the previous model that is well established in the Israeli constitutional and political culture, Amendment No.8's main arrangements anchor the following structure: First, it stipulates a rotating government as an alternative model to the regular one-headed prime-ministership. For that purpose, it entrenches a new 'Alternate prime minister' who is another Knesset Member. The alternate prime minister is "a member of the Knesset who is to serve as Prime Minister in an exchange government and a Member of the Knesset who served in the same rotating government before the rotation"; The prime minister's authority in a rotating government to dissolve the Knesset requires the consent of the alternate prime minister.

The political significance of such a rotating government is determined by a definition—in the Amendment itself—of the political affiliation of government ministers to both the Prime Minister and the Alternate Prime Minister, equally and separately. Thus, the amendment states that in such a government, "every minister and deputy minister shall be identified as having an affiliation with the prime minister or the alternate prime minister"; And that "the number of ministers identified as having an affiliation with the prime minister shall be equal to the number of ministers identified as having an affiliation with the alternate prime minister."

Amendment No.8 reflects a development in which ordinary politics—in the narrowest sense of provisional agreements to enter a coalition—is nowadays characterized by a deep distrust, which does not allow for democratic reciprocity and consent. This distrust led the party leaders to choose a path of a significant structural amendment to the Basic Law, in order to anchor the mandate and political power of the two main party leaders in the new rotating government.

1 For some general overview of Israeli formal constitutional change mechanism see: Suzie Navot, Israel, in *How Constitutions Change: A Comparative Study* (Dawn Oliver and Carlo Fusaro eds., Hart Publishing, 2011), ch. 9.

2 Dana Blander and Ofer Kenig, A Unity Government to Deal with the Emergency?' *The Israel Democracy Institute* (24 March 2020).

3 The political situation in Israel was compared to that of Ireland. See Ofer Kenig, 'Ireland Finally Has a Government!', *The Israel democracy Institute* (2 July 2020).

The political urge in amending the Basic law was also reflected in the amending process. Amendment No.8 was enacted in a rapid legislation for two weeks. This fast-track legislative process did not include any serious constitutional deliberations or in-depth analysis of their implications on the governmental structure, ministerial and other constitutional accountability, prospective influence on the party system, or other questions relevant to such an amendment. In contrast with amendments whose purpose is prospective and long-term, in the present case, it was clear that this was a constitutional amendment that served the narrow political purpose of forming a government that would be sworn in immediately after legislation.

Following the formation of the rotating government, in May 2020, it was characterized by ongoing disputes over various policy and constitutional issues related to dealing with the COVID-19 crisis and maintaining the rule of law in Israel, in light of the challenges posed by Netanyahu's criminal trial; and also, in a strong disagreement regarding the passage of state budget, which led to crisis over the budget. That also involved a second passage of constitutional amendments.

2. AMENDING BASIC LAW: THE STATE ECONOMY AND REDUCING BUDGETARY ACCOUNTABILITY

The political conflict within the established rotating government has led to a constitutional change in the Basic Law that regulates the approval of the annual state budget.

In the Israeli constitutional system of separation of powers, the Knesset oversees the government, but has only limited oversight tools. An important part of its supervisory role is through the approval of an annual budget in the Knesset. Basic Law: The State Economy stipulates that the budget will be annual and will be determined by law.[4] The HCJ jurisprudence states, in this context, that: "The principle according to which the budget is determined by law and that the government will bring the expected and planned government expenditures is a constitutional principle enshrined as stated in the Basic Law";[5] But on the other hand, governments in the last decade have amended the Basic Law by temporary orders in order to break the principle and pass a biennial budget. The default rule is that failure to pass the annual budget leads to the dissolution of the Knesset.[6] If no annual budget has been passed, Basic Law: The State Economy stipulates that the government will act by virtue of a "continuation budget". The Basic Law directs the restrictions that the state has on action through such a budget. Basically, the government will act each month according to a budget that is 1/12 of the previous year's budget; And its expenditures are limited in light of the order of precedence laid down by the Basic Law, which generally prioritizes only vital actions and rigid commitments, and does not allow for broader action, such as spending on reforms or policy programs not budgeted for that year.

The government did not pass an annual budget and instead, amended the Basic Law that deals with budget submission and approval—several times and in an unprecedented manner—in a way that allows it to sustain a continuation budget expenditure to deal with the COVID-19 crisis without passing an annual budget. The absence of an annual budget was also allegedly affected from the prime minister's considerations regarding the date of the dissolution of the Knesset, since within the framework of the coalition agreements, the non-transfer of the budget was an agreed legal case to dissolve the government and break into elections and for a prime-ministership rotation.

After failing to agree on the initiation of an annual or biennial budget, and using the parliamentary majority of the two parties, an agreement was reached between them on maintaining executive action through a continuation budget and not through an annual budget.[7] This agreement was reached only in August 2020, long after the 2020 budget deadline. Therefore, in an unprecedented move, the Knesset amended the rule directing its dissolution in the event of non-transfer of a budget, in order to extend the deadline for its dissolution, until December 2020.[8]

At the same time, the government amended the Basic Law: State Economy, by a temporary amendment,[9] in a manner that allows the establishment of a "special continuation budget",[10] which along with the authorized expenditures that the Basic Law allows in a 'special budget plan' for expenses related to the corona crisis.

After the Knesset decided to dissolve, it amended Basic Law: State Economy again, this time, in a permanent amendment alongside a temporary provision for 2021. This amendment further expanded the government's ability to manage through a special continuous budget, while linking the expenditure allowed to the increase of population rate and increasing the 'special budget plan', with a temporary provision, to 50 billion NIS.[11]

The practical result of these amendments—from a functional standpoint—is that Israel has moved from a model of approving a government budget proposal by the Knesset in an annual budget law; to the model of administrative action of the Government, on the basis of amendments expanding the framework of a continuation budget, the scope of which expands with each amendment; While being able to issue government 'action plans' whose detailed budgeting is not stipulated by law; And while significantly reducing the level of detail oversight and transparency of expenditure data communicated to the Knesset.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In Israel, there are no explicit unamendable provisions. The Basic Laws, which form the Israeli Constitution, lack any eternity or substantive restrictions on the formal amendment power. More than that, there are generally no procedural or temporal limits on the Knesset's constituent power and Basic Laws can be enacted and amended through a simple majority, even in one day. There are only some minor exceptions of constitutional provisions that require a special majority, but they were not violated by the recent constitutional reform.

4 Section 3. During the budget year, the Knesset overseas the government through the Finance committee, the practice of which was also criticized in the last decade. See HCJ 8749/13 Shafir v. Minister of Finance (13.8.2017)
5 The Shafir Case Ibid, at pr. 7.
6 Section 36A(a) of Basic Law: The Knesset.
7 The Government did not choose the more reasonable and available option of enacting a temporary budget.
8 Section 36A.(a) (b) of Basic Law: The Knesset (Amendment Number 50)-2020.
9 For some general background on this practice see Nadav Dishon, 'Temporary Constitutional Amendments as a Means to Undermine the Democratic Order - Insights from the Israeli Experience' (2018) 51(3) *Israel Law Review* 389.
10 Section 3B(b.1) of Basic Law: State Economy (Amendment Number 10)-2020.
11 Basic Law: State Economy (Amendment Number 11)-2020.

With that said, the recent reforms do raise concerns. The amendment to Basic Law: The Government seems like a dismemberment—by completely replacing the system of government from a government with one Prime Minister to a system with two rotating Prime Ministers, each responsible for his own Ministers. The amendment concerning the budget seems prima facie like a misuse of constituent power for temporary and specific circumstances. The question of whether these amendments violate basic constitutional principles or manifest misuse of constituent power for narrow and specific political interest was at the heart of the judicial hearing regarding the constitutional challenges to these reforms, before an extended bench of 9 judges.[12]

As for judicial control of constitutional reform, this is a thorny issue in Israeli public debate, as shall elaborate bellow. There is no explicit authority to review basic laws.[13] Nonetheless, the court has already reviewed various basic laws, although never providing a clear precedent on its jurisdiction to do so and concerning the limits that are impost upon the Knesset's constituent power. In a decision of 2017, the Israeli Supreme Court issued a nullification notice to a temporary Basic Law that changed the annual budget rule to biennial one, for the fifth time in a row, by applying a doctrine of "misuse of constituent power".[14] The precise scope of this doctrine remains unclear.

In an academic article from 2011,[15] five years after his retirement from the bench, former President of the Supreme Court, Prof. Aharon Barak explored the question of "unconstitutional constitutional amendments" in Israel. Barak argued that the Knesset's constituent authority is not unlimited. It is limited by supra-constitutional principles, yet these limitations are narrower than accepted in comparative constitutional law because the constitution-making process in Israel is still on-going:

> "Under the comprehensive and full meaning of this doctrine as it is accepted in comparative law, this question indeed has no place in Israel. The reason for this is that the concept of an 'amendment' to the constitution is itself problematic in Israel. The constitutional project in Israel is a work in progress. The mission has not yet been completed. The 'whole' has not yet been completed, and in any case the arrangements for amending it have not yet been developed. … In my opinion, the Knesset is not omnipotent as regards the establishment of a new basic law or the amendment of an existing basic law. In both cases, the Knesset, as the constitutional assembly, must act within the framework of fundamental principles and fundamental values of the constitutional structure. It must act within the framework of the principle-based standards upon which Israel's Declaration of Independence and the entire constitutional project are based …. However, in Israel we are in the middle of a constitutional process, based on basic laws, which has not yet been completed. Even if one accepts the basic approach that there are restrictions on the establishment of a constitution in Israel or on the power to amend it, my opinion is that, as long as the project of enacting basic laws has not yet been completed, these restrictions operate in a narrower framework than is customary in comparative law."[16]

This notion was adopted by the Chief Justice of the Supreme Court, Esther Hayut in a judgment concerning an amendment to Basic Law: the Knesset that allows the removal from the legislature of lawmakers whose actions constitute incitement to racism or support for an armed struggle against the State of Israel. Writing the court's opinion, Chief Justice Hayut wrote in her judgment that although the amendment "seriously infringes basic rights", "it cannot be said that it contradicts the core of state's democratic identity". President Hayut wrote that "For now, and considering the unfinished stage in which the Israeli constitutional enterprise is at, and especially as there are no established procedures for enacting and amending basic laws, there is a great difficulty in adopting a comprehensive doctrine concerning unconstitutional constitutional amendments such as we find in comparative law. It is worthy that the doctrine to be applied in this context in the Israel law ought to be set upon the completion of the basic law enterprise towards a full constitution."[17]

It is important to note, that this statement is not a rejection of the idea of implied limits on the Knesset's constituent power. It is simply that at that case, the court did not see the need to examine the applicability of implied limits. As Chief Justice Hayut concludes, it is better to leave the complex question regarding the applicability of the doctrine in Israeli law undecided for now.[18]

IV. LOOKING AHEAD

Apart from judgments concerning the amendments to Basic Law: The Government and the Budget, the major case is the judgment concerning Basic Law: The National State of the Jewish People (which was issued in July 2021).

This Basic Law was meant to be another 'chapter' in the Israeli constitution—which is still in the making in light of the incremental constitution-making process—dealing with the Nation's identity. It establishes that Israel is the "national home of the Jewish people", and deals with state symbols like the flag and national anthem, the official language, national holidays, the Sabbath, Jerusalem as the capital, etc.[19]

Supporters of the basic law state that it is mainly declarative and does not change the existing state of affairs. Opponents of the basic law claim that because it fails to mention neither the democratic character of the state nor the principle of equality, it alienates the non-Jewish minority in the state and aims to shift the balance in the "Jewish and Democratic" character of the state towards the former. Moreover,

12 HCJ 2905 The Movement for Equality of Government in Israel v. The Knesset and HCJ 5969 Shafir Csae.

13 There is no explicit authority to review ordinary legislation as well, but this was decided in the famous CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) P.D. 221 (1995).

14 HCJ 8260/16 Ramat Gan Academic Center of Law and Business v. Knesset (Sept. 6, 2017) (Isr.). For a review of this case, see Yaniv Roznai, 'Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset' 51(4) *Verfassung und Recht in Übersee* (2018-2019), 415-436. On this doctrine of "misuse of constituent power", see Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel', 21(3) *European Journal of Law Reform* (2019), 403-423.

15 *See e.g.* Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44(3) *Israel Law Review* 321.

16 Ibid. More generally on this question, see Mazen Masri, 'Unamendability in Israel—A Critical Perspective', in Richard Albert and Bertil Emrah Oder (ed.), *An Unconstitutional Constitution? Constitutional Unamendability in Constitutional Democracies* (Springer Publishing, 2018), 169–193.

17 HCJ 10214/16 MK Yousef Jabareen v. Knesset (27 May 2018), para. 25.

18 Ibid.

19 For an English translation of the full text of the basic law, see: https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf

the provisions regarding 'exclusive' right to self-determination to the Jewish People (Art. 2), the decrease of the status of the Arab language from an official language to 'a special status', and the provision according to which "The state views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation" (Art. 7), are allegedly discriminatory towards non-Jews. On this basis, various petitions were submitted to the High Court of Justice against the basic law, which were heard before an extended bench of eleven judges.

The challenges against the 'constitutionality' of the basic law brought to the fore the question of whether the HCJ possess the power to review basic laws, which carry a constitutional status.

One of the main speakers against the authority of the court was the former Minister of Justice Ayelet Shaked, who has argued that the arguments supporting the court's authority to review basic laws are dangerous and could bring down the fundamental system of government. Supporters of judicial activism, she claimed, want Israel to be like countries as Bangladesh, Colombia, Honduras and India, where courts have the authority to repeal constitutional laws. "With all due respect, Israel has nothing to learn from them. Even as a joke, this has gone too far," Shaked said.[20] She also warned that if the High Court of Justice would strike down the highly contested basic law, this would be an 'earthquake' and cause a war between the branches.[21]

This approach was supported by various public thinkers and scholars. Eugene Kontorovich, for example, claimed that "if [the Supreme Court]... claims the authority to consider challenges to constitutional provisions, it will set itself up as a supreme authority that is above even Basic Law. This will put it above any checks and balances; it will be a true judicial coup..."[22]

In contrast, Amos Schocken claimed that "the Basic Law on Israel as the Nation-State of the Jewish People must be declared an unconstitutional constitutional amendment that contravenes the basic values of the system, and it must be annulled."[23]

We claim that in the Israeli legal system, where the overly flexible legislative process is controlled by the government, the only real balancing authority to the power of the majority, is the Supreme Court. The authority of the court to review basic laws is therefore a central part of its ability to protect fundamental rights or the constitutional order and must be recognized.[24] Indeed, the identity of bodies—the Knesset being also the holder of constituent authority, with no real procedural distinction, in addition to the de-facto control of the government in the legislative process, causes the mingling of longer-range issues of constitutional planning with short-term interests of political power and raises the risk of misusing constituent authority for short political interest or convenience.

Thus, the question of the court's authority to review basic laws and the applicability of doctrines such as the Indian Basic Structure Doctrine in Israel, is at the center of a heated public and academic debate. This discourse is far from being purely academic; it has clear dramatic practical implications, as the court was facing what seems like three of the most important judicial cases in its history.

V. FURTHER READING

Adam Shinar, Barak Medina, Gila Stopler, 'From promise to retrenchment: On the changing landscape of Israeli constitutionalism' (2020) 18(3) *International Journal of Constitutional Law* 714.

Doreen Lustig "We The Majority...": The Israeli Nationality Basic Law' (2020) 25(3) *Israel Studies* 256.

Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020), 183-223.

Mordechai Kremnitzer and Yuval Shany, 'Illiberal Measures in Backsliding Democracies: Differences and Similarities between Recent Developments in Israel, Hungary, and Poland' (2020) 14(1) *Law & Ethics of Human Rights* 125.

Moshe Maor, Raanan Sulitzeanu-Kenan & David Chinitz, 'When COVID-19, constitutional crisis, and political deadlock meet: the Israeli case from a disproportionate policy perspective' (2020) 39 *Policy and Society* 442.

20 Yehuda Shlezinger, 'Repealing nation-state law "dangerous", justice minister warns' *Israel Hayom* (October 10, 2018), https://www.israelhayom.com/2018/10/10/repealing-nation-state-law-dangerous-justice-minister-warns/

21 'Shaked warns of "earthquake" if Israel's top court quashes nation-state law', i24NEWS (August 06, 2018), https://www.i24news.tv/en/news/israel/181123-180806-shaked-warns-of-earthquake-if-israel-s-top-court-quashes-nation-state-law

22 Eugene Kontorovich, 'Basic Truths About the Basic Law' *Jerusalem Post* (August 12, 2018), https://www.jpost.com/Opinion/Basic-truths-about-the-Basic-Law-564697

23 Amos Schocken 'Annul the Nation-State Law', *Haaretz* (March 29, 2019), https://www.haaretz.com/opinion/.premium-the-unconstitutional-basic-law-on-israel-as-the-nation-state-of-the-jewish-people-1.7066214

24 See e.g. Yaniv Roznai, 'Limits to Basic Law' *Jerusalem Post* (August 15, 2018), https://www.jpost.com/Opinion/Limits-to-Basic-Law-564976; Suzie Navot and Yaniv Roznai, 'Yes, Judicial Review of Basic Laws is Needed' *Ynet* (October 7, 2018), https://www.ynet.co.il/articles/0,7340,L-5364799,00.html (Heb.)

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I. INTRODUCTION

The present report discusses the constitutional reform passed in the Italian legal system through a constitutional referendum held on September 20th and 21st, 2020 (the referendum was originally scheduled for March 29th, 2020 and then postponed due to the Covid-19 pandemic).

The report analyzes the constitutional reform, which aimed at amending three articles of the Constitution, namely Articles 56, 57 and 59. The amendment deals with a topic that has reappeared cyclically in the Italian political debate, i.e. the reduction of the size of the Parliament.

This amendment is an example of what have been qualified as 'surgical' amendments. Indeed, the sole aim of the reform has been to reduce the number of members of the Chamber of Deputies from 630 to 400, and the number of members of the Senate of the Republic from 315 to 200. Furthermore, the reduction of the total number of MPs has also led to set the number of members of the Parliament elected by Italian citizens resident abroad at twelve and to limit life senators at five.

The report first discusses the main aspects of the 2020 constitutional reform, focusing in particular on the procedural reasons that led to the popular referendum. In this respect, it seems worth providing a brief outline of the constitutional amendment procedure. Secondly, the context in which the referendum was held is analyzed, with a specific attention paid to the political and constitutional debate. Then, in order to better frame the 2020 constitutional amendment within the category amendment/dismemberment, a comparative analysis with the structure and scope of previous constitutional reforms is carried out. Finally, some conclusions are drawn with respect to adjustments that have to be made to both the electoral law and the two Houses' standing orders as well as to possible future amendments, which should be passed in order to update other constitutional provisions.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The 2020 amendment was approved following a constitutional referendum, the reason of the public consultation lying in the procedure for approving constitutional amendment laws and other constitutional laws as regulated at Article 138 of the Italian Constitution. It seems convenient to briefly address the amendment procedure in order to have a better understanding of the whole process.

According to Article 138, the Constitution is amended by both the Chamber of Deputies and the Senate of the Republic after two successive debates, with an interval between the two approvals of at least three months. The constitutional amendment procedure provides for strict and rigorous conditions in order to have the amendment approved with a large political consensus, similar to the one that brought to the entry into force of the Constitution. The rationale is to provide an appropriate deliberation and to avoid a speedy reform approved by a 'makeshift' majority. While the first approval by each of the two Houses requires just a simple majority, the second approval must be at least by an absolute majority, thus requiring the involvement of the Oppositions. Then, the law is published in the Official Gazette and, within a period of three months, either 500,000 voters, one-fifth of the members of a House, or five Regional Councils may seek a popular referendum. If the referendum is sought, then the entry into force of the constitutional amendment will depend on the results of the referendum. Since a structural quorum (a turnout above 50%) is not required due to its confirmative nature, for the constitutional law to be passed it is sufficient that the majority of valid votes approves the reform. Then the constitutional law is promulgated by the President of the Republic, published in the Official Gazette and after fifteen days it enters into force. However, it is possible that in the second deliberation the law is approved by a qualified majority of two-thirds of the members of each House. In this case, the law cannot be submitted to a popular referendum; rather, it is promulgated by the President of the Republic and it comes into force fifteen days after it is published in the Official Gazette.

After the second approval by the Senate—which had not received a qualified majority (it was approved by only 180 senators, 50 voting against, 0 abstaining)—in Autumn 2019, the bill was finally approved by 553 (out of 630) members of the Chamber of Deputies, (14 voting against the reform, 2 abstaining, and the others were not present).

Then, in January 2020, the constitutional referendum—the fourth in the history of the Italian Republic—was sought by 71 Senators (more than one-fifth of the members of the Senate of the Republic), acting in dissent from their own parties.

The referendum was originally scheduled on March 29th, 2020 and then postponed to September 20th and 21st due to the Covid-19 pandemic.

The referendum question asked the electors the following: "*Do you approve the text of the Constitutional Law concerning 'Amendments to Articles 56, 57 and 59 of the Constitution regarding the reduction of*

the number of Members of Parliament', approved by Parliament and published in the Official Gazette of the Italian Republic no. 240 of 12 October 2019?".

Hence, the amendment reduces the number of the members of the two Houses of Parliament, providing that the members of the lower chamber (the Chamber of Deputies) are to be reduced from 630 to 400, while the number of members of the higher chamber (the Senate of the Republic) from 315 to 200, with a total number of the members reduced from 945 to 600. Moreover, the reform sets the maximum limit of life senators at five, thus explicitly excluding a different interpretation on their number (i.e. the possibility for each President of the Republic to appoint five of them). Lastly, the reform provides for a reduction of the number of MPs elected by the Italian citizens resident abroad: the number of deputies is lowered from twelve to eight, whilst the one of senators from six to four.

In the September 2020 referendum, the voter turnout was 51.12% and the proposed constitutional revision was approved at the polls with 69.96% electors voting "Yes".

To sum up, as an effect of this reform, from the next Italian legislature there will be 400 MPs sitting in the Chamber of Deputies and 200 MPs sitting in the Senate of the Republic and the life senators will be no more than five (in addition to the former Presidents of the Republic, which automatically become life senators). This reduction has direct consequences on the Senate's representation, which is negatively affected. Indeed, with regard to its composition, the Constitution provides that the Senate of the Republic is elected on a regional basis and that no Region may have fewer than seven senators, the only exceptions being Molise with two, Valle d'Aosta with one, and the six elected in the overseas constituency. With the reduction of senators from 315 to 200, the minimum number of senators for each Region is lowered to three, again excepting Molise (two) and Valle d'Aosta (one). Hence, the regional representation in the Senate in not uniformly reduced. Whilst Molise and Valle d'Aosta are not affected by the reform, the other Regions suffer from the reduction (a good example is Lombardy, whose senators are reduced from 49 to 31).

Since the reduction of members of Parliament could not have been immediate, the Parliament passed, together with the Constitutional Law No. 1 of October 19th, 2020, the Law No. 52, May 27th, 2019 in order to guarantee the applicability of the electoral law. For this reason, the successful constitutional amendment is expected to be effective only at the next general election, which may be held either at the natural conclusion of the parliamentary term—scheduled to be no later than May 2023—or earlier, in case of a dissolution of Parliament.

The Constitutional Law No. 1 of October 19th, 2020 on "Amendments to Articles 56, 57 and 59 of the Constitution on the reduction of the number of members of Parliament" was then published in the Official Gazette No. 261 of October 21st, 2020.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As to the origin of the 2020 constitutional reform, in the first place it is necessary to underline that the reduction of the size of the Parliament has reappeared cyclically in the Italian political debate since the 1980s. Secondly, the fact that it has popped up again in 2018 is closely connected with the rise of the Five Star Movement. This political movement—whose anti-establishment attitude has been the driver of its critique toward the old political class, the so called 'political élite'—has made the issue of the reduction of MPs one of the core points of its political program, justified by an intent to rationalize the Parliament's work and to minimize public spending. In spite of this, considering the populistic connotation of the Movement, the reduction proposal is better framed as a move against the élite.

The relevance of the constitutional issues stemming from this revision has produced a lively debate among Italian constitutional scholars as to the reasons for voting either "Yes" or "No". Those in favor of the reform advocated for its virtuousness relying on three main arguments. A reduction in the number of MPs would consist in a consequent reduction of public expenditure. Secondly, it would result in a more efficient legislative process. Lastly, it would allow to diminish the Italian Parliament's overrepresentation. Indeed, the number of deputies of the lower Chamber per 100,000 inhabitants would drop from 1 to 0.7.

The same three arguments, though overturned, were advocated by those against the reform. Firstly, the savings on public spending resulting from the reduction of MPs are insignificant with respect to the amount of the state budget, the expected savings being just the 0.007% of Italian public spending per year. Secondly, when considering the rationalization of the legislative process, this argument is not supported by objective elements and does not address the risk that a future smaller Parliament may replicate the same slowness and inefficiencies or, in the worst-case scenario, even work more slowly. The reform does not touch any of the Italian form of government's structural challenges, especially the bicameral Parliament where the two Houses have (almost) equal functions, with such a constitutional amendment resulting in a mere reduction of the representation of the legislative branch. Thirdly, the reduction in size can also result in the strengthening of the Executive power and in a subsequent and inevitable weakening of the legislative branch.

As previously mentioned, the reduction in size of Parliament had already been discussed. However, this was the first time that the proposal was not part of a constitutional reform wider in its scope. Furthermore, it is important noting that the 2020 reform was confirmed by a popular referendum, which caused the two previous constitutional reforms (2006 and 2016) to fail. Therefore, is seems now convenient to briefly analyze the 2020 constitutional reform in comparison with the previous ones, in order to better assess the nature of the amendment as well as the reasons of its success.

The 2006 and 2016 unsuccessful reforms were designed as organic reforms; hence, it has been argued that their wide scope had ultimately been the reason that contributed to their failure. Indeed, the previous proposals of reducing the number of MPs were inserted into broader constitutional amendments, which significantly affected the system of government, as well as the dynamics between the powers of the State and between the State and Regions.

However, it can hardly be argued that there is a deterministic relationship between the width of the scope and the success of the reform. The successful 2001 reform can be mentioned as an interesting example of a reform that covered a detailed aspect (i.e. the relation between the State and Regions), despite requiring the amendment of fifteen articles of the Title V of the Constitution (6 repealed, 2 amended and 7 replaced).

Coming back to the 2020 reform, it has been argued that it has been successful because it focused only on a specific topic (the total number of MPs) and it affected only three articles. The 'surgical' approach as the key to its success.

If we want to place the 2020 reform in the category either of amendment or dismemberment, it can hardly be defined as a dismemberment and the reason is its 'surgical' character. Even though, as it will be discussed below, some corrective measures will be required. Opposite to the 2006 and 2016 reforms would have certainly fallen within the category of constitutional dismemberment.

Furthermore, if we examine the 2020 amendment according to the content-based approach, it may fall into the category of amendment, as it is an authoritative change that corrects a minor part of the Constitution, without touching its core presuppositions. Indeed, the Italian Constitution, as amended, remains coherent with the fundamental assumptions of the pre-amendment constitution, even if it needs some corrective measures.

When considering the 2020 reform with respect to the limits to the constitutional amendment, no tension has been created with unamendable rules. Although the reform has been qualified as 'surgical', it has significantly affected the principle of representation, which was already under stress because of the growing strengthening of Executive power. Nevertheless, the reduction of the size of the two Houses does not clash with neither explicit nor implicit limits to constitutional amendments. Indeed, the only explicit limit is provided at Article 139 (the form of Republic). Whilst the Constitutional Court has elaborated a series of implicit limits linked to the Constitution's supreme principles (such as, for example, the democratic principle, the principle of equality, the principle of pluralism), also placing at the same level the inviolable rights of the person which cannot be modified (at least, not *in peius*).

On a last note, it is convenient to briefly examine the role played by the Constitutional Court in the Italian legal system and in the context of the 2020 reform. The Italian Constitutional Court's positioning within the Italian form of government has changed over the years from an attitude of self-restraint towards a more activist one. Indeed, given its traditional countermajoritatian role, the Court has also played an enlightened role, driven by the core values and fundamental rights of the Constitution.

With regard to the role of the Constitutional Court in the context of the 2020 reform, it must be reported that between July 23rd and 29th, 2020, four disputes about the attribution of powers between powers of the State were raised before the Constitutional Court. The *ricorsi* (complaints) were raised by the following subjects: the referendum promoters' Committee, Senator Gregorio De Falco, the political party +Europa and the Basilicata Region. Marta Cartabia, the then President of the Constitutional Court, has disposed for the examination of such recourses on August 12th, 2020. It is important to underline that, out of four, two complaints (the ones filed by the promoters' Committee and Senator De Falco) focused on the decision to hold together the constitutional referendum and the regional elections, one (+Europa) on the procedures for regional elections and one (Basilicata) on an alleged detrimental effect on regional representation in Parliament in case of approval of the constitutional reform.

The Constitutional Court has declared the inadmissibility of all four complaints with an order (*ordinanza*). Indeed, with Order No. 195/2020, the Court declared the inadmissibility of the first complaint concerning the possibility of holding in one electoral round both the constitutional referendum and the regional elections. On this regard, it needs to be underlined that only powers of the State can lodge a claim with the Constitutional Court in the case of a jurisdictional dispute for the attribution of powers. Despite *locus standi* has been recognized to the referendum promoters' Committee by the Court's case law, inadmissibility in this specific case was due to the fact that the Constitution does not attribute to the promoters' Committee the general function of guaranteeing the exercise of the right to vote.

Relying on the same premises, Senator De Falco's complaint against the Senate, the Government and the President of the Republic was also rejected by Order No. 197/2020 because his complaint was confused and failed to clearly identify the constitutional provisions that were allegedly breached.

+Europa challenged the reduction of one-third of the minimum number of subscriptions needed in order to present lists and nominations in regional elections and not providing for an exception for parties already in Parliament. With Order No. 196/2020 the Court has declared the conflict inadmissible since, according to its interpretation, parties are not a power of the State.

Lastly, Basilicata filed a complaint, because the success of the constitutional reform *in itinere* would have negatively affected the Region's representation in Parliament: the reduction of Basilicata senators from 7 to 3 would imply a 57.13% reduction in representation. With Order No. 198/2020 the Court has declared inadmissible the Basilicata Region's recourse due to the lack of subjective legitimization of the sub-national level.

IV. LOOKING AHEAD

The successful outcome of the constitutional referendum opens up a season of important reforms in order to introduce some corrective measures. Although the reform appears to be quite limited in its scope and merely technical, it does significantly affect the principle of representation.

Hence, the two most urgent reforms are the electoral legislation from the one hand and the Houses' standing orders from the other hand. Besides, also a further constitutional revision appears to be necessary.

As far as it concerns the electoral legislation, the amendment should be carried out within a very short term and certainly within the duration of the legislature, whose natural conclusion will be in March 2023. The urgency is explained with the fact that the possibility of an earlier dissolution of the Houses cannot be excluded. Therefore, according to Article 3 of the Law No. 51 of May 27th, 2019, within 60 days from an eventual entry into force of a constitutional law reducing the number of MPs, the Government was delegated to approve a legislative decree to adjust the distribution of seats to be assigned in uninominal and plurinominal districts. Indeed, after Constitutional Law No. 1 of October 19th, 2020, the Government approved the Legislative Decree No. 177 of December 23rd, 2020.

When considering the two Houses' standing orders, they need to be modified as soon as possible in order to consider the reduction in size of the MPs. In particular, the minimum number required to form parliamentary party groups needs to be updated, together with the numerical composition of parliamentary committees and their functioning mechanisms.

Besides the reforms of the electoral legislation and of the Houses' standing orders, some constitutional amendments appear to be necessary as well, although they may prove difficult because of the special procedure under Article 138. Indeed, there are some provisions which may be significantly affected by the 2020 amendment. The first one is the provision on the election of the President of the Republic. Article 83 of the Constitution provides that the President is elected by Parliament in joint session integrated with 53 regional delegates. Now this number, 53, results to be disproportionate with respect to the new total number of MPs. Therefore, it would be convenient to reduce the number of regional delegates. Similarly, it would be advisable also to rethink the quorum for the election of the President of the Republic and the majorities for the constitutional amendment procedure.

The discussion of the 2020 amendment has made clear that even a surgical amendment may affect the system as a whole, thus requiring further adjustments. This calls into question whether it is correct to amend the Constitution without a general vision or not. However, even if this constitutional reform lacked a general constitutional design, it could be considered as a preliminary step to pave the way for wider constitutional amendments that could address the serious challenges that the Italian parliamentary system is currently facing.

These two perspectives entail a twofold way to understand constitutional amendments: either as the last expression of higher law-making or as a slow path where construction starts with small steps.

V. FURTHER READING

Antonia Baraggia, *'Symposium | Introduction | Reducing the Size of the Italian Parliament: Lights and Shadows of a Controversial Constitutional Amendment'*. (Int'l J. Const. L. Blog, 2020). <http://www.iconnectblog.com/2020/09/symposium-introduction-reducing-the-size-of-the-italian-parliament-lights-and-shadows-of-a-controversial-constitutional-amendment> accessed 14 February 2021

Massimo Luciani, 'Audizione Commissione Affari costituzionali della Camera dei Deputati' (2019)

Gaetano Azzariti, *'Referendum, la trappola del Sì o No sul numero dei parlamentari'* (Il Manifesto, 2020) <https://ilmanifesto.it/referendum-la-trappola-del-si-o-no-sul-numero-dei-parlamentari/> accessed 14 February 2021

Elisabetta Catelani, *'Riforme costituzionali: procedere in modo organico o puntuale?'* (Federalismi.it, 2020). <https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=41983&dpath=document&dfile=14042020172823.pdf&content=Riforme%2Bcostituzionali%3A%2Bprocedere%2Bin%2Bmodo%2Borganico%2Bo%2Bpuntuale%3F%2B%2D%2Bstato%2B%2D%2Bpaper%2B%2D%2B> accessed 11 February 2021

Matteo Garavoglia, *'Italy's constitutional referendum: the right solution to long-standing problems?'* (LSE European Politics and Policy—EUROPP - blog, 2020) <https://blogs.lse.ac.uk/europpblog/2020/09/17/italys-constitutional-referendum-the-right-solution-to-long-standing-problems/> accessed 10 February 2021

Japan*

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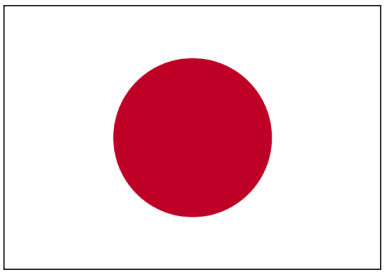

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I. INTRODUCTION

The Constitution of Japan was established on November 3, 1946, and enforced on May 3, 1947. In the 75 years that have passed, it has never once been revised. (Further implications of this for constitutional revision in Japan are discussed in Part III, Section 1.) The Constitution of Japan is thus the oldest constitution in the world that has never been revised after enactment. Yet there were no lack of proposals attempting to revise it during Japan's postwar era, a periodization which references the whole duration of its political transformation after World War II. Official projects on constitutional reform were respectively formed in the Cabinet from 1956 to 1965, and in the Diet from 2004 to 2007; nonetheless, the discussions generated in those forums produced no changes to the Constitution.

However, in 2012, debates over constitutional reform gained momentum with the release of a draft revised Constitution from the Liberal Democratic Party (LDP), the ruling political party in government for most of Japan's postwar period but 1993 to 94 and 2009 to 12. In particular, Abé Shinzo [1], who began his second term as Prime Minister (PM) that year, declared his slogan to break with the prevailing postwar regime, and indicated a strong commitment to constitutional revision called the "Abé Initiative". Despite this, Abé resigned in 2020, citing illness, and was succeeded by Suga Yoshihide. The question for observers is whether the present Suga cabinet will inherit the mantle of the "Abé Initiative" with regards to reforming the Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. CURRENT PROPOSALS FOR OFFICIAL REVISIONS TO THE CONSTITUTION OF JAPAN

1.1. FOUR CATEGORIES OF CONSTITUTIONAL REVISION

The Abé administration, from December 2012 to September 2020, lasted a total of 7 years and 8 months, making it the longest serving administration in Japanese history. In that time, PM Abé made numerous statements on various means of constitutional revision, in a bid to make concrete proposals for accomplishing the first ever constitutional reform in postwar Japan.[2]

Soon after the draft revised Constitution in 2012 written by the LDP when the party stepped down from the administration was released, Abé, who had already strongly backed constitutional reform, reclaimed political power. The LDP's 2012 draft contained a full-on revision of the current Constitution, tantamount to producing an entirely new Constitution. Abé did not attempt to make the 2012 draft a reality, but first sought to lay the ground for constitutional revision through a proposal to reform Article 96 of the Constitution, which stipulates procedures for constitutional amendment. Article 96 requires two-thirds or more of the total number of members from both the House of Representatives and the House of Councillors in the Diet to initiate a constitutional amendment, which must then garner a majority of concurring votes in a national referendum. Abé's efforts to ease these requirements drew criticism and failed. Next, in 2014, his administration used a single cabinet decision to override the governmental consensus that Japan's Self-Defense Forces (SDF) may only be mobilized for individual, and not collective, self-defense.[3] This pushed the Cabinet Legislation Bureau, which acts as legal counsel for the Cabinet, to state that this longstanding government interpretation could not be deviated from without revising the Constitution. PM Abé, having deemed direct revision of Article 9[4] to be impossible, had altered its interpretation in government to implement de facto constitutional change.

Regardless, official constitutional amendment could not be accomplished via textual revision through the formal procedure in Article 96. PM Abé, desirous of altering the text of the Constitution through any means, narrowed the targets of constitutional revision to four points, and planned to create concrete timelines for their political realization.[5]

At its party convention on March 26, 2018, the LDP made achieving these four items of constitutional revision a current goal. It further aims

1 Japanese names in this essay are given in Japanese order, with surname first, unless otherwise specified in citations.

2 Byron Tau, 'Abe's Window of Time for Amending Japan's Pacifist Constitution Narrows', *The Wall Street Journal* (New York, 12 August 2018) <www.wsj.com/articles/abes-window-of-time-for-amending-japans-pacifist-constitution-narrows-1534075201> accessed 1 February 2021; Martin Fackler, 'Shinzo Abe Has Eyes On Revising Constitution In Japan' *The New York Times* (New York, 25 December 2014) <www.nytimes.com/2014/12/25/world/asia/japan-shinzo-abe-begins-new-term-with-push-to-revise-constitution.html> accessed 1 February 2021.

3 Based on Article 9, which permits Japan to maintain armed forces exclusively for self-defense. Article 9 prohibits Japan from enacting war and forms the basis of the Constitution of Japan's global reputation as a "peace constitution".

4 See previous note.

5 At the time of planning, these targets were supposed to be achieved by the 2020 Tokyo Olympics.

for the early establishment of a revised version of the Act on Procedures for Amendment of the Constitution of Japan, a national referendum law needed to implement constitutional revision. The four items of constitutional revision consist of: 1) stipulating the SDF; 2) enabling a state of emergency; 3) dissolving merged constituencies; 4) supplementing education.[6] We explain each of these items below.

1.2. STIPULATING THE SDF

This entails a proposal to insert the term "Self-Defense Forces" into the text of the Constitution. Paragraph 1 of the current Article 9 states that:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

Paragraph 2 follows:

> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

The LDP suggests maintaining the pacifism and the restriction on military force inherent in both paragraphs of the present Article 9, while adding a new clause it calls "Article 9-2", shown below:

> Paragraph 1: The provisions in the preceding paragraph shall not interfere with mechanisms of self-defense necessary for preserving the peace and independence of our country, as well as the safety of the State and the people. The Self-Defense Forces shall be maintained for this purpose, as an armed organization under the command of the Prime Minister as the head of the Cabinet, as provided for by law.
> Paragraph 2: The activities of the Self-Defense Forces shall be subject to the approval of the Diet and other regulations as provided for by law.

The reason for this proposal is that, although the SDF's activities presently enjoy broad public support, its status is contested on three fronts: many constitutional scholars of Japan consider its existence unconstitutional, a number of junior high school textbooks frame the SDF in similar fashion, and some political parties in the Diet hold the same view of the SDF's unconstitutionality. Solving the problem of arguments for the SDF's unconstitutionality thus requires situating the SDF in the Constitution.

1.3. ENABLING A STATE OF EMERGENCY

Except for convoking the House of Councillors in emergency session (Article 54, paragraph 2), the Constitution of Japan contains no provisions that anticipate a state of emergency, and specific crisis countermeasures have been implemented by separate laws. In order to speedily respond to future natural disasters, including earthquakes and tsunami of the largest magnitude, the LDP proposes establishing Article 73-2 to expand the functions of the Cabinet, as follows:

> Paragraph 1: When a major earthquake or such other abnormal and large-scale disaster presents an extraordinary situation too urgent to enact law in the Diet, the Cabinet may enact its orders to protect the lives, bodies and property of the people.
> Paragraph 2: When the Cabinet enacts its orders according to the preceding paragraph, it shall speedily request the approval of the Diet as provided for by law.

Furthermore, the LDP proposes the addition of the following Article 64-2 as a special provision to Article 64:

> When a major earthquake or such other abnormal and large-scale disaster presents impediments to the appropriate implementation of general election for the House of Representatives or ordinary election for the House of Councillors, the Diet may make special provisions for terms of office with a majority of two-thirds or more of the members present in each House.

1.4. DISSOLVING MERGED CONSTITUENCIES

The Supreme Court, emphasizing the equal value of votes, has ruled that the demarcation and the allocation of Diet seats to constituencies must be strictly proportional to a constituency's voting population. This has resulted in fewer Diet seats for municipally elected representatives, and a growing gap between administrative and electoral districts. Following the revision of this election law after the Supreme Court ruling, merged constituencies for the House of Councilors emerged as electoral districts drawn across prefectural boundaries, such as the district for Tottori and Shimane, as well as that of Tokushima and Kochi. However, such merged constituencies are now facing resolutions in several municipal assemblies, including the National Association of Prefectural Governors, aimed at their dissolution.

Here the LDP takes the stance that population proportion should not be the only standard for an electoral district. As such, it proposes to amend the current Article 47 of the Constitution, which stipulates elections and voting methods, by adding the following clause:

> For the election of members of both Houses, the drawing of electoral districts, as well as the number of representatives due each electoral district, shall be determined based on population and a comprehensive consideration of factors such as administrative districts, regional integrity, and topography. For the election of all or part of the members of the House of Councilors, in cases where the respective districts of a broad-based local public entity are electoral districts, each electoral district may vote to elect at least one representative during elections.

Furthermore, the LDP seeks to specify both basic local public entities (cities, towns and villages) and broad-based local public entities

6 See the LDP's official website for details. Liberal Democratic Party of Japan, 'LDP announces a new draft Constitution for Japan' (*News*, 7 May 2012) <www.jimin.jp/english/news/117099.html> accessed 3 February 2021.

(prefectures and equivalent municipalities) in the Constitution as standards for determining electoral districts. To do so, it proposes the following amendment to the current Article 92:

> Local public entities shall fundamentally consist of the basic local public entities and the broad-based local public entities under which they are included. Matters relating to their type, organization and management shall be fixed by law in accordance with the principle of local autonomy.

In this way, the LDP is mounting a determined defense of prevailing political units, seeking to protect the continuity of municipal identities from the threat of merged constituencies.

1.5. SUPPLEMENTING EDUCATION

The current Constitution establishes education as a key national principle in paragraph 2 of Article 26, which stipulates that "compulsory education shall be free". The LDP proposes the addition of a third paragraph to this article, stipulating that the State must endeavor to maintain an environment where all may enjoy educational opportunities regardless of their economic means:

> The State shall take the view that education aims for the completion of the character of each of its people, forms an indispensable element in their pursuit of happiness, and bears a vital role in creating the future of the State, such that it must endeavor to maintain an educational environment which secures for each person the opportunity to receive education regardless of their economic situation.

2. THE PRESENT STATE

As earlier mentioned, these four items of constitutional revision were approved at the LDP's party congress in 2018, but they were mere rough plans, with no concrete program. There is no consensus even within the LDP itself on these four items, particularly the first one, on the additional clause to Article 9. One reason for this split is that amendment of Article 9 is firmly opposed by the Komeito, the LDP's coalition government partner and a centrist party largely supported by Buddhist-affiliated organizations.

At present, the LDP has pulled back from a frontal push of these four items of constitutional revision as its ultimate objective. Instead, it is attempting to advance the argument for constitutional revision through passing a revised version of the Act on Procedures for Amendment of the Constitution of Japan, on issues such as placing limitations on political advertisements. In January 2021, however, the COVID-19 pandemic and a string of political scandals has prevented it from doing so.

2.1 COVID-19 AND THE CONSTITUTION OF JAPAN

As its current Constitution contains no provisions for a state of emergency, Japan's declarations of a state of emergency, issued on April 7, 2020, and January 8, 2021, have been based on the Special Measures Law on Pandemic Influenza and New Infectious Diseases (Special Measures Law). The Special Measures Law stipulates that, in case the spread of infectious disease like pandemic influenza creates "grave effects on national life and national economy", the chair of the government countermeasures headquarters (i.e., the Prime Minister) may issue a declaration of a state of emergency that specifies three conditions: duration, area, and the outline of the emergency (Article 32, paragraph 1). Even in the absence of such a declaration, if adequate and speedy implementation of infection countermeasures are deemed necessary, governors of prefectures and equivalent municipalities may call for the general cooperation of groups or individuals with such measures (Article 24, paragraph 9). However, once the Prime Minister has issued a declaration of a state of emergency, governors of prefectures and equivalent municipalities may determine a more concrete period and area for their directives; they may also devise emergency measures to "request" voluntary restraint on nonessential and nonurgent outdoor activity (Article 45, paragraph 1), restrict the use of facilities and the halting of particular social events (Article 45, paragraph 2), and give "instruction" (Article 45, paragraph 3) in case a "request" is not followed.

Here the key point is that the "request" and "instruction" based on the Special Measures Law, unlike the lockdowns in Europe and the United States, cannot be enforced by any sort of punitive sanction; in the sole exception to this, the names of particular facilities may be publicly announced if they are the target of a request or an instruction that restricts or halts their activities (Article 45, paragraph 4). However, it is debatable whether this constitutes a sanction, or the provision of information. Furthermore, whether or not a state of emergency is declared, governors of prefectures and equivalent municipalities may, based on the Infectious Diseases Act, take measures to hospitalize COVID-19 patients, or to recommend their hospitalization (Article 19, Article 20). In reality, an acute shortage of hospital beds means that the Ministry of Health, Labor and Welfare has issued guidelines calling on patients other than the elderly and those with underlying conditions to avoid hospitalization and asked those with light or no symptoms to stay at home, or in municipally provided accommodations. However, even if patients leave their medical facilities, the Infectious Diseases Act cannot sanction them, and as there is no legal basis for requesting that people stay at home or in municipal accommodations, there have been several cases of patients departing their medical facilities without permission.

Moreover, Japanese society is increasingly manifesting a tendency towards the undesirable politics of manipulating people's trait of conforming to social expectations via psychological pressure (*sontaku*), where said pressure to conform, applied not by legal sanction but by the sanctioning gaze of one's superiors or peers, constitutes de facto enforcement.[7] Even without legal sanction, the strong presence of such *sontaku* politics proved somewhat effective in controlling the pandemic during the first declaration of a state of emergency from April to May of 2020. Nonetheless, the virus kept spreading, and the second declaration of a state of emergency for Tokyo and other major cities was issued on January 8, 2021.

In response to these issues, on January 22, 2021, PM Suga's cabinet proposed a revised version of the Special Measures Law to the Diet, which was passed on February 3. Now, even before a state of emergency is declared, key measures to prevent the spread of infectious disease that limit constitutional rights may be implemented where a

7 Yasutoshi Nishimura, 'How Japan Beat Coronavirus Without Lockdowns' *The Wall Street Journal* (New York, 8 July 2020) <www.wsj.com/articles/how-japan-beat-coronavirus-without-lockdowns-11594163172> accessed 3 February 2021.

situation threatens "grave effects on national life and national economy". For instance, governors may order the imposition of fines up to 200,000 yen (~1900USD) on businesses without "justifiable reasons" for failing to comply with requests to cease or shorten their hours of operation. In addition, a degree of legal sanctions has been introduced against patients who refuse hospitalization recommendations, or who flee confinement in medical facilities. The Infectious Diseases Act has also been amended to make staying at home or in municipal accommodations mandatory for those with light or no symptoms.

While Article 22 of the Constitution of Japan guarantees freedom of movement and of occupation, these freedoms are not absolute, and may be limited by law in cause of "the public welfare" (Article 13). Since the former Special Measures Law lacked enforcement mechanisms, it did not conflict with constitutional rights. However, the contents of the revised law raises outstanding questions of constitutionality.

3. NOT CONSTITUTIONAL REVISION, BUT THE EFFECTIVE EQUIVALENT OF CONSTITUTIONAL CHANGE

As discussed in the introduction, the Constitution of Japan has never once been revised since its enactment. Attempts to revise the constitution, as detailed in Part II, Section 1, have concrete proposals but no specific political schedule for their implementation. In other words, constitutional change in Japan cannot be understood simply by looking at changes to the text of the Constitution. Sources of law extrinsic to the Constitution also require examination. From this perspective, the problems arising from the Special Measures Law on measures concerning COVID-19, covered in Part II, Section 2, most deserve our attention. Besides the policies related to that law, the following sections discuss problems related to constitutional change through analyzing developments in Japanese government over the last few years.

3.1. DESTRUCTION AND FALSIFICATION OF GOVERNMENT DOCUMENTS

The Abé cabinet generated a large number of political scandals, but a weakened opposition and mass media failed to hold it accountable, enabling PM Abé's political survival. In that process, it became clear that Abé's administration had illegally handled many government documents, particularly the Moritomo Gakuen scandal, a controversy over whether a private school operator, a friend of PM Abé's, had been allowed to purchase state-owned land at a steep discount.[8] Although this burgeoning affair even implicated PM Abé's wife, the politics of *sontaku* worked to prevent civil servants from fulfilling their duty to the public. Government documents indicating PM Abé's involvement were falsified, investigations into the affair conducted by the Ministry of Finance excluded contracts on the lease and sale of state land, and many records of negotiations between the parties involved were destroyed. As a result, an official at the Ministry of Finance involved in this cover-up committed suicide.

The Abé administration is not the only government in Japan that has destroyed or falsified important state records, but it presents a particularly prominent example of this shamefully recurring trend. PM Abé's possession of the longest term in power allowed the LDP to weaken opposing forces inside and outside of its ranks, and this hegemony pressured government officials working under Abé to prioritize pleasing those in the highest echelons of power even without receiving direct orders to that end. In short, the politics of *sontaku* have been especially entrenched in the Abé administration. Japanese bureaucrats were known as the best and brightest of their educational cohorts, and considered integral policymakers capable of speaking truth to political power, based on an ethos of documentation and factual analysis. The Abé administration has crushed their reputation in a fell swoop. Its doing so implies a shift in the fundamental ethos and morality of Japan's governing organs, and should be viewed as a kind of constitutional change.

According to Article 1 of the Public Records and Archives Management Act, government documents constitute "an intellectual resource to be shared by the people in supporting the basis of sound democracy, in accordance with the principle of sovereignty of the people", and are vital in "ensuring accountability of the State and incorporated administrative agencies, etc. to the public for their various activities in both the present and future". The Abé administration, in effectively appropriating government documents for its personal use, has undermined the basis of the democracy that is the Constitution's premise.

3.2. ABUSE OF THE PRIME MINISTER'S AUTHORITY OVER PERSONNEL AFFAIRS

The appropriation of state organs for personal use further manifests in the abuse of authority over personnel affairs. Two key examples of this phenomenon, explained below, are the scandals surrounding the revision of the Public Prosecutor's Office Law, and the blocking of appointments to the Science Council of Japan.

The revision of the Public Prosecutor's Office Law[9] revolves around the anomalous case of the Cabinet's decision, in January 2020, to extend the retirement age for Kurokawa Hiromu, a chief of the Tokyo High Public Prosecutor's Office who did not prosecute the parties involved in falsifying government records concerning the aforementioned Morikawa Gakuen scandal, and who is notorious as "a gatekeeper" of PM Abé. To provide a general legal basis for this decision, the Cabinet proposed revising the Public Prosecutor's Office Law in May of the same year. This sparked intense backlash from opposition parties and the public, who viewed this as a post-hoc measure to justify the extension of Kurokawa's retirement age, and the proposal was scrapped in June. A public prosecutor has the capacity to investigate those in high places; the placing of such a figure under the ruling party's control by delaying his retirement shattered the norm of keeping politics out of prosecutorial personnel affairs, and damaged the delicate balance between the executive and the judiciary.

Furthermore, in October 2020, PM Suga blocked the appointment of six new members of the Science Council of Japan (SCJ)[10], all of whom

8 Jonathan Soble, 'Shinzo Abe Hurt by New Disclosures Over Ties to Extreme Right-Wing Group' *The New York Times* (New York, 16 Mar 2017) <www.nytimes.com/2017/03/16/world/asia/japan-shinzo-abe-scandal-ties-right-wing-organization.html> accessed 2 February 2021.

9 Satoshi Sugiyama, 'In blow to Abe, panel delays showdown over prosecutor retirement bill' *The Japan Times* (Tokyo, 15 May 2020) <www.japantimes.co.jp/news/2020/05/15/national/politics-diplomacy/japan-prosecutor-retirement-bill-showdown-delayed/> accessed 3 February 2021.

10 Linda Sieg and Yoshifumi Takemoto, 'Japan's Suga, under fire, defends rejection of scholars for science panel' *Reuters* (London,, 5 October 2020) <www.reuters.com/article/uk-japan-politics-academics/japans-suga-under-fire-defends-rejection-of-scholars-for-science-panel-idUKKBN26Q1HO> accessed 4 February 2021.

had opposed the dubious legislation of the Abé administration. The SCJ is the pre-eminent national organization of scholars across all fields of research. While technically under the PM's jurisdiction, it is an independent body, whose governing law frames it as the organ which represents Japanese researchers domestically and internationally. Its members are selected from the ranks of researchers highly esteemed by their peers, who are subsequently appointed by the PM on the basis of such professional recommendation.[11] The issue here is whether appointment gives the PM discretionary powers over SCJ personnel. A 1983 government response to this question states that the PM may not refuse to appoint those recommended by the SCJ. Moreover, the Constitution guarantees academic freedom in Article 23, protecting scholarship from political interference. Thus, PM Suga's refusal to appoint the six researchers drew heated criticism from academic groups inside and outside of Japan.[12]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As mentioned in the Introduction, the Constitution of Japan has never once been revised since its enactment in 1946. It is a comparatively unadorned code composed of 103 articles, each of which are quite simple. Thus, constitutional change in Japan cannot be accurately grasped only by referencing the text of the Constitution; we must further grasp the realities of legislation, government interpretation, case law, and other equivalent sources of law that surround it.

Part II outlined how the LDP's constitutional reform remains on paper, with formal revisions yet to be implemented. However, in Japan's history of postwar constitutional politics, it is extremely rare for the ruling party to produce an actual draft of a revised constitution. Should constitutional revision actually happen in the near future, the LDP's four items of revision form the strongest roadmap for that to be accomplished. Yet we question whether the LDP's proposal for revising the Constitution connects to a sound process of constitutional reform, or to a constitutional dismemberment that razes the current Constitution's fundamental principles. At present, the answer to this query is unclear.

Let us revisit the first of the LDP's four items for constitutional revision, the specifying of the SDF. In order to silence constitutional scholars who assert that the SDP contravenes Article 9, PM Abé has claimed that the purpose of this proposed item is to efface purportedly unproductive arguments of the SDF's unconstitutionality, and to recover the honor of SDF members. To that end, he says, we must inscribe the characters for *Jieitai* (the SDF in Japanese) into Article 9 of the Constitution. Here, though, the important thing is what the concept of the SDF implies, and what range of activities constitutes the right to self-defense. Shockingly, PM Abé has given no clear indication of either. True, inscribing the component words "Self-Defense Forces" would make their referents constitutional. Nonetheless, the LDP's draft of a revised constitution does not clarify what kind of missions the SDF would undertake, which means this issue would still require the interpretation of Article 9. Therefore, constitutional scholars would continue to interpret Article 9, as they have been doing, and raise debates about how self-defense must exclude the use of force, or how collective self-defense cannot exceed the boundaries of individual self-defense. Essentially, even if PM Abé succeeds in revising the Constitution, debates over it would persist, along with the status quo.

Even more amazing is that, in response to being asked about whether the SDF will be officially unconstitutional in case the LDP's draft is rejected, PM Abé has replied that "even if this proposal is rejected, nothing will change", and that "the SDF will continue to exist in the same way as today". What point is there to a constitutional revision that will effect no changes whether or not it is implemented? The conclusion is that PM Abé's proposal to revise the Constitution cannot be deemed sound or unsound: it is simply meaningless.

IV. LOOKING AHEAD

Former PM Abé's challenge of the current Constitution has ended with his resignation from office. His successor, PM Suga, appears to have inherited his revisionist stance, but may not actively pursue it. At present, the LDP holds an overwhelming majority in the Diet, and we may assume it has control of enough seats in both Houses to achieve the two-thirds or more of affirmative votes required for constitutional revision. However, as discussed in Parts II and III, its proposals for constitutional revision are highly controversial. Even if it uses its majority to break through the hurdle of revision, it will face a mountain of issues in its quest to make its reforms to the Constitution genuinely meaningful. How can we discuss proposals for reforming the Japanese constitution, when Japan at present has not even established a platform for robust debate concerning the basic structures of its state? Japan's first priority should arguably be to equip itself with a political platform worthy of a project which would revolutionize the traditions of its post-war political history.

V. FURTHER READING

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Jordan

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I. INTRODUCTION

The constitutional reforms in any country are the main support for developing a state applying the rule of law. A state in which all persons, institutions, and entities are accountable to publicly promulgated laws. Measuring the progress of states in its way of the democratic sphere and the protection of human rights is based on the efficiency of the constitutional system that governs them, which lies in the set of written general rules that define the system of government, the form of the state, the formation of the public authorities in the state, the functions and tasks of each of them, the persons in charge of their administration, and the relationship of these authorities to each other, Individuals' rights and fundamental freedoms, and the constitutional guarantees available to guarantee those rights and freedoms.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

There are three main constitutional reforms occurred in Jordan recently, the first is the response for the Arab spring. The second is an amendment concerning the Minister dual nationalities. The third is a result of COVID-19 pandemic which has reached a constitutional level of ambiguity.

The constitutional amendments of 2011, to limit the manifestations of the domination of the executive authority over the legislative authority in various occasions and situations, the most important of which is the issuance of temporary laws, where the state of necessity that allows the Council of Ministers to issue temporary laws in the absence of the Council of Representatives has been redefined and limited to limitation. The executive authority's powers to postpone parliamentary elections for a general delay were also cancelled, and an independent election body was established to supervise and manage parliamentary elections instead of the Ministry of Interior.

However, other manifestations of hegemony by the executive authority over the legislative authority remain present in the Jordanian constitutional system that needs to be reconsidered in any future amendment to the constitution, the most important of which is the right of the executive authority to postpone the constitutionally scheduled National Assembly meeting on October 1st of each year and postpone it. Its sessions and its right to extend the House of Representatives' term for no less than one year and not more than two years.

Whether the parliamentary government in Jordan is based on appointing the leader of the winning party as prime minister or the matter is limited to selecting the prime minister by the nation's representatives, the constitutional frameworks for the relationship between the legislative and executive authorities in the Jordanian constitution remain unclear and need to be reconsidered towards devoting The principle of full cooperation and harmony between the two authorities, and avoiding all manifestations of competition and rivalry between the legislative and executive authorities.

The importance of re-demarcating the relationship between the legislative and executive authorities also emerges in the fact that the supreme constitutional reform that the Jordanian state intends to undertake, which is to implement the idea of the parliamentary government, may include the inclusion of ministers in the executive authority who are originally representatives in the legislative authority, and this is known as the principle of parliament ministers, which It would threaten the principle of separation of powers unless the foundations and pillars on which the relationship between the legislative and executive authorities are based are clear and predetermined in such a way that the deputy who works as a minister does not fear that there will be a conflict or inconsistency in his work tasks in both authorities.

The Royal Decree was issued with the approval of the Council of Minister's decision, announcing the implementation of Defense Law No. 13 of 1992, throughout the Hashemite Kingdom of Jordan, effective March 17, 2020.

The aim of activating this exceptional law is to provide an additional tool and means to protect public health, maintain Jordanians health and safety, improve performance, and raise the coordination level among all to confront this epidemic.

The Prime Minister of Jordan issued Defense Order No. 21 of 2020, to ensure the continuation of the right to litigate, and the regular functioning of the courts in light of the repercussions of the spread of the Corona epidemic on the allegation that Defense Order 21 supported this order, just as all defence orders issued are Article 124 of the Constitution and Article 3 of the Defense Law and the procedures issued according to Defense Order 21; For the benefit and safety of lawyers, judges, employees, and citizens who review the courts.

The issuance of the defence order was until some texts in the Code of Civil Procedure or other provisions were dealt with. This defence order was a shock to the lawyers and those interested in the justice sector, as it included interference in court procedures, which prompted the Bar

Association to implement a comprehensive strike to prevent pleading before the courts.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In light of the 2011 constitutional amendments, an administrative judiciary of two degrees was established in Jordan through the Administrative Judiciary Law No. (27) of 2014, which provided for the establishment of primary administrative courts and other appeals, which replaced the Supreme Court of Justice. An independent constitutional judiciary was also established, represented by the establishment of the Constitutional Court according to its own law No. (15) of 2012 to act as the original oversight body over the constitutionality of laws and regulations in force and the interpretation of the provisions of the constitution. Members of the Senate and five judges of Jordan's highest regular court.

The question always arises regarding the judicial authority about the extent to which Jordanian laws and courts devote fair trial standards and the right to litigation, especially with regard to judicial procedures before special courts, specifically those that are established by a special law, and courts of a military nature, such as the State Security Court, the Police Courts, and the Military Court. Although the 2011 constitutional amendments limited the jurisdiction of the State Security Court to five crimes, namely treason, espionage, terrorism, drug crimes and currency counterfeiting, the laws and ordinary laws that were issued that addressed the definition of previous crimes, especially the Jordanian Terrorism Prevention Law, have expanded into the crimes that can be Consider them as images of the crimes mentioned in the body of the constitution.

The legal system applied in Jordan is the Latin system that relies on legislation as a basic source for the legal base in addition to custom. The principles of Islamic Sharia, jurisprudence, the judiciary and general principles of law are informal and reserve sources that help the judge in the interpretation and application of legal texts, with the exception of personal status issues where Islamic Sharia is the main source of Jordanian personal status law. This is in contrast to the situation in the Anglo-Saxon legal systems that rely on case law and the decisions of the higher courts as a primary source of legal basis.

With regard to the strength and compulsion of the legal rules in Jordan, they fall within a legislative hierarchy on which the constitution rests as it is the supreme law in the country and which no other legislation that contradicts or opposes the texts of which must be issued. In the legislative hierarchy, the constitution follows the laws issued by the National Assembly, followed by the regulations issued by the Council of Ministers, and the instructions issued either by the Council of Ministers or any of the ministers. It follows from this legislative hierarchy that no lower legislation may contravene a higher one, and if any law violates the provisions of the constitution, then that law is considered unconstitutional and can be challenged by annulment before the Constitutional Court. If a system violates the provisions of the law, then it is considered an unlawful system, and it shall be challenged by cancellation before the administrative courts.

Monitoring the constitutionality of laws and regulations in Jordan is a subsequent monitoring after the law has been issued and becomes enforceable, so that the unconstitutionality of any law or system is not challenged unless it is adhered to by one of the parties in a case pending before the courts, unlike the situation in many courts. Arab and foreign constitutional reviews that exercise constitutional control prior to the promulgation of the law, so that if it is proven to the court that the draft law violates the constitution, then it is not issued in the first place.

Regarding international conventions that Jordan ratifies and enter into force, the jurisprudence of the Jordanian Court of Cassation has settled on considering it higher than ordinary law and less than the constitution, meaning that no international agreement may violate the provisions of the constitution, and that in the event of a conflict between a text in an approved international agreement According to the rule of law, the priority in application is the international treaty ratified.

Nevertheless, the main problem remains in the unconstitutionality of the status of international treaties and agreements in the Jordanian legal system as an explicit text in the body of the constitution, and the disagreement over the scope of international treaties and agreements that are subject to the supervision of the National Assembly and which are currently limited to treaties and agreements concluded between states only and which carry something to the state treasury. Treaties and agreements concluded between the state and natural or legal persons and which affect the public or private rights of Jordanians, and the state treasury bears some of the expenses.

IV. LOOKING AHEAD

The current reality that the Jordanian constitutional system suffers from due to the lack of clarity of the constitutional vision in the relationship between the three authorities in the state and the governmental and judicial agencies related to the practice of the system of government increases the importance of forming a future outlook to improve this reality based on the following foundations:

1. PUSHING FOR THE FORMATION OF A PARLIAMENTARY GOVERNMENT

At the top of the hierarchy of reform endeavors in Jordan is the achievement of greater harmony between the various parties of the political system in Jordan, from an executive authority chosen by the people in fair, fair and periodic parliamentary elections called a parliamentary government, and a legislative authority capable of exercising its constitutional powers in legislation and oversight of the executive authority, An independent judiciary has its own legislation that guarantees the right to litigation and a fair trial.

In terms of implementing the parliamentary government, the monarchy in Jordan spares no effort in highlighting the positive aspects of that reform step and its role in redrawing the constitutional map in Jordan through discussion papers it issued dealing with the priorities and approaches of political reform, and defining the roles of each of the parties to the equation from political parties. The Council of Representatives, the Council of Ministers, individuals, and even the king himself has a role in the approach of the parliamentary government, which is to change his role in favor of considering him the safety valve of the Jordanian constitutional system, so that his constitutional

powers are reduced and considered merely a protector of the nation's den, and the head of state is resorted to in cases that require protection of the higher interest of the state.

In this context, constitutional reforms have not yet succeeded in approaching the implementation of the concept of parliamentary government. What happened on the ground since the beginning of the constitutional reform process was merely adopting a simplified model for parliamentary government represented in applying the consultative rule with the parliament in choosing the prime minister. These consultations, which were implemented for the first time in Jordan in 2012, raised doubts regarding their seriousness and objectivity in choosing the prime minister from the womb of the parliament, due to their failure to be based on clear legal and constitutional grounds.

Therefore, the political and constitutional reform process that took place in Jordan must be reviewed and evaluated in order to initially agree on the form of the parliamentary government that we seek to implement, and whether the matter will stop at the point of adhering to the basis of consecration with the House of Representatives in choosing the prime minister, in this case it is necessary Focusing on the importance of the parliamentary blocs and activating their constitutional and parliamentary role within the House of Representatives in favor of considering them the nucleus of political parties in the Representative Council, or for the overarching goal of reform to push towards the concept of parliamentary government in its full concept, which is based on choosing the head of the winning party as prime minister. The situation We must focus on conducting another review of the constitutional texts and laws regulating political life, foremost among which is the election law, the law on political parties and the law on public meetings, in addition to the law on associations.

2. REFORMULATION OF THE RELATIONSHIP BETWEEN THE LEGISLATIVE AND EXECUTIVE AUTHORITIES

The implementation of the idea of the parliamentary government entails the necessity of working to reformulate the relationship between the legislative and the executive authorities, based on the fact that the executive authority in the parliamentary government will be partisan or at least include party ministers or members of Parliament. This government must prove to it the principle of general mandate in managing the internal and external affairs of the state in a way that enables it to implement its programs and political goals that were elected by the people on its basis. Hence, the general formation of the executive authority in the Jordanian constitution from the king as president and the ministers must take into account this new concept of governance, so that the activation of the general mandate of the parliamentary government must be matched by the gradual push towards the implementation of the restricted constitutional monarchy, which is based on reducing the powers of the king in the constitution in favor of Parliamentary government.

It should be noted in this context that the Jordanian constitutional system has already begun reformulating the relationship between the two parties of the executive authority in 2014, when Article 127 of the constitution was amended and the determination of the king's sole right to appoint the army commander and the director of the General Intelligence. The implementation of the parliamentary government does not in any way mean stripping the king of his full constitutional powers in favor of the prime minister. Rather, it is consistent with the concept of the parliamentary government that the elected prime minister exercises public powers in managing the internal and external affairs of the state and that the king retains part of the constitutional powers he exercises alongside the prime minister. The elected person, provided that these constitutional powers established for the king in the system of parliamentary government are limited to matters articulated in the state related to protecting its security and stability and protecting the supreme interest of the state. Whoever the king chooses as commander of the army or director of intelligence will remain governed by the constitution in spirit and by the law in text, and he will be subject to the supervision of the judiciary, which will impose on him the penalties stipulated in the legislation related to his work in the event that he violates its provisions and provisions.

Such an approach, which was devoted by the Jordanian constitutional legislator to affirming the king's right to appoint the army chief and the intelligence director, was preceded by many comparative constitutions that restricted the authority to appoint to the highest civilian and military positions and dismiss them with the head of state despite its determination of the principle of elected representative governments in order to avoid potential negative effects. To form representative governments upon appointment to those positions, such as the Moroccan Constitution of 2011 in Chapter Thirty, Article (153) of the Egyptian Constitution of 2014, Article (40) of the Bahraini Constitution of 2002, and Article (106) of the Syrian Constitution of 2012.

V. FURTHER READING

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Kazakhstan

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I. INTRODUCTION

Kazakhstan is the largest state in Central Asia, which is a unitary state with a presidential form of government. Despite the fact that Kazakhstan gained independence on December 16, 1991 by secession from the CIS (Commonwealth of Independent States), a lot has been done in the formation of the judicial system in the state. According to the Constitution of the Republic of Kazakhstan, Kazakhstan is proclaimed a democratic, secular, legal and social state, the highest values of which are a person, his life, rights and freedoms.

The provisions of the current Constitution of the Republic of Kazakhstan, adopted at a popular referendum on August 30, 1995, consolidated the judiciary along with the legislative and executive branches of government. Gradually, there was a separation of the courts from the executive branch of government.

In ensuring the proper functioning of the judiciary, effective protection of the rights and legitimate interests of citizens and organizations, it is important to create the most optimal system of the judiciary. The system of courts in the Republic of Kazakhstan is composed of the Supreme Court of the Republic and local courts.

On December 25, 2000, the first in history of Kazakhstan, the Constitutional Law on Courts and the Status of Judges of the Republic of Kazakhstan was adopted. The Qualification Collegium and the Supreme Judicial Council were created with the help of which qualified, trained and competent lawyers were selected for judicial positions.

The precondition for the creation of specialization of courts and judges in Kazakhstan was the rapid development of market relations and civil society.

Since 2002, specialized economic and administrative courts have been introduced in the judicial system of Kazakhstan, aimed at resolving cases according to jurisdiction, using established procedures in each of the subtypes of courts.

The study of the experience of European and foreign countries of the world contributed to the introduction of some provisions into the current judicial system of Kazakhstan.

Since January 2010, specialized courts for criminal cases were introduced in Kazakhstan. Their jurisdiction includes cases of especially grave crimes. These criminal courts also work with the participation of jurors.

Today, courts for juvenile affairs (juvenile courts), military and financial courts have also been established and are functioning in Kazakhstan.

The creation of specialized courts contributes to the most optimal resolution of issues of specialization of cases, to increase the efficiency of judicial activity when considering cases. It improves the qualifications of judges, and also reduces the overall burden on courts, since judges consider cases according to the jurisdiction of the court and the specialization of the judges themselves.

As the experience of specialized courts operating in many countries shows, specialization allows judges to make more qualified court decisions, which is one of the most important factors ensuring the effectiveness of judicial work and solving some problems related to judicial burden, on the basis of in-depth knowledge of certain branches of law, specific features and nuances of certain categories of cases.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The past 2020 is associated with the time when the entire world community was subjected to changes, and the systems operating in each of the states were rebuilt in response to the emerging pandemic. These changes also affected the judicial system within Kazakhstan. Basically, the administration of justice in courts from March 2020 to the present is carried out online, which is undoubtedly convenient for judges, but I think that it is not convenient and difficult for the participants in the process when providing evidence, arguments, interviewing witnesses and specialists, familiarizing with documents attached by the court provided by the other party at the time of the court session, etc.

The open online platform "Judicial Office", which allows online filing of claims, additional documents and written arguments by the participants in the process, sometimes fails, the website is in technical work for periods. In my practice, there were several times in 2020, when the website of the online platform "Judicial Office" was in technical work, and it was necessary to postpone all cases in order to take the physical documents to the court myself.

Also today, there is still a question of non-objectivity and incomplete consideration of the arguments and circumstances set out by the participants in the trial in the complaint against the judge. Practically no measures were taken against judges who have violated judicial ethics, who have committed unlawfulness during the trial or when passing a judicial act. After a complaint from the participants in the process against the judge, applications for the disqualification of the judge, in cases of refusal to satisfy these appeals, the case continues to be

considered by the same judge. It turns out that the judge already has the fact of bias towards the participants in the process.

Of course, there are also positive aspects in the ongoing judicial reforms, but today, I cannot yet say, with 100% certainty, that the judicial power in Kazakhstan is completely independent and does not interact with the state, namely the branches of state power in the administration of justice.

One of the successfully implemented projects in Kazakhstan, "Night Court", was launched on the base of the best practices of the United States and Singapore, and has been being carried out for a year and a half by now. The courts work in the evening from 6:30 P.M. to 10 P.M. and consider road traffic accidents. The victim, with the consent of the offender with the violations committed while driving and the damage caused, is able to quickly resolve the dispute in the Administrative Court on the road where the accident occurred, including in the evening.

In more than 23 thousand administrative cases, participants in road accidents did not have to take time off from work, study, or resolve the issue with children in order to participate in the trial, if the party to the trial has a minor child. As a result, the launch of this project contributed to a significant reduction in the time required for the transfer of materials drawn up by the traffic police to the court. The terms of consideration of administrative cases on road traffic accidents were reduced, as well as the terms for receiving the insurance payment by the injured party.

It turns out in indisputable cases, where the culprits of road accidents are found guilty, the terms of consideration of cases in court have been significantly reduced. As a result, amendments were made to the current Administrative Code of the Republic of Kazakhstan regarding the fact that on such indisputable cases, the decisions made by the court immediately come into legal force. Similarly, a procedure is provided for the immediate consideration of a case within the framework of the "Night Court" project; if the parties agree, the court is now also entitled to consider cases in the field of violation of migration legislation and petty hooliganism.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In the published message of the President of the Republic of Kazakhstan K-Zh. Tokayev, addressed to the people of Kazakhstan dated September 1, 2020, "Kazakhstan in a new reality: time for action", it is indicated that an important criterion of the rule of law is impartial and fair justice, indicating as a priority goal—strengthening confidence society to the courts.

All elements of the judicial reform carried out in 2020 in Kazakhstan were aimed at increasing confidence in the court, improving the quality of justice, and improving the judicial system. An important criterion for the success of the rule of law is fair and impartial justice.

In 2020, the ongoing judicial reform in Kazakhstan was based on the provisions of the "7 stones of justice" Program, impremented in 2018. This program laid down the main strategic guidelines that guided the course of the ongoing judicial reform in 2020. In this program, "7 stones of justice" 7 priority projects were announced, the implementation of which is planned: "Impeccable Judge", "Model Court", "Fair Process", "Quality Result", "Smart Cell", "Communication Strategy" and "Reconciliation before trial, in court".

The program was created with the active role of the legal community, judges, lawyers and prosecutors. Everyone who was interested in improving judicial activity in the country responded to the appeal of the Supreme Court and made their proposals.

Let us consider each of the priorities of the "7 Stones of Justice" Program, which was implemented in Kazakhstan in 2020:

1. The project "Impeccable Judge" is aimed at solving the problem of the qualitative composition of the judiciary. The Supreme Court of the Republic of Kazakhstan, together with the Supreme Judicial Council, changed the approaches to the selection of candidates for judges and the requirements for them. In addition to testing, candidates must pass interviews with judges of the Supreme Court and members of the Supreme Judicial Council, solve case problems and write an essay. As a result, whereas previously every fourth candidate became a judge, now out of 20 candidates for a judge only 1 passes.

The demand for the current composition of judges has also increased. The Supreme Court has created a Commission on the Quality of Justice, which evaluates the professional activity of a judge, and introduced a new Assessment Methodology. It is recognized by foreign experts as a unique and objective assessment tool. Particular attention was paid to strengthening the independence of judges—the Judicial Jury and the Staff Reserve Commission were transferred to the Supreme Judicial Council. Thus, all issues related to the selection of new judges, the promotion of existing ones and the consideration of disciplinary cases against judges are concentrated in one body independent of the Supreme Court. There has been a ban on holding the office of chairmen of courts and judicial collegiums more than 2 times. By the way, a competitive selection has been introduced for the chairmen of the collegiums of regional courts.

2. The aim of the projects "Impeccable Judge" and "Fair Process" is to increase public confidence in the court. The judge serves the rule of law and thus ensures the protection of rights and legitimate interests. The law, in turn, should assist the judge in establishing justice. Relatively recently, a judge in a civil proceeding was bound by the limits of the claim, exempted from collecting evidence, and this did not contribute to the establishment of the truth in the dispute. Accordingly, the fairness of the decision is in question. On June 10, 2020, amendments were made to the current Civil Code of the Republic of Kazakhstan, according to which, now the judge is obliged to be active in seeking the truth in the arisen litigation, the judge received the necessary powers. This is especially true for people who do not have legal support and legal education, relevant knowledge in the field of law.

3. The goal of the "Quality Outcome" project is to ensure that each judicial act is written in an understandable language, contains a full analysis of the positions of the parties involved in the case, and the conclusions contained in it are clearly substantiated, logically verified and understandable to everyone who reads it. For this, a new format of judicial acts was developed and enshrined in regulatory decisions. A judicial act is the final document of a legal process.

Additionally, within the framework of this project, the judges were obliged, immediately after the announcement of their decision, to orally explain its essence, motives and legal consequences. When a person

understands what exactly became the basis for making a decision by the court, he will understand what his strength or weakness was and he will be able to defend his rights better in the future.

The Supreme Court of the Republic of Kazakhstan has developed a Guide for drafting decisions in civil cases with sample acts.

4. Within the framework of the "Model Court" project, in 230 courts on the territory of Kazakhstan, according to a single design, front offices have been opened, which are an open space, a reception, a digital queue for visitors, and terminals for payment of the state duty charged when filing lawsuits. Additionally, the court will provide offices for a mediator, lawyer, notary. In this case, a mediator is an independent person (mediator, conciliator) who helps the parties to resolve the existing conflict, dispute before the parties go to court. At the same time, the parties on a voluntary basis can either apply to the mediator before the trial, or go directly to the court without going to the mediator.

5. Concerning the project "Reconciliation before the court, in court". This project is aimed at reducing conflicts in society, maintaining partnership, friendship and even family relations. Kazakhstan began to implement this reconciliation project based on the experience of Singapore in the courts. In order to implement this project, amendments were made to the Civil Procedure Code of the Republic of Kazakhstan, providing for an increase in the time period for a court to accept a statement of claim during conciliation procedures from 5 to 10 working days. Initially, the lawsuit goes to a judge, who has one task—to reconcile, if the reconciliation procedures did not lead to a compromise, for example, in financial or family disputes (division of property, divorce, determination of the place of residence of a minor child)—then another judge looks at the case.

6. Within the framework of the Communication Strategy project, judges, regardless of the jurisdiction of the court, "went out" to the social networks of the Internet, conduct explanatory work, participate in discussions and answer users questions (in Facebook, Telegram YouTube, and Instagram). The group of the Supreme Court "Smart-sot (*smart-court*)—IT justice KZ" is gaining popularity on Facebook with an actively updated feed of discussions, having gathered in a short time about more than 11 thousand participants. Thus, feedback is provided, a dialogue is conducted between courts and society, and traditional TV communication tools are actively used: together with TV channels, they began to shoot TV projects, commercials and serials; explanatory and informational publications of judges in collections and legal journals are carried out, judges and judicial officials take part in conferences and meetings held by business communities, live broadcasts, press tours and briefings are held.

7. The "Smart-Cell" project is aimed at digitizing the entire judicial system of Kazakhstan. In the "Doing Business" rating, Kazakhstan ranks 4th among 190 countries of the world in terms of an indicator assessing the digitalization of ships. According to the recently released Periodic Report of the European Commission on the Effectiveness of Justice (CEPEJ) for 2018-2020, our country received 9.23 points from the first time for the use of modern information and communication technologies by the courts. There are only three countries above: Latvia (9.79), Estonia and Portugal (9.25 each). Today, all courts in Kazakhstan are equipped with videoconferencing, allowing participants in the process, prosecutors, lawyers, witnesses, experts, and the media to participate in them from anywhere in the world. Through the Internet service "Judicial Cabinet",[1] you can get access to all judicial services: filing a statement of claim in court, sending a response to the court, objection, petition, appeal and supervisory complaint, etc., control their movement without leaving home. On this Internet service, the courts post the pronounced judicial acts in the course of the consideration of the case, and the data on the pronounced judicial acts for the past years are gradually being added. Constant work is underway to improve the free mobile application "Judicial Office" (for iphone and Android users).

For this project, a lot is planned for implementation in 2021. From the beginning of the pandemic in 2020 to the present, all court sessions by judges with participants in the process are conducted online using video conferencing.

The judicial reform carried out in Kazakhstan in 2020 has not yet been completed. Constant work is being carried out to improve legislation, bring by-laws into line with the reforms being carried out in Kazakhstan, further work is carried out to increase the confidence of the court and the judiciary in society, the availability of legal assistance and the protection of their rights by citizens and legal entities in court. In the course of the judicial reform carried out in Kazakhstan, the Constitutional principles of the presumption of innocence and independence of the judiciary are strictly observed.

IV. LOOKING AHEAD

Despite the positive trend in the field of directions and decisions taken during the implementation of judicial reform in Kazakhstan in accordance with the constitutional provisions enshrined in the Constitution of Kazakhstan, adopted on August 30, 1995, work continues in Kazakhstan to consistently consolidate all provisions of constitutionalism in laws and in practice, guaranteeing human and civil rights and freedoms, stimulating the development and protection of entrepreneurship, ensuring constitutional security.

At the videoconference "Reform of the law enforcement and judicial system of Kazakhstan: how to avoid pitfalls" held on December 22, 2020 in Kazakhstan, a member of the Constitutional Council of the Republic of Kazakhstan, former Prosecutor General Askhat Daulbaev, drew the attention of the participants and listeners of the videoconference to the fact that over the past five years the number of applications to the Constitutional Council was less than one per year. According to the Constitution of the Republic of Kazakhstan, citizens do not have the right to apply to the Constitutional Council of the Republic of Kazakhstan, this right is exercised through the courts.

The Constitutional Council was established in accordance with the Constitution of the Republic of Kazakhstan, adopted in 1995. The activities of the Constitutional Council are aimed at ensuring the supremacy of the Constitution throughout the territory of the Republic. The Constitutional Council considers for compliance with the Constitution of Kazakhstan laws adopted by the Parliament prior to their signing by the President of the Republic of Kazakhstan.

1 https://sud.gov.kz/

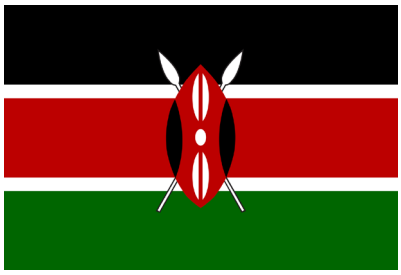
Also at the videoconference that took place, a member of the Constitutional Council, Askhat Daulbaev, listed that: "In 2020 the courts did not apply to the Constitutional Council even once! Zero! In 2019—once, in 2018—twice, in 2017—not once, zero. In 2016—once, and in 2015—not once!—Whereas since 2010, the French Constitutional Council has considered about a thousand applications and submissions from the courts. On average, one hundred calls per year. I think this is a topic that deserves attention!"—said the speaker Askhat Daulbaev.

Today, the development and adoption of a draft law is relevant, which would provide for the mandatory consideration by the court of appeals of citizens, prosecutors, lawyers in the process on the issue of the inconsistency of the legislative norm with the provisions of the Constitution of Kazakhstan. Whether it is criminal, civil or administrative proceedings. It is necessary to clearly and unambiguously prescribe the procedure for the consideration of such appeals by the courts. In order to prevent the issuance of a judicial act (decision, verdict, ruling) that would contradict the Constitution of Kazakhstan.

In the course of the ongoing judicial reform in Kazakhstan, actual issues in the work of the judicial system and administration of justice remain the facts of violation of the law by judges, violations of the rights of participants in proceedings, the interest of courts in making decisions in favor of state bodies, making unjustified and unjust decisions, eradicating corruption in the judicial system. and increasing citizens' confidence in the courts.

In Kazakhstan, it is necessary to continue further work to improve the quality of the ongoing judicial process, to constantly improve the qualifications of judges depending on specialization, to reduce the greater workload on judges, which will provide an opportunity for judges to study in depth all the circumstances of the case, and it is also necessary to exclude any interest of the court and individual judges when considering complaints of citizens and legal entities about the actions of a judge, violation of judicial ethics, abuse of authority by judges and the judge's interest in resolving cases.

Kenya



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I. INTRODUCTION

Arguably, Kenya is about to undergo the first amendments to the 2010 Constitution. This report looks at the journey to the current constitutional amendment Bill, it highlights how the Bill was conceptualised, who its sponsors are, what it provides for and the legal challenges it is facing in terms of content and process. The journey to constitutional amendment has a diverse group of actors including its sponsors, the Independent Electoral and Boundaries Commission, county assemblies, the National Assembly, the Senate, voters, and the Judiciary. The Kenya Constitution has survived several amendments attempts. However, it now faces the most organised national Executive and elite reform drive purportedly to address the winner-takes-all politics and ensure better ethnic balance.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Kenya's President Uhuru Kenyatta and former Prime Minister Raila Odinga in October 2020 unveiled a constitutional amendment Bill as part of their efforts to address what they considered constitutes a winner-takes-all politics. According to the two, this kind of politics has been the cause of Kenya's political violence, poverty, inequality, marginalisation, high unemployment rate and lack of development. The constitutional amendment Bill unveiled in October 2020 was subsequently revised and officially published in November 2020.

The journey to the constitutional amendment Bill started on 9th March 2018 when President Uhuru Kenyatta and former Prime Minister Raila Odinga engaged in a now famous public 'handshake' signalling the end of political hostilities and commitment towards working together for Kenya's greater good. The two were the main protagonists in the 2017 presidential elections where Kenyatta won the vote in a repeat election boycotted by Odinga.

Following up on the 'handshake' a 'Building Bridges Initiative' (BBI) was launched along with a Taskforce on Building Bridges to Unity Advisory. The Taskforce was composed of elected political leaders, representatives of religious organisations, political scientists and lawyers all appointed through Presidential Decree. A constitutional challenge to the authority of the President to establish the Taskforce was dismissed by the High Court.

The Taskforce was mandated to evaluate national challenges and make recommendations to build lasting unity in Kenya, alongside policy initiatives, administrative reform proposals and implementation modalities. Following nationwide consultations, the Taskforce launched its report with far reaching proposals for legislative and constitutional reforms. The report made 14 legislative thematic proposals, including a law to ensure transparent procurement of goods, works and services in public institutions; a law to provide for prompt payment of goods and services procured by public entities and mechanisms for settling disputes over invoices; and a law to give higher education loanees a grace period before they can commence repayment of loans advance to them.

The highlight of the Building Bridges Initiative was the publication of the constitutional amendment Bill, 2020. As per Articles 255, 256 and 257 the Constitution, there are two pathways towards constitutional amendment in Kenya; a popular initiative that would culminate in a referendum, or a parliamentary initiative. Proposals that touch on judicial independence, independent commissions, the bill of rights, functions of parliament (consisting of the National Assembly and Senate) and the structure of devolution require a referendum, in addition to parliamentary approval. Parliament may pass other amendments with a two-thirds majority.

The sponsors of the constitutional amendment Bill decided to process it as a popular initiative Bill under Article 257 of the Constitution. A constitutional amendment Bill through this pathway required support by more than one million voters and presentation to the Independent Electoral and Boundaries Commission (IEBC). This was achieved and the IEBC submitted the Bill to the 47 county assemblies for debate and approval in January 2020. If a county assembly approves the draft Bill within three months after the date it was submitted by the IEBC, the speaker of the county assembly is to deliver a copy of the draft Bill jointly to the speakers of the two houses of parliament, with a certificate that the county assembly has approved it. If at least 24 county assemblies approve the Bill, it would move to parliament for debate. As at 26th February 2021, 41 county assemblies had voted to approve the Bill while 2 had rejected it. This means that now parliament may debate the Bill and vote whether to reject or approve it.

The Bill will require a majority of votes from each of the two houses of parliament. If either house fails to pass the Bill, or in relation to entrenched provisions as per Article 255 of the Constitution, upon approval in each house, it will be submitted to a referendum. A valid

referendum requires 20% turnout in at least half of the counties, and support by a simple majority of all voters.

1. KEY PROVISIONS OF THE CONSTITUTIONAL AMENDMENT BILL

1.1. THE EXECUTIVE

The Bill proposes to expand the national Executive by creating the positions of the Prime Minister and two Deputy Prime Ministers. The Bill stipulates that the two positions are to assist the President. Currently, the national Executive comprises of the President, Deputy President and Cabinet Secretaries. Further, if the Bill becomes law, the Cabinet Ministers may be appointed from among the members of the National Assembly. Currently, a member of the National Assembly may not serve as a Cabinet Secretary. The Bill also removes parliamentary oversight in relation to appointment of Cabinet Secretaries.

The role of the Prime Minister under the Bill is—

- to be the leader of government business in the National Assembly;
- to oversee the legislative agenda in the National Assembly on behalf of government;
- to supervise the execution of the functions of ministries and government departments;
- to chair cabinet committee meetings as assigned by the President;
- to assign any of the functions of the Office to the Deputy Prime Ministers; and
- to perform any other duty assigned by the President or conferred by legislation.

On appointment of the Prime Minister, the Bill provides that—

- Within seven days of the President being sworn in after a general election, or following an occurrence of a vacancy in the office of the Prime Minister, the President shall nominate a Prime Minister.
- A person is eligible to be nominated as the Prime Minister if the person is a member of the National Assembly who is the leader of the majority party or coalition of parties in the National Assembly.
- Within seven days of the Speaker receiving a nomination from the President, the Speaker shall call a vote in the National Assembly to confirm the appointment of the person proposed by the President.
- A vote under clause (3) passes if it is supported by more than half of all the members of the National Assembly.
- Where the National Assembly fails to confirm the appointment of a person nominated by the President, the largest party or coalition of parties shall within seven days of rejection of a nominee, designate another member to be the party leader in the National Assembly and clauses (1), (2) and (3) shall apply.
- If the National Assembly fails to confirm the appointment of the person proposed under clause (5), the President shall appoint a member who, in the President's opinion, is able to command the confidence of the National Assembly.

On dismissal of the Prime Minister, the Prime Minister loses their position if –

- they are dismissed by the President;
- they cease to be a member of the National Assembly;
- they resign from office in writing addressed to the President; or
- they are impeached from office.
- a member of the National Assembly supported by at least one-quarter of all members may propose a motion of no confidence in the Prime Minister.
- the National Assembly, by a resolution supported by more than half of all members pass the motion of no confidence in the Prime Minister, the Prime Minister ceases to hold office.

The Bill also provides that an election would not be called off if a Deputy President candidate dies. However, if a Presidential Candidate dies, the presidential election is to be called off. Further, under the Bill, the timeline for the Supreme Court to determine Presidential Election Petitions is expanded from fourteen days to thirty days.

1.2. ELECTORAL PROCESS

The Bill provides that Parliament is to pass legislation on elections that will among other things provide for sanctions for a political party that fails to comply with the principle that not more than two-thirds of the party's candidates are of the same gender. (Currently, Article 27(8) of the Constitution provides that the "*State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender*").

The Bill also provides that election petition may be served to other parties through electronic media.

The Independent Electoral and Boundaries Commission is mandated to ensure that party lists comply with two-thirds gender rule and representation of persons living with disabilities. Where parliament does not meet the two-thirds gender rule after elections, the Bill proposes to have additional persons nominated to ensure the gender quotas are achieved. The nominations are to be done in relation to the number of votes a political party participating in the National Assembly elections receives.

The Bill expands constituencies from two hundred and ninety to three hundred and sixty (an additional 70 constituencies).

1.3. PARLIAMENT

1.3.A. NATIONAL ASSEMBLY

As highlighted above, the National Assembly under the Bill is proposed to have three hundred and sixty members, plus four members, being two women and two men, representing persons with disabilities; two members, being one woman and one man, representing the youth; and the number of special seats members necessary to ensure gender quotas (two-thirds rule).

The Bill also stipulates that there will be a Leader of Official Opposition, the Attorney-General, who is an ex officio member of the National Assembly and the Cabinet Ministers, who are not members of Parliament as other ex officio members.

On the position of Leader of Official Opposition, the Bill states that the Leader of Official Opposition shall be the person—

- who received the second greatest number of votes in a presidential election; and
- whose political party or coalition of parties has at least twenty-five percent of all the members of the National Assembly.

Where the person described above is unable to assume office, or the office becomes vacant, the political party or coalition of parties not forming government to which the person was a member is to nominate another person to be the Leader of Official Opposition.

1.3.B SENATE

The Bill proposes to restructure the Senate to have ninety-four members, being one woman and one man from each county, elected by the registered voters of the counties. Currently, the Senate is composed of forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency plus sixteen women members who are nominated by political parties according to their proportion of members of the Senate; two members, being one man and one woman, representing the youth; two members, being one man and woman, representing persons with disabilities.

With the restricting of the Senate, the voting in the Senate also changes. The Bill does away with the current voting structure which is one county, one vote.

1.4. BILL OF RIGHTS

The only amendment to the Bill of rights is on the right to privacy. The Bill expands the right to privacy to include that every person has the right to privacy, which includes the right not to have their personal data infringed.

1.5. JUDICIARY

The Bill increases the years for qualification to be Chief Justice, Deputy Chief Justice, or a Judge of the Supreme Court from 15 years of experience to 20 years of experience. For Court of Appeal Judges, from 10 years of experience to 15 years of experience.

The Bill creates the office of the Judiciary Ombudsman who is to be an ex officio of the Judicial Service Commission (JSC). The person nominated for this position is to be nominated by the President and vetted by the Senate. The role of the Judiciary Ombudsman will be to—

- receive and conduct inquiries into complaints against judges, registrars, magistrates, and other judicial officers and other staff of the judiciary;
- sensitise and promote engagement with the public on the role and performance of the Judiciary; and
- improve transparency and accountability of the Judiciary.

The Judiciary Ombudsman is also to prepare regular reports to the Judicial Service Commission and an annual report to Parliament.

Further, the Bill expands the role of the Judicial Service Commission to include –

- receiving complaints against judges,
- investigating judges, and
- disciplining judges by warning, reprimanding or suspending a judge.

The Bill also indicates that members of the JSC who are practicing lawyers shall not practice in courts and tribunals during their period of service with the Commission.

2. COUNTY GOVERNMENTS

On County Assemblies, the Bill indicates that special seats in the County Assembly shall be elected through the party list by political parties in proportion to the votes received. The Bill also adds a recall clause for a member of a county assembly.

The Bill provides that a in making the nomination for a running mate, a candidate for election as a county governor shall consider a person of the opposite gender.

3. FINANCE

The Bill provides that for every financial year, the equitable share of revenue raised nationally that is allocated to county governments shall not be less than thirty-five per cent of all revenue collected by the national government. This is up from fifteen per cent.

On revenue sharing the Bill states that there is need to ensure that the average amount of money allocated per person to a county with the highest allocation does not exceed three times the average amount per person allocated to a county with the lowest allocation.

The Bill creates a Constituencies Development Fund. This Fund shall be used to facilitate the performance and implementation of national government development priorities set out in the national budget within the constituencies.

The Bill creates a Ward Development Fund, into which shall be paid in each financial year at least five percent of all the county government's revenue in each financial year.

The Fund is to be used only for development expenditure falling within the functions of the county government within the county wards; and to facilitate actualisation of the rights guaranteed under Article 43 within the county wards.

4. RESPONSIBILITIES OF A CITIZEN

The Bill introduces responsibilities of a citizen. It states that every citizen has a responsibility to—

- cultivate national unity on the basis of respecting Kenya's ethnic, intellectual, economic and cultural diversity;
- promote and protect the well-being of the family including respect for their parents and elders;
- practice ethical conduct and combat corruption;
- fulfil parental responsibilities towards their children;

- develop one's abilities and skills for the advancement of self, the community and the nation;
- honestly declare their incomes to lawful agencies and pay prescribed taxes and duties;
- respect private property and protect public property from waste and misuse; and
- promote the unity and dignity of Africa and her people.

The responsibilities are to apply equally, where appropriate, to non-citizens.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The proposed constitutional amendments are a dismemberment of the Constitution of Kenya, 2010. The fact that the constitutional amendment Bill radically restructures the Executive and the Legislature, it amounts to a new constitutional dispensation. The Bill is a creation of the national Executive, having been sponsored by the current President and the former Prime Minister.

It is important to note that there are no unamendable clauses within the Kenya Constitution. What is key is that the amendment process as provided for under Article 255, 256 and 257 is adhered to. Under Article 255, provisions that require a referendum to be amended include those relating to the supremacy of the Constitution, the territory of Kenya, the sovereignty of the people, the national values and principles of governance mentioned in Article 10 (2) (a) to (d), the Bill of Rights, the term of office of the President, the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies, the functions of Parliament and the objects, principles and structure of devolved government. However, a petition was filed in the High Court of Kenya challenging the notion that all provisions of the Kenya Constitution may be amended. The Petitioners want the court to declare that—

- the doctrines of basic structure, eternity clauses, constitutional entrenchment clauses and unamendable constitutional provisions are applicable in Kenya;
- Chapter One on sovereignty of the people and supremacy of the Constitution, Chapter Two on the Republic, Chapter Four on the Bill of Rights, Chapter Nine on the Executive and Chapter Ten on the Judiciary form the basic structure of the Constitution, entrenched provisions and therefore cannot be amended by Parliament or through a popular initiative; and
- There ought to be no constitutional amendments that destroy the 'basic structure' of the Constitution.

Still on court cases, some county governments have sought advisory opinions from the Supreme Court. The Supreme Court Advisory Petitions seek to clarify among other issues whether the county assemblies when considering the Bill should undertake public participation; whether the county assemblies may amend the Bill in line with contributions from members of the county assembly and views from the public; what ought to be the threshold in voting for the Bill in the county assembly; what should be the procedure at the national assembly and senate when considering the Bill; and how the referendum question in relation to the Bill ought to be formulated. The Supreme Court's advisory opinion once rendered will hopefully clarify matters relating to substance and process in relation to constitutional amendment Bill.

In a recent advisory opinion to one of the county governments, the Attorney General has stated that (the advisory by the AG is not binding)—

- The people of Kenya may choose to amend one or more provisions of the Constitution through a single amendment initiative;
- County Assemblies when determining whether or not to approve the constitutional amendment Bill, may not make any alterations to it but must undertake public participation limited to whether the Assembly should approve or reject the Bill;
- The referendum question ought to be either approval or rejection of the Bill as opposed to a multiple question referendum; and
- The State (read the Executive) is well within the law to initiate and fund the constitutional amendment process (there is a petition that is yet to be determined at the High Court challenging the use of public resources for the process).

There was also a petition to the High Court against the Independent Electoral and Boundaries Commission (IEBC) to stop signatures verification; as highlighted above, the constitutional amendment Bill required support by more than one million voters. The sponsors of the Bill achieved this threshold. However, the Petitioners in this case had asked IEBC if it held and maintained a database of specimen signatures of all registered voters. IEBC responded in the negative. The Petitioners then questioned the basis within which the IEBC was verifying the signatures in support of the Bill. IEBC went ahead and verified the signatures and submitted the Bill to the 47 county assemblies. As at 26th February 2021, 41 county assemblies had voted to approve the Bill while two had rejected it.

A five Judge bench of the High Court consolidated all petitions relating to the constitutional amendment process. On 8th February 2021, the Court issued temporary orders and stated–

> 'Consequently, we hereby order that a conservatory order be and is hereby issued restraining the Independent Electoral and Boundaries Commission from facilitating and subjecting the Constitution (Amendment) Bill, 2020 to a referendum, or taking any further action to advance the Constitution (Amendment) Bill, 2020, pending the hearing and determination of these Consolidated Petitions.'

What this means is that no referendum may be held before the petitions are determined. The Court on county assemblies and parliament debating the Constitutional amendment Bill pronounced—

> 'Notwithstanding the fact that we decline to interfere with the legislative processes in the County Assemblies and Parliament a priori, as rightly appreciated by the 1st Respondent in Petition No. E416 of 2020, this Court has the power to intervene even at the tail end of the process. Differently put, there is no such doctrine as constitutional fait accompli: Parliament and the County Assemblies, even as they consider the Constitutional Amendment

> Bill in the face of these Consolidated Petitions, must be aware that this Court has the requisite jurisdiction and obligation to declare such actions unconstitutional and, therefore, invalid, ex post facto if, upon the conclusion of these Petitions the Court answers some or all the questions presented by the Petitioners in their favour. Rushing the Constitutional Amendment Bill through County Assemblies and eventually Parliament, does not inoculate the resultant proposed constitutional amendment from the possibility that it could yet, upon final disposition of these Petitions, be declared invalid.'

IV. LOOKING AHEAD

In the next months several matters will determine the success or failure of the constitutional amendment process; what will determine this includes—

- What the Supreme Court will advise (Supreme Court Advisory opinions are binding in Kenya) in relation to the questions highlighted in the previous section of this report;
- What the High Court will determine in relation to question of use of public resources, verification of signatures and whether there exist eternity/entrenched clauses in the Kenya Constitution;
- Whether Parliament will approve or reject the Bill; and
- Whether the Bill will be approved or rejected in a referendum.

Kosovo

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I. INTRODUCTION

This report will address the processes of constitutional reform that have taken place in Kosovo, from the declaration of independence and the adoption of the constitution in 2008 to the final process of constitutional changes in 2020.

Considering the fact that the process of declaring independence and the constitution of Kosovo is based on the Comprehensive Proposal for the settlement of the final status of Kosovo, also known as the Ahtisaari Package, has reflected in the great need for immediate constitutional changes.

This report examines all constitutional amendment processes initiated in Kosovo, providing a brief explanation of the reasons for the failure of some processes and also an analysis of the evaluation of amendments made by the Constitutional Court of Kosovo.

As a new Court which as will be seen in this report has been subjected several times to the process of evaluating amendments, has made it inevitable that this report analyzes the jurisdiction of this court as well.

The proposed amendments to this day, tend to change the constitution in different segments and chapters. This makes this report attractive to read and enriches it with concrete information about the fate of these amendments.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In the short thirteen-year history of Kosovo's constitution, it has been subjected to eight constitutional amendment initiatives. Out of these eight times, five times the constitution has been successfully amended and three times the amendments have failed for various reasons. Out of these five successful processes, the constitution of Kosovo has 26 amendments in force. Following, based on time-chronological intervals, all processes will be analyzed.

1. FIRST AMENDMENT PROCESS—FAILED

In 2012, based on a political agreement between the leaders of political entities: Alliance for New Kosovo, Democratic League of Kosovo and the Democratic Party of Kosovo (AKR, LDK and PDK), the Assembly of Kosovo established the Constitutional Commission to draft several constitutional amendments.

The agreement defined the constitutional changes, through which the way of electing the President of Kosovo would be changed from the parliament to the people.

Thus, according to this agreement, the leaders of those political entities agreed to immediately form a "Presidential Election Reform Commission" that would draft constitutional amendments and other necessary legislation, to ensure that the President of Kosovo is directly elected by the people, and that direct presidential elections in Kosovo to be held no later than six months from the date on which these changes and amendments to the Constitution and the accompanying legislation take place.[1]

Following the drafting of the amendments, based on the constitutional regulations, the proposed amendments were signed by at least a quarter (1/4) of the deputies.[2] Thus, on March 23, 2012, the President of the Assembly submitted to the Constitutional Court the proposed amendments, requesting that the Court assess whether the amendments proposed by 31 deputies diminish any of the rights and freedoms set forth in Chapter II of the Constitution. *'The Court had evaluated that the proposed amendments by the judgment of 20 July 2012 had ruled that six of the amendments, which amended eight articles of the constitution',* reducing the human rights and freedoms set forth in Chapter II of the Constitution.[3]

Thus, this process of changing the constitution had failed and Kosovo has continued to elect the president from Parliament.

2. SECOND AMENDMENT—SUCCESSFUL TWENTY-TWO AMENDMENTS—AMENDMENTS 1—22

As noted at the beginning of this report, since the Constitution of Kosovo was drafted based on the principles set out in the comprehensive proposal for resolving Kosovo's final status, this has led to the constitution being subject to changes in the part of transitional provisions. This process refers to the constitutional changes to ending the supervised independence.

1 See the reference to the agreement made by the Constitutional Court in Judgment no. K.O. 29/12 and K.O. 48/12, summary of facts, point 21.
2 The Constitution of the Republic of Kosovo, Article 144, stipulates that the right to propose constitutional amendments has the Assembly of Kosovo, a quarter of the deputies. The article 144 has been transferred to Chapter I—Basic provisions with amendment 5.
3 Case Nr. K.O. 29/12 and K.O. 48/12

The Government of the Republic of Kosovo, in charge of implementing the agenda for the completion of independence, had proposed amendments to the Constitution of the Republic of Kosovo, which would make possible that even formally the Ahtisaari Package[4] to be implemented, but such a thing would also make possible the removal of international mechanisms, which have implemented oversight and at the same time have had the quality of constitutional entities.[5]

The process of concluding international oversight of independence produced changes to the Constitution and the Laws of the Republic of Kosovo. These changes were intended to fully implement the Ahtisaari Package and integrate it simultaneously into the Constitutional System of Kosovo. The constitutional reform of concluding the international supervision of independence produced a total of 22 amendments, as well as the amendment of over 20 laws, which were amended through the Law on the Completion of International Supervision of Independence. Amendments to the Constitution and legislation were voted in the Assembly of the Republic of Kosovo on September 7, 2012.[6]

3. THIRD AMENDMENT PROCESS—SUCCESSFUL ONE AMENDMENT—AMENDMENT 23

On March 14, 2013, the Assembly of Kosovo amended the Constitution of Kosovo for the second time. Unlike the first process, this amendment is not related to the Ahtisaari Package, as it is an amendment of a complementary nature. Specifically, it adds a new provision to the Constitution of the Republic of Kosovo and through this amendment, Article 65 of the Constitution has been amended and a point has been added, where they have increased the competence of the Assembly to grant amnesty. Prior to this amendment, the Assembly of the Republic of Kosovo did not have such a competence. With this amendment of the constitution in the issue of amnesty / Assembly is added the following competence.

In Article 65, after point (14) is added point (15), with the following text: *"(15) gives the amnesty with the relevant law, which is approved by two thirds (2/3) of the votes of all deputies of the Assembly "*.[7]

4. FOURTH AMENDMENT PROCESS—FAILED

The Ahtisaari package appears again as the reason for a new proposal for constitutional changes. This is due to the fact that Kosovo, despite being declared an independent state in 2008, completed the supervised independence 3 years later. In the field of defense-army, it had not achieved full consultation, as the Kosovo Army, according to the constitution, continued to be limited by its competencies, also known in constitutional terms as the Kosovo Defense Force. To make this change, on March 11, 2014, the President of the Assembly presented to the Constitutional Court of Kosovo, the proposed amendments for the transformation of the KSF [8] in the Kosovo Armed Forces.[9] According to the amendments proposed in 2014, the KSF was renamed as the Kosovo Armed Forces and became a military force, tasked with protecting the sovereignty and territorial integrity of Kosovo.[10]

At the time the constitutional amendments were made to transform the KSF into an army, the Assembly of Kosovo and the governing coalition in general were in crisis. On May 5, 2014, the voting of the constitutional amendments that would turn the KSF into an army were included in the agenda for approval, but this agenda item was postponed for the next session of the Assembly of Kosovo, because for this item were required additional consultations, without disclosing the nature of these consultations. To postpone this point, the Assembly of Kosovo had taken the decision with 83 votes in favor, 1 against and 2 abstentions.[11] However, in the next session of the Assembly, on May 7, 2014, when the constitutional amendments for the establishment of the Kosovo Army were to be voted, the deputies voted to dissolve the assembly with 90 votes in favor, 4 against and 3 abstentions.[12] In these circumstances, the first attempt to establish the Kosovo Army, through constitutional changes had failed. Thus, unlike the previous amendments, the failure came for political reasons, despite the fact that the Constitutional Court in evaluating the amendments, did not find that they diminish freedoms and human rights.

5. FIFTH AMENDMENT PROCESS—FAILED

The next proposal for constitutional changes refers to the amendment of the constitution, namely Article 96 [Ministries and Representation of Communities]. Amendment referred by the President of the Assembly, on the proposal of a number of deputies [13], proposed the addition of a paragraph (addition of paragraph 8), which proposed: "None of the genders can be represented, less than 40% in the positions of ministers and deputy ministers of the Government of the Republic of Kosovo".[14]

This initiative was taken in order to increase the representation of women in the executive branch, ie in the government cabinet. The Constitutional Court, after offering a series of arguments on the definition of equality before the law and the values of the Constitution of Kosovo, defined outside Chapter II, has issued a judgment deciding to declare that: *"The proposed amendment reduces the human rights and freedoms, defined in Chapter II and Chapter III of the Constitution, as well as* ***its letter and spirit****, as defined in the case law of the Court"*.[15]

6. SIXTH AMENDMENT PROCESS—SUCCESSFUL ONE AMENDMENT—AMENDMENT 24

The sixth attempt to change the constitution refers to a very special process. Through this change, Kosovo creates a special court together with a specialized chamber of the prosecution and a special chamber of the constitutional court. Exactly after Article 161 a new article is added

4 Comprehensive proposal for resolving Kosovo's final status...
5 Bajrami, A., Muqaj, F., *'Constitutional Law'* (University of Prishtina, 2018)
6 Ibid
7 Official newspaper of the Republic of Kosovo: Assembly of the Republic of Kosovo, *'Amendment of The Constitution of Republic of Kosovo'* (2013). <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8650>.
8 Kosovo Security Force.
9 Constitutional Court of Kosovo, JUDGMENT in Case no. K044 / 14 Assessment of the amendments to the Constitution proposed by the Government, submitted by the President of the Assembly of the Republic of Kosovo on March 11, 2014, by letter no. 04-DO-2186, paragraph 6.
10 Draft amendment no. 35, which amended Article 126 of the Constitution of Kosovo 2008.
11 Transcript of the plenary session of the Assembly of the Republic of Kosovo, held on 5 and 6 May 2014, p.38.
12 Transcript of the extraordinary plenary meeting of the Assembly of the Republic of Kosovo, held on May 7, 2014, p.32.
13 According to the Constitution of Kosovo ¼ or 30 deputies, have the right to raise the issue of constitutionality of other acts with the constitution.
14 Case Nr. K013 / 15-Point 25 (Scope of evaluation).
15 Ibid (Decision), point 2.

with the following wording: Article 162 [Specialized Chambers and the Office of the Specialized Prosecutor] The new amendment to the constitution (Article 162) stipulates that the organization, functioning and jurisdiction of the Specialist Court would be clarified by a specific law. This constitutional change states that the Specialist Chambers and the Specialist Prosecutor's Office shall "have full legal and juridical personality" and "all the necessary powers and mandate for their operation, judicial co-operation, assistance, witness protection, security, detention and the service of sentence outside the territory of Kosovo for anyone convicted".[16]

On March 9, 2015, the President of the Assembly of the Republic of Kosovo, in accordance with Articles 113.9 and 144.3 of the Constitution of the Republic of Kosovo, referred to the Constitutional Court of the Republic of Kosovo this amendment. It is important to note that this amendment was proposed by the Government of the Republic of Kosovo on March 7, 2015.[17]

As a result of these negotiations, on August 3, 2015, the Assembly of Kosovo approved the constitutional amendment, namely the new Article 162 of the Constitution of Kosovo, with two thirds (2/3) of the votes of the deputies of the Assembly of Kosovo, as well as the Law for the Specialized Chambers and the Office of the Specialized Prosecutor, with 71 votes of the deputies of Kosovo.[18] This amendment proposed 3 dimensional changes. The first concerns a specialized chamber within the meaning of the Court. Second, this amendment proposes the establishment of a specialized prosecutor's office, and third, a Specialized Chamber of the Constitutional Court, composed of three international judges appointed in addition to the judges referred to in Article 114 (1), that will decide exclusively on referrals according to Article 113 of the Constitution in relation to the Specialized Chambers and the Specialized Prosecutor's Office in accordance with the special law.[19]

Another thing that the proposed amendment provided was that: The Specialized Chambers and the Specialized Prosecutor's Office will have full legal capacity and will have all the necessary competencies and mandate for legal cooperation, assistance, witness protection, security, and detention outside the territory of Kosovo for anyone sentenced, as well as in relation to the management of any case remaining after the end of the mandate. While all authorities in Kosovo are required to assist the Specialist Prosecutor's Office in its investigations, it will not receive instructions from the Government of Kosovo or share any information with Kosovo authorities.[20] Arrangements arising from the exercise of these powers are not subject to Article 18 which specifies the ratification of international agreements.[21]

This amendment was evaluated by the Constitutional Court of Kosovo, which through Judgment no. KO 26/15 had decided that amendment 24 does not reduce human rights and freedoms, defined in Chapter II of the Constitution and Chapter III of the Constitution or its letter and in its spirit, as defined in the case law of the Court.[22]

16 Gëzim Visoka, *'Assessing the potential impact of the Kosovo Specialist Court'*, (2017) 26.
17 Judgment of the Constitutional Court KO 26/15.
18 Kosovo Law Institute, *'Special Court Game'* (2017), 6.
19 Judgment of the Constitutional Court KO 26/15.
20 Gëzim Visoka, *'Assessing the potential impact of the Kosovo Specialist Court'*, (2017) 28.
21 Judgment of the Constitutional Court KO 26/15.
22 Ibid.

7. SEVENTH AMENDMENT PROCESS—SUCCESSFUL
ONE AMENDMENT—AMENDMENT 25

This amendment amends Article 108 of the Constitution of Kosovo. This article deals with the functioning and organization of the Kosovo Judicial Council. Concretely, according to the new amendment of the constitution, the way of electing the members of the judicial council will be changed. Out of thirteen members of the Judicial Council, five were first elected by the Judiciary, while with the new amendment, seven will be elected. Whereas out of four members who were first elected by the deputies, this two of the elected members had to be judges. With the new amendment, now only 2 members will be elected by the deputies, where one of the elected members must be a Judge.[23] This amendment was also subject to the assessment of the Constitutional Court.

8. EIGHTH AMENDMENT PROCESS—SUCCESSFUL
ONE AMENDMENT—AMENDMENT 26

The proposed amendment provides for the addition of a new paragraph after paragraph 8 of Article 22 [Direct implementation of International Agreements and Instruments] of the Constitution, respectively to add paragraph 9, as follows:

> "(9) COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE".

Proponents of the amendment claim that the proposed amendment sets important standards in the field of violence against women and domestic violence and aims to protect women from all forms of violence, and to prevent, prosecute and eliminate violence against women and domestic violence.[24]

The Court in its judgment KO162 / 18 found that the wording of the proposed amendment does not reduce any of the rights and freedoms set forth in Chapter II of the Constitution. Moreover, it only advances and develops these rights.[25]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. *Are each of the reforms best described as amendments or as dismemberments?*

After the analysis of all amendment processes, including those that have failed but also those that have been successfully implemented, it results that all processes have followed the constitutional path, based on constitutional amendment procedures.

In none of the cases treated above, it appear that the proposal came from unauthorized parties by the constitution to propose amendments

23 Official Gazette of the Republic of Kosovo Nr. 9/11 MARCH 2016, PRISTINA-Amendment No. 24.
24 Judgment of the Constitutional Court KO 162/18.
25 Ibid.

and also in all processes, the deadlines were respected and especially the role of the constitutional court in assessing the constitutionality of amendments. Considering the fact that of a short period of time, after the adoption of the constitution, the institutions authorized to propose amendments, have avoided procedural deviations that would produce dismemberments.

2. *Did any of the reforms raise a tension with any unamendable rules in the Constitution, assuming the Constitution codifies unamendable rules?*

Yes, the first process of constitutional changes that tried to change the constitution in terms of the way the President is elected, thus trying to make an election directly from the people, rather than by parliament as it was in the constitution, was evidenced by the Court as a change that contradicts the immutable values of constitutions.

Since the Constitutional Court according to the constitution has the competence to assess whether a proposed amendment reduces the rights and freedoms guaranteed by Chapter II of the Constitution,[26] it had found that some of the amendments violated exactly the second chapter of the constitution. First, it should be clarified that: Based on this competence that the constitutional court has to assess whether an amendment tends to reduce freedoms and human rights within the second chapter of the constitution, this fact makes the second chapter an unamendable chapter of the constitution, in a very explicit language of the constitution.[27]

In the first process of the proposed amendments, the court found that 6 amendments that amended 8 articles in the constitution, try to reduce freedoms and human rights. Thus, the Court makes the second chapter practically unamendable, insofar as the amendments aim to reduce the freedoms and rights defined by this chapter. This interpretation by the Constitutional Court strengthens the position that the drafters of the constitution, decided to protect certain parts of the constitution, which if opened to a political debate, could harm society. The Court thus clarifies that the second chapter is an important international obligation and that any political will to bring change in this chapter challenges the constitutional order and the spirit and letter of the constitution.

3. *Is there generally any constitutional control of constitutional reforms, and was there any constitutional control in the instances discussed in Part II, for instance by a domestic court or legislature, or by a supranational court or legislature? If yes, what is the justification used to control a constitutional reform?*

All (8) processes of the amendment of the constitution analyzed earlier, have been subjected to the control of the amendment conform the procedure defined by the constitution. Prior to their approval, the President of the Assembly sent them to the Constitutional Court to see if the proposed amendments diminish the freedoms and rights guaranteed in the second chapter of the constitution. Of the eight processes, in two of them the court found that the proposed amendments tend to reduce freedoms and human rights.[28] The first process, discussed above, refers to changing the election of the president. The second process is the proposed amendment to change the gender representation in the Government.[29]

4. *What is the role of the Court in your jurisdiction? Does it play a countermajoritarian role, a representative role, an enlightened role, or some combination of the three—and how does this role inform whether and how (if at all) the Court exercises constitutional control of constitutional reforms?*

Related to the constitutional review of amendments, the Constitution of Kosovo authorizes the Constitutional Court to evaluate amendments, in two different directions. Initially, the Constitution authorized the Assembly, the President, and the Government to request from the Constitutional Court an assessment of the compatibility of a proposed constitutional amendment with binding international agreements[30], ratified according to the Constitution and the review of the constitutionality of the procedure followed.[31] In paragraph 3 of Article 113, while addressing the competencies of the Constitutional Court, the Constitution of Kosovo specifies that: "The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to raise the following issues: Subparagraph 4: *"the compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed"*. From the analysis of the Judgments so far and the study of the jurisprudence of the Constitutional Court, it results that such a procedure, to exercise this type of control, has never been initiated by the authorized authorities as above. The other aspect or issue in which the Constitutional Court of Kosovo has constitutional powers of review of amendments, has to do with the evaluation of the proposed constitutional amendments, in order to determine whether the proposed amendment reduces (diminishes) the rights and freedoms of guaranteed, by Chapter II of the Constitution.[32] Otherwise, this jurisdiction, known as (Ex-ante) gives the Constitutional Court the right to pre-evaluate the proposed constitutional amendment.[33]

IV. LOOKING AHEAD

Amending the Constitution to turn the KSF into a Kosovo army has failed due to the blocking vote of minority communities in the constitutional amendment process.[34] As a result, on December 14, 2018, unable to change the constitution, the Assembly of Kosovo adopted three laws

26 Constitution of the Republic of Kosovo Article 113, paragraph 4, point (4).

27 Luz Balaj, '*Explicit and Implicit Unamendable Constitutional Provisions from The Perspective of The Kosovo Constitution*' in 'Perspectives of Law and Public Administration', Vol. 9, Issue 1, (2020).

28 Judgment of the Constitutional Court no. KO 29/12 and K.O. 48/12.

29 Judgment of the Constitutional Court no Nr K013/15.

30 According to D Doli and F Korencia "A binding international agreement is an agreement that has been ratified under the authority of this constitution. See also: Doli, D., Korenica, F., *'Kosovar Constitutional Court's Jurisdiction: Searching for Strengths and Weaknesses'* (German Law Journal, n.d.), Vol. 11, No. 08.

31 Constitution of the Republic of Kosovo (2008), Article 113, paragraph 3, point (4).

32 Ibid, article, 113, parag. 9.

33 An accurate explanation of the nature of this jurisdiction can be found in the first Judgment of the Constitutional Court, on the assessment of constitutional amendments. See also: Case No. Ko 38/12 Ko 29 and 48/12 Item 66.

34 Constitution of the Republic of Kosovo. Article 144 paragraph 2 (Any amendment shall require the approval of two thirds (2/3) of all members of the Assembly, including two thirds (2/3) of all members of the Assembly holding reserved or guaranteed seats for representatives of non-majority communities in the Republic of Kosovo.

which enabled the transformation of the KSF into an army in Kosovo. The approved laws, with 106 votes in favor and one abstention were: Law on the Kosovo Security Force; Law on the Ministry of Defense and Law on Service in the Kosovo Security Force.[35] After the establishment of the Kosovo Army by law, a soft support came from NATO, despite the expressed reservations, NATO expressed its readiness to support the development of the Kosovo Security Force.[36] From the content of these laws, it is clear that these laws have the features of quasi-constitutional amendments. This is for two reasons, that such a change was initially foreseen to happen through the amendment, while the second, also from the constitutional language, it is clearly seen, that these laws have exceeded the constitutional provisions in the areas that regulate the military organization in Kosovo. Such a process will eventually require the completion of the transition in the military sphere, through the amendment of the constitution.

V. FURTHER READING

Luz Balaj, *'Explicit And Implicit Unamendable Constitutional Provisions From The Perspective Of The Kosovo Constitution'* in Luz Balaj 'Perspectives of Law and Public Administration', (Volume 9, Issue 1, 2020).

Luz Balaj & Floren Muqaj, 'The Extension of the Jurisdiction of Constitutional Court in Assessing the Constitutional Amendments – the Case of Slovakia and Kosovo' in International and Comparative Law Review, 2020, vol. 20, no. 2, pp. 239–253. DOI: 10.2478/iclr-2020-0027.

35 Kosovo legislature approves creation of national army, DW, article, https://www.dw.com/en/kosovo-legislature-approves-creation-of-national-army/a-46734640, qasur me 09.01.2021. Bianca Britton, "Kosovo lawmakers approve army, as tensions with Serbia risë", 14 December 2018, CNN, https://edition.cnn.com/2018/12/14/europe/kosovo-approves-law-army-serbia-opposition-intl/index.html, qasur me 07.01.2021.

36 Statement by the NATO: *'Secretary General on the adoption of the laws on the transition of the Kosovo Security Force'*, (2018), NATO. <https://www.nato.int/cps/en/natohq/news_161631.htm?selectedLocale=en>.

Kyrgyzstan

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I. INTRODUCTION

On January 10, 2021, early presidential elections and a referendum to determine the form of government were held in Kyrgyzstan. On January 20, the CEC summed up the results. Sadyr Japarov was declared the winner. 79.2 percent of voters voted for him. According to the results of the plebiscite, 81.3 percent chose the presidential model of the state structure.

In the spring, the country will have another popular vote, but already after the adoption of the draft of the new edition of the Constitution. Its redrawing has long been a favorite pastime of the country's authorities.

The constitution of independent Kyrgyzstan in 1993 was adopted after the collapse of the Soviet Union. The project was prepared by a special committee and discussed for two years—from 1991 to 1993. The new draft, among other things, determined the powers of state institutions new to the country: the President and the Constitutional Court.

The 93 Constitution is considered the most progressive and establishing system of checks and balances between the branches of government. During the regime of the first president, Askar Akayev, the Constitution was revised five times in favor of strengthening the powers of the president, and changes were also made to other norms in 1994, 1996, 1998, 2001, and 2003. The changes were developed by members of the constitutional meeting.

Kurmanbek Bakiev (the second president), who replaced Akaev, did not return the first Constitution but he instructed to write a new one. However, in November and December 2006, an opposition group of deputies prepared and adopted two versions of the Constitution. But on September 14, 2007, the Constitutional Court canceled the actions of the November and December editions. The 2003 version of the Constitution came into force again. However, in 2007, according to the decree of President Kurmanbek Bakiev, a nationwide referendum was held, which adopted a new version of the Constitution.

Amid bloody inter-ethnic clashes in the south of the country after the coup d'état on April 7, 2010, the interim government (headed by the President of the Transitional Period, Roza Otunbaeva) is holding a referendum on the adoption of the new Constitution. Its authors are considered to be members of the constitutional meeting headed by Omurbek Tekebaev. The constitution changes the form of government from presidential to parliamentary, limiting the powers of the head of state. The Constitutional Court has been abolished. Instead, a Constitutional Chamber was created under the Supreme Court. The document, among other things, pays great attention to human rights, especially section two. Article 16 prohibits all types of discrimination. Article 20 contains provisions on the rights of prisoners, including the abolition of the death penalty and torture. Also, the law on the entry of this Constitution imposed a moratorium on constitutional changes for at least ten years (until 2020).

However, in the summer of 2016, a draft amendment was submitted to parliament, in particular, expanding the powers of the prime minister. The country at that time had a moratorium on amendments until 2020. But neither the deputies nor Almazbek Atambaev, who was president at the time, was embarrassed by the existing ban. The Constitutional Chamber, by ten votes to one, found that the draft amendments did not violate the law. The Venice Commission and the ODIHR published their opinion on the draft amendments. In December 2016, the amendments were approved in a referendum held without OSCE supervision.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. NOVEMBER 18, 2020

Sadyr Japarov, who came to power following the political events in October 2020, announced that the country was awaiting another constitutional reform. A bill on the appointment of a referendum on the adoption of a new draft Constitution and a proposed version of the country's main document focused on the presidential form of government, appear on the official website of the parliament. The concept also includes changing the electoral system from proportional to majority-proportional, reducing the number of the deputy corps to 90 people, and creating the kurultai institute. Lawyers and civil activists criticized the announced project, calling it a "khanstitution" or "Kingstitution", and Sadyr Japarov, who originally had the idea to rewrite the Basic Law, was accused of trying to usurp power. In Bishkek, protest marches began against the redrawing of the Constitution and a possible plebiscite.

2. NOVEMBER 20, 2020

Acting President Speaker of the Parliament Talant Mamytov (he received this prefix after Sadyr Japarov resigned his powers due to

participation in the presidential elections.—Note) signed a decree on convening a constitutional meeting. Lawyers who were not included in the constitutional meeting declared its illegitimacy, and the members of this body were accused of incompetence. They responded by asking them to recall the events of 2010[1] and the June 27 referendum, which took place at the height of the interethnic conflict in the south[2].

3. DECEMBER 11, 2020

The work of the constitutional meeting has been suspended. Talant Mamytov signed a law calling for a referendum to determine the form of government in Kyrgyzstan. The law was adopted by the Jogorku Kenesh (Kyrgyz National Parliament) on December 10. The document provides for the appointment of a referendum throughout the country on January 10, 2021. The question concerning the choice of the form of government of the Kyrgyz Republic is submitted to a referendum:—presidential republic;—parliamentary republic;—against all options. The law came into force on the day of its official publication.

4. JANUARY 10, 2021

On the second Sunday of the new year, early presidential elections and a plebiscite to determine the form of government were held in Kyrgyzstan. 81.3 percent supported the presidential model of government. In the spring, Kyrgyzstanis will have to go to the ballot boxes again and adopt another new draft of the Basic Law, aimed at expanding the powers of the head of state.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The October 5 events have caused turmoil in political and social life of Kyrgyzstan and have left their mark: the new interim government has come, Member of Parliaments of the 6th convocation could not abandon their mandates, and now the amendments to the basic law of the country—the Constitution—are coming up.

On November 17, the draft law «On the constitution», which was initiated by 80 members of this parliament, was submitted for public discussion. The referendum on the new draft was proposed by the parliamentarians to be held on January 10, 2021. Due to the massive critics on hurries of constitutional changes it was not happened. There was a decision to prolong work of the Constitutional Meeting (Council/Conference).

1. CONSTITUTIONAL MEETING

As for the status of the Constitutional Meeting, some experts say that all this is being done illegally. This body was created by decree of Acting President. And according to the Constitution, he has no authority either to convene the Constitutional Meeting, or to initiate constitutional reform. But the members of the Constitutional Meeting are silent. The work of the Constitutional Meeting does not comply with democratic principles. Members were not supposed to edit the document they had sent but create a new one.

Now, the latest version of the Constitutional draft is under "big secret". I have asked my colleagues from the Constitutional Meeting, but they weren't been able to provide it for me. The Chair of the Constitutional Meeting is keeping the final draft and planning to submit it next week to the Parliament.

2. REFERENDUM (1ST)

On January 10th was only one question regarding the forms of government: What do you prefer: presidential or parliamentarian system? In a hurry, with gross violations, the Jogorku Kenesh adopted a bill on holding a referendum. The wording of the question put to the referendum contradicts the very law on referendum, according to which it is necessary to exclude the possibility of multiple interpretations. According to the wording, it is not clear what is meant by the parliamentary and presidential forms of government, since there are many of them. "We must proceed from the content, not from the definition. In the USA, for example, the presidential form works successfully. In Kyrgyzstan, it rested on authoritarianism. But a dictatorship can appear in both parliamentary and mixed forms. This is important to understand." Nurlan Sadykov, Director of the Institute for Constitutional Policy

3. WHY DOES THE CONSTITUTION NEED NEW AMENDMENTS?

According to the initiators of amendments, they do it at the request of the masses in order to fight corruption in government agencies and to consider the opinions of the wider population when drafting trends of the national development.

The need for the constitutional reform is based on numerous factors, including existing discrepancies and gaps in provisions of the existing Constitution, inefficiency of the existing system of government, and lack of mechanisms to hold it liable. These circumstances did not become legal instruments for real promotions in economic and social spheres, which causes fair criticism of the authorities by the society and citizens of the Kyrgyz Republic», according to the explanatory notes to the draft of law.

4. WHAT WILL BE CHANGE

The new version of the Constitution is close to the 1993 version and contains not 9 chapters as the existing one, but 5—chapters 3 to 7 about the president, government, parliament and judicial authorities have been reduced.

In brief, the main amendments refer to:

1. the rights and liberties of citizens,
2. the introduction of the People's Kurultai,
3. the expansion of presidential powers and holding him/her liable for the formation and performance of the government,
4. the reduction of the number of parliamentarians and reduction of their powers.

The proposed version of the main law changes fundamentally the vertical power structure, and the form of government shifts from parliamentary back to the presidential as was during before 2010.

1 The April Revolution (the second revolution in Kyrgyzstan. There were three in total: March 24, 2005 and the last October 6, 2020)

2 June events more from PEA

Lawyers fear that the proposed changes will lead to dictatorship and usurpation.

5. PRESIDENT AND ITS NEW POWER

According to new amendments, the Head of State can be elected for two terms and control the executive branch.

The role and powers of the Head of State will expand significantly. For example, the president will also exercise executive powers—he may appoint prime minister and form the structure of the Government with consent of the parliament. In fact, prime minister will be subordinate to the President and may cancel acts adopted by the cabinet of ministers, whereas the activities of the Government will be controlled by the Presidential administration.

The same refers to the representatives of the executive branch, Head of State administrations and chairs of state committees. He may dismiss them from office at his discretion or as suggested by the People's Kurultai.

The powers of the President also include the right to initiate draft laws and set a date of referendum at the initiative of at least 300 thousand voters, the majority of the total number of members of the parliament.

Besides, the President will not only head the Security Council, but also form it, as well as the State Security Guard Service and National Guard. If he fails to exercise his powers, the functions of the President will be delegated to the Prime Minister, not the Speaker of the Parliament, as it is now.

6. PEOPLE'S KURULTAI

According to the new draft of the Constitution, People's Kurultai is proposed to make the supreme advisory, consultative and coordinating body of popular rule. Moreover, it will have the right to make decisions regarding development of the state and society, rights and liberties of citizens, as well as to report inaptitude to the position held by representatives of state agencies and local governments. It is already clear in advance that this body will be fully controlled by the presidential apparatus.

In fact, the idea of the People's Kurultai is not new. It was suggested 10 years ago, but the law was never adopted. The system of people's kurultai was set forth in law at the level of local community only.

Kurultai is one of the forms of popular rule, which can raise the question straightforward and issue a yellow or red card (as a football terminology) to the Speaker of Parliament or President. The tricky part is the draft Constitution, which reads that Kurultai may convene at the President's initiative, not people's.

It is unknown who will be its members and the principle of their selection. Its efficiency also raises doubts—the decisions made by this body will be of advisory nature, whereas the People's Kurultai will not be able to convene on its own.

Expert Emil Dzhuraev noted that the proposed project still contains points that initially raised questions. In particular, the people's kurultai and the president's address to the nation broadcast through it. "The idea of creating a folk kurultai is utopian. The 21st century is outside, and we are raising from the darkness of times and reanimating some archaic organs. What for? There is a parliament, and if the Constitution obliges the president to address the people, then he should do this only in the Jogorku Kenesh. As it was before, when ministers, heads of regions and representatives of the judicial branch of government were invited to the meetings. Or through television, through social networks, whatever you like, but not through the kurultai," said Emil Dzhuraev.

7. PARLIAMENT

Initiators suggest to cut down the number of parliamentarians from 120 to 90, and their authorities will be reduced, too.

By the way, the decision that the Parliament should consist of 90 members had been already made earlier. The constitutional reform of 2003 established that in 2005 the unicameral parliament would be formed—the new composition of Parliament should have been elected from party lists in the total number of 90 deputies.

The public demanded the reduction in the number of parliamentarians long ago, but in this situation, there are concerns that 90 deputies will not be able to stand against the Head of State, who can initiate laws, select the composition of the Government, etc.

In the new version of the Constitution, the Parliament will have to agree many decisions with the President and the People's Kurultai. Now, Parliament has the right to fix the date of referendum; if the new Constitution is adopted, the President will have the decisive word.

Also, the clause reading that a MP may be appointed as Prime Minister or First vice Prime Minister and retain the MP's mandate and the voting right at plenary sessions of the parliament is removed now.

Legislative initiative: The president again has the right to initiate legislation and can return laws with objections to the JK. The head of state does not have an absolute veto right.

In addition to him, the Kurultay, the Prosecutor General's Office and the Supreme Court were also endowed with such a right of legislative initiative.

Thus, now, instead of three subjects (10 thousand voters (people's initiative); MPs of the Jogorku Kenesh; Government), which today have this right, under the new constitution there will be seven subjects.

8. GOVERNMENT CHANGE

In terms of its structure, it won't, but it's not exact. The role of the President will strengthen in the performance of the cabinet of ministers. According to the new draft of the Constitution, he will be in control of the activities of the executive branch, give orders to the Government and subordinate agencies, control the implementation of his orders, cancel acts of the Government and subordinate bodies, suspend ministers and chairs of state committees from office.

Now, the Head of State may attend sessions of the Government. The President will also decide the structure of the cabinet of ministers.

9. CONSTITUTIONAL CHAMBER WILL NOT BE A PART OF THE SUPREME COURT

According to the new version of the main law, the Constitutional Court will again become an independent body, as before.

After the April 2010 events, the Constitutional Court was dissolved

by decree of the Interim Government, and the Constitutional Chamber of the Supreme Court appeared in 2013.

Constitutional Court, according to the new draft law, will perform the following functions:

10. interpret the Constitution officially;
12. give opinions to the draft law regarding any amendments and modifications to the Constitution;
13. issue opinions about compliance with the procedure of bringing charges against the president;
14. solve disputes regarding the competence between the branches of the state power;
15. determine cases regarding compliance of laws and regulations with the Constitution;
16. issue opinions regarding the validity of international treaties, to which Kyrgyzstan is a member, that wait to come into force.

The decision made by the Constitutional Court shall be final and may not be appealed.

10. CHANGES IN THE JUDICIAL SYSTEM

There are no significant changes in the judicial system. The new version suggests to elect the judges of the Constitutional and Supreme courts before they reach the age limit, 70 years old.

The President, upon consent of the Parliament, may appoint the Chair and deputies thereof for 5 years. This practice was available before 2010, but many thought the independence of the judicial system was allegedly violated this way.

According to the new version, a judge of the Constitutional Court may be a citizen of Kyrgyzstan not younger than 40 and not older than 70 years old, with a degree in law and experience in legal profession for at least 15 years.

A judge of the Supreme Court may be a citizen of Kyrgyzstan not younger than 40 and not older than 70 years old, with a degree in law and experience in legal profession for at least 15 years, including at least 5 years as a judge.

A judge of a local court may be a citizen of Kyrgyzstan not younger than 30 and not older than 65 years old, with a degree in law and experience in legal profession for at least 5 years.

11. CENSORSHIP

Article 23 of the new version of the Constitution implies that the authorities will be using it to restrict the activities of undesirable media.

The clauses about moral values, traditions and culture of Kyrgyzstan are very vague and unspecified. It is also unclear who and how will determine them.

Mixing moral and ethical values with law is a dangerous tendency. This is what is planned to be included in the Constitution of Kyrgyzstan.

> "In the preamble of the new edition of the Constitution, the desire of the people to assert the rule of law is going to be replaced by the following:
> 1. Adherence to universal human moral principles
> 2. Striving to assert the supremacy of moral values and social justice.

12. THE NEW WORDING OF THE PREAMBLE IS VERY DANGEROUS. WHY?

"The preamble of the Constitution expresses the main political decision of the society and reflects the main aspirations of the state and people. The preamble is the fundamental premise of all subsequent norms and defines the true goals of society. So, in the preamble of the new edition of the Constitution there is a substitution and replacement of objective legal norms with subjective norms of morality and ethics. Replacing the rule of law with the rule of moral values is fraught with the fact that in the future this may lead to the establishment of a "punitive state", a gendarme that will pacify everyone who deviates from the so-called "moral values" of society", said Prof of American University in Central Asia Saniya Toktogazieva.

"The most dangerous thing lies in the idea of removing the notion of "secularism" from the Constitution. Strengthening towards Islamization will begin, and religious scholars will have the opportunity to interfere in the affairs of state institutions. A very dangerous precedent." Ms Tattybubu Ergeshbaeva, expert on constitutional law.

The new version also has no clauses regarding the right of every citizen to receive information about the activities of state agencies, local governments and state enterprises, and the right of every Kyrgyzstan to freely seek, get, retain, use information, and distribute it verbally, in writing and in any other way. If the new Constitution is adopted, it's only the media that will have this right.

13. CAN THE NEW CONSTITUTION BE AMENDED?

Yes, only the referendum fixed by the President at the initiative of the majority of parliamentarians may decide to amend the Constitution. The Parliament, at the initiative of the President, may also make such a decision by the majority of deputies or at the initiative of at least 300 thousand voters.

If now the Constitution does not allow to amend the chapters regarding the fundamentals of the constitutional system and the human and citizen's rights and liberties, the new version has no such restrictions.

If the new Constitution is adopted, all previous versions will become invalid, as is written in the draft law. The Parliament and the Government will have to bring all existing laws into line with the new Constitution within 6 months.

A constitutional referendum will be held on April 11, along with local council elections.

If people will positively vote for the new draft of the Constitution, then MPs will have to adopt more than a thousand laws.

IV. LOOKING AHEAD

The Venice Commission released an urgent opinion today "amicus curiae" on the postponement of the parliamentary elections in connection with the constitutional reform in Kyrgyzstan.

The opinion was prepared at the request of the Constitutional

Chamber of the Supreme Court of Kyrgyzstan on November 4, 2020.

In its opinion, the Venice Commission notes that, while there is no practice in postponing elections by the outgoing parliament, there are nevertheless several guidelines that need to be followed to ensure that international principles and good democratic practices are respected.

The Venice Commission states that when the parliament's mandate is extended beyond the constitutional deadline, due to elections being postponed, parliament only limits its powers and has no legitimacy to carry out constitutional reforms.

Any amendments to the Constitution and legislation must comply with the procedure and time frames established by the constitution and law.

The Venice Commission emphasizes that it does not intend to comment on the political situation/disputes in the Kyrgyz Republic, which are the background for the consideration of the case, to advocate for a certain result of the consideration or to speak out on the interpretation of the Constitution of Kyrgyzstan. The purpose of the opinion is to assist the Constitutional Chamber by providing a general overview of international democratic principles relevant to the issues raised by the Court. The Commission understands these principles as embodying the three pillars of the European constitutional heritage—democracy, human rights, and the rule of law.

The Constitution of the Kyrgyz Republic, namely Art. 114 gives the initiators the right only to amend this Constitution, and not to replace/substitute it with a new Constitution.[3]

The sixth convocation of the Jogorku Kenesh of the Kyrgyz Republic is not entitled to initiate amendments to the Constitution of the Kyrgyz Republic. Accordingly, only the 7th convocation of the Jogorku Kenesh of the Kyrgyz Republic can legally and legitimately carry out the constitutional reform.[4]

V. FURTHER READING

Main information based on materials provided by:

Ms Saniya Toktogazieva, Doctor of Juridical Science, American University in Central Asia

Mr Kairat Osmonaliev, Doctor of Law, Member of Central Election Comission

Mr Edil Eraliev, lawyer of Precedent law Firm

"Why is the proposed constitutional reform in Kyrgyzstan illegal and how should it be under the Constitution?" Prepared by: Saniia Toktogazieva, Doctor of Juridical Science and Group of Lawyers of the Kyrgyz Republic

See also relevant Internet sources:

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https://ru.sputnik.kg/politics/20201109/1050372757/kyrgyzstan-zhaparov-konstitutsiya-proekt-obsuzhdenie.html

3 Why is the proposed constitutional reform in Kyrgyzstan illegal and how should it be under the Constitution? Prepared by: Saniia Toktogazieva, Doctor of Juridical Science and Group of Lawyers of the Kyrgyz Republic. Page 2

4 Same, page 3

Latvia

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I. INTRODUCTION

In Latvia, the year 2020 marked an introduction of crucial questions of legal and political significance. The main driving force behind them was the Constitutional Court. By its judgments it initiated the discussion over the constitutionally prescribed concept of a "family" in its relation to same-sex relationships as well as the necessity to amend the laws concerning State budget and finance in order to protect the most vulnerable groups of the Latvian society. At the same time, the Latvian society has been active in expressing their legislative initiatives for potential constitutional reform.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

On 16 September 2020, the Committee of Mandate, Ethics and Applications of the Parliament of the Republic of Latvia has considered the legislative initiative signed by 10,479 citizens of Latvia to restrict the previously dismissed Members of the Parliament (the ones who have betrayed confidence of the electorate or do not perform their duties as MPs) to run for the elections of the Parliament. Legal experts have expressed their opinions of the non-compatibility of the proposed amendment with the Constitution of Latvia. The Committee of Mandate, Ethics and Applications dismissed the initiative. However, the non-governmental organisation "My Voice" ("Mana balss") continues gathering signatures on this proposed amendment.

On 12 November 2020, the Constitutional Court of Latvia has adopted a judgment in case No. 2019-33-01, which recognises the right of an absence leave for the partner of the child's mother of a same-sex couple. On the basis of human dignity of every individual, non-discrimination and the right to private life, the Constitutional Court has recognised that same-sex couples are to be considered as a family, which is protected by Section 110 of the Constitution of Latvia. The judgment requires the legislator to make an in-depth research and amend numerous Latvian laws to enforce legal protection as well as social and economic protection and support measures of families of same-sex couples.

On 25 November 2020, the platform of a non-governmental organisation "My Voice" ("Mana balss") which has developed as a platform for gathering legislative initiatives, has received an initiative for the legislator to amend the Constitution of Latvia to strengthen legal recognition, protection, and support for the concept of "natural family", which recognises the rights of a child to a mother, who is a woman, and a father, who is a man, and not permitting the redefinition of these concepts. The non-governmental organisation "My Voice" has declined to publish this initiative with a reference to its quality standard.

However, in early 2021, the political party "National Union" ("Nacionālā apvienība") has officially proposed a constitutional amendment to amend Section 110 of the Constitution of Latvia in clarifying the concept of "family". In response to that, the political union "Development/For!" ("Attīstībai/Par!") has initiated the involvement of Prime Minister of the Republic of Latvia in this constitutional discussion in order not to allow any discrimination of various kinds of families living in Latvia. The development of this constitutional initiative is yet to be seen.

In addition, discussions gathering constitutional law experts have been held to examine the necessity of formation of a Council of a State, which according to the French model would serve as an institution, which would elaborate draft laws. This initiative is aimed at enhancing the quality of laws and would potentially have an impact on a constitutional reform. The progress of this idea is yet to be seen.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The development of a potential constitutional amendment on the clarification of the concept of "family" in light of a legal recognition of same-sex relationships in the Latvian legal system is to be considered as an amendment and its progress is yet to be seen. However, it has to be stressed that it has been exactly the role of the Constitutional Court of Latvia, which initiated the discourse on the necessity to legally recognize and adequately protect same-sex families.

In the jurisdiction of Latvia, the Constitutional Court embodies a combination of all three roles—the countermajoritarian role, the representative role, and the enlightened role. Although the Constitutional Court does not have the power to exercise constitutional control over the amendments of the constitution itself, several of its judgments of the year 2020 point out to its involvement in guiding the legislator and executive to amend the most relevant laws regarding the constitutionally prescribed social and economic rights. That should enhance State's sustainable development, as the Constitutional Court concludes. These cases directly affect the distribution of State finances and State budget.

1. In the case No. 2019-24-03 the Constitutional Court had to rule on the compatibility of the law prescribing the State-guaranteed minimum income level with Section 1 (which stipulates that Latvia is an independent democratic republic) and 109 (which stipulates the right to social security) of the Constitution of Latvia. On the basis of respect of human dignity and observing the principle of socially responsible State ensuring the social equality and State's sustainable development, the Constitutional Court ruled that the State minimum income of 53,00 EUR a month is incompatible with the Constitution of Latvia and proclaimed it as invalid as of 1 January 2021.
2. Similarly, in the case No. 2019-25-03 the Constitutional Court held that the law that prescribes the average income level according to which a person or a family is to be considered poor, was incompatible with Sections 1 and 109 of the Constitution of the Latvia.
3. Also, in the case No. 2019-27-03 the Constitutional Court proclaimed that the amount of State-prescribed social support benefit for unemployed persons with disability and seniors is incompatible with Sections 1, 91 (prohibition of discrimination) and 109 of the Constitution of Latvia.
4. In the same vein, in the case No. 2020-07-03 the Constitutional Court proclaimed that the laws prescribing the minimum amount of old-age pensions are incompatible with Sections 1 and 109 of the Constitution of Latvia.

IV. LOOKING AHEAD

With regard to the clarification of the concept of a "family" in the Constitution of Latvia, the future debate is dependent on political compromise. At the same time, the politicians cannot disregard the guidance given by the Constitutional Court to amend the Latvian laws so that they address and reflect the need and the social reality to protect same-sex families.

Also, the other potential constitutional reform initiatives is amending the basic national laws on the State finance and budget to protect the most vulnerable groups of the Latvian society, as well as the idea of creating a new (constitutional) organ, a Council of a State to enhance the quality of the draft laws, depend on the political will. However, both initiatives are well-grounded in strong rule of law considerations, which give them their weight of legal quality.

V. FURTHER READING

I Ziemele, *Interview 'The Justices of the Constitutional Court should Observe the Processes in the Society' ('Satversmes tiesas tiesnešiem "visas antenas" ir jānoregulē uz procesiem, kas notiek sabiedrībā')* (2020, Lawyer's Voice—Jurista Vārds)

M Šķiņķis, *'Commentary on the Judgment No, 2019-33-01 of the Constitutional Court' ('Komentārs par Satversmes tiesas spriedumu lietā Nr. 2019-33-01')* (2020, Lawyer's Voice—Jurista Vārds)

I Bite, *'The Constitutional Court as the Positive Legislator' ('Satversmes tiesa kā pozitīvais likumdevējs')* (2020, Lawyer's Voice—Jurista Vārds)

E Pastars, *'The Court's Judgment: a Possibility for a Proportionate Political Compromise' ('Tiesas spriedums: iespēja samērīgam politiskajam kompromisam')* (2020, Lawyer's Voice—Jurista Vārds)

Lithuania

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I. INTRODUCTION

The year of 2020 for all jurisdictions has been quite special because of the COVID-19 pandemic, and the constitutional adjudication is not an exception. But the reforms brought by this phenomenon are scheduled for the years to come, when appropriate constitutional justice cases all over the world will be resolved.

Meanwhile the year 2020 was significant for Lithuanian constitutional order because it has embodied one of the most important constitutional reforms since 1992, when the Constitution of the Republic of Lithuania has been adopted by the referendum of Lithuanian people. Although the amendments to the Constitution introducing individual constitutional complaint came into force on 1st September 2019, the year of implemention of this constitutional reform is undoubtedly 2020. This constitutional reform was long-anticipated and discussed for more than ten years[1], before the necessary amendments were successfully made. This review will address the main characteristics of the new constitutional institute that could be considered one of the most significant constitutional reforms and second major constitutional change after Lithuania's accession to the European Union. The reform was warmly welcomed by all the enthusiasts of human rights and considered to be an effective instrument for the individuals seeking the reestablishment of their infringed constitutional rights and freedoms.

The year 2020 will also be marked in Lithuanian constitutional history concerning the non-implementation of one important procedural rule, enshrined in the Constitution, namely, the rotation of constitutional justices. Under the Article 103 of the Constitution, every three years one-third of the Constitutional Court is reconstituted. The candidates for justices are nominated by the Speaker of the Parliament, President of the Republic and President of the Supreme Court, and then voted by the Parliament. This year for the first time since the establishment of the Constitutional Court in 1993 the renewal of the composition of the Constitutional Court failed. After the Parliament has rejected all the three nominees in March 2020, the rotation process did not come to an end till the moment this paper has been drafted. The failed rotation of constitutional justices might be a worrying sign of the possible interference of political institutions to the activities of the Constitutional Court and the potential threat to the principle of the judicial independence. However, as the process is still ongoing, it is recommended to analyze this issue next year.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The introduction of individual constitutional complaint was enacted through a procedure of constitutional amendment. This amendment was made according to the constitutional procedures, i.e. considered and voted at the Parliament twice, with a break of not less than three months between the votes, having in favor not less than 2/3 of all the Members of the Parliament[2]. The content-based approach might only confirm that it was one of the significant constitutional changes since the adoption of the Constitution in 1992.

While analyzing the new constitutional instrument, it is worth to notice that the first attempt to amend the Constitution introducing provisions on individual constitutional complaint failed in the mid of 2017, as required qualified majority of parliamentarian votes was not achieved. According to Constitution, a failed amendment to the Constitution may be submitted to the Parliament for reconsideration not earlier than after one year. However, the initiators of this amendment were quite impatient and keen to introduce the changes as quick as possible. Their intentions might be quite understandable, as the question of the introduction of the individual constitutional complaint in Lithuania was discussed since 2004[3], action of Parliament begun in 2007, then the reform was several times postponed for various reasons. Though, it was considered as inevitable change for the more effective protection of the human rights and freedoms. Thus, in order to bypass the constitutional requirement of the postponement of a new amendment for one year, the updated version of amendment was registered,

1 In 2007 the Parliament adopted the Conception on introduction of the individual constitutional complaint (Decision of Seimas of 4th July 2007 No 1246 *Official gazette*, 2007-07-12, Nr. 77-3061), providing the conditions and terms for filling the petition before the Constitutional Court, but the reform was implemented only this year.

2 Constitutional procedure for the constitutional amendments is enshrined in Article 148 of the Constitution that could be changed itself only by referendum.

3 While considering having a new constitutional mechanism for human rights protection, there was a statement, that there could be more than one way to introduce the individual complaint institute into Lithuanian legal system. The more traditional and most probable way is to make an amendment to the Constitution and another possible way might be introducing this right to through the official interpretation of existing constitutional provisions (Articles 6, 30), made by Constitutional Court. See more: Toma Birmontienė "The perspectives of introducing the constitutional complaint in the Republic of Lithuania" in *The Limits of Constitutional Review of the Ordinary Court's Decisions in the Proceedings of the Constitutional Court* (Ustavni Soud Českerepubliky Praha, 2005) 143-155.

calling it the "new" amendment, thus, not required waiting for a year to pass it in the Parliament. This could raise some discussions about the correctness of fallowing the procedure, but expectations for the change were so considerable, that they overweighed the doubts. The initial idea was to amend the Constitution, providing with a few new subjects that might address the Constitutional Court: according to the first draft of amendment the individual persons, also ombudsmen shall have a right to fill a petition before the Constitutional Court in the area of their competence. In the so-called new project only the provisions on the possibility for the individual persons to address the Constitutional Court left, not mentioning the ombudsmen anymore.

This time the constitutional amendment procedure went well, and the articles 106 and 107 of the Constitution were amended successfully, introducing the new subject entitled to fill a complaint to the Constitutional Court—individual person. Hence, the constitutional amending procedure was formally followed, although is possible to question whether the amendment project, in which some slight elements were changed, but the essence of it remained, could be really considered as a new project that could be presented without waiting the constitutional gap of one year.

The amendment of the Constitution introducing the individual constitutional complaint refers to the textual alteration of two constitutional articles. First of all, article 106 providing the subjects that are entitled to address the Constitutional Court in their respective competence was supplemented by the brand new 4 paragraph, providing that "*Every person shall have the right to apply to the Constitutional Court concerning the acts specified in the first and second paragraphs of Article 105 if a decision adopted on the basis of these acts has violated the constitutional rights or freedoms of the person and the person has exhausted all legal remedies. The procedure for implementing this right shall be established by the Law on the Constitutional Court.*" Also concerning the consequences of such a petition, the article 107, which regulates the outcome of the constitutional decision, was supplemented by a new paragraph stating that a decision of the Constitutional Court adopted upon the individual complaint that a challenged legal act is not in compliance with the Constitution, is "*a basis for renewing, according to the procedure established by law, the proceedings regarding the implementation of the violated constitutional rights or freedoms of the person.*"

Thus, the amendments to the Articles 106 and 107 of the Constitution not only introduced the individual constitutional complaint, but also determined some requirements that must be respected by the individual before addressing the Constitutional Court, and determined further means to protect the individual's rights[4]. As it is provided by the Constitution, more detailed regulation was established by the Law on Constitutional Court.

First of all, it must be headlined that a right to fill a petition before the Constitutional Court is afforded to all the individual persons, might it be physic or moral person, having the Lithuanian citizenship, or not. Thus, the range of subjects entitled to address the Constitutional Court was broadened[5]. Secondly, it is obvious from the provisions of the Constitution that Lithuania did not opt for *actio popularis*. Every person addressing Constitutional Court has to prove the direct link between the challenged legal act and the violation of their rights and freedoms. Particularly, only the people whose rights have been violated by the challenged legal act may fill the petition.

Only legal acts falling in competence of Constitutional Court could be challenged[6]. The broader range of subject to address the Constitutional Court did not broaden its competence: individuals can challenge only legal acts, adopted by Parliament, Government and President of the Republic, but Constitutional Court cannot control the constitutionality of the judicial decisions, as it is not the supreme instance above the Supreme Court of the Republic of Lithuania. It was very important to preserve the clear delimitation between constitutional and ordinary or administrative jurisdictions, as the Lithuania has chosen European model of constitutional control, where the Constitutional Court is a special institution, separated from other jurisdictions (although under the Constitution, and still being part of the judicial power[7]). Therefore, the Constitutional Court does not interfere with the jurisdiction of ordinary or administrative courts and cannot verify the constitutionality of their decisions. The Constitutional Court does not decide neither upon individual request nor under the petition of other subject entitled to address the Constitutional Court on the constitutionality of the ministerial decisions or acts of local governments. Their constitutionality might be controlled in administrative courts.

One of the most discussed requirements imposed by the amended Constitution to the individuals is the requirement to exhaust all legal remedies before addressing the Constitutional Court. This requirement was elaborated by the Law on Constitutional Court providing that final judicial decisions that are not a subject to appeal must be adopted. By this requirement, it was assured that the competence of ordinary or administrative courts remained unchanged and namely those jurisdictions should be considered as a primary instrument to protect individual rights and freedoms.

The Article 65.2.3 of the Law on Constitutional Court provides that the individual application might be filled in only if the term of four months after the day that the final non appealable decision came into force did not expire. Although the duration of the term for filling the petition is provided by the ordinary legislation, the requirement itself

4 The decision of the Constitutional Court recognizing the act contrary to the Constitution does not change the individual situation directly, as the Constitutional Court can invalidate only challenged legal regulation, but not the decision adopted towards the individual person, violating their rights.

5 Before these amendments came into force, only state institutions—the Parliament, the Government, the President of the Republic and the courts (ordinary and administrative jurisdictions) could address the Constitutional Court. The individuals had only indirect access to the constitutional control via the courts, asking the latter to address their question of constitutionality to the Constitutional Court and decide on the matters only after its assessment. This demand was not binding to the court if the court had no doubts by its own on the compatibility of the norm applicable in the case with the Constitution.

6 Under the Article 102 of the Constitution the Constitutional Court "*shall decide whether the laws and other acts of the Seimas are in conflict with the Constitution, and whether the acts of the President of the Republic and the Government are in conflict with the Constitution or laws*". Constitutional Court construed that it stems from the Constitution that, taking into consideration *inter alia* the hierarchy of legal acts and the separation of powers, the jurisdiction of the Constitutional Court covers not only the legal acts *expressis verbis* mentioned in the Constitution, but any legal act, adopted by the Parliament, Government or the President, or the one that is adopted by referendum, be it the acts of higher legal power than the laws, i.e. constitutional laws, or the acts of lower legal power, i.e. sub-statutory legal acts adopted by the Parliament. Constitutional Court Ruling of 28 March 2006 <https://www.lrkt.lt/en/court-acts/search/170/ta925/content>

7 The Constitutional Court was confronted by a case where it had to decide, whether it was a judicial institution after all, or not; the answer was positive. Constitutional Court's Ruling of 6 June 2006 <https://www.lrkt.lt/en/court-acts/search/170/ta1339/content>.

stems implicitly from the Constitution. The Constitutional Court while construing new constitutional provisions held that the right to apply to the Constitutional Court is implemented in accordance with the other conditions established by the Law on the Constitutional Court, *inter alia*, within the time limit set by this law[8]. Therefore, the legislator had no other choice but to establish the appropriate term by its own discretion limiting the implementation of the right to individual constitutional complaint. According to the provisions of the Law, the aforementioned term can be renewed, if the time limit has been missed due to important reasons.

There is no requirement in the Constitution, nor in the Law on Constitutional Court to have a lawyer in order to fill in the petition. There is neither any court fee for the individual constitutional complaint. The legislator amending the Constitution decided to make this new possibility available to the greater number of persons interested in the defense of their constitutional rights and freedoms.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The introduction of the individual constitutional complaint has led to some changes in the administration of constitutional justice in Lithuania but it did not transform the constitutional system itself, did not destroy nor remake it. The new constitutional doctrine on the admissibility of petitions, applicable for all the petitioners, not only the individuals, was formulated and the new grounds for the refusal to accept the petition were introduced. But it did not create any new constitutional order, the Constitutional Court did not acquire any new competences, the field of constitutional control was left the same as before. The consistency of the existing Constitution and the essence of constitutional adjudication was kept as it was in the pre-change form, the harmony of the constitutional regulation was not infringed, as the change embedded coherently in the existing constitutional architecture. Hence, there is no place to consider this change as a constitutional dismemberment, occupying the space between and amendment and a new constitution[9,10]. This change was long-anticipated and finally accomplished, and its impact to the future jurisprudence is rather predicted to be positive. As it comes from the assessment of the Constitutional Court, this amendment goes in line with the constitutional spirit of the effective protection and defense of the constitutional rights and freedoms that could be violated by a decision adopted based on legal acts (parts thereof) contrary to the Constitution[11]. It could be assessed that this amendment has finally aligned the constitution to the expectation of individuals to have this ultimate instrument for the protection of their constitutional rights and freedoms[12], as before they had only indirect access to the constitutional justice via ordinary and administrative courts.

The constitutionality of this reform might be verified by the Constitutional Court itself, as it has the competence to pronounce on the compliance of the constitutional amendments with the Constitution. Though *expressis verbis* not provided in the Constitution, this competence of the Constitutional Court implicitly stems from it and is disclosed in the constitutional jurisprudence, based on the assumption that no legal act might be immune from the constitutional review, thus, nor having the laws amending the Constitution, otherwise it would be impossible to effectively ensure the supremacy of the Constitution and the rule of law[13]. Constitutional Court has recognized the special nature of laws amending Constitution, stating that amendments to the Constitution are incorporated into the text of the Constitution and the content of the provisions of the Constitution as well as the interrelations between these provisions are changed. These laws can also change the balance of the values consolidated in the Constitution. Therefore, the laws amending the Constitution, in Lithuania have the force of the Constitution[14]. However, laws amending the Constitution are not acts of a constituent nature and it is not a primary source of law, stemming from the direct will of people. They are adopted (by Parliament or by referendum) only in accordance with the rules laid down in the Constitution itself. Therefore, under the Constitution, the Constitutional Court has the exclusive competence to decide whether laws amending the Constitution (amendments to the Constitution) are in line with the substantive and procedural limitations on the alteration of the Constitution, otherwise these constitutional limitations would be rendered meaningless[15].

The Court is authorized also to decide whether the Law on the Constitutional Court including the provisions on individual constitutional complaint is not in conflict with the Constitution. It falls into a regular competence of any institution charged to perform the control of constitutionality of legal acts adopted by the legislative and executive. In this point of view, the Lithuanian Constitutional Court is not an exception, playing the countermajoritarian role while invalidating legal acts adopted by the Parliament, President of the Republic or Government, and the Law on Constitutional Court is one of them. The Constitutional Court occasionally plays also an enlightened role when it invalidates legal regulation against common sense,superstitions or prejudices of society in order to ensure human dignity[16], but as the institute of individual constitutional complaint is brand new, the Court did not manifest itself in another role than the countermajoritarian.

8 Ruling of 25 November 2019 of the Constitutional Court < https://www.lrkt.lt/en/court-acts/search/170/ta2056/content>

9 See Richard Albert, Constitutional amendments, p. 78.

10 As a constitutional dismemberment (fundamental changes in constitutional rights, structure or identity), improving the existing constitutional identity, might be called an amendment to Lithuanian Constitution, adding to it a constitutional act on Membership of the Republic of Lithuania in The European Union, being an inseparable part of the Constitution; before it because of historical reasons Lithuania was meant to be independent of any state unions.

11 Ruling of the 25 November 2019 of the Constitutional Court on the solutions provided for in the Management Plan of the Curonian Spit National Park, § 15.1.3. TAR (*Official Gazette*), 2019-11-25, No 18747.

12 The possibility to introduce individual constitutional complaint was also considered while drafting the text of the Constitution, but in the time of adjusting the final text which in large amount has been a political compromise this possibility was removed. See: Juozas Žilys, "Konstitucinės justicijos ištakos Lietuvoje" [Origins of constitutional justice in Lithuania] in Egidijus Kūris (ed) Lietuvos Respublikos Konstitucijos dvidešimtmetis" patirtis ir iššūkiai (Lietuvos notarų rūmai, Vilnius, 2007).

13 This constitutional competence was revealed in the Constitutional Court's ruling of 24 January 2014, where the Constitutional Court had to assess the compatibility of a law amending constitution (procedural aspects of its adoption) <https://www.lrkt.lt/en/court-acts/search/170/ta850/content>

14 Ruling of 30 July 2020 of the Constitutional Court <https://www.lrkt.lt/en/court-acts/search/170/ta2220/content>

15 *Ibid.*

16 Best example is the development of the constitutional definition of family, starting from the marriage of different sex couples, what is sought to be written in the Constitution, and now determined as gender neutral concept, based on mutual relationship, that might be other than marriage (Rulings of 11 January 2019 and 28 September 2011), whereas Lithuanian society remained quite conservative. The Court emphasized though that the Constitution is an anti-majoritarian act, which protects every individual. The argument of human dignity was the leading one when resolving this issue.

It should be noted as well that, in both cases, whether it comes to control the constitutionality of law amending constitution or ordinary legal acts specifying the provisions of Constitution on individual constitutional complaint, it could be only done when there is a petition filed before the Constitutional Court, i. e. the Court cannot initiate a constitutional review procedure *ex officio*.

There was no petition or individual constitutional complaint challenging norms regulating the individual's right to address the Constitutional Court that would be accepted for considering. Therefore, the constitutionality of this constitutional reform was not verified in the Constitutional Court yet. Some attempts to challenge the constitutionality of the provisions of the Law on Constitutional Court regarding the conditions of individuals applications were made, but they were not successful. The Court has received once a petition asking to verify whether the Article 65.2.2. of the Law on Constitutional Court is not in conflict with the Constitution as limiting the constitutional right to individual constitutional complaint in the extent that it provides the obligation to apply to an ordinary or administrative court in order to exhaust all other legal remedies before addressing Constitutional Court, even if those remedies obviously will not be effective when defending infringed rights and freedoms. The other petition challenged the Article 65.2.3 of the same law, complaining about the term of four months to fill the individual constitutional complaint. The Constitutional Court rejected those petitions as legally unfounded[17], although it is not excluded that those provisions, as may be some others might pose questions about their constitutionality.

IV. LOOKING AHEAD

Latest constitutional amendments consolidating individual constitutional complaint play a major role for the protection of human rights and freedoms. The new legal instrument creating preconditions to seek the defense of violated constitutional rights and freedoms is sought to reduce the number of petitions filed before international courts. It also creates the ground for the development of constitutional jurisprudence in the field of human rights and freedoms, as well as for the more intense control of the acts adopted by the legislative and executive. Lithuanian Constitutional Court being quite active and principled does not hesitate when there is a need to invalidate the challenged legal act[18]. It cannot be excluded that the consolidation of a new constitutional institute will lead to the constitutional interpretation of the Constitutional Court's power in the area of the individual constitutional complaint. The first step was already made, when the Constitutional Court recognized that upon the individual request it has the competence to decide on the constitutionality of legal acts that are no longer in force, as the Court did upon the petitions of ordinary and administrative courts[19].

17 Decision of 2 July 2020 of the Constitutional Court No KT116-A-S108/2020 and decision of 8 January 2021 of the Constitutional Court No KT6-A-S6/2021 of the Constitutional Court.

18 In 2020, the Lithuanian Constitutional Court adopted 18 Rulings where it performed constitutional control (alongside with other constitutional acts), and in 14 of them at least one of the impugned legal regulation was recognized in conflict with the Constitution, therefore, not applicable from the day of the official publication of the constitutional ruling. But even bearing in mind the high percentage of cases where legal regulation contradicts the Constitution, it should not be seen as the constitutional dictatorship, as it comes from a high number of legal acts adopted in Parliament per year, what obviously leads to poor quality legislation.

19 Ruling of 25 November 2019, Ruling of 18 March 2020 of the Constitutional Court.

Lithuania was one of the latest states in Europe to introduce individual constitutional complaint and thereby strengthening the constitutionalism, while promoting its essential idea of limitating the state power on behalf of protection of human rights and freedoms.

After it was consolidated in constitutional provisions, it become clear that the decision to opt for the limited model of individual constitutional complains was the right choice. The growth of the Court's workload was predictable. But the statistics of the first year shows that only 3 % of applications were found acceptable for further consideration, and it does not differ much from the numbers experienced by other states having the same mechanism. It is foreseen that in the years to come the number of petitions in general should lower, and the percentage of accepted petitions will grow, as the individuals will understand better and better the requirements posed by the Constitution to the individual constitutional complaint.

Looking forward, the future prospects of the constitutional reforms in Lithuania might envisage the further expansion of the range of subjects entitled to initiate the review of the constitutionality of legal acts, adopted by Parliament, President of the Republic and Government, coming back to the originally intended idea to grant this right to ombudsmen (parliamentarian ombudsmen, ombudsmen for children right and ombudsmen for equal protection). Such a reform would be consistent with the core of existing constitutional justice model and will reinforce even more the control of constitutionality of legislative and executive acts and will widen the possibilities of the development of constitutional doctrine.

V. FURTHER READING

Concerning the introduction of individual constitutional complaint:

Dovilė Pūraitė and Andrikienė, *"The Development and Prospects of the Lithuanian Constitutional Justice Model" in Gintaras Švedas, Donatas Murauskas (eds) "Legal Developments During 30 Years of Lithuanian Independence"* (Springer Nature Switzerland, 2021).

Toma Birmontienė, *"The perspectives of introducing the constitutional complaint in the Republic of Lithuania" in "The Limits of Constitutional Review of the Ordinary Court's Decisions in the Proceedings of the Constitutional Court"* (Collection of Contributions from the Conference held by the Constitutional Court of the Czech Republic in cooperation with the Venice Commission of the Council of Europe in Brno, 2005).

Concerning constitutional amendments:

Toma Birmontienė, *"On the constitutionality of amendments to the Constitution"* in *"Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos"*, vol. 2 (Coimbra Almedina, 2016).

Luxembourg

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I. INTRODUCTION

Constitutional reform still was a dominant issue in 2020 in Luxembourg, as in the years before, bearing in mind that the Constitution of Luxembourg is one of the oldest constitutions in Europe showing deficiencies as to consistency, transparency and international standards on human rights protection, rule of law or balance of powers[1]. Within the period covered by the present report, the modernization of the constitutional text was though limited to a single, but major constitutional reform as regards authority of Constitutional Court's rulings. As we shall discuss below (III), this reform is not to be considered as revolutionary in terms of division or redistribution of powers between, on the one hand, the Constitutional Court vested with the control of compliance of legislative acts with the Constitution and, on the other hand, legislative power taking those legislative acts.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The sudden and unexpected ending, in summer 2019, of the general constitutional reform project continued to mark constitutional reform in 2020. Several selective constitutional reform proposals were filed in 2020, which generally followed up on the proposals already made in recent past. However, some of the proposed "new" constitutional provisions reflect political standstill, notably with respect to role and position of the Grand Duke as head of executive power.

In this context, it is worth remembering that the Parliament (*Chambre des députés*) had worked, since 2005, on the modernization of the constitutional text. In 2009, the Constitutional Review Commission of the Parliament (CRC) had filed a general reform proposal aiming at adapting the constitutional text to political reality and international standards[2]. From then on, the constitutional reform procedure required commitment of all institutions, such as Parliament, Government, Council of State, courts and various advisory commissions, filling more than 4000 pages of official parliamentary and preparatory documents. However, disagreement within the Parliament on several points of the constitutional reform text and procedure had put an end to the ambitious project of a general overhaul of the Constitution[3], whereby the CRC reiterated, at the same time, its willingness to continue constitutional reform. It identified some 30 points of selective constitutional reform on which large cross-party consensus seemed still to exist and explicitly requested a fifth and last opinion of the Council of State, which this constitutional advisory body issued on February 11, 2020. The CRC then intensified its efforts, in a first step, in the field of reforming constitutional provisions on organization and functioning of courts and judiciary, notably of the Constitutional Court.

Indeed, because of slow progress of the general constitutional reform procedure, the Parliament had already filed, in February 2019, a proposal to reform article 95*ter* of the Constitution relating to the organization of the Constitutional Court and the effects of its rulings. This proposal aimed, firstly, at introducing the possibility to assign substitute judges, thus facilitating to set up a body of decision within the Constitutional Court. Secondly, it intended to strengthen authority of Constitutional Court rulings[4]. Whilst, after having split the amendment project in two parts, the Parliament adopted the first part regarding substitute judges in December 2019[5], it finally adopted the second part regarding effects of Constitutional Court rulings on May 15, 2020[6]. We will analyse in-depth this second part of Constitutional Court reform in part III of this report, when dealing with the question about the nature of this reform.

Also, in May 2020, the CRC filed another selective constitutional reform proposal, this time covering the complete chapter VI of the Constitution, which deals with the judiciary in general[7]. Most of the proposed new provisions only reiterate proposals, which were already made in the context of the failed general constitutional reform project. Therefore, it comes with no surprise that the proposal, still aspiring at adapting judiciary in Luxembourg to international standards, aims notably at creating a constitutional basis for the National (or Supreme) Council of Judiciary[8], at strengthening rights of persons on trial and at explicitly guaranteeing independence of judges as well as of members

1 Jörg Gerkrath, "Some Remarks on the Pending Constitutional Change in the Grand Duchy of Luxembourg", *European Public Law* 19, no 3 (2013), 449; Carola Sauer, "Luxembourg", *2017 Global Review of Constitutional Law*, 184.

2 Parl. doc. No 6030, *Proposition de révision portant instauration d'une nouvelle Constitution* of April 21, 2009.

3 See Jörg Gerkrath, Carola Sauer, Catherine Warin, "Luxembourg", *2019 Global Review of Constitutional Law*, 214.

4 Parl. doc. No 7414, *Proposition de révision de l'article 95ter de la Constitution* of February 27, 2019.

5 *Loi* (Act) of December 6, 2019, *portant revision de l'article 95ter de la Constitution*, Mémorial A-No 831 (December 10, 2019).

6 *Loi* (Act) of December 6, 2019, *portant revision de l'article 95ter de la Constitution*, Mémorial A-No 406 (May 15, 2020). See also Parl. doc. No 7414B.

7 Parl. doc. No 7575, *Proposition de révision du Chapitre VI. de la Constitution*, declared admissible by the Parliament May 12, 2020.

8 See also the still ongoing project of *Loi* (Act) *portant organisation du Conseil suprême de la justice*, Parl. doc. No 7323.

of prosecution office (*Ministère public*)[9]. Moreover, the Constitutional Court will get the competence to decide conflicts on competencies between judicial authorities and shall acquire new competencies, if so decided in future by simple legislative act. On February 23, 2021, the Parliament has proposed some modifications to provisions of the initial reform proposal, so-called parliamentary amendments, in order to react on opinions of several advisory bodies, such as the opinion issued in November 2020 by the Council of State. After having analysed the recently filed parliamentary amendments, the Council will issue its next opinion in March 2021. The constitutional reform on judiciary might then be adopted even before summer holidays in 2021.

In June 2020, Parliament declared admissible a constitutional reform proposal aspiring at modifying the review of regulatory measures taken by the executive in state of emergency. This proposal follows up on the management of Covid19-pandemic and the very first application, after its reform in 2017, of article 32 (4) of the Constitution on state of emergency. In fact, on March 18, 2020, the Government declared state of crisis and urgency, a situation that was validated ten days later by a law unanimously voted by Parliament, which extended the state of emergency mechanism for three months[10]. The constitutional reform proposal aims at introducing the possibility to attack regulatory measures taken by government in such state of emergency before the constitutional judge. The Council of State will issue its opinion on this proposal in March 2021. Taking into account the existing review procedures before non-constitutional judges, notably administrative judges, and the limited competencies and resources of the Constitutional court, the passing of this reform proposal seems less probable.

In November 2020, the CRC filed yet another constitutional reform proposal with the purpose of modifying not less than ten chapters of the Constitution[11], focusing on executive power. The failed general reform project strongly inspired this "new" reform proposal. Moreover, it should be noted that the "Waringo report", which was prepared by a former high civil servant and published in January 2020, certainly speeded up the reform progress regarding the constitutional provisions on the Grand Duke, constitutional monarchy and executive power in Luxembourg, strengthening the willingness of Parliament to reform this politically sensitive chapter. Indeed, the Waringo report revealed some serious dysfunctions with respect to staff regulation, organization and public financing of the Grand-Ducal Court[12]. Some other core features of the existing Constitution are though upheld, Parliament insisting apparently on the symbolic and protocol function of a Grand Duke as head of state. Therefore, the Constitution will continue to employ the term Grand Duke, whenever the function of head of executive power appears, instead of "head of state". The proposal to distinguish the function of head of state from the person of Grand Duke, made in the context of the failed general reform project, indeed no longer received majority in CRC. Moreover, it is worth mentioning that provisions regarding constitutional monarchy, such as heredity of the function "head of state" within the Family of Nassau, lieutenancy, regency or abdication, will be transferred from the beginning of the actual constitutional text to a second section of chapter III regarding Grand Duke and executive power. Instead, the reformed Constitution will start with fundamental provisions on nature and intrinsic and essential values of the state. For instance, the proposal aims, in new Article 2 of the Constitution, at explicitly introducing respect of rule of law and human rights. From a methodological perspective, the reform proposal somewhat lacks consistency, as it combines provisions of the failed general constitutional reform project with already existing constitutional provisions, whilst presenting the "new" reform proposal through "newly reformed" chapters. In other words, some chapters present themselves as "reformed constitutional chapters", with only rare or even no modifications made with regard to the actual constitutional text, or simply recopying the failed reform proposal. For instance, "new" chapter XI, untitled "General provisions", reproduces already existing, but newly numbered provisions without making any substantial modification. It seems likely that Parliament will adopt this constitutional reform in 2021.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Since the Parliament adopted, in 2020, only one of the constitutional reform proposals described above, the analysis of nature of constitutional reform being an amendment or dismemberment will be limited on this specific reform aiming at strengthening authority of Constitutional Court's rulings. The analysis of the other reform proposals will therefore be left for next year's report and, regarding the fundamental transformation of the Constitution to enhance democracy, rule of law, respect of human rights and rebalancing legislative, executive and judiciary power, certain of these proposals will doubtlessly need to be qualified as necessary constitutional dismemberments.

However, the constitutional reform adopted in 2020 is to be qualified as amendment, because it is not questioning the constitutional distribution of power between legislative and judiciary. Provocatively spoken, its announced purpose to adapt Constitution, which is to render effective the role and function of Constitutional Court reviewing legislative acts, might not even been achieved.

In this context, it is worth recalling that Constitutional Court's competencies are considerably limited[13]. Reviewing legislative acts, except for acts approving international treaties, constitutional judges decide only upon preliminary ruling request, initiated by a general court within a concrete court case. Moreover, Luxembourgish constitutional judges still seem to seriously self-restrain their competencies, even though no juridical argument nor reasoning constraints them to do so. Although its jurisprudence has been remarkably opened to International and European Law through interpretation of constitutional provisions and

9 Following the insisting Council of State. See Parl. doc. No 7575/11, Opinion of the Council of State November 17, 2020.

10 For more details on the state of crisis management in Luxembourg, see Jörg Gerkrath, "Luxembourg", *2020 Global Review of Constitutional Law*, to be published; Edoardo Stoppioni, "The remains of the days of crisis: The second wave of legislative Covid-19 measures in Luxembourg", *VerfBlog*, 2021/3/03.

11 Parl. doc. No 7700, *Proposition de révision des Chapitres Ier, III, V, VII, IX, X, XI et XII de la Constitution* of November 25, 2020. The Constitution is composed of twelve chapters. One modification deals with transfer of a provision from one chapter to another, without proposing to reform the latter chapter (rights and liberties) in substance. Strictly speaking, one might thus argue that this constitutional reform project aims at modifying "only" nine chapters.

12 The report is accessible on the website of the Government: https://gouvernement.lu/fr/publications/rapport-etude-analyse/me/rapport-du-representant-special-du-premier-ministre-aupres-de-la-cour-grand-ducale.html.
See also Jörg Gerkrath, "Luxembourg", *2020 Global Review of Constitutional Law*, to be published in 2021.

13 See Carola Sauer Rappe, "Contrôle juridictionnel des lois au Luxembourg", *Larcier*, 2019.

principles in the light and spirit of directly applicable international rules[14], the Constitutional Court continues to refuse control of legislative acts provisions, which have to be defined precisely by the referring judge, with respect to *all* constitutional provisions and principles. In other words, the referring judge demarcates the constitutional framework, in which the constitutional judge then controls the specific legislative act.

Another element of limitation has been, until the adoption of constitutional reform in 2020, the rather limited authority of Constitutional Court rulings. In fact, when introduced into the Constitution, Article 95*ter* remained silent on the question of effects of the Court's decisions. Referring to legislative act for all details of Court's functioning and organization[15], it simply indicated: "[t]he Constitutional Courts decides, by means of ruling, on the conformity of legislative acts with the Constitution." Articles 6 and 15 of the amended Act of July 27, 1997[16], on the organization of the Constitutional Court determine the effects of constitutionality rulings. Article 15 (2) of this Act establishes *inter partes* authority of these rulings. It provides: "[t]he court which has referred the question for a preliminary ruling, as well as all other courts called upon to rule in the same case, are bound, for the solution of the dispute before them, to comply with the judgment delivered by the Court." Article 6 of the same Act extends these legal effects to preliminary questions of constitutionality having the same object, in that a court is exempted from referring it to the constitutional court[17]. Since the decisions of the Constitutional Court have therefore relative legal effects, more precisely relative *res judicata* authority, an Act declared unconstitutional does not disappear from the legal order, but it is up to the legislator to repeal, amend or maintain it. However, in a large number of cases of unconstitutionality (complete or partial), the legislator has neither repealed nor amended the disputed provisions or has preferred to amend the Constitution instead of adapting the unconstitutional provisions. Unsurprisingly, this situation has been vigorously criticized by academia and politics, pointing out the lack of effectiveness of constitutional review.

By Act of May 15, 2020, Article 95*ter* of the Constitution has been enriched by a paragraph 6, according to which "[t]he provisions of legislative acts declared to be unconstitutional by a ruling of the Constitutional Court shall cease to have legal effect the day after the publication of this ruling in the form provided for by law, unless the Constitutional Court has ordered another deadline. The Constitutional Court shall determine the conditions and limits within which the effects that the provision has produced are liable to be called into question." This paragraph not only ranks the question of effects of constitutional rulings on constitutional level, but it aims to amend the Constitution, in order to render effective its core element of allowing constitutional review of legislative acts.

When looking closely, one might though understand that constitutional judges will still not have the competency to really "sanction" unconstitutional legislative acts. Without any doubt, the Parliament aspired to reform the rather non-efficient legal effect of simple non-application of unconstitutional provisions (*inter partes*), but it also clearly refused that the Constitutional Court may declare unconstitutional legislative acts null and void (*erga omnes* and *ex tunc*)[18]. At first sight, the wording "shall cease to have legal effect" seems to have two different lectures. On the one hand, it could mean abrogation of the unconstitutional provision (*erga omnes* and *ex nunc*). On the other hand, and this is the probable lecture, it could be qualified as a typical Luxembourgish "pragmatic" solution, which is to combine and adjust several possible legal effects, existing in other jurisdictions. This lecture implies, more precisely, (retroactive?) *erga omnes* non-application effect with the possibility to modulate effects in time.

It is worth underlining that Italian and French Constitutions have strongly inspired the newly introduced regime of effects of constitutional rulings[19]. At our knowledge, only the Italian Constitution uses the wording "the law ceases to have effect"[20], bearing in mind that Italian constitutional rulings, when declaring legislative acts unconstitutional, have retroactive effects of non-application without any possibility to modulate these effects. Therefore, in Italy, legal provisions declared unconstitutional shall not be applied neither on situations to occur, nor in pending proceedings, which are not yet decided at the time of taking the constitutional ruling[21]. Regarding time effects, this retroactive effect certainly goes further than an abrogation *pro futurum*. Regarding, in Luxembourg, the correspondent extension of constitutional ruling's effects *erga omnes*, future will show if constitutional rulings ordering non-application will suffice to oblige the legislator to amend or replace those acts. In its final report, CRC underlined that such constitutional rulings not only target all judges, but also public authorities in general and all persons subject to law[22]. Nevertheless, with respect to this *erga omnes* effect, it has to be pointed out that, according to Article 9 (4) of the Act on status of civil servants[23], officials have no authority to refuse execution of law, except in case of execution subject to criminal repression.

The part of new paragraph 6 introducing the possibility to modulate effects of constitutional rulings in time, and notably its last sentence, is an accurate copy of the correspondent constitutional provision in France, more precisely Article 62 (2)[24]. As constitutional rulings issued by the Constitutional Council in France result in the abrogation *ex nunc* of unconstitutional provisions, the modulation of this absolute effect is sometimes considered necessary with respect to legal certainty or exceptional social interest, in order to avoid excessively harsh consequences or legal vacuum. This modulation of effects is also known

14 For example, see decisions Nos. 119/17 of June 16, 2017, 131/17 of December 8, 2017, 156/20 of November 13/2020 and 152/21 of January 22, 2021.

15 Article 95ter (4) : "The organization of the Constitutional Court and the manner of the exercise of its attributions, are regulated by the law."

16 Memorial A No 54 of August 13, 1997, p. 1724.

17 Article 6, subparagraph 2c, of this Act: "A court is exempted from referring to the Constitutional Court when it considers that [...] the Constitutional Court has already ruled on a question having the same object."

18 In fact, the introduction of *ex tunc* effects of constitutional rulings, being the general principle in other jurisdictions such as Germany, has been vigorously refused.

19 See notably the CRC final report, Parl. doc. No 7414B/4.

20 Article 136 (1) of the Italian Constitution: "When the Court declares the constitutional illegitimacy of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision."

21 Raffaele Rifulco, Davide Paris, "Der Italienische Verfassungsgerichtshof", *Verfassungsgerichtsbarkeit in Europa: Institutionen und Verfahren, Ius Publicum Europaeum*, Vol. VIII, 2019, 271.

22 See note 19.

23 Loi (Act) modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'État (Memorial A No 31 of April 17, 1979, p. 622).

24 Article 62 (2) of the French Constitution: "A provision declared unconstitutional [...] shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge."

in other jurisdictions and has convinced Luxembourgish Parliament to include such a provision in Article 95*ter* of the Constitution. Until now, no single ruling of the Constitutional Court in Luxembourg issued since the amendment of Article 95ter decided to modulate its effects.

Regarding the introductory question of how to define the reform of Constitutional Court in 2020, its qualification as amendment seems justified because of its corrective character, which, in our view, does not question nor unmake any core element of Luxembourgish Constitution. Even if the compliance of this reform with the intrinsic and essential features of the actual Constitution[25] would be questioned in Luxembourg, no court has competence to review constitutional reform acts. Moreover, theory of unamendable constitutional rules has for now not been admitted in Luxembourgish Constitutional Law, keeping in mind that directly applicable International and European Law is considered superior to Constitution.

IV. LOOKING AHEAD

The ongoing constitutional reform proposals (as described in Section II) will certainly have a major impact on the understanding, application and living of the Luxembourgish Constitution. Several reform proposals have not yet been filed by Parliament, but are expected for 2021, in that the CRC is working on reforming also chapters II and V of the Constitution. In chapter II, rights and liberties are established and guaranteed. Still relying on the failed general constitutional reform project, the Parliament aspires to define more precisely constitutional provisions in the field of protection of human rights, adapting them to international standards. In particular, the introduction of a so-called "transversal provision" shall limit restrictions to the necessary, imposing a strict proportionality test. With respect to chapter V, the CRC aims at reforming in-depth legislative power and Parliament itself. The upcoming debate between Parliament, Government and Council of State on the already ongoing constitutional reform proposals might also trigger debate in public. Since the Parliament proceeds through selective constitution reform proposals, referendums are though less probable with regard to the strict conditions to engage such referendum[26] and, in consequence, public debate could as well remain rather limited on academia and politics.

V. FURTHER READING

Marc Besch, "Normes et légistique en droit public luxembourgeois", 2019, 692

Jörg Gerkrath, "Le mécanisme de la révision constitutionnelle au Grand-Duché de Luxembourg", *Journal des Tribunaux Luxembourg* 6 [2006], 174-180

Carola Sauer, "Les (nouveaux) effets des arrêts du juge constitutionnel", *Revue du droit public luxembourgeois* 10 [July 2021], forthcoming

25 Though we speak of "actual Constitution", one should first analyse if a constitutional text has already been "dismembered" in the (recent?) past, because of (necessary) adaptations and reforms. Put in other terms, a "dismembered" Constitution, can it again be dismembered or only be restored by (reactionary?) amendment? Some of constitutional reform in Luxembourg, notably the explicit introduction of the principle of democracy in 1919, is surely to be qualified as (fundamental) dismemberment, as it shifts power to legislative, thus enhancing democracy.

26 If no referendum is organised by Parliament itself (according to Article 51 (7) of the Constitution), Article 114 (3) of the Constitution establishes the possibility to submit a constitutional reform text to a referendum, "if, within two months of the first vote [by Parliament], a request is made either by more than a quarter of the members of the Parliament or by twenty-five thousand electors registered on the electoral rolls for the legislative elections." Since the Covid-19-Pandemic makes registration on electoral scrolls more difficult (one has to register personally), the second option to engage a referendum seems less realistic.

Malawi

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* The views expressed in this report are the author's own and do not necessarily reflect those of the institution.

I. INTRODUCTION

When re-introducing multi-party democracy in 1994, Malawi also adopted a new Constitution (the Constitution) that was grounded on democratic principles.[1] Among others, therefore, the Constitution introduced a presidential term limit, with a President allowed to hold office for a maximum of two consecutive terms—each term covering five years;[2] provided that presidential elections would be held simultaneously with elections for Members of Parliament (MPs) and councilors after every five years;[3] prescribed that a President must be elected by a 'majority of the electorate';[4] and specified a timeframe for swearing-in the President.[5]

Since its adoption, the Constitution has undergone several reforms. In the first decade of its adoption only, 13 Constitutional Amendment Bills were tabled before Parliament.[6] Nine of these were passed—amending about 90 sections, while two Bills failed to pass and the other two were withdrawn.[7] This report, however, focuses on the 2020 constitutional reforms. The major reform that the report discusses is the adoption of the 50%+1 system for electing the President, replacing the hitherto applicable first-past-the-post (FPTP) system. Arguably, the High Court of Malawi's ('the Court') interpretation of the Constitution in *Chilima and Chakwera v Mutharika and Electoral Commission* (Chilima case)[8]—a decision which was upheld by the Malawi Supreme Court of Appeal ('the MSCA') in *Mutharika and Electoral Commission v Chilima and Chakwera* (Mutharika case)[9]—propelled the implementation of this reform. The report also discusses the reforms regarding the age of eligibility for voter registration, the appointing authority for the Chairman of the Electoral Commission ('the EC'), the extension of the term of office for the current MPs and councillors, and the timeframe for swearing-in the President.

II. PROPOSED, FAILED, SUCCESSFUL CONSTITUTIONAL REFORMS

Continuing with the trend set during the first decade of the Constitution's adoption, a number of constitutional reforms were proposed in 2020. This time, however, most of the reforms emanated from the Court's judgment of 3 February 2020 in the *Chilima* case. The main proposed reform related to the system for electing the President. In its original form, section 80(2) of the Constitution stated that the President 'shall be elected by a majority of the electorate'. In 2000, the MSCA in *Chakuamba and others v Attorney-General and others* (Chakuamba case) interpreted the meaning of the word 'majority' in the provision as 'a number greater than a number achieved by any other candidate'.[10] Following this decision, there was a general acceptance that the Constitution provided for a FPTP system for electing the President.[11] However, in *Chilima*, the Court revisited the interpretation of the term, and came to the conclusion that 'majority' means 50%+1. Essentially, the *Chilima* case held that the Constitution provided for a majoritarian system.

When making that pronouncement, the Court also nullified the May 2019 presidential elections and ordered that fresh presidential elections be held. It further ordered that the fresh elections and all future presidential elections in Malawi be held in accordance with the 50%+1 system. The then government was unhappy with this decision. Before fresh elections were held, therefore, it proposed some reforms to section 80(2) of the Constitution. Basically, it wanted Parliament to decide whether to adopt the 50%+1 system as pronounced by the Court, or to continue with the FPTP system.[12] The President went as

1 Augustine Titani Magolowondo, 'Conceptual and Contextual Background' in Nandini Patel and Lars Svasand (eds), *Government and Politics in Malawi* (Kachere Series 2007). See also Mwiza Jo Nkhata, 'Academic Freedom, Institutional Autonomy and The University of Malawi: An Analysis of Some Trends and Prospects' (2017) 21 Law, Democracy and Development 127.

2 The Constitution, s 83. See also *State v Ex parte Muluzi and Another (Constitutional Civil Cause No 2 of 2009)* [2009] MWHC 13, which held that a President (including First Vice-President and Second Vice-President) can serve no more than two terms.

3 The Constitution, ss 67(1), 80(1) and 147(5).

4 The Constitution, s 80(2).

5 The Constitution, s 81(3).

6 Anthony Kamanga, 'Amendments to the Constitution Since May 18th 1994' (1st National Constitutional Review Conference, Lilongwe, March 2006).

7 ibid. Amongst the Bills that MPs voted against was the Constitution (Amendment) (No. 1) Bill, 2002 which sought to amend section 83(3) of the Constitution to allow open terms for the presidency.

8 *Chilima and Chakwera v Mutharika and Electoral Commission (Constitutional Reference No. 1 of 2019)* [2020] MWHC 2.

9 *Mutharika and Electoral Commission v Chilima and Chakwera (MSCA Constitutional Appeal No. 1 of 2020)* [2020] MWSC 1.

10 [2000–2001] MLR 26, 43.

11 Mwiza Jo Nkhata, 'Presidential Elections in Malawi: Towards a Majoritarian (50+1) Electoral System?' (*ConstitutionNet*, 30 May 2017) <https://constitutionnet.org/news/presidential-elections-malawi-towards-majoritarian-501-electoral-system> accessed 1 January 2021. See also Law Commission, *Report of the Law Commission on the Review of the Constitution* (Law Com Rep No 18, 2007); Law Commission, *Report of the Law Commission on the Review of Electoral Laws* (Law Com Rep No 32, 2017).

12 Paul Chamdimba Nkhoma, 'Malawi: Bill for MPs to Decide 50+1 or First-Past-the Post in Electing Malawi Leader' (*Nyasa Times*, 9 June 2020) <www.nyasatimes.com/bill-for-mps-to-decide-501-or-first-past-the-post-in-electing-malawi-leader/> accessed 18 January 2021. See also Mike Kalumbi, 'Constitutional

far as urging Parliament not to 'agree with every judgment that comes from the courts'.[13] However, when the Bills containing the proposed reforms were tabled before Parliament, they, on two separate occasions, failed to garner the required support.[14] The first Bill was presented in February, less than a month after the Court delivered its judgment. This Bill was rejected because the opposition MPs were of the view that the Court had already declared that the Constitution prescribed the 50%+1 system for electing the President.[15] The second Bill was tabled in June 2020. However, it was caught in the "politics" of setting the date for fresh elections. On the day it was put before Parliament, some MPs claimed that the date for fresh elections had already been set the previous day.[16] Ironically, the new Bill, apart from giving Parliament the chance to choose between the FPTP system and the 50%+1 system, intended to set a date for fresh elections.[17] It was, partly, due to its attempt to re-introduce the issue of setting the polling date that some MPs, mainly those from opposition, rejected it.[18]

Despite the controversy surrounding the setting of the polling date, fresh presidential elections were eventually held in June 2020—with the opposition leader, Chakwera, defeating the incumbent, Mutharika. Having been ushered into power, the new government made a fresh proposal to amend section 80(2) of the Constitution. The proposed amendment provided that a President must be elected by 'a majority of more than fifty percent of the valid votes cast', and where no candidate achieves this threshold in the first poll, the top two candidates in that poll must compete in the second poll which must be held within 30 days of the declaration of the first poll's results.[19] MPs voted in favour of the Bill introducing the provision, and it has since been assented to by the President.[20]

Although this was the major reform, the new government proposed several other reforms which were equally successful. Firstly, although the Constitution provides that MPs and councillors are elected for a five-year term,[21] it has been amended to extend the term of office for the current MPs and councillors by about a year.[22]

Secondly, the Constitution provides that the Chairman of the EC must be a judge.[23] This can either be a High Court judge or a justice of appeal.[24] Though it provided that such a judge must be nominated by the Judicial Service Commission, in its original form, section 75(1) of the Constitution did not expressly state the appointing authority for the EC's Chairman. It has now been amended to explicitly mention that the President is the appointing authority.[25]

Thirdly, the Constitution guarantees every person the right to vote.[26] One limitation to this right, however, is with respect to age. Only those who have attained a certain age are eligible to register as voters. Originally, section 77(2)(b) of the Constitution allowed only those who were at least 18 at the date of the application for registration to be registered as voters. This provision has been amended to allow those who can provide proof that they will have attained the age of 18 on or before the polling day to be registered.[27]

Fourthly, the Constitution provides that a person occupying the office of the President, First Vice-President or Second Vice-President must take an oath or affirmation, administered by the Chief Justice, before assuming office.[28] Section 81(3) of the Constitution provided that this must be done within 30 days of being elected or appointed. It has been amended, with the new provision making two notable changes. First, while it maintains that the elected President or First Vice-President must be sworn into office before the expiry of 30 days from the date of the declaration of election results, it stipulates that a minimum period of 7 days must lapse after the results are declared before the swearing-in can be done.[29] Second, it makes a distinction, in terms of the period for swearing-in, between a Vice-President who has been elected and the one who has been appointed. The minimum period that must lapse before swearing-in can be done does not apply to a Vice-President (First or Second) who is to assume office pursuant to an appointment. Further, the period within which such a Vice-President must be sworn into office is 14 days of the date of appointment.[30]

III. SCOPE OF THE REFORMS AND CONSTITUTIONAL CONTROL

While some constitutional changes are amendments, others go beyond being mere amendments and occupy a unique position of dismemberments.[31] The distinction between the two lies in the scope of the reform. While an amendment makes changes to the constitution that are 'consistent with the existing design, framework, and fundamental presuppositions of the constitution',[32] a dismemberment changes at least one of the 'constitution's essential features'.[33]

As earlier stated, Malawi's major constitutional reform in 2020 related to the system for electing the President. Classifying this reform as an amendment or dismemberment raises some difficulty because it requires determining what system Malawi had prior to 2020. Malawian courts have given two conflicting answers to this question. While the MSCA in *Chakuamba* concluded that the Constitution prescribed the FPTP system for electing the President, in *Chilima*, the Court held that the Constitution provided for the 50%+1 system.[34] In *Mutharika*, the

Amendment Bill Rejected in Parliament' (*Malawi24*, 10 June 2020) < https://malawi24.com/2020/06/10/constitutional-amendment-bill-rejected-in-parliament/> accessed 17 January 2021.

13 Mike Fiko, 'Mutharika Tells MPs to Hold Judges Accountable: 'Malawi Parliament Supreme Above Courts" (*Nyasa Times*, 5 June 2020) <www.nyasatimes.com/mutharika-tells-mps-to-hold-judges-accountable-malawi-parliament-supreme-above-courts/> accessed 18 January 2021. See also Mwayi Mkandawire, 'Parliament is Above the Courts—Mutharika' (*Malawi24*, 5 June 2020) < https://malawi24.com/2020/06/05/parliament-is-above-the-courts-mutharika/> accessed 17 January 2021.

14 Mwayi Mkandawire, 'Malawi Fresh Elections: Parliament Sets Date' (*Malawi24*, 24 February 2020) < https://malawi24.com/2020/02/24/malawi-fresh-elections-parliament-sets-date/> accessed 17 January 2021. See also Kalumbi (n 12).

15 Kalumbi (n 12).

16 ibid.

17 Andrew Nyondo, 'Parliament Sets Poll for June 23, But…' (*The Nation*, 10 June 2020) <www.mwnation.com/parliament-sets-poll-for-june-23-but/> accessed 22 January 2021.

18 Kalumbi (n 12).

19 Constitution (Amendment)(No.5) Act, 2020, s 5.

20 Tom Sangala, 'Lazarus Chakwera Assents to Bills' (*The Times*, 3 November 2020) < https://times.mw/lazarus-chakwera-assents-to-bills/> accessed 19 January 2021.

21 The Constitution, ss 67(1) and 147(5).

22 Constitution (Amendment) (No.5) Act, 2020, ss 2 and 8.

23 The Constitution, s 75(1).

24 *Sabwera and another v Attorney-General* [2004] MLR 315.

25 Constitution (Amendment)(No.5) Act, 2020, s 3.

26 The Constitution, s 40(3).

27 Constitution (Amendment)(No.5) Act, 2020, s 4.

28 The Constitution, ss 81(1) and 81(2).

29 Constitution (Amendment) (No.5) Act, 2020, s 6(a).

30 ibid, s 6(b).

31 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019).

32 ibid 79.

33 ibid 85.

34 *Chilima* (n 8) 388.

MSCA affirmed the position taken in *Chilima*.[35] If one agrees with the *Chakuamba* case—which both the *Chilima* case and the *Mutharika* case fully discussed before arriving at a different conclusion—therefore, the changes made to section 80(2) of the Constitution in 2020 may be regarded as much more transformative than if one agrees with the *Chilima* and the *Mutharika* cases.

A review of the two opposing MSCA decisions is beyond the scope of this report. Invoking, therefore, the general rule that whenever there are two conflicting decisions of courts of co-ordinate jurisdiction, the later in time, if made after fully considering the earlier decision, must be preferred,[36] leads to the conclusion that the reform relating to the system for electing the President is an amendment rather than a dismemberment.

While not changing any core feature of the Constitution, the reform was necessitated by two factors. First, although the Court's interpretation of 'majority' was upheld by the MSCA, considering the controversy that the term has caused, it would have been unfitting to leave it in the undefined manner it was. This is more so considering that 'majority' is sometimes used in describing both the FPTP system and the 50%+1 system.[37] For instance, FPTP is sometimes called 'simple majority',[38] while 50%+1 is referred to as 'absolute majority' or 'majoritarian'.[39] Second, considering that the *Chakuamba* case used 'the absence of provisions, in the Constitution and other laws, providing for a second round of voting',[40] as one of the reasons for holding that the Constitution provided for the FPTP system, the Court's pronouncement that 'majority' means 50%+1 was, therefore, not enough. Consequently, the Court proceeded to order Parliament to enact laws to make provision for holding run-off elections where no candidate attains 50%+1 of the votes in the first poll.[41]

Taking all this into account, it is evident that the reform is an elaborative amendment. Building on the Court's pronouncement in *Chilima* that the Constitution provides for the 50%+1 system for electing the President, the reform advances the system by explicitly mentioning it in the Constitution, and providing for a second poll where no candidate obtains an absolute majority in the first poll.

Unlike the reform relating to the system for presidential elections, the scope of the other 2020 constitutional reforms is less contentious. They were aimed at clarifying some provisions, addressing deficiencies in the law, and effecting the consequential orders that the Court gave in *Chilima*. For example, the reform relating to the appointing authority for the Chairman of the EC—which is another elaborative amendment—was made pursuant to the Court's direction. Whereas the original section 75(1) of the Constitution failed short of mentioning the appointing authority for the EC's Chairman, the amended provision explicitly states that the appointing authority is the President.[42] It is the Court in *Chilima* that noted the omission and directed that the provision be clarified.[43] The reform does not contradict any principle of the Constitution. All along the President has been the appointing authority.[44]

The reform regarding the extension of the term of office for the current MPs and councillors was also initiated by the Court.[45] Prior to 2020, Malawi had been holding tripartite elections with the President, MPs and councillors being elected simultaneously. With the Court nullifying only presidential elections, and ordering fresh elections, it meant that the elected President was to start serving his term later than the MPs and councillors. Without amending the law, therefore, it would not have been possible to, in future, hold tripartite elections as the MPs and councillors would have finished their terms earlier.[46] To preserve the principle of tripartite elections—while also ensuring that the current President fully serves his five-year term—the Constitution has been amended to extend the term of office for the current MPs and councillors by about a year.[47] Like the other reforms, this reform does not transform any essential feature of the Constitution. It is a restorative amendment.

The reform regarding the age of eligibility for voter registration, however, is a corrective amendment. It was aimed at bringing consistency between the Parliamentary and Presidential Elections Act (PPEA) and the Constitution, and addressing the 'disenfranchisement perpetrated by the phased registration'.[48] Voter registration in Malawi is done in phases—with registration being done earlier in some parts of the country than in others.[49] While the PPEA provides that any person who attains 18 on or before the polling day is eligible for registration as a voter,[50] section 77(2)(b) of the Constitution provided that only those who are at least 18 at the date of application for registration qualify for registration. With the phased registration, the constitutional provision created a scenario where, for instance, two people from different areas who would both be 18 by the polling day could be treated differently depending on the date that voter registration is done in their respective areas. In an area where registration is done earlier, someone could be barred from registering who would, if registration had been done on a later date, have been allowed to register. To remedy this, the provision has been amended to allow those who can provide evidence that they will be 18 on or before the polling day to be registered as voters.[51] This reform is in line with the spirit of the Constitution. The Constitution prohibits discrimination.[52] It also regards those aged 18 and above as no longer children.[53] The reform, therefore, is corrective in that it seeks to eliminate the differential treatment and to give all Malawians who attain the age of majority on or before the polling day an equal chance to participate in choosing leaders.

Lastly, the reform regarding the timeframe for swearing-in the President was meant to provide for proper transition of power from

35 *Mutharika* (n 9) 109.
36 *Minister of Pensions v Higham* [1948] 1 All ER 863.
37 See Law Commission 2017 (n 11) 40, which stated that the conceptualization of the term 'majority' determines whether one is referring to a plurality electoral system or a majoritarian system.
38 ibid. See also Law Commission 2007 (n 11) 69, which stated that the *Chakuamba* case understood 'majority' to mean 'simple majority'.
39 Nandini Patel, 'Malawi: The Role of the EMB in Electoral Reform' (*Aceproject* 2012) < https://aceproject.org/ace-en/topics/lf/eml/eml03> accessed 31 December 2020; Nkhata, 'Presidential Elections in Malawi' (n 11).
40 Mwiza Jo Nkhata, 'Malawi's Nullified Presidential Elections and the Plurality vs Majoritarian (run-off) Debate' (*ConstitutionNet*, 29 February 2020) < https://constitutionnet.org/news/malawis-nullified-presidential-elections-and-plurality-vs-majoritarian-run-debate> accessed 1 January 2021.
41 *Chilima* (n 8) 418.
42 Constitution (Amendment) (No.5) Act, 2020, s 3.
43 *Chilima* (n 8) 418.
44 *Sabwera* (n 24). The current Chairman of EC, Justice Dr Chifundo Kachale, was appointed by the Malawi's former President, Peter Arthur Mutharika.
45 *Chilima* (n 8) 417-418.
46 Since fresh presidential elections were held in June 2020 while MPs and councillors were elected in May 2019, MPs and councillors would have completed their terms about a year earlier.
47 Constitution (Amendment) (No.5) Act, 2020, s 2.
48 Constitution (Amendment) (No.5) Bill, 2020, memorandum.
49 Law Commission 2017 (n 11). See also African Union, 'African Union Election Observation Mission to the 21 May 2019 Tripartite Elections in the Republic of Malawi' (Final Report, 2019).
50 PPEA, s 15.
51 Constitution (Amendment) (No.5) Act, s 4.
52 Constitution, s 20.
53 The Constitution, s 23(6).

the serving President to the President-elect.[54] Although the original section 81 of the Constitution stipulated the timeframe for swearing-in the newly elected President and First Vice-President, it did not provide for any minimum period to lapse before the swearing-in can take place. In Malawi, past experience reveals at least two things. First, election results are usually disputed. The cases of *Chakuamba*[55] and *Chilima*,[56] bear testimony with respect to the 1999 and 2019 presidential elections respectively. Second, once presidential election results are declared, there is usually a rush to swear in the President-elect. For instance, in 2014, Mutharika was declared the winner of the presidential elections on Friday, and sworn into office the next day, Saturday—31 May 2014.[57] Similarly, Chakwera was sworn into office on Sunday—28 June 2020, having been declared the winner of the fresh presidential elections just the previous day—27 June 2020.[58] The urgency with which a President-elect is sworn into office makes it difficult to have proper handovers, and does not give enough room for the resolution of electoral disputes before the President-elect assumes office.[59] To address this, the amended provision provides for a period of 7 days to lapse before the President-elect and First-Vice President-elect can be sworn into office.

This reform does not negate any core feature of the Constitution. Even under the old provision, it was—but for the hurry—possible to conduct the swearing-in after the lapse of 7 days, but before the expiry of 30 days. The reform merely revises the period for swearing-in of the President-elect and First Vice-President-elect by barring the swearing-in from being done within 7 days of the declaration of the results to ensure the proper transition of power. The amendment, therefore, is reformative.

Although some reforms are not related to the pronouncement in the *Chilima* case, most of the reforms stemmed from the Court's interpretation of the Constitution, its observations regarding deficiencies in the law, and its proposals and directions to Parliament. The MSCA made it clear that a court is entitled to note any deficiencies in the law, and if it does so, it is obliged 'to bring the inadequacies it observes in the law to the attention of the legislature to address them'.[60] The precursor to the 2020 constitutional reforms in Malawi reveals that most of the reforms were circumscribed by the Court's prior interpretation of the Constitution and the directions and proposals it made in *Chilima*. In other words, the Court provided guidance regarding the nature and, to some extent, the content of the reforms that were to be made. The Constitution (Amendment) (No.5) Bill, 2020's memorandum confirms this by explicitly mentioning that the Bill's purpose was to 'enact provisions in the Constitution necessary to give effect to consequential orders issued' in *Chilima*.[61]

Commenting on the Malawian courts after the nullification of the May 2019 presidential elections, Dingake argued that Malawi's Constitution creates a judiciary that 'is bound to be interventionist in character'.[62] The Constitution assigns the judiciary the responsibility to interpret, protect and enforce the Constitution and other laws.[63] The Court's pre-amendment constitutional control of the reforms was, therefore, justified on the basis of the interpretation it made—in the discharge of its interpretative function—coupled with the effect that the nullification of the presidential elections only had on the practice of holding tripartite elections, and the need to clarify the law and address legal inadequacies. It was further justified on the basis that courts have an obligation 'to remedy democratic deficiencies as part of their role in strengthening Malawi's democratic processes'.[64]

The circumstances surrounding the reforms also reveal that the Court largely played a *representative* role. In arriving at the conclusion that 'majority' under section 80(2) of the Constitution meant 50%+1, and proceeding to order Parliament to make provision for a second poll in the event that no presidential candidate achieves that threshold in the first poll, the Court, in *Chilima*, gambled. Firstly, none of the parties to the dispute gave the issue relating to the meaning of 'majority' any serious attention.[65] Secondly, the issue did not arise directly. One of the reliefs that the second petitioner in the matter sought was that Mutharika 'was not duly elected as President of the Republic of Malawi as he did not truly obtain a majority of the votes polled'.[66] It was this relief that gave the Court an opportunity to have a fresh look at the meaning of 'majority'. Because of the tangential manner in which the issue arose, it is unsurprising that after the judgment was pronounced, Kainja described the part of the judgment relating to the interpretation of the word 'majority' as 'unexpected'.[67] Thirdly, considering that there was a binding precedent, the easier option for the Court was to simply adopt the meaning *Chakuamba* pronounced. This is even more so considering that, in the past, the MSCA has not taken kindly to the Court trying to take a different approach to it.[68] By departing from *Chakuamba*, the Court put its life on the line.

Importantly, since *Chakuamba* was decided, the subsequent elections were conducted on the premise that the country follows the FPTP system. No doubt, this system drew discontent from some people.[69] Although reservations about it might have started earlier,[70] it was really Bingu's win in 2004 with 35.8% of the national vote that triggered calls for the abandonment of the FPTP system.[71] In its 2007 report, therefore, the Special Law Commission on the Review of the Constitution proposed that, to enhance the legitimacy of the elected President, the country should adopt the 50%+1

54 Law Commission 2017 (n 11).
55 *Chakuamba* (n 10).
56 *Chilima* (n 8).
57 'Peter Mutharika Sworn in as Malawi's New President' (*Made for minds*, 31 May 2014) <www.dw.com/en/peter-mutharika-sworn-in-as-malawis-new-president/a-17674192> accessed 18 January 2021.
58 Hamza Mohamed, 'After Historic Election, What Next for Malawi?' (*Aljazeera*, 28 June 2020) < https://www.aljazeera.com/news/2020/6/28/after-historic-election-what-next-for-malawi> accessed 18 January 2021.
59 Law Commission 2007 (n 11); Law Commission 2017 (n 11).
60 *Mutharika* (n 9) 109.
61 Constitution (Amendment) (No.5) Bill, 2020, i.
62 Oagile Bethuel Key Dingake, "The Judicial Annulment of the 2019 Presidential Election in Malawi: A Discussion and Analysis' (2020) 25 Journal of the Commonwealth Magistrates' and Judges' Association 7, 10.
63 The Constitution, s 9.
64 International IDEA and Electoral Commissions Forum of SADC 'Lessons from Malawi's Fresh Presidential Elections of 23 June 2020' (Conference Report, Webinar, August 2020) 13.
65 The High Court in *Chilima* acknowledged this at page 380, while the Malawi Supreme Court of Appeal in *Mutharika* made the observation at pages 101-102.
66 *Chilima* (n 8) 380.
67 Jimmy Kainja, 'Malawi Court Orders Fresh Elections. What now?' (*African Arguments*, 4 February 2020) < https://africanarguments.org/2020/02/malawi-court-orders-fresh-elections-what-now/> accessed 13 January 2021.
68 See *Nseula v Attorney-General and Another* [1999] MLR 313 where the Malawi Supreme Court of Appeal censured a High Court judge for not following the Supreme Court of Appeal's decision on the meaning of 'public office'; *Civil Liberties Committee v Minister of Justice and Another* [2004] MLR 55 in which the Malawi Supreme Court of Appeal again chastised a High Court judge for disregarding the approach taken by it on the issue of locus standi.
69 Adem K Abebe, 'Electing African Executive Presidents: Beyond A False Dilemma' in *Annual Review of Constitution Building Processes: 2017* (International IDEA 2018).
70 See Nkhata, 'Presidential Elections in Malawi (n 11) who states that the Petitioners' challenge to 1999 presidential elections in the *Chakuamba* case demonstrates some people's discontent with the FPTP electoral system.
71 Patel (n 39).

system for electing the President.[72] However, this proposal was not implemented. Though Bingu managed to obtain an absolute majority of the votes (66%) in 2009,[73] his brother Peter's victory in 2014 with 36.4% of the votes rekindled calls for the adoption of the 50%+1 system.[74]

Noting that 'concerns and debates on the propriety' of the FPTP system persisted, in 2017, the Special Law Commission on the Review of Electoral Laws made another proposal that section 80(2) of the Constitution be amended to provide for the 50%+1 system.[75] Government was 'reluctant to table the necessary constitutional amendments' to implement the Commission's recommendations.[76] The public, including Civil Society Organizations, faith groups and opposition MPs, however, threatened to stage protests.[77] Demonstrations were called off when government promised to table the Bill before Parliament.[78] However, when the Bill introducing the 50%+1 system was tabled before Parliament,[79] MPs, mainly from government side, voted against it.[80] The May 2019 elections, therefore, were held on the background of a failed attempt to amend the Constitution.

Despite the failure to implement the 50%+1 system as proposed by both the 2007 Commission and the 2017 Commission, the Court's interpretation of the word 'majority', coupled with an order that Parliament must enact laws to provide for a second poll where no candidate attains absolute majority in the first poll,[81] interestingly, almost gave effect to the reforms that the public had been yearning for. Though no data exists to tell the exact percentage of the population that supported the idea to adopt the 50%+1 system, the following enable us to conclude that a larger section of the society was in favour of the idea. First, both the 2007 Commission and the 2017 Commission proposed the adoption of the 50%+1 system. Second, when government was reluctant to table the Bill in 2017, the public had to force it to do so. Third, after the Bill was rejected in 2017, the public expressed its disapproval of how Parliament handled the Bill and continued to express its discontent with the FPTP system.[82] Since the decision in *Chilima* propelled the implementation of a presidential electoral system favoured by the majority of the population, it was, therefore, *representative*.

IV. LOOKING AHEAD

The 2020 constitutional reforms took an important step towards enhancing the legitimacy of the President. However, beyond being legitimate, a person elected as a President also needs to be capable of discharging the duties attached to that office. Although the Constitution provides for citizenship and age eligibility criteria,[83] it does not prescribe the minimum academic qualification for those who seek to contest for the presidency. Both the 2007 Commission and 2017 Commission considered the issue of educational eligibility criteria. Their proposals were similar. In totality, they proposed that, considering the demands of the office of the President, a person standing for the presidency must have a minimum qualification of a first degree or its equivalent from a recognized or accredited institution.[84]

Secondly, while women form about 51 percent of Malawi's population,[85] they are greatly underrepresented in Parliament. In 1994, only 5.65% of the elected MPs were women.[86] While women's proportion in Parliament increased to 8.29% in 1999; 13.99% in 2004; and 22.27% in 2009, it fell to 16.58% in 2014.[87] The current percentage of female MPs is 22.92%.[88] Evidently, since the re-introduction of multiparty democracy, women have always formed less than a quarter of the legislative body. As one way of addressing the imbalance in representation, the 2017 Commission proposed that the Constitution be amended to provide that, in each of Malawi's 28 districts, one seat must be reserved for which only female candidates should be allowed to compete.[89]

The implementation of these proposals is long overdue. The inclusion of an educational eligibility criteria for presidential candidates has been proposed by two different Commissions. Regarding the imbalance in representation, women have been underrepresented in Parliament for so long. However, considering that, in Malawi, law reform and politics are intrinsically linked, any attempt to foretell whether and/ or when these proposals will see the light of the day would be but an exercise in futility.

V. FURTHER READING

Dingake OBK, 'The Judicial Annulment of the 2019 Presidential Election in Malawi: A Discussion and Analysis' (2020) 25 Journal of the Commonwealth Magistrates' and Judges' Association 7

Nkhata MJ, 'Malawi's Nullified Presidential Elections and the Plurality vs Majoritarian (run-off) Debate' (*ConstitutionNet* 29 February 2020) <https://constitutionnet.org/news/malawis-nullified-presidential-elections-and-plurality-vs-majoritarian-run-debate> accessed 1 January 2021

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72 Law Commission 2007 (n 11).
73 Abebe (n 69).
74 Nandini Patel and Michael Wahman, 'The presidential, Parliamentary and Local Elections in Malawi, May 2014' (2015) 50 Africa Spectrum 79.
75 Law Commission 2017(n 11) 57.
76 Adebe (n 69) 16.
77 Makhumbo Munthali, 'Fear of Losing 2019 Election Holds Nation at Ransom: The Case of 50+1 Electoral System in Malawi' (*Nyasa Times*, 1 January 2018) <www.nyasatimes.com/fear-losing-2019-election-holds-nation-ransom-case-501-electoral-system-malawi/> accessed 31 December 2020.
78 ibid.
79 Constitution (Amendment) (No. 2) Bill, 2017.
80 Dan Banik and Happy Kayuni, 'A Great Judgment, but Court Victories Won't Deliver Democracy in Malawi' (*The Conversation* 10 February 2020)) <https://theconversation.com/a-great-judgment-but-court-victories-wont-deliver-democracy-in-malawi-131483> accessed 10 January 2021. See also '50+1 Bill Rejected' (*Malawi24*, 15 December 2017) < https://malawi24.com/2017/12/15/501-bill-rejected/> accessed 31 December 2020.
81 *Chilima* (n 8) 418.
82 Munthali (n 77); Russell Kondowe, 'Malawi Approach on Electoral Reforms Worrisome—PAC' (*Malawi24*, 17 May 2018) < https://malawi24.com/2018/05/17/malawi-approach-on-electoral-reforms-worrisome-pac/> accessed 20 January 2021.
83 The Constitution, s 80(6).
84 Law Commission 2007 (n 11); Law Commission 2017 (n 11).
85 Government of Malawi, '2018 Malawi Population and Housing Census Report' (National Statistical Office, 2019)
86 Tam O'Neil and others, 'Women and Power: Representation and Influence in Malawi's Parliament' (ODI Report, 2016).
87 ibid.
88 IPU Parline, 'Malawi National Assembly' <https://data.ipu.org/content/malawi?chamber_id=13456> accessed 30 December 2020.
89 Law Commission 2017 (n 11).

Mexico*

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I. INTRODUCTION

Mexico had a year of contrasts in 2020 with respect to constitutional change. This paper aims to account for them. First, the number of successful constitutional amendments was lower than the historical average (there were eight successful amendments) and, unlike previous years, those reforms arguably did no imply any substantive constitutional change. Second, the number of proposed constitutional reforms was the highest in the last twenty-five years: 529. To understand this impressive number, and the radical constitutional changes, some of these proposals put forward, we reflect on the political role they played. We focus on the judicial reform proposal, arguably one of the most important bills discussed in 2020, which is very likely to be enacted in early 2021. Although the reform aims to fight corruption and nepotism within the judiciary, two of its most persistent and urgent problems, it also features some polemic aspects. Its critics argue that it substantially undermines judicial independence of lower-court judges vis-à-vis their superiors, enhancing the political gains of capturing the head of such a vertical judicial system. We also discuss several executive unilateral actions taken in the context of the COVID-19 pandemic. Arguably, some of these unilateral actions have *de facto* transformed the constitution, empowering the Armed Forces and the executive in ways that will be hard to reverse. We close with an account of the Supreme Court's constitutional role during 2020.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Regarding constitutional reforms, 2020 was an atypical year in Mexico. It was atypical in two important respects: First, the number of successful constitutional amendments was lower than the historical average and, unlike previous years, those reforms arguably did no imply any substantive constitutional change. Second, the number of proposed constitutional reforms was the highest in the last 25 years, and several of those proposals put forward changes that, if approved, are likely to transform our constitutional structure in important ways. In this section we present a brief account for these two points and show how they fit together.

Let us start giving some context for the discussion that follows. As is well known, the 1917 Mexican Constitution is the third most amended charter in modern constitutionalism. From its enactment, in February 1917, until January 2021 Mexico's Constitution has had 737 amendments.[1] Moreover, few constitutions have been more enduring. Hence, no other existing codified constitution has been subjected to such a constant pattern of renewal through amendments.[2] Moreover, this pattern of hyper-reformism is a relatively recent development, seventy percent of the total number of amendments is post-1982, and almost forty percent of them passed from 2006 to 2018.[3]

As a result of a landslide victory in July 2018, the coalition led by President Lopez Obrador's party took control of both chambers of Congress creating a unified government for the first time since 2000, when PRI lost the Presidency after 70 years of hegemonic rule. The election of Andres Manuel Lopez Obrador (AMLO) has brought an important transformation in the power configuration of the political elite. For this reason, many thought hyper-reformism would end, and a new Constitution could be enacted. This did not happen: the Constitution has been amended forty-two times since the new administration was inaugurated in December 2018. As we have argued elsewhere this pattern of constitutional change has most probably become self-reinforcing.[4] Moreover, at least for now, the President has signaled that no constitutional convention is required, since the Constitution has been, and will probably continue to be, "transformed" through amendments.

Prima facie, 2020 was not a paradigmatic year of such a hyper-reformist pattern. In this year, only eight constitutional amendments were successful. Eight amendments may not seem a negligible number from a comparative perspective, but within the Mexican context they are not many. From 1982 to 2020 the mean number of amendments passed per year is 13.5.

Should we conclude that 2020 was a calm year for Mexico's frenetic standards of constitutional activity? In what follows, we argue that such a conclusion would be misleading: 2020 was very dynamic in

1 In Mexico, reforms are formalized by the issuance of a constitutional reform decree. Decrees can involve a single change to a specific article or several changes to different articles. Our measure of constitutional amendments follows most Mexican scholars who usually define "one amendment" as a change in one article made at a particular moment in time through the issuance of the corresponding decree.

2 By a "codified constitution" we mean a rigid a written constitution. The amendment formula in Article 135 requires the affirmative vote of 2/3 of attending members in each federal chamber, plus ratification by half of the state's legislatures.

3 Francisca Pou-Giménez and Andrea Pozas-Loyo, *The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition While Blocking Democratic Consolidation*, (Hart Publishing 2019).

4 Francisca Pou-Giménez, Andrea Pozas-Loyo, and Camilo Saavedra-Herrera, *The Dynamics of Mexico's Self-Reinforcing Hyper-Reformism* (2020), research paper under review.

constitutional terms, but most of the activity took place either though constitutional bargains and threats of constitutional change of which the staggering number of amendment proposals are a symptom, or through the unilateral actions promoted by the executive in the context of the pandemic. As we discuss in the following section, the central constitutional debate in 2020 was whether some of the administration's "decrees" and "agreements" (two forms of executive unilateral actions) are unconstitutional, and to what extent some have already led to *de facto* constitutional changes that will be difficult to undo, such as the empowerment of the Armed Forces and the concentration of power in the executive.

First, let us present a brief account of the eight constitutional articles that were amended in 2020, which, as we have told, do not constitute any substantive constitutional change. These reforms are grouped in four constitutional decrees. Six of the eight reforms constitutionalized President AMLO's public policies. Arguably, the most consequential modified article 4 to constitutionalize the new Health Institute for Wellbeing (INSABI). The federal executive submitted the bill in November 2019 and the reform was published six months later. Its approval was the last step on a long debate over public health insurance programs. The INSABI substitutes *Seguro Popular*, a health insurance that covered approximately 60 million people in the informal sector. The critics of this reform argued that the previous program's catastrophic expenses protection fund had proved its efficiency and economic viability. President AMLO argued that it enabled corruption and was part of a neoliberal inherited institutional framework to be discarded. With the new scheme, the federal government gains discretion over the allocation of resources. The amendment also establishes the obligation for the Mexican State to provide economic support to elderly and disabled persons, as well as to establish scholarships for public schools.

The other "policy amendments" of this year are the following: Article 28 was amended to forbid tax condonations (this amendment was published on March 15th). Articles 4, 73, 115 and 112 were amended to establish the State's obligation to promote policies for the comprehensive development of youth. Those economic transfers (to the elderly, a section of youth, and some students) are part of the social policy of this administration, which is consistent with their distrust with institutional structures, have chosen direct cash payments. Finally, in December, article 4 was amended to recognize the right to mobility and article 73 to grant Congress faculties to issue secondary legislation on mobility matters.

Now, the amendments proposed in 2020 could hardly be more contrasting to the amendments actually ratified this year. On the one hand, their quantity is impressive: the bills proposing at least a constitutional reform amount to 529. Actors linked to the coalition in government submitted 49.7% of them (187 belong legislators affiliated to MORENA, 49 to the Labor Party, 24 to Social Encounter Party, and 2 more were formalized by the Federal Executive). Regarding the topics coved, 20.8% are related to legislative branch, 17.8% to human rights, 9.4% to social development, 9.3% to public security and the 8.7% to elections. It is important to note that 514 out of the 529 initiatives are in process of analysis in congressional committees.

To understand the impressive number of proposed amendments and the radical constitutional changes some of them put forward, it is necessary to reflect on the political role those proposals have played in an increasingly polarized country. Although this year has had the largest number of proposed amendments in the last 25 years, it is part of a trend that has characterized the current legislature (in which 1317 bills proposing at least one constitutional amendment have been submitted). Arguably, amendment proposals, and particularly radical ones, have been used as threats and exchange chips among political actors. As we argue elsewhere, this role has been part of Mexico's constitutional processes since the late 1970s.

The judicial reform was arguably one of the most important bills discussed in 2020, and also the only one presented and approved by 2/3 of present members of Congress before the end of the year. It has not been officially enacted because ratification by the majority of states' legislatures is still pending. The reform seeks to fight the corruption and nepotism, which for decades have affected the judiciary, through the renovation of the rules governing the judicial career. But, at the same time, it introduced some polemic changes. Several members of the legal community have argued that it substantially undermines judicial independence of lower-court judges vis-à-vis their superiors (i.e. internal independence), enhancing the political gains of capturing the head of such an extremely vertical judicial system.[5] It is worth noting that, in the midst of this polemic, the Chief Justice often argues that it is important to remember that several more radical amendment proposals were presented in Congress, and that his proposed reform is much better than several of the alternatives. This line of argument shows the important role amendment proposals can play in constitutional bargains.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In Mexico there are not unamendable rules, and the Court has refrained from exercising explicit review of constitutional amendments.[6] Moreover, as we explained above, the amendments passed in 2020 do not constitute substantive constitutional changes; hence, they cannot be considered dismemberments.

Nevertheless, 2020 was a year of important constitutional changes. In substantive terms, the most radical constitutional modifications came in the form of unilateral executive actions; the most important being the *Militarization Agreement* published in May.[7] It could be argued that this unilateral action does constitute the last step in the dismemberment process of the civil-military relations that characterized the Mexican constitutional system since 1942.

The *Militarization Agreement* authorizes Armed Forces to make detentions, seize assets, execute arrests warrants, preserve, secure,

5 Julio Ríos Figueroa, Mexico's Constitutional Reforms: Threats to Judicial Independence from Within?, (2021) Available at <https://constitutionnet.org/news/mexicos-constitutional-reforms-threats-judicial-independence-within> Accessed on February 14, 2021.

6 On the debate around the judicial review of amendments in Mexico see: Pou-Giménez F, Pozas-Loyo A and Saavedra-Herrera C, *Interpreting the Ship of Theseus: Constitutional Hyper-Reformism and Judicial Review in Mexico (1917-2019)* (2020), research paper under review

7 Agreement by which the permanent Armed Forces are available to carry out public security tasks in an extraordinary, regulated, supervised, subordinate and complementary manner, (2020) Available at <https://www.dof.gob.mx/nota_detalle.php?codigo=5593105&fecha=11/05/2020> Accessed on February 13, 2021. See also: Andrea Pozas-Loyo, *On the Possible Legal and Political Effects of the COVID-19 Pandemic in México*, (2020). Available at <http://www.iconnectblog.com/2020/06/on-the-possible-legal-and-political-effects-of-the-covid-19-pandemic-in-mexico/> Accessed on February 14, 2021.

investigate, and process evidence in crime scenes (among other functions). It also gives the Armed Forces the tasks of preventing crime, maintaining order and social peace in all the places subject to federal jurisdiction, such as airports, customs, and federal roads. Moreover, it establishes that all the actions taken by the Armed Forces in the fulfillment of this agreement will be under the supervision and control of a military authority not subjected to transparency laws, and without clear accountability mechanisms to a civilian authority. In sum, this unilateral action transforms the role of the Armed Forces (empowering them above the constitutional limits), arguably impinges on the functions of other important constitutional actors (e.g. the Federal Prosecutor), and it is in conflict with several constitutional rights.[8]

Let us now turn to the Supreme Court's constitutional role during 2020. From our perspective, in general terms, the Court avoided to challenge the government's agenda, at least partially, on strategic grounds. As we have seen, a judicial reform was discussed this year, and the Court knew the risks it involved. Moreover, there is a widely shared perception that the Court has ideologically moved a step closer to the current government. The appointment of three new justices in the first year of this administration played an important role in this change. Two of the three vacancies were scheduled due to the end of the 15-year constitutional term of justices Cossío and Luna. The third vacancy, on the other hand, emerged from the resignation of justice Medina Mora, who left the Court eleven years before the end of his term.

In 2020, the Court adjudicated a total of 3958 cases. This year the Court received 525 constitutional cases, 171 more than in 2018. Given the space limit, we focus on three sets of cases that have particular constitutional importance.

Let us start with the important decision on the constitutionality of a referendum (popular consultation) on whether five former presidents should be criminally prosecuted. The consultation originated in September 2020 when President AMLO, resorting to a prerogative established in Article 35 of the Constitution, requested Congress to officially call the consultation.[9] As it is constitutionally forbidden to carry out referenda on certain matters (e.g. human rights, electoral and financial issues, public security and the organization and performance of the AF), article 35 also grants the Supreme Court the faculty to rule on the constitutionality of the matter to be consulted before Congress formalizes a referendum (i.e. it gives it the Court the capacity to exercise *a priori* constitutional review of referenda's matters).

In October 2020, after an intense debate, the Court ruled in favor of President AMLO in a 6 to 5 decision. On the one hand, the five justices in the minority argued that, as proposed by the President, the consultation implied to vote over human rights, one of the matters prohibited by the Constitution. According to them, if there is an alleged crime, the alleged victim(s) has the right to an investigation, and the prosecutorial authorities have the obligation to investigate. Hence, such an obligation cannot be subject of a popular consultation. On the other hand, the majority leaded by Chief Justice Arturo Zaldivar and the three justices nominated by President AMLO considered that the reform that incorporated popular consultations to the Constitution produced a major redesign of Mexico's form of government as it implied a transition from a representative to a participatory democracy. So, following the nature of the reform, the consultation should not be ruled unconstitutional. Nevertheless, the Court's majority decided that, to be constitutional, the specific question had to be rephrased, and they did so in a very ambiguous fashion, taking away any reference to any specific individuals, and referring "a process of clarification" of "the political decisions taken in the last years".

The second set of cases we want to focus on, are linked to the militarization agreement we discussed above. This unilateral action was challenged in federal courts immediately after its enactment. The central arguments are that the president does not have the prerogative to issue agreements of this nature, and that it does not comply with the 2019 Constitutional Reform that mandates the creation of the National Guard under civilian authority and the progressive de-militarization of public safety tasks. Most of the challenges derived from *amparo* demands (individual constitutional claims) filed in District Courts. Among the decisions rendered so far, two stand out because the judges in charge determined the unconstitutionality of the agreement arguing that regulation of Armed Forces is a faculty that belongs to Congress, not to the executive. This argument was also present in the constitutional controversies (concrete review) filed in the Supreme Court by Laura Rojas as the president the Chamber of Deputies, as well as by different governors and municipalities. The demands not only claim that the presidency violated the competences of the legislative branch, but also that the enforcement of this unilateral action will result in gross human rights violations. In this connection, the National Human Rights Commission and the United Nations High Commissioner for Human Right in Mexico have expressed great concern about the effects of this agreement. The final decision on the constitutionality of this unilateral action by the Supreme Court is still pending. In September 2020, the Second Chamber of the Court postponed the analysis of a project drafted by Justice Yasmin Esquivel —one of President AMLO's appointees—proposing to dismiss the Chamber of Deputies' demand.

Finally, the cases dealing with the austerity measures of the current administration require special attention. Austerity has been a central piece of President AMLO's rhetoric for a long time, but after his inauguration it inspired the creation of new pieces of legislation such as the Federal Act of Republican Austerity and the Federal Act of Public Servants Remunerations, that have been subject of thousands of *amparo* demands since their enactment in 2019. More recently, already in the context of the COVID pandemic, the President transformed one of his interventions in his daily press conferences into a decree known as the "Austerity Decree" introducing further cuts for the Federal Administration. Among the measures this unilateral action mandates are a 75% cut to the operation budget of all public agencies and a "voluntary" progressive reduction in the salary of all "high" public servants up to a 25% cut. In addition, most governmental expenditures have been postponed (with the exception of the administration's megaprojects). Through this decree President AMLO made substantive modifications to the 2020 federal budget, which is a faculty of the Chamber of Deputies.

The Austerity Decree has been criticized not only for upsetting the system of checks and balances, but also for endangering the State's

8 For a detailed discussion see: Nuria González-Martín, *Emergencia Sanitaria Por Covid-19: Un Acuerdo Desconcertante ¿emergencia Por Motivos de Salud o de Seguridad?* (UNAM 2020).

9 Article 35 was amended in 2012 to introduce different mechanisms of direct democracy. One of these mechanisms is the "consulta popular" (popular consultation), which can be requested by the Presidency, thirty-five percent of the members of either chamber of Congress, or at least the two percent of the electoral roll.

capacity both in the sort run through this year's budget cuts, and also in the longer term through in human capital, organizational capacity, and infrastructure's losses. This decree has been challenged in federal courts, but a final resolution has not been made yet. Nevertheless, it has produced severe consequences in multiple public agencies. For instance, the commissioner of the Executive Commission for Victims Assistance resigned just a few weeks after this decree's enactment, arguing that budget cutbacks virtually paralyzed the Commission in a context of extreme violence, and therefore of great need for victims' assistance.

IV. LOOKING AHEAD

Hyper-reformism has persisted as the main path of constitutional change despite the significant political and ideological changes that emerged from the 2018 general election. Instead of promoting a new Constitution, the coalition led by President AMLO has successfully resorted to constitutional amendments to develop its agenda. In view of the number of amendments and proposals accumulated in 2020, it is difficult to foresee the end of the hyper-reformistic trend in the near future.

Furthermore, the government has made explicit the intention to promote reforms that would further centralize power in the executive. In this connection, President AMLO's criticisms against the Constitutional Autonomous Organs indicate they might be the main target of constitutional change in the coming months. These organs, which resemble the independent regulatory agencies that exist in other countries, are in charge of designing, implementing and even adjudicating disputes in multiple policy areas such as elections, transparency and access to information, human rights, energy, economic competence, telecommunications, among others. They are central to the constitutional structure of checks and balances produced by the democratic transition, and their suppression or transformation would arguably constitute a dismemberment of such structure.

The 2021 midterm-elections' results will be consequential for the direction of constitutional change in Mexico. A positive outcome for the opposition might moderate the content of the reforms. Although some analysts think that, given the great popularity of President AMLO, if blocked by a legislative majority, he could push through a constitutional convention. If the President's coalition gets a wider legislative majority, the amendments that concentrate power in the executive would most likely continue. Either way, future constitutional debates will probably be focused on the Constitutional Autonomous Organs, created in the last 30 years, which aimed to check and limit the executive power.

In the previous section, we emphasized the impact the judicial reform's discussion and approval on the Supreme Court behavior. Now, the reform is the final process towards its enactment —the only aspect pending is the ratification by state-legislatures—. It is therefore worth reflecting on its likely short-term consequences. The main one would be a major renovation of judicial personnel through the enforcement of new recruitment rules. The Federal Judicial Institute, the academic branch of the Federal Judicial Council, will soon by transformed into the Federal School of Judicial Training and, as result, will be granted with wider competences for recruiting judges and law clerks through merit examinations. Before so, however, the Institute is already carrying out a process to fill 120 positions in appellate courts, which represent the 14.8% of all the positions of this level (*magistrados*).

The renovation of the judiciary will not take place in lower court but also in the highest one. Justice Fernando Franco is scheduled to leave the bench in December 2021. If President AMLO's coalition does well in the midterm elections, another ally of the president will likely replace him. This would reinforce the administration's influence on the constitutional tribunal, which has already ideologically and politically moved closer to the president. Of course such a change would be very consequential for Mexico's constitutional future.

V. FURTHER READING

Fix Fierro H., Valadés D., Márquez D, *Toward the Reorganization and Consolidation of the Text of the Constitution of the United Mexican States of 1917. Introductory Essay' in Héctor Fix Fierro, Diego Valadés*, (UNAM 2016).

González-Martín N., *Emergencia Sanitaria Por Covid-19: Un Acuerdo Desconcertante ¿Emergencia por motivos de Salud o de Seguridad?* (UNAM 2020).

Pou-Giménez F., Pozas-Loyo A., *The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition While Blocking Democratic Consolidation*, (Hart Publishing 2019).

Pou-Giménez F., Pozas-Loyo A., Saavedra-Herrera C., *The Dynamics of Mexico's Self-Reinforcing Hyper-Reformism*, (2020).

Pou-Giménez F., Pozas-Loyo A., Saavedra-Herrera C., *Interpreting the Ship of Theseus: Constitutional Hyper-Reformism and Judicial Review in Mexico (1917-2019)*, (2020).

Netherlands

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I. INTRODUCTION

Let us come straight to the point: the Constitution of the Netherlands has not been amended in 2020. But, please, do not yet stop reading. Several legislative developments have taken place that will likely lead to noteworthy changes in the Dutch constitutional text and/or wider constitutional order in the coming years. In accordance with Article 137 of the Dutch Constitution, amending the Constitution of the Netherlands requires two legislative readings (explained in more detail below). In 2020, two amendment proposals have been ratified by the Lower House in the first reading and are currently awaiting a first reading in the Upper House, and an additional two amendment proposals have reached the second reading. In this report, we discuss these four amendment proposals. First, we summarize the proposals and explain how they seek to change the constitutional text as well as Dutch constitutional reality. Then we indicate the scope of the proposals, consider their possible unconstitutionality, and outline extant constitutional control of constitutional reforms. Finally, we conclude by providing our take on some of the big questions awaiting the Netherlands in the context of constitutional reform in the years ahead.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Article 137 of the Dutch Constitution (*Grondwet*) stipulates that formal amendments require two legislative readings, with intervening general elections for the Lower House of Parliament (*Tweede Kamer*). In the first reading, a proposal for constitutional amendment requires a simple majority in both Houses. Before the second reading—which requires a qualified two-thirds majority in both Houses—a general election must be held so as to ensure that the electorate is consulted on any proposed constitutional amendment.[1] Finally, an amendment proposal must be ratified by the government.

As indicated, during the year 2020, no proposal has passed all these hurdles. However, two amendment proposals have been adopted in a first reading and two proposals have made it to a second reading. The latter two may be considered 'partly successful' or 'semi-successful', although one should note that this status has no consequences for the legal meaning of the existing constitutional text: proposals awaiting a second reading are *not* considered part of the written constitution as surviving a first reading merely implies that a proposal may be *considered* in second reading. Additionally, in practice, the content of a proposal in a second reading has no special authority or considerable normative force.

The following two amendment proposals were adopted by the Lower House in a first reading in 2020 and are presently considered in a first reading by the Upper House:

1. *Duration of the Upper House*. The Constitution stipulates that the duration of the Upper House of Parliament (*Eerste Kamer*) shall be four years (Article 52, paragraph 1). The proposed amendment seeks to extend this duration to six years. It also seeks to introduce staggered elections of Upper House members with elections every three years to fill respectively 38 and 37 of the total 75 seats. These changes require amendments to articles 52, 55 and 64 of the Constitution. The newly proposed Article 52 paragraph 1 states: 'The duration of the Upper House shall be six years. Every three years, thirty-eight and thirty-seven Member shall resign in turn'. The proposed Article 55 only retains the first sentence of the existing Article 55, stating that 'The members of the Upper House shall be chosen by the members of the Provincial councils and the members of an electoral college as referred to in Article 132a, paragraph 3'. Note that the election of members of the Upper House has been and will remain indirect: the Dutch electorate can only affect the make-up of the Upper House through Provincial elections and, for citizens living in the Caribbean part of the Netherlands, the election of an electoral college (as mentioned in Article 132a). Lastly, the proposal seeks to change the fourth paragraph of Article 64. The proposed paragraph stipulates that: 'The duration of an Upper House that meets following a dissolution shall be determined by Act of Parliament; the term shall be one year at the most and shall not be longer than the terms mentioned in Article 55'.

2. *Second reading constitutional revision in joint session*. As noted, constitutional amendments currently require two

1 The adoption of a proposal in the first reading does not automatically trigger a general election. For at least a century, Dutch constitutional actors waited for the regular general Lower House election to take place. Constitutional issues are therefore commonly overshadowed by ordinary political debates during elections. In fact, the average voter does commonly not realize that her 'ordinary' vote might also be relevant with regard to a proposal for constitutional amendment. See E.A. Alkema, 'Constitutional Law', in J.M.J. Chorus *et al.* (eds.), *Introduction to Dutch Law*, 3rd edn, (Kluwer 1999) 293.

legislative readings. The proposed amendment seeks to alter Article 137 of the Constitution to bring about changes to the second reading: rather than having separate readings in both Houses of Parliament, the second reading will take place in a joint session. This should make it harder for the indirectly elected Upper House to block a constitutional amendment that has the support of the directly elected Lower House. A slightly more powerful Lower House in the constitutional amendment procedure would better reflect the fact that the decisions of the Lower House have, as a directly elected body, greater democratic legitimacy.

The following two amendment proposals have been adopted in a first reading in 2020 and, hence, will reach a second reading after the general election of the Lower House in early 2021.

3. *Electoral college Upper House for citizens living abroad.* As noted, Article 55 of the Dutch Constitution stipulates that the members of the Upper House shall be chosen by the members of the Provincial councils and by the members of an electoral college elected by citizens living in the Caribbean part of the Netherlands. This means that Dutch citizens living abroad currently cannot influence the make-up of the Upper House of Parliament. The proposed revision seeks an amendment of Article 55: citizens living abroad receive the right to vote for a separate electoral college and this electoral college will participate in the Upper House elections on behalf of non-resident citizens.

4. *Recalibration of the constitutional amendment procedure.* This proposal seeks to ensure that the Lower House elected after the first reading of a constitutional amendment proposal, has the authority not only to consider it, but also to let it expire. Currently, a second reading can be postponed endlessly, at least as a legal matter. The proposal is to amend Article 137 to ensure that the second reading expires if the Lower House does not take a decision during its four-year term (with exceptions in case of premature elections). The occasion for this proposal was the re-consideration of a constitutional amendment proposal in second reading in 2015. This proposal—seeking to introduce constitutional review in the Netherlands—was adopted in a first reading in 2008 but a second was never completed. After the Lower House election of 2017, a debate arose on the question whether the second reading of the concerned proposal could continue. The Council of State (*Raad van State*) advised against it, amongst other reasons, because the past election(s) had no longer any real relation to this proposal.[2] Thereupon, the Lower House dropped the proposal and ended the procedure. The proposal to recalibrate the constitutional amendment procedure should prevent a recurrence of this problem by ensuring that a Bill seeking to amendment the constitution cannot be adjourned endlessly.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Two authoritative observers of Dutch constitutional law, Kortmann and Bovend'Eert, hold that only the 1848 and 1917 revisions of the Dutch Constitution have been of any real significance.[3] The abovementioned proposed and semi-successful constitutional reforms do not call for a modification of their assessment. The concept of 'constitutional dismemberment'[4] as developed by Richard Albert — significant changes to the constitution's constituent parts that transform the identity of, or fundamental values contained in the constitution — certainly does not apply. Partly for this reason we do not expect that the amendment proposals awaiting a second reading will play any significant role in the upcoming elections. Indeed, we are almost certain that they will be overshadowed by debates surrounding the global pandemic, 'institutional racism', immigration and, who knows, climate change and digitization.

The Dutch Constitution does not codify unamendable rules. Hence, none of the proposed reforms discussed above are in tension with the written Constitution. However, in the wider constitutional order of the Netherlands, rules can be identified that might render new amendments to the written constitution 'unconstitutional'.[5] Possible sources of such rules are, first, European and international law, which according to Dutch law have a standing that is higher in the hierarchy of norms than the written constitution; second, natural law which, according to some authors, is a source of 'higher law'; and, third, the 'immanent coherence' of the Dutch constitutional document, which is sometimes cited as a source of rules that may collide with constitutional amendments. According to the last doctrine, the written constitution of the Netherlands is a document securing the rule of law (*rechtsstaat*) and (parliamentary) democracy, such that any amendment that undermines these fundamental features of the Dutch constitutional order would be invalid.

In Dutch constitutional history, however, these theories of unamendability have never been put to the test. Also, the changes proposed in 2020 will not qualify as a test, since they arguably strengthen the rule of law and democratic legitimacy. Only the second proposal discussed above—requiring the second reading of a constitutional amendment in a joint session of both Houses of Parliament—may be considered unconstitutional by some as it weakens the position of the Upper House. Yet, others may defend the proposal precisely on the grounds that it would strengthen Dutch democracy since it better reflects the political reality that the directly elected Lower House, which is also the primary arena for political debate, enjoys greater democratic legitimacy than the indirectly elected Upper House. However, this argument may not convince members of the Upper House, as it would require them agreeing to a significant reduction of their own power, and hence the amendment may turn out to be 'structurally'[6] impossible. But who knows, the Upper House also includes members that favor weakening the body of which they are part. Time will tell.

In the Netherlands, constitutional amendment proposals are not scrutinized in advance by any court, whether a constitutional court (as the Netherlands does not have one) or ordinary courts. Article 120 of the Constitution prohibits constitutional review of legislation, a prohibition that extends to constitutional legislation. However, any Bill, including a Bill proposing to amend the Constitution, must be send to the Council of State for consultation (Article 73, paragraph 1 Constitution). The Council of State addresses its advice to the government, which

2 *Kamerstukken II* 2017/18, 32334, 11, p. 5-6.

3 C.A.J.M. Kortmann & P.P.T. Bovend'Eert, *Dutch Constitutional Law* (Kluwer 2000).

4 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019).

5 Reijer Passchier, *'Inconstitutionele grondwetherzieningen: grenzen aan de bevoegdheid van de grondwetgever [Unconstitutional constitutional amendments: limits to amendment powers]'* (Tijdschrift voor constitutioneel recht 2, 2020)..

6 Richard Albert, *'Constructive Unamendability in Canada and the United States'* (2014) 67 *SCLR* 181.

then forwards it to Parliament if it decides to continue with the Bill. The advice of the Council of State may carry (some) weight, depending on the political context of the Bill concerned, but it is not binding.

The Council of State has indeed critically reviewed some of the proposals discussed above. The Council advised against changing the second reading of the constitutional amendment procedure, because the official explanation of this proposal lacks a proper foundation. The Council also questioned why the proposal leaves untouched other decision procedures requiring a two third majority in the Upper House, such as the ratification of Treaties that conflict with the Constitution (Article 91 paragraph 3). The proposal that seeks to introduce an (indirect) voting right for non-resident citizens to elect members of the Upper House, too, was criticized by the Council of State. According to the Council, the official justification for this proposal lacked a proper foundation. The Council also found that the need for introducing this right and establishing a special electoral college has not been sufficiently addressed in Parliament, particularly considering that bringing about such changes affects the constitutional position of the Parliament itself. It is difficult to estimate what role these recommendations will play going forward, since much depends on the political reality after the general elections in early 2021. On the whole it appears, though, that the proposals, containing fairly minor constitutional revisions, have a reasonable chance of being ultimately successful.

IV. LOOKING AHEAD

Looking ahead we see in particular the following two issues of constitutional reform arising in the Netherlands. In its report, published in late 2018, the State Commission on the Parliamentary System in the Netherlands, made a number of recommendations to strengthen the rule of law and to reinforce the resilience of parliamentary institutions.[7] One of its recommendations was to alter the appointment procedure of members of the Dutch Supreme Court (*Hoge Raad*). Currently, if there is a vacancy the president of the Supreme Court first nominates six candidates, whereafter the Lower House nominates three candidates of which one is appointed by royal decree. The Commission identified the risk of unwanted political interference in this procedure, since the selection of the House of Representatives formally does not have to adhere to the list proposed by the president of the Supreme Court. The procedure is therefore liable to being misused and could lead to an erosion of the independence of the judiciary. The Commission proposed amending Article 118(1) of the Constitution such that new members of the Supreme Court henceforth are appointed by royal decree on a binding nomination of a committee consisting of an expert to be appointed by the Lower House, a member of the Supreme Court, and an external expert, appointed by the president of the Supreme court and the Lower House jointly.[8] This recommendation appears to have political support and may lead to a constitutional amendment in the coming years. An internet consultation for the proposal has been concluded, and in December 2020 the Council of Ministers of the Kingdom (*Rijksministerraad*) has agreed to pursue an amendment to the Constitution along these lines. The next step is for the Council of State to advice on the proposal, after which a Bill may be introduced in the Lower House.

7 State Commission on the Parliamentary System, *'Democracy and the Rule of Law in Equilibrium'* (2018), translation: https://www.staatscommissieparlementairstelsel.nl/binaries/staatscommissie-parlementair-stelsel/documenten/rapporten/samenvattingen/072019/18/download-the-english-translation-of-the-final-report-of-the-state-commission/Integrale+vertaling.pdf

8 *Ibid*., p. 160.

The second issue with political salience concerns the Dutch membership to the European Union (EU). As it stands the Dutch constitution does not contain a clause requiring the membership of the Netherlands to the European Union. In effect, this means that a withdrawal from the EU could be triggered by a legislative act decided with a simple majority in both Houses of Parliament. With the withdrawal of the United Kingdom from the EU— "Brexit"—fresh in mind, two members of the Lower House from the firmly pro-Europe political party D66 have proposed a constitutional amendment that would enshrine membership of the EU in the Dutch constitution and formalize parliamentary involvement in a potential withdrawal process. A Bill to this effect is currently awaiting discussion in the Lower House. The Bill proposes to add a new Article 95a to the Constitution (placed after the articles concerning foreign affairs), stating (1) "The Kingdom is a member of the European Union", and (2) "The law regulates the involvement of the States-General in decision-making of the European Union concerning legislation and treaties". The first clause accords with the advice of the Council of State on a previous version of the Bill, which concluded that anchoring membership of the EU in the Constitution is warranted given the momentous economic, institutional, and legal consequences of a potential withdrawal.[9] The second clause does not. The Council of State considered that the extant Constitutional provisions concerning the delivery of information by the government to the Houses of Parliament in the context of the preparation and implementation of European decision-making (including in particular Article 68 of the Constitution) sufficiently guarantees the parliamentary involvement in a potential withdrawal process. The initiators of the bill have not followed this advice, stating in their response to the advice that they consider it important for the legislator to regulate parliamentary involvement, which would formalize the precise role Parliament plays in the European decision-making process and increase the general compliance (by the government) with the relevant rules. The main effect of this amendment, if successful, is that the withdrawal of the Netherlands from the EU would itself require a constitutional amendment. This would render a withdrawal legally, if not politically, much more difficult to achieve.

V. FURTHER READING

Materials relating to the proposals discussed above are (to our knowledge) unavailable in English. Those interested in learning more about the Dutch Constitution and its wider constitutional and political context in general might consider reading:

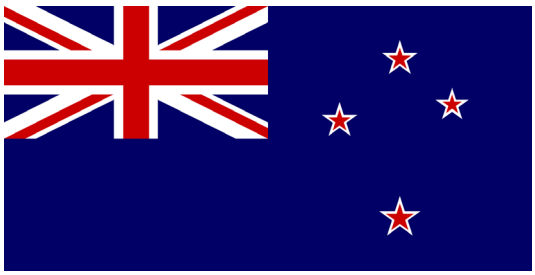
Giuseppe France Ferrari, Reijer Passchier and Wim Voermans (eds.) *The Dutch Constitution beyond 200 Years: Tradition and Innovation in a Multilevel Legal Order* (Eleven International Publishing, 2018)

Wim Voermans, 'Constitutional Law—Chapter 15', in: J. Chorus, E. Hondius & W. Voermans (Eds.), *Introduction to Dutch Law* (Kluwer, 2016).

Leonard Besselink, 'The Kingdom of the Netherlands', in: L. Besselink, P. Bovend'Eert, H. Broeksteeg, R. de Lange, & W. Voermans (Eds.), *Constitutional law of the EU member states* (Kluwer, 2014).

9 Kamerstukken *II* 2019-2020, 35202-(R2126), nr 4. (Advies van de Afdeling Advisering van de Raad van State van het Koninkrijk en reactive van de initiatiefnemers).

New Zealand



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I. INTRODUCTION

Coherently analyzing constitutional reform is challenging in New Zealand. New Zealand's constitution remains 'unwritten' in the traditional sense, lacking a special documentary framework for government that is recognized as authoritative. As a result, constitutional reform does not always engage formalized amendment procedures. Instead, reform tends to involve the incremental evolution of constitutional practice, supported by changes in the underlying discourse that identifies and explains the basic norms of New Zealand's system of government. In an unwritten constitution, changes in discourse, institutional relationships and common practice may do more than simply precipitate or reflect constitutional reform. In a very real sense those changes are the constitutional reform in question.[1]

This is one way of saying that, even outside of the usual obvious identifiers of constitutional reform such as amendments to the controlling constitutional text, it is difficult to analyze even formal constitutional change in New Zealand in terms of Ackerman-type 'constitutional moments'. Instead, the most useful idiom to frame the analysis might be one of 'constitutional momentum'. Change is always happening, or at least potentially happening, but only some changes have the stickability to overcome the institutional inertia inherent to any stable form of government and embed themselves as a new or modified part of the existing constitutional system. It is in these 'sticky' changes that meaningful instances of constitutional reform can be identified.

Although this understanding of constitutional reform can appear unstructured or unhelpfully contingent on value judgements to those scholars more familiar with comparatively rigid constitutions, it still enables a number of instances of meaningful constitutional reform to be identified. In 2020, these instances of constitutional change were primarily shaped by two events. The obvious, international event was the outbreak of the COVID-19 virus, which saw public health imperatives clash with maintenance of personal liberties. The second event, which carried more focus domestically, was the general election for membership of the New Zealand House of Representatives. Against the context of those significant events, the constitutional system saw the re-enfranchisement of certain prisoners, the beginnings of statutory confirmation of the judicial jurisdiction to give declarations of inconsistency with protected rights, an unusual exercise of Prime Ministerial prerogative in relation setting an election date, as well as novel political and legal accountability mechanisms relating to government's pandemic response efforts.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The most important attempt at intentional constitutional reform has been efforts to re-enfranchise members of the New Zealand prison population, allowing them to enroll for and vote in national and local body elections. Prior to 2010, only prisoners who were serving a custodial sentence of 3 years or more were prohibited from enrolling as electors, a policy which reflected the relative seriousness of the crimes for which those prisoners had been convicted. However, since 2010, changes to the Electoral Act 1993 meant that all prisoners in custody on election day have been prohibited from enrolling to vote.

Even if one accepts that it is constitutionally appropriate that some prisoners should have their democratic right to vote removed, the 2010 amendment was clearly unconstitutional on grounds of arbitrariness. Being in prison on election day is a matter of luck and timing, rather than bearing any relationship to the seriousness of the crime committed. This was expressly recognized when the 2010 amendment was passed.[2] Since that time, the High Court,[3] Court of Appeal,[4] and Supreme Court,[5] have all found the 2010 amendment inconsistent with the protected right to vote in free and fair elections.[6] In addition, the Waitangi Tribunal (a type of truth and reconciliation commission) found that the disenfranchisement policy had a disproportionate impact on indigenous Māori populations.[7] However, it was only this year, ahead of the general election, that Parliament grasped the nettle and legislated to overturn the original amendment. This occurred with passage of the Electoral (Registration of Sentence Prisoners) Amendment Act 2020, which amended the Electoral Act 1993 by restoring the pre-2010 state of affairs.

This is a good example of the 'momentum' nature of constitutional reform in New Zealand. Legislative reform was needed to restore

1 See Paul Rishworth, 'New Zealand' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011) 235 at 236237.

2 Hon Chris Finlayson, *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (New Zealand Government Printer 2010).

3 *Taylor v Attorney-General* [2015] NZHC 1706.

4 *Attorney-General v Taylor* [2017] NZCA 215.

5 *Attorney-General v Taylor* [2018] NZSC 104.

6 See New Zealand Bill of Rights Act 1990, s 12.

7 Waitangi Tribunal, *He Aha I Pērā Ai? The Māori Prisoner Voting Report* (2020) WAI 2870.

prisoner voting rights, but that reform was not forthcoming until institutional and public pressure became overwhelming. And while the reform can be understood narrowly as resulting from the 'constitutional moment' of a legislative act, the building up of wider pressures for reform cannot be overlooked. The constitutional elements that embed the reform have been in train for some time. As a result, while the status of prisoner voting rights is technically at the whim of a future, differently constituted Parliament, there is a strong degree of constitutional embeddedness that makes further restrictions on prisoner voting unlikely.

Related to the prisoner voting issue is the jurisdiction of the New Zealand courts to issue declarations of inconsistency in respect of rights and freedoms protected by the New Zealand Bill of Rights Act 1990 (hereafter, NZBORA). One implication of New Zealand's unwritten constitution, coupled with its traditional adherence to the English ideal of Parliamentary sovereignty, is that there is no judicial mechanism to strike down legislation that is inconsistent with constitutional standards. For some time, however, the superior courts have toyed with the idea that there might be jurisdiction to formally declare an inconsistency in respect of legislation that breaches of NZBORA. Any such declaration would vindicate the plaintiffs' rights, and bring the issue of a serious rights violation to the attention of Parliament even if it could not compel Parliamentary action in response. The issue is a fraught one conceptually because NZBORA does not make any explicit provision for remedies when rights have been unjustifiably breached. Where the courts have issued similar declarations in other jurisdictions, the jurisdiction to do so has been explicit in the empowering statute.[8]

When the issue was put to the New Zealand courts in the context of the challenge to the prisoner voting issue, all three courts involved (the High Court, Court of Appeal and Supreme Court, as cited above) found jurisdiction to declare an inconsistency. The remaining question was how Parliament would react to this novel jurisdiction. In the event, it initiated this year legislative reform to confirm the jurisdiction in NZBORA and provide for a formal response. The legislative reform, set out in the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 230-1, has not yet been enacted — a select committee process is currently examining the implications of the reform for Parliament's Standing Orders. However, the very initiation of legislative action is important confirmation that the court's implied jurisdiction to offer declaratory relief for legislative breaches of NZBORA is accepted by politicians and is so not particularly controversial. The change, initiated by the courts in this instance, is likely to 'stick'.

It is convenient now to turn to the New Zealand government's response to the COVID-19 pandemic. Like many countries around the world, New Zealand imposed border restrictions and instituted a nation-wide 'lockdown' that included closing businesses and confining people to their homes (albeit with exceptions of essential workers and essential businesses). These actions were subject to novel accountability mechanisms at both the political and legal level.

At the political level, a special Parliamentary committee was established, chaired by the Leader of the Opposition and comprised of a majority of Opposition members, to inquire into the Government's pandemic response. The committee's establishment recognized that Parliament itself was not actively meeting as part of the pandemic response efforts. The committee had a wide mandate and exercised plenary powers, calling evidence from a wide range of elected representatives, officials and affected persons. While novel, the committee performed its functions admirably, with its establishment and operation supporting the core constitutional principle of politically accountable government. This effective and meaningful political accountability gives context to the legal challenges discussed below.

At the legal level, a number of court actions were brought challenging the legal basis in the Health Act 1956 to impose the lockdown. An initial action seeking a writ of Habeas Corpus for unlawful detention failed unsurprisingly.[9] A more serious challenge, invoking classic rule of law grounds of the need for clear positive law authorization when rights are significantly impacted, proved more conceptually difficult. A government oversight had meant that during the initial period of the lockdown, police were enforcing stay-at-home orders announced by the government that had no legal basis. In *Borrowdale v Director-General of Health* [2020] NZHC 2090, the High Court issued a declaration that there was no lawful basis for the stay-at-home order during this initial period, which gives some credence to the ideal of judicial insistence on the executive government's compliance with the rule of law.

However, the core of the *Borrowdale* challenge was an argument that the relevant powers in the Health Act 1956 did not extend to enforcing stay-at-home restrictions on a comprehensive, nationwide basis. The argument here is cogent, and was supported by some academic analysis.[10] However, the High Court leaned heavily (albeit often implicitly) on previous (unreviewed) examples of the comprehensive use of the Health Act powers (during the polio outbreak in the middle of last century) and both the success of and popular support for, the government's lockdown. In doing so, the Court was comfortable finding that the unprecedented use of the lockdown restrictions had a lawful statutory basis.

Past practice (rather than legal precedent) and popularity (rather than legal principle) are not natural bedfellows with traditional rule of law compliance, and so the High Court's reasoning suggests something of a change in approach to the understanding of the legitimate use of executive power under the New Zealand constitution.[11] Before *Borrowdale*, the assumption in the discourse would have been that clear and express authorization would be needed to restrict rights such as the freedoms of association and movement,[12] as occurred with the government's lockdown orders. *Borrowdale* offers a more contextual reading, which may not be inappropriate given the emergency pandemic context in which it was decided. Either way, the reasoning in the case speaks to an important change in how we understand the concept of 'law' and what law authorizes executive government to do in constitutional terms. Rather than a set of black and white rules or bright-line standards, law is understood here as a nebulous network of guidance, encouragement and command placed in service of an empowered executive.[13]

8 See, for example, Human Rights Act 1998 (UK), s 4.

9 *Nottingham v Ardern* [2020] NZCA 144.

10 Andrew Geddis and Claudia Geiringer, 'Is New Zealand's COVID-19 lockdown lawful?' (*UK Constitutional Law Blog*, 27 April 2020) <https://ukconstitutionallaw.org/2020/04/27/andrew-geddis-and-claudia-geiringer-is-new-zealands-covid-19-lockdown-lawful/> accessed 8 January 2021.

11 See Edward Willis '*Borrowdale* and Executive Power' [2020] *New Zealand Law Journal* 397.

12 New Zealand Bill of Rights Act 1990, ss 17 and 18.

13 See Dean Knight, 'Lockdown's Legality and the Rule of Law' *Newsroom* (Wellington, 4 August 2020) <https://www.newsroom.co.nz/ideasroom/lockdowns-legality-and-the-rule-of-law> accessed 8 January 2021.

This potential recasting of rule of law analysis to assess the legitimacy of executive government action must also be understood in light of the novel political accountability mechanisms, discussed above, that operated to scrutinize the government's pandemic response.[14] More traditional, black letter rule of law analysis might be appropriate if government action was otherwise unchecked. The new (or at least emerging) understanding is that the lawfulness of government action can be assessed contextually, and this has implications for our understandings of the constitutionally appropriate use of executive government power that still require working through.

The dual events of the COVID-19 pandemic and the national election also coincided in a constitutionally significant way. The New Zealand Prime Minister retains a de facto prerogative power to set the date of a general election, subject to certain statutory maximum timeframes. A community outbreak of the COVID-19 virus in Auckland, New Zealand's largest city, weeks ahead of the scheduled election date caused the Prime Minister to remake her initial decision and set a new election date for several weeks later. New Zealand elections have been suspended before, such as during wartime, but only by Parliamentary endorsement. This year was the first time that a Prime Minister had suspended an already determined election date through use of the residual prerogative power. Although there is no indication that the Prime Minister acted inappropriately, remaking the decision for the first time confirms and deepens the largely unfettered nature of the Prime Minister's discretion with regards to this matter.

Two further statutory reforms must be briefly mentioned in the interests of completeness. The first is the Public Service Act 2020, which provides for a modernized legislative framework for the operation of New Zealand's independent public service. The broad policy intent is to create a less siloed, more collaborative public service while maintaining its traditional strengths of impartiality and sense of public purpose. The second is the Privacy Act 2020, which updates New Zealand law in respect of the privacy of personal information. NZBORA does not contain protection for a general right to privacy, and so the Privacy Act regime gives expression to the individual's interest in privacy in New Zealand law. Significant changes include a notification regime for privacy breaches that risk serious harm, and new enforcement powers for the Office of the Privacy Commissioner.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The unwritten nature of New Zealand's constitution means that questions relating to the scope of reform and of constitutional control are implicitly addressed in the very fact of constitutional change. As explained above, the surrounding context is itself what identifies the fact of constitutional change as an instance of constitutional reform. For that reason, identified constitutional reform and its context have been considered together in the previous section.

This conflation of constitutional reform with wider constitutional, political and legal context will no doubt strike some readers as dissatisfying. No apology is made for this approach, however. It reflects the nature of constitutional change in a New Zealand context fully and accurately.

If any additional academic support for this position is required, the reader is referred to two additional sources. The first is Matthew Palmer's account of 'constitutional realism', which theorizes the New Zealand constitution in broad terms that account for the full reality of legal and political power.[15] This realist framework has its flaws as a general theory of constitutionalism in the New Zealand context, but is particularly apt for identifying constitutional change in the absence of a controlling document with special constitutional authority.

The second is Philip Joseph and Gordon Walker's theory of constitutional change, which understands the evolution of the New Zealand constitution in terms of changes in normative discourse.[16] Joseph and Walker argue that constitutional change occurs in New Zealand often without direct reference to decisive actions of constitutional actors, but rather in the shifting understandings of the legal, academic and political communities that concern themselves with constitutional practice.

These ideas are big, and to a meaningful extent they challenge the chapter format that authors in this volume have been presented with (certainly with respect to the New Zealand experience but perhaps beyond New Zealand as well). Again, no apology is made for this. It is in the good faith intellectual debate about the merits of different frameworks for understanding constitutions and constitutional change that improved accounts of constitutional reform can best be constructed.

IV. LOOKING AHEAD

By the end of the year, a loose proposal to extend the maximum length of the Parliamentary term from 3 to 4 years had gained a degree of profile.[17] Both major political parties expressed an interest in the idea of reform during the election campaign period, although neither sought a specific mandate to pursue the issue. The prevailing view among the political class and many members of the public is that a maximum term of 3 years is too short to incentivize and pursue medium- to longterm policy initiatives. This prevailing view is not necessarily borne out by the available evidence, although very little by way of official analysis has been undertaken. Nonetheless, the popular perception that there is a need for reform appears to be peaking. Securing reform could technically be achieved by way of supermajority support in the House of Representatives (Electoral Act 1993, section 268), but perceptions of legitimacy would probably require the issue to be put to a popular referendum. It is anticipated that the issue of reform will garner ongoing attention over the next 3 years.

Also gathering appreciable momentum is a grassroots campaign to lower to the minimum voting age from 18 years to 16 years. Like many other jurisdictions, younger demographics in New Zealand are voting in diminishing numbers. Part of the impetus for the reform campaign is that establishing voting habits early may encourages individuals to continue voting habitually in subsequent elections. In *Make It 16 v AttorneyGeneral* [2020] NZHC 2630, members of the reform campaign applied to the High Court for a declaration that the current law

14 See Janet McLean, 'Risk and the Rule of Law' (2020) 16 *Policy Quarterly* 11 at 14

15 See especially Matthew Palmer, 'What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-Holders' (2006) 17 *Public Law Review* 133.

16 Philip Joseph and Gordon Walker, 'A Theory of Constitutional Change' (1987) 7 *Oxford Journal of Legal Studies* 155.

17 See Edward Willis, "Government Terms: Three Years or Four?" *Newsroom* (Wellington, 20 November 2020) <https://www.newsroom.co.nz/ideasroom/government-terms-three-years-or-four> accessed 8 January 2021.

is inconsistent with the protected right to vote in NZBORA. That application was unsurprisingly rejected by the Court, albeit on grounds that may not withstand close scrutiny.[18] Nonetheless, the campaign is gaining a degree of momentum as a result of the publicity associated with the court action taken.

As always with New Zealand constitutional development, two perennial topics of potential reform always warrant mention. The first is the possibility of adopting for the first time a comprehensive, authoritative written constitution. Two high-profile commentators headed a campaign on this issue some years ago,[19] but initial enthusiasm has dropped away. There is no obvious support for the issue at the party-political level, although certain elected representatives have gone on record to support the cause (primarily on the grounds of stronger protection for individual liberties). The issue is likely to continue to simmer, especially in light of developments in the United Kingdom where issue has become live again. But there is no indication that reform will occur in the near future.

The second perennial issue is the republican question: should New Zealand discard is monarchical heritage and become a republic? There is a vocal minority that support this reform, but it has never achieved wide-spread popularity. New Zealanders are largely indifferent to the monarchial form of their government, and current arrangements do not appear to create serious issues. Indeed, the anachronistic nature of New Zealand monarchy is often seen as one of its strengths.[20] In the absence of some kind of flashpoint issue sparking wider calls for reform, this issue is also unlikely to crystalize into tangible reform in the near term.

V. FURTHER READING

Andrew Geddis and Alex Latu 'Unlawful commands, Bills of Rights, and the common law' [2020] *New Zealand Law Journal* 393.

Dean Knight, 'New Zealand, Covid-19 and the constitution: an effective lockdown and muted rule of law concerns' in *Covid-19 and Constitutional Law* (Universidad Nacional Autónoma de México 2020) 233.

Janet McLean 'Risk and the Rule of Law' (2020) 16 *Policy Quarterly* 11.

Leonid Sirota 'How Not to Decide a Bill of Rights Case' [2020] *New Zealand Law Journal* 410.

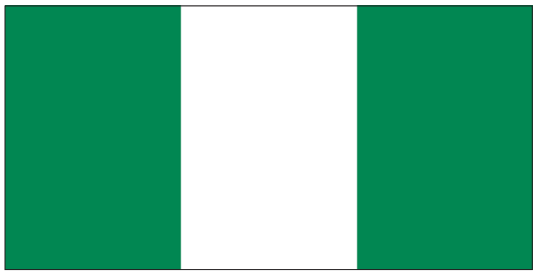
Edward Willis '*Borrowdale* and Executive Power' [2020] *New Zealand Law Journal* 397.

18 See Leonid Sirota, 'How Not to Decide a Bill of Rights Case' [2020] *New Zealand Law Journal* 410.

19 Geoffrey Palmer and Andrew Butler, *A Constitution for Aotearoa New Zealand* (Victoria University Press 2016).

20 See Dylan Matthews '3 Reasons Why New Zealand has the Best-designed Government in the World' *Vox* (Washington, 16 January 2015) <https://www.vox.com/2014/9/23/6831777/new-zealand-electoral-system-constitution-mixed-member-unicameral> accessed 8 January 2021.

Nigeria



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I. INTRODUCTION

Nigeria is an American-type presidential federal republic of 923,768 square kilometers and a population of roughly 200 million. Since 1960, when it got independence from the United Kingdom after a century of colonial rule, Nigeria has operated five constitutions (1960, 1963, 1979, 1989, and 1999) with three decades of military dictatorships between them. Under the present Constitution of 1999, executive power is vested in the President, who may exercise it directly or through the vice president and ministers of the Government of the Federation or officers in the public service of the Federation. Legislative powers are vested in a bicameral National Assembly comprising a 360-member House of Representatives and a 109-member Senate. Each of the thirty-six states constituting the Federation has a unicameral legislature. The present National Assembly (since 2019) is the ninth. (The First, Second, and Third National Assembly were under the previous 1979 and 1989 constitutions, respectively.) The National Assembly and the state legislatures have a tenure of four years without term limit. The President and Governors also have a four-year tenure but with a two-term limit. The Supreme Court of Nigeria is at the apex of the judicial system and has nationwide jurisdiction, partly original and partly appellate. All constitutional amendments must be initiated at the National Assembly. An act of the National Assembly amending the Constitution is transmitted to the state legislatures for their concurrence. Although the Constitution's text does not assign any role in this process to the either the President or the Governors, judicial interpretation created a requirement of presidential assent. This power has been very consequential, as constitutional amendments passed by the National Assembly and ratified by the state legislatures have frequently been vetoed by the President.

In summary, constitutional amendment is a three-stage process, namely, the process is triggered by the National Assembly passing a constitutional amendment bill by a two-thirds majority, followed by ratification by two-thirds of state legislatures, and presidential assent. This report highlights the constitutional amendment programme of the 9th National Assembly, which commenced in 2020 and at the time of this report is still at committee stage. However, in order to provide a broader context, the scope and outcome of recent similar exercises by the previous National Assembly will also be reviewed.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The two rules governing amendment of the Nigerian Constitution are provided by section 9 as follows:

> (1) The National Assembly may, subject to the provisions of this section, alter any of the provisions of this Constitution.
> (2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.
> (3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8, or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.
> (4) For the purposes of section 8 of this Constitution and of subsections (2) and (3) of this section, the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in section 48 and 49[1] of this Constitution.

The section contains two separate rules. The general rule is expressed in section 9(2), which requires that an amendment of the Constitution shall be passed by a two-thirds majority of each of the two houses of the National Assembly and ratified (with a majority vote) by at least two-thirds of the state legislatures. That is, at least twenty-four of the thirty-six states. This general rule is complemented by a special rule with a higher threshold, applicable only to amendments of three sets of provisions. Two of these are the amendment clause (section 9) and creation of new states or adjustment of boundary between states (section 8). The third are the fundamental rights

1 These sections specify, respectively, that there shall be three senators per state and one for the Federal Capital Territory, and the House of Representatives shall have three hundred and sixty members.

guarantees set out in Chapter IV of the Constitution (sections 33-46). It is hardly surprising that given the higher threshold required (four-fifths majority of the National Assembly), none of these provisions has ever been successfully amended.

As is the established practice, during its second year (2020), the House of Representatives and Senate of 9th National Assembly constituted their respective Ad hoc Committee on the Review of the 1999 Constitution to steer the constitutional amendment exercise. The chair of the House committee is Deputy Speaker and the Senate committee, the Deputy Senate President. Both committees are supported by a team of technical experts. Constitutional amendment bills are referred to the committee after the first reading, and it recommends the bills to be voted on at plenary. Constitutional amendment bills passed by both houses are harmonized and thereafter passed separately. It is these that are subsequently transmitted to the state legislatures for ratification. As we have previously noted, presidential assent is required for the ratified constitutional amendments to become law.

Success has been uneven. There was no successful constitutional amendment by the three pre-1999 Constitution National Assembly (First, Second, and Third) nor by the first two under the Constitution of 1999 (Fourth and Fifth). The constitutional amendment programme of the Fifth National Assembly ended in a fiasco principally because it was corrupted by the President surreptitiously pushing for removal of the presidential term limit. However, the 6th (in 2010) and the 8th (in 2017) National Assembly successfully amended several provisions of the Constitution, although the success of the latter was tempered by presidential veto. Constitutional amendment by the 7th National Assembly was a spectacular failure. Although it managed to pass the Constitution (Fourth Alteration) Bill in its final year and the required majority of state legislatures ratified it, with the term of the National Assembly ending, the President killed the bill by withholding assent. Also, only 40 percent (*n* 5) of the constitutional amendment bills (*n* 12) passed by the 8th National Assembly and ratified by the state legislatures received presidential assent. As we shall show in the next section of this report, the president's gatekeeping role has perhaps practically made him easily the most powerful player in the constitutional amendment process.

In the present 9th National Assembly, there are about two hundred House and Senate constitutional amendment bills pending. Except a few that have been reported out of committee, they have either only passed first reading or are at committee stage. Because, in practice, the committee consolidates bills seeking to amend the same provision of the constitution, the number of bills reported out of committee to the plenary will be a fraction of the number that passed first reading. It is expected that, everything else being equal, in 2021, the committee process should be complete, and the plenary would adopt some of the bills favourably reported by committee. In the 8th National Assembly, just over a third (37.5 percent) of the thirty-three constitutional amendment bills recommended by the Constitution Review Committees were unsuccessful at plenary. Most of the constitutional amendment bills introduced so far in the 9th National Assembly merely seek editorial changes to the text of the Constitution. But there are also several significant amendment proposals dealing with one of the following four important subjects:

- Decentralization of power-sharing between the Federal and state governments (3)
- Revenue-sharing (2)
- Decentralization of police services, in particular, to allow states to establish and maintain state police forces (4)
- Judicial reform (3)

Because power and revenue-sharing issues are easily polarizing in Nigeria, it is quite challenging to muster support required to scale the constitutional threshold for passing an amendment unless scope is limited. Constitutional amendment proposals similar to the present ones failed to pass during the 8th National Assembly, or passed but either failed to get ratification by the state legislatures or the president withheld assent in spite of the ratification.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Nigerian Constitution has been successfully amended four times. Three times in 2010 and a fourth in 2017. However, because each of these was a package of amendments affecting several sections of the Constitution, while the Constitution may have been amended on only four occasions, the number of amendments is greater number.

Amendment Law	Sections of the Constitution amended
First Alteration Act 2010	29
Second Alteration Act 2010	9
Third Alteration Act 2010	16
Fourth Alteration Act 2017	10
Total	**64**

Therefore, for analysis and comparison, it is helpful to distinguish the number of times the constitution has been amended from the number of amendments. Bulk amendments are not necessarily a unique Nigerian experience. An act amending the India Constitution, for example, may alter more than one section of the Constitution. However, this feature is a characteristic of constitutional amendments in Nigeria because amending the constitution is a programme on the calendar of every National Assembly as an exercise in constitutional maintenance rather than a limited response to a specific demand for constitutional change. As a result, the constitutional text affected by a constitutional amendment bill may be considerable. For, example, the first iteration of the Fourth Alteration Bill, reported by committee to plenary in the 8th National Assembly, was 157 pages. Similarly, the subjects included in Fourth Alteration Act 2017 are financial autonomy for state legislatures, grant of additional powers to the electoral commission, restriction of the tenure of the President and governors, reduction of age eligibility for elective office. This law amended ten sections of the constitution.

How amendments to the Nigerian constitution are counted is critical to measurement of the impact of the amendment rules. To illustrate, we shall use the methodology proposed by David Lutz[2] to determine the amendment rate of constitutions (the average number of amendments per year

2 Donald S Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006) chap 5.

since the constitution came into existence[3]). A moderate amendment rate (0.95-1.25 amendments per year average) is associated with a successful constitutional system. The calculation of amendment rate is simply the age of a constitution divided by the number of amendments. Thus, as the age of the present Nigerian Constitution is 22 years, if there have been only four amendments, the amendment rate is a mere 0.2. Although still higher than the United States (0.13) on Lutz's scale, it is significantly below the range considered a moderate amendment rate (0.95-1.25). A low or moderate amendment rate is positively associated with difficulty of the amendment process. "The more difficult the amendment process, the lower the amendment rate, and vice versa."[4] Using Lutz's index for estimating the relative difficulty of an amendment process, Nigeria scores 5.1[5] (same as the United States) on account of the following:

Two-third majority of the National Assembly (1.60)
Concurrence of two-thirds of state legislatures (3.0)
Action by the executive (presidential assent) (0.5)

If, on the other hand, there have been 64 amendments to the Nigerian constitution, rather than 4, the amendment rate is 2.9, which is to the north of the moderate amendment rate. While there is a dissonance between this amendment rate and a high score (5.1) for difficulty of the amendment process, the length of the Nigerian constitution (over 70,000 words) is associated with a high amendment rate. In contrast, relatively short constitutional documents (10,000 to 20,000 words) tend to have a lower amendment rate. Lutz suggests that, "Those writing a new constitution can expect with some confidence…that there will be about a .60 increase in the amendment rate for every ten-thousand-word increase in the length of the document."[6]

Whether they are counted few or many, constitutional amendments so far are rarely consequential. They mostly edit the constitutional text to effect relatively minor changes, most of which are corrective or, sometimes, reformative. Easily the most significant is the amendment of the stipulation on temporary presidential transition where the President is unable to perform the functions of his office (section 145). This original text, modelled on section 2 of the 25th Amendment to the U.S. Constitution, read as follows:

> Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary, such functions shall be discharged by the Vice President as Acting President

In 2009, President Umaru Yar'Adua, who was seriously ill, traveled abroad for medical care. Unfortunately, his condition deteriorated significantly and may have become unable to communicate. Because he did not send a written declaration to the leadership of the National Assembly according to the terms of section 145, the Vice President was unable to take charge as Acting President. This created a major constitutional crisis that was ultimately resolved by the National Assembly proclaiming the vice president Acting President "by the doctrine of necessity." To avoid a similar crisis in the future, the First Alteration Act 2010 amended the section by completely rewriting it as follows:

> (1) Whenever the President is proceeding on vacation or is otherwise unable to discharge the functions of his Office, he shall transmit a written declaration to the President of the Senate and the Speaker of the House of Representatives to that effect, and until he transmits to them a written declaration to the contrary, the Vice-President shall perform the functions of the President as Acting President.
> (2) In the event that the President is unable or fails to transmit the written declaration mentioned in subsection (1) of this section within 21 days, the National Assembly shall, by a resolution made by a simple majority of the vote of each House of the National Assembly, mandate the Vice-President to perform the functions of the office of the President as Acting President until the President transmits a letter to the President of the Senate and Speaker of the House of Representatives that he is now available to resume his functions as President.

This amendment illustrates the four proper functions of constitutional amendment identified by Richard Albert.[7] The amendment is as much corrective as it is restorative since the aim was to restore the intended purpose of the section. The amendment also elaborates this function for greater certainty by creating a default clause where a president is unable or fails to transmit the written declaration within the time frame created. This clause reforms the section.

Difficulty of the amendment process increases with the number of actors involved. They are the 469-member National Assembly, the state legislatures, and the President. If the amendment rule's required threshold of two-thirds majority of each house of the National and the concurrence of at least two dozen state legislatures creates significant amendment difficulty, the additional requirement of presidential assent escalates, as experience shows, the difficulty exponentially. Presidential role is not explicit in the text of section 9. One view was that, like the United States Constitution,[8] which the Nigerian Constitution models substantially, the design of the amendment rule neither contemplates nor is it compatible with presidential assent. However, by an absurd literal reading of the constitution, conflating constitutional amendment and the general legislative process of the National Assembly, a court ruled that, as with ordinary legislation, presidential assent was required.[9] The practical effect is to create a significant gatekeeping role for the President. For instance, only five of the twelve amendments passed by the 8th National Assembly and ratified by state legislatures received presidential assent. The remainder (60%) died.

This judicial intervention aside, there is no judicial review of constitutional amendments.[10]

3 Ibid 154.
4 Ibid 171.
5 The complementary rule in section 9, which creates a four-fifths threshold for certain amendments would raise Nigeria's difficulty score to 5.3. But, as there has never been a successful constitutional amendment applying this higher threshold, it is unnecessary to include it in this analysis.
6 Ibid 177.
7 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) 80-82.
8 *Hollingsworth, et al. v. Virginia* (1798) 3 US 378, 3 Dall. 378
9 *Olisa Agbakoba v. National Assembly and another* (unreported Suit No. FHC/L/CS/941/2010 of 8 November 2010). See Nat Ofo, 'Amending the Constitution of the Federal Republic of Nigeria 1999' (2011) 4 Afr. J Leg St 123.
10 However, in 2015, the President refused to give his assent to certain constitutional amendments and instead challenged their constitutionality at the Supreme Court. Because the tenure of the National Assembly and the President

IV. LOOKING AHEAD

The subject that looms over any discussion of constitutional change in Nigeria is reform of the federal system. Though mostly lacking clarity on constitutional design, and sometimes confusing, there is a persistent and growing demand for transformative constitutional change that includes decentralization of the federal system and natural resource revenue sharing.[11] This demand is partly for a radical amendment of the present constitution and partly for writing of a new constitution. It is not clear that either will gain the required traction to set reform on course in the immediate future. Even though there are no textual limitations in section 9 excluding it, whether it is legitimate for the National Assembly to initiate a radical amendment of the constitution, or constitutional dismemberment,[12] is open to question. Even more problematic is whether and how the National Assembly may become a constituent assembly tasked with writing a new constitution, or whether a special constitutional convention should be convened.

In spite of the demand to change it, it is noteworthy that the present constitution is in its third decade and counting. No previous Nigerian constitution has survived for more than a half decade. As institutionalization, and with it, diffuse support, grows with age,[13] wholesale revision or a rewriting of the Constitution will be increasing less likely with passage of time. That aside, there is as yet no national consensus on the details of the transformative change demanded any way. Such consensus is a prerequisite for a major change. On the other hand, it is just as possible for a consensus to evolve that would channel the demand for grand constitutional change into modest achievable goals. The Nigerian federalism system has long departed from a more decentralized original design.[14] The distortion of the design was principally a result of overthrow of the Constitution of 1963 by the military and the civil war and prolonged centralized military rule that followed. Unfortunately, the Constitution of 1979, of the first post-military democratic government, retained many of the distortions of the federal design that the military effected,[15] genetic aberrations that passed to the Constitution of 1999. The present demand for federalism reform is justified. However, the National Assembly has so far been unsuccessful in making even minor changes to the existing power-sharing scheme in the Constitution.

A separate source for the demand to write a new constitution is the claim that the present constitution is illegitimate because it was imposed by a military government as a process of the transition of power to a democratic civilian regime in 1999,[16] even though the constitution closely replicates the earlier constitution of 1979 that was formulated by a constituent assembly. The demand to write a new constitution is to ensure popular participation in the process. A flaw of the amendment rules in section 9 is the absence of any requirement for popular participation in the process. Although the National Assembly ad hoc committees on constitutional amendment are required by their mandate to invite the public to submit memoranda and to hold public hearings, there is no popular intervention in the adoption of proposed amendments by the National Assembly or their ratification by the state legislatures. The situation will be different, for example, if the section 9 rules were amended to require constitutional amendments to be subject to a referendum before they become legally effective.

In spite of high-threshold amendment rules, sixty-four sections or other provisions of the Constitution were successfully amended since 2010, confirming a positive correlation established in the literature between a constitution's length and its amendment rate. However, because the amendments are for the most part not consequential changes, it also suggests that the institutional incentives created by the amendment rules are neutered by countervailing social and political factors that create resistance to constitutional change. Some of the resistance, of course, is a factor of the number of players in the amendment process and in particular, the gate-keeping role of the President. A consequential constitutional change is unlikely to come by way of the section 9 process.

V. FURTHER READING

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Kalu N Kalu, *State Power, Autarchy, and Political Conquest in Nigerian Federalism* (Lexington Books, 2008).

Rotimi T Suberu, 'The Supreme Court of Nigeria: An Embattled Judiciary More Centralist than Federalist' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists of Unitarists?* (University of Toronto, 2017) 290.

ended before the Court heard the matter, the case was struck out. The amendments died.

11 Solomon Ukhuegbe, 'Facts and Fallacies in the "Restructuring" Conversation, or How not to Approach Federalism like Scripture' (Constitutionalism Blog, 17 October 2017) < https://wp.me/p9aUBW-11 > accessed 7 February 2021.

12 For constitutional dismemberment, see Albert (n 7) 76-92.

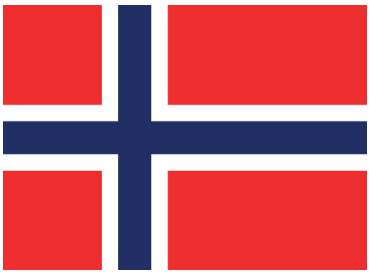
13 '...the longer an organization or procedure has been in existence, the higher the level of institutionalization. The older and organization is, the more likely it is to continue to exist through any specific future time period. The probability that an organization which is one hundred years old will survive one additional year, it might be hypothesized, is perhaps one hundred times greater than the probability that an organization one year old will survive one additional year.' Samuel P Huntington, *Political Order in Changing Societies* (Yale University Press, 1968) 13-14.

14 A comprehensive analysis of the original design is provided by Eme O Awa, *Federal Government in Nigeria* (University of California Press, 1964). For the historical context of the evolution of the design see Donald S Rothchild, *Toward Unity in Africa: A Study of Federalism in British Africa* (Public Affairs Press, 1960) 148-177. For its present distortions, see Dele Babalola, *The Political Economy of Federalism in Nigeria* (Palgrave Macmillan, 2019), Augustine A Ikein & Comfort Briggs-Anigboh, *Oil and Fiscal Federalism in Nigeria: The Political Economy of Resource Allocation in a Developing Country* (Ashgate, 1998).

15 L Adele Jinadu, 'The Constitution Situation of the Nigerian States' (1982) 12 Publius 155, 160-178.

16 Julius O Ihonvbere, 'How to Make an Undemocratic Constitution: The Nigerian Example' (2000) 21 Third World Q, 343; Tunde I Ogowewo, 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' (2000) 44 J. Afr. L 135.

Norway



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I. INTRODUCTION

The Norwegian Constitution combines continuity and change. Dating back to 1814, it is one of the oldest constitutions in the world still in force. It has, however, been amended more than 320 times.[1] Among the enduring aspects is the formal amendment clause, now Article 121, which has remained unaltered in essence. The provision requires, first, that proposals must be submitted during the first three years of a parliamentary period and adopted during the first three years of the next period. This means that there will be intermediary general elections. One of the (theoretical) intentions behind the system is to give the people a chance to vote based also on the proposed amendments thus ensuring direct as well as representative input into constitutional amendments. A second criterion is that the adoption of proposed amendments requires a two-third majority. In addition to these formal criteria comes a material requirement that amendments must not "contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution".

In this report, we will mainly focus on formal amendments pursuant to Article 121. In part II, we offer a general overview of proposals voted upon and proposals tabled in 2020. In part III, we analyze in more depth the reform of the provision on judicial review, which was the most significant—and controversial—reform in 2020. Then we move on to a high-profile Supreme Court climate case from 2020 concerning whether a block of oil and gas licenses issued for deep-sea extraction from sites in the Barents Sea was unconstitutional under a constitutional provision on the right to a healthy environment. This provision was revised during the Constitution during a major constitutional rights-reform in 2014. The provision and the case demonstrate the relationship between formal constitutional amendments and informal *ex post* clarification and development through judicial interpretation. In part IV, finally, we consider whether a rare request from Parliament for an advisory opinion from the Supreme Court may end up with an informal amendment of the constitutional provisions regarding transfer of power to international organizations—such as the EU.

1 For an overview: Langford, M. and Berge, B. K., *'Norway's Constitution in a Comparative Persepctive'*, *(Oslo Law Review* 6, 2019), 198–228. <https://doi.org/10.18261/ISSN.2387-3299-2019-03-02>.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2020, Parliament voted upon 16 amendment proposals tabled during the preceding parliamentary period (2013–2017).[2] By "proposals" we refer to each formal document tabled by the MPs. One should note, however, that a proposal can be a package containing several proposed amendments. The proposals ranged from topics such as the introduction of a referendum system in the Constitution to the abolition of the Norwegian church as the country's National Church.[3] Only five proposals were adopted, and of these, two concerned mere relocations of already existing provisions.[4] As to the three more substantial amendments, the first added a new exception to the main rule that anyone who is elected to Parliament has a duty to accept such election. The exception covers cases where the elected person has declared in written form that he or she does not want to be placed on a political party's electoral list.[5] The second amendment concerned the abolition of the requirement that senior civil and military officials must take an oath before their appointment, wherein they solemnly declare obedience and allegiance to the Constitution and the King. The requirement was replaced by a mere declaration of said duty of obedience and allegiance.[6] The third amendment of a more substantial nature concerns the provision on judicial review. We come back to this in part III. In sum, the adopted constitutional amendments from 2020 mostly concerned minor issues.

When it comes to last year's proposals for constitutional amendments, the total number was 39. Here, it is worth noting the cyclical nature of the Norwegian system. As mentioned, Article 121 requires that proposals be submitted during the first three years of a parliamentary period, that is, approximately one year before the general elections held in September every four years. In practice, almost all the proposals are tabled in the last months preceding the proposal

2 In total, 45 proposals were submitted in 2013–2017. The remaining 29 were voted upon in 2018 and 2019.

3 All proposals for constitutional amendments are accessible in Norwegian through this webpage: <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Grunnlovsforslag/>.

4 Cfr. Article 25 (3) (ex Article 101 (3)) on the employment of military force against citizens and Article 120 a (ex Article 33) on the Norwegian Central Bank.

5 Cfr. Article 63 (1) litra c. The amendment was motivated by criticism from the Organisation for Security and Co-operation in Europe (OSCE). According to OSCE, the Norwegian system was problematic in light of Article 18 (2), 19 (1) and 22 of the International Convention on Civil and Political Rights (ICCPR).

6 Cfr. Article 21.

deadline. For the 2017–2021 parliamentary period, then, 2020 was the great proposal year.[7]

A considerable amount of the proposals are "regulars", i.e., proposals that have been downvoted in previous rounds, often several times. These proposals have a limited chance of success but may concern issues that are of importance to the various political parties or MPs. Examples include proposals to lower the voting age from 18 to 16 years, to constitutionalize the right to seek asylum, the right to housing, and various other rights, to prohibit nuclear weapons on Norwegian territory, and to substitute the monarchy with a republican form of government.

Among the novel submissions, the perhaps most noteworthy proposals are two packages, dealing with the electoral system and the independence of the judiciary respectively. The latter proposes, *inter alia*, to fix the number of Supreme Court justices, to regulate the appointment procedure and irremovability of all judges, and to enshrine the principle of an independent court administration.[8] In addition to this package, there is also another, separate proposal to constitutionalize the principle of the independence of the prosecution authority.[9] The electoral system package includes proposals to regulate the administration of the general elections in the case that extraordinary events seriously interfere with the possibility of holding a normal election, to introduce a new system of election dispute resolution, and to enhance the element of proportional representation by lowering the threshold for parties to compete for extra seats from four to three percent.[10]

From the foregoing, a general trend emerges. There is an evident desire to improve the protection of fundamental rule of law principles by establishing these on a constitutional level, and not merely relying on ordinary legislation and a stable and consensus-based political and constitutional culture. A significant context here is the recent rule of law-deterioration in certain European countries, as well as the closely related development of rule of law-standards by European organs such as the Court of Justice of the European Union, the European Court of Human Rights, and the Venice Commission. This tendency also follows up on one of the reasons behind the constitutional rights reform of 2014, and previous amendments codifying customary law elements such as parliamentarism and the duty of government to ensure the information of parliament, namely that foundational elements of the rule of law-state should follow from the written constitution. In addition, COVID-19 and the 2020 American elections served as reminders that normal elections processes should not be taken for granted. In essence, the proposals convey a certain anxiety about the future, a precautionary approach, and a belief in the important role of bolstering constitutional law in that regard.

The two packages are noteworthy not only in terms of their content, but also in terms of having been thoroughly prepared by expert commissions. In this regard, they are—unfortunately—exceptions from main practice. As we get back to in part III, constitutional proposals are usually poorly drafted, which is a paradox in a legal system where the drafting procedure for ordinary legislation is normally meticulous and open to broad public participation. An extreme example is a 2020 submission that proposes to introduce a system of abstract judicial review, whereas the traditional system is one of concrete control. The explanation and justification for such a transformation count 1,5 pages.[11] The packages, in contrast, have been drafted as part of broader reforms instigated by the Government and prepared by expert commissions that have spent years finalizing comprehensive white papers.[12] This enhances the quality of the proposed amendments, which is particularly important in light of the fact that all cards are played when the proposal is tabled: the wording (and even punctuation) of proposals cannot be modified when they are debated by the new Parliament. As we get back to in part III, the procedure for constitutional amendments has been criticized, it remains to be seen to what avail.[13]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As mentioned in part II, the most significant constitutional reform from 2020 concerned the Constitution's provision on judicial review from 2015. The reform was also a controversial one.

Judicial review in the form of constitutional review of statutes has been customary law in Norway since the early mid-1800s.[14] The Norwegian type of review is concrete, *ex post* and "strong form". It has been practiced quite deferentially by Norwegian courts, albeit with higher frequency and intensity in some historical periods.[15] This form of statutory review was amended to Article 89 of the written constitution in 2015. The amendment came as part of the constitutional rights reform of 2014, by which a chapter of human rights was amended to the constitution.[16] The reasons for amending it to the written constitution was that such review was necessary to effectuate the rights guarantees in the chapter provisions, as well as the general parliamentary wish driving the reform—that central parts of constitutional law should follow from the written constitution rather than "just" being customary law.

Another form of judicial review, that of courts reviewing to what extent administrative action keeps within the limits of their legal basis, is also customary law in Norway. This form of review was explicitly not codified through the 2015 amendment, as this lay outside the mandate of the human rights committee preparing the constitutional rights reform.[17]

Already in 2016, an amendment was proposed to the relatively new Article 89.[18] It stated it did not purport to alter the material content

7 In addition, one proposal was submitted in 2019, making the total number of proposals for the 2017–2021 period 40.

8 Dokument 12:39 (2019–2020). Worth mentioning in this regard is also a separate proposal by another MP which requires that Parliament must approve, by a two-third majority, the Government's appointment of Supreme Court justices. See Dokument 12:3 (2019–2020).

9 Dokument 12:2 (2019–2020).

10 Dokument 12:11 (2019–2020).

11 Dokument 12:25 (2019–2020).

12 For the report on the electoral system, see NOU 2020: 6. For the report on the Norwegian courts, see NOU 2020: 11. Also the aforementioned proposal regarding the independence of the prosecution authority is based on an "NOU" ("Official Norwegian Reports"), see NOU 2016: 24.

13 Criticism has been raised by: Eirik Holmøyvik, *'Reform av grunnlovsprosedyren'* (*Kritisk juss,* 2018) No. 1, 5–34. <https://doi.org/10.18261/issn.2387-4546-2018-01-02>.

14 Rune Slagstad, *'The Breakthrough of Judicial Review in the Norwegian System'* in Eivind Smith (ed), *Constitutional 'Justice Under Old Constitutions'* (Kluwer Law International, 1995) 81.

15 Anine Kierulf, *'Judicial Review in Norway. A Bicentennial Debate'* (Cambridge University Press, 2018).

16 Anine Kierulf, *'Norway: Human Rights and Judicial Review Constitutionalized'*, (*Int'l J. Const. L. Blog,* 2015). <http://www.iconnectblog.com/2015/06/norway-human-rights-and-judicial-review-constitutionalized>.

17 Codification of administrative review was therefore explicitly rejected in the preparations before the 2015 amendment, see Dokument 16 (2011–2012) 14.4.1, cf. 14.5 and Innst. 263 S (2014–2015) p. 4.

18 Dok.nr.12:19 (2015–2016).

of the provision, only to clarify what it did already encompass. One clarification it needed, it was said, was to make explicit that Article 89 did not open for abstract review. From the preparatory works to the 2015 amendment, it is clear that the Article 89 only codified the existing customary law of concrete review.[19] Another clarification said to be needed, was that of expressing that administrative review was part of the provision. Which, according to the preparatory works to the 2015 amendment, it was clearly not. Particularly this latter point prompted several lawyers (one of the authors of this article included) to point out that the amendment could not do both: Either it could alter only the wording of the provision, not its material content, or it could alter also the material content by expanding Article 89 to cover two, not one form of review.[20] Following a short debate in the spring of 2020, the proposal ended up being enacted in May, without this dilemma being addressed.

Due to COVID-19 restrictions, only two-third of the total members of parliament could be present to vote over the section 89 amendment.[21] It is quite common that MPs are not present, even for such votes. If they abstain by their own choice, that presents no constitutional problem. In this case, however, it was the party groups and the parliamentary presidency who decided what MPs could and could not be present. It can thus be questioned whether the amendment is at all constitutionally valid, a question at least one leading law professor has answered in the negative.[22] Be that as it may; as there is no tradition for judicial review of constitutional amendments in Norway, this is likely to remain an academic question. It is generally considered that courts cannot review whether the criteria in the amendment clause (Article 121) have been complied with—there is no judicial review of constitutional amendments—at least not of their material content.[23]

In the pragmatic tradition of Norwegian law, the finer details of the wording of Article 89 are unlikely to present practical, legal problems. Courts will probably conduct both forms of review as they have always done. Both forms now follow from Article 89 but developing and clarifying the more precise content of administrative review will still be left to the courts, as it has been until 2020. The amendment does, however, illustrate the problematic feature of the Norwegian constitutional amendment procedure that we touched upon in part II: Constitutional provisions are, as a rule, prepared, proposed, and debated in a much less thorough and democratically entrenched manner than are ordinary legislative provisions. This again leads not only to flawed constitutional provisions, but also has the potential to weaken the respect for and legitimacy of the constitution as a political and legal institution. The procedure has been considered flawed both in terms of legislative-technical control and political deliberation of the amendment proposals and has led to calls for reform.[24] Maybe the history of Article 89 will contribute to stronger calls for such reform.

Having dealt with the 2020 amendment of Article 89, we will now move to the very system of judicial review itself. More specifically in this context, we would like to highlight the connection between judicial review and formal amendments. A salient feature of the system of judicial review is that the content of constitutional amendments—especially constitutional rights provisions—are oftentimes determined or clarified by the courts as part of their concrete review. The formal division of power is undisputed: Parliament adopts constitutional amendments and the courts merely apply them. The informal division of labor is more nuanced. The connection between amendments and clarification through review has been manifest over the last years, in the wake of the major 2014 reform. As mentioned previously, this reform introduced a full-fledged chapter of constitutional rights, on the occasion of the bicentennial of the Constitution. The post-2014-phase has been marked by discussions and court-based clarifications on several unclear points.[25]

A prominent Supreme Court judgment from 2020 is illustrating. Almost to the day one year after the Dutch Supreme Court handed down its landmark climate decision in the *Urgenda* case, on 22 December 2020, the Norwegian Supreme Court decided a major climate lawsuit.[26] The main issue of the case was whether the Government's decision to grant new petroleum searching licenses in the Barents Sea violated Article 112 of the Constitution, which prescribes that everyone has the right to a healthy environment. Article 112 was adopted in 1992 and slightly amended as part of the 2014 general rights reform. The Court was asked to clarify the meaning of Article 112—first and foremost whether it was a justiciable right at all or merely a political guideline, and then the precise scope and content of the provision. The Court confirmed that the provision is justiciable but stated that in cases where Parliament has been actively involved in the process, Article 112 is supposed to be a safety valve, only applicable in exceptional circumstances. As Parliament had been involved in the decision-making process concerning the searching licenses, the Court found for the Government.[27] The climate case demonstrates how the amendment process does not necessarily come to an end with the formal vote in Parliament. In some cases, the *ex post* clarification by the courts is a significant part of the picture.

19 There are no examples of abstract review in Norwegian law. In 2019, however, the organization "No to EU" filed a claim that Norway's implementing EU's third energy market package was contrary to the Constitution's regulation of delegation of public power—"sovereignty"—to international organizations. Cfr. on this constitutional issue in Part III below. The city court and court of appeal both dismissed the case because it represented a question of abstract review. With reference to the so-called Maastricht-exception in Danish law, where the Danish Supreme Court in 1996 found that abstract review could pass in cases of profound impact on all areas of life that could not otherwise be tried by the courts, "No to EU" claims there must be exceptions to the rule that courts do not review constitutional questions in the abstract. The case, limited to the particular question of abstract review, was admitted to the Supreme Court in plenary, and the decision is expected in February 2021.

20 See e.g.: Kjetil Kolsrud, *'Advarer Stortinget mot å vedta grunnlovsendring'* (*Rett24*, 2020), <https://rett24.no/articles/advarer-mot-a-vedta-grunnlovsendring>

21 Two-third is the required quorum when Parliament votes upon constitutional amendments, cfr. Article 73.

22 See: Benedikte Moltumyr Høgberg, '*Statsrett. Kort forklart*' (Universitetsforlaget, 2020) 3rd ed., 98–99.

23 Cfr. e.g. ibid. and: Andenæs, J., and Fliflet, A., '*Statsforfatningen i Norge*' (Universitetsforlaget, 2017), 11ed. 77.

24 See fn 13 above.

25 See e.g. the Supreme Court judgment in HR-2015-206-A, which clarified important principles regarding how to interpret the new provisions in light of international human rights provisions, and in HR-2016-2554-P, which clarified that the reform did not incorporate international human rights treaties into the Constitution.

26 HR-2020-2472-P (plenary judgment). For a brief overview in English, see e.g.: Libell, H. P., and Tayler, D. B., *'Norway's Supreme Court Makes Way for More Arctic Drilling'*, (*New York Times*, 2020) <https://www.nytimes.com/2020/12/22/world/europe/norway-supreme-court-oil-climate-change.html>. An official translation has now been published. This is not a big thing, but it could be possible to change the final sentence to the following: "The judgment is available through the Supreme Court's webpage: <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2020-2472-p.pdf>."

27 In addition to the constitutional issue, the case also raised questions about potential violations of Article 2 and Article 8 of the European Convention on Human Rights and of procedural administrative law. In respect of the latter, a minority of four judges concluded that the climate impact assessments violated the EU Strategic Environmental Assessment (SEA) Directive (Directive 2001/42/EC).

The case also demonstrates some of the consequences of the flawed constitutional amendment procedure. The preparatory works to the 2014 amendment of Article 112 were brief and rather vague. Therefore, the Court was left to decide fundamental issues like whether the provision is justiciable at all or not. To some extent the nature of fundamental rights is such that they necessitate clarification through individual cases. This is unproblematic. But when Parliament amend the Constitution in ways making the very scope of a provision is unclear, this may serve to undermine the democratic and legal legitimacy of the constitution as a foundational institution. It also challenges its social legitimacy through negatively influencing public debate. The climate lawsuit received great attention, but the debate was dominated by lawyers and turned out to be a hodgepodge of legal and political arguments. It remains to see whether, in light of the Supreme Court's interpretation, there will be initiatives to amend Article 112. If so, one could hope for a thorough, broad, inclusive, and non-judicialized process, where politicians, experts, stakeholders, and the common man alike have the chance to debate whether there should be any constitutional limits to state power in the field of combatting climate change. Or whether this field ought to be left entirely to the political domain. Determining the province of constitutional law essentially belongs to the political sphere, where it can be properly debated without the formal constraints of legal reasoning.

IV. LOOKING AHEAD

Theoretically, 2021 should be the year of the constitutional amendment cycle when the people reflect upon the proposals that were submitted in the preceding parliamentary period and vote for their *pouvoir constituant*-constituents in the September general elections. In practice, the proposed amendments will probably barely be mentioned during the election campaigns. In terms of formal amendments, then, 2021 will be a standstill—with neither new proposals nor votes upon the proposed ones.[28]

The COVID-19 situation will, however, likely spark debates about a reform of the constitutional regulation of states of exception, and these debates might start in 2021. The Norwegian Constitution is virtually silent about crisis situations, and states of exception are regulated by a doctrine of constitutional custom. The introduction of a provision regulating derogation from human rights in times of crises—parallel to, for instance, Article 4 of the ICCPR—was rejected by Parliament in 2014. A similar proposal was submitted once again in 2020, and it will be interesting to follow its destiny.[29]

The major constitutional development in 2021 is likely to be an advisory opinion from the Supreme Court, at the request of Parliament. The opinion is of interest in this context as it might end up as an informal amendment of the Constitution. The legal basis for the opinion is the very rarely invoked Article 83 of the Constitution, according to which Parliament may obtain the opinion of the Supreme Court on points of law. The last time this mechanism was used was in 1945.

The object of the requested opinion is the applicable constitutional procedure for the delegation of public power to international bodies. The issue has become increasingly practical due to the growth of various EU agencies with administrative powers, and the case at hand relates to the transfer of certain powers to the European Agency for Railways (ERA). The delegation of public power to international bodies is regulated in Article 115 of the Norwegian Constitution, requiring the acceptance of two thirds of the Parliament. This provision, however, only mandates such delegation to organizations to which Norway adheres or becomes member. However, Norway is not a member of the EU, but only associated with the union through the EEA Agreement. Consequently, Article 115 is unapplicable in cases concerning the delegation of power to EU agencies. For many years, the solution has been an unwritten doctrine according to which Parliament may decide upon such delegation by a regular majority vote through the ordinary treaty-making competence (Article 26) in cases where the delegation of power is "limited in scale" ("*lite inngripende myndighetsoverføring*"). This doctrine has been controversial. Now, the Supreme Court is asked to give its opinion on whether Parliament is constitutionally allowed to accept such delegation of powers to the ERA pursuant to Article 26.

The unwritten doctrine may be considered as an informal amendment to the Constitution developed through legal theory and government and parliamentary practice. If the Supreme Court accepts the doctrine, it will consolidate this practice, even though the opinion it gives under Article 83 will not be binding. If, on the other hand, the Supreme Court rejects the doctrine, this could be seen as a way of informally amending constitutional law by altering what is established as a long-standing constitutional customary practice. Interesting it will be, in any event, to see what legal and political consequences the decision will bring about. The only thing certain is that the formal amendment clause gives Parliament the final saying about the content of the written Constitution—an enduring aspect of the Norwegian Constitution.

V. FURTHER READING

Eirik Holmøyvik, *'Strasbourg slams old democracies on elections'*, 1 August 2020, *Verfassungsblog.* <https://verfassungsblog.de/strasbourg-slams-old-democracies-on-elections/>

Kjølstad, M.M., Koch, S., and Sunde, J. Ø., *'An Introduction to the Norwegian Legal Culture'* in Koch, S., and Sunde, J. Ø. (eds), *'Comparing Legal Cultures'* (Fagbokforlaget, 2020) 2nd ed.

28 In theory, the newly elected Parliament may vote upon proposals submitted during the 2017–2021 period in the course of the autumn. In practice, however, proposals for amendments are decided during spring sessions.

29 Dokument 12:37 (2019–2020).

Peru

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I. INTRODUCTION

On September 30, 2019, the President of the Republic, Martin Vizcarra, invoking Article 134 of the Constitution, dissolved the Congress of the Republic. Such situation arises because the Congress denied the vote of confidence (*voto de confianza*) related to the reform of the procedure for the election of judges of the Constitutional Court proposed by the President, since there was a risk that such entity could be taken over by magistrates of a certain political composition (court packing), then, in order to avoid this, it was proposed to modify the procedure for the selection of its members. Once the Congress was dissolved, the Permanent Commission of the Congress filed an action for jurisdiction (*demanda competencial*) against the decision to dissolve the Congress at Constitutional Court. Afterwards, a date was set for new congress elections to be held on January 26, 2020.

In general terms, some relevant aspects that have taken place during 2020 in the country are: (i) on January 14, the Constitutional Court adopted and published the ruling declaring the competency claim concerning the dissolution of Congress unfounded. With four votes in favor and three against, the Constitutional Court declared unfounded the jurisdictional lawsuit filed by Pedro Olaechea, president of the Permanent Commission, against the decision of Martin Vizcarra that dissolved the Congress (Congress of the Republic vs. Executive Power in case N.º 0006-2019-CC/TC), (ii) on January 26, congressional elections were held, the newly elected congressmen will complete the 2016-2021 congressional term that had been interrupted by the dissolution, (iii) on March 15, the President of the Republic announces the beginning of mandatory social isolation for 15 days due to the outbreak of COVID-19, (iv) the congress of the republic approved the constitutional reform to eliminate parliamentary immunity (in first vote, on July 5 and, in second vote, on December 10, being ratified) and (v) president Martin Vizcarra is vacated (*impeachment or presidential vacancy*) on November 9 by the Congress for alleged acts of corruption with 105 votes in favor, 19 against and 4 abstentions, then assumes the president Manuel Merino de Lama, later replaced by Francisco Sagasti.

Perhaps the most relevant political-constitutional event during 2020 was the vacancy of President (impeachment process) Martin Vizcarra. On November 9, he was vacated by the Congress of the Republic for a series of alleged acts of corruption linked to the irregular hiring of people in the Ministry of Culture and when he was regional governor of Moquegua[1]. The same that would have constituted the cause of permanent moral incapacity, foreseen in Article 134 of the Constitution, therefore, the Congress was authorized to remove him from office. In relation to this, the population showed its discontent because it demanded that criminal responsibilities be established by the Public Prosecutor's Office and other judicial instances, but not at a political level (the Congress), since his term of office ends on July 28, 2021; even the vacancy promoted by the Congress was described as a *coup d'état*. After the vacancy occurred, on November 10, Manuel Merino de Lama assumed the presidency of the Republic, since he was president of the Congress and constitutionally corresponded to occupy that position. The assumption of office of the latter aroused much popular rejection and protests that lasted several days, until Manuel Merino resigned on November 15 amid protests. Finally, on November 16, Francisco Sagasti, who is currently President of the Republic, was sworn in as President of Peru and, according to the Constitution, his term of office lasts until July 28, 2021.

In short, these are the most important events that had an impact on the constitutional sphere and, to a certain extent, the constitutional reform. Specifically, within this political-constitutional tension, several constitutional reforms have also been implemented, which were promoted by the Congress of the Republic or at the initiative of the President of the Republic, as we will explain in the following section. Some constitutional reform initiatives were successful, while others failed or were paralyzed. Along these lines, we will give an account of the main constitutional reforms embodied or incorporated in the constitutional text.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

During 2020, several constitutional reform initiatives were promoted by Congress, which were channeled through bills on various topics. As an example, we have the constitutional reform bill that seeks to reinstate the bicameralism, constitutional reform bill that aims to change the 1993 Constitution to return to the 1979 Constitution, constitutional reform bill that regulates the single public health system, constitutional reform bill that eliminates parliamentary immunity, among others. Some reform initiatives have been successful and were incorporated into

1 It is one of the 24 departments of Peru. He was governor of the same during the years 2011 to 2014.

the Constitution, while others were shelved in the commissions or are still in the process of deliberation. With these annotations, we will begin by giving an account of the constitutional reforms that were successful, then we will explain some that remained as proposals.

2.1. CONSTITUTIONAL REFORM LAW THAT REMOVES PARLIAMENTARY IMMUNITY

Act No. 31118 reforms the Constitution eliminating the parliamentary immunity which was approved by the Congress of the Republic on December 10, 2020. The plenary of the Congress approved with 103 votes in favor, 14 against and 3 abstentions, the opinion of the Constitution Committee that eliminates the parliamentary immunity. Such measure was adopted and put into effect in the first vote on July 5 and in the second vote on December 10. The objective of the Act is to eliminate immunity, once this is achieved, the wording of Article 93 of the Constitution is as follows: "Congressmen represent the Nation. They are not subject to imperative mandate nor to interpellation. They are not responsible before any authority or jurisdictional body for the opinions and votes they issue in the exercise of their functions. The magistrates of the Constitutional Court and the Ombudsman enjoy the same prerogatives as the congressmen. The Supreme Court of Justice has jurisdiction over the prosecution for the commission of common crimes imputed to members of the Congress of the Republic during the exercise of their term of office. In case of commission of crimes before assuming the mandate, the ordinary criminal judge is competent"[2]. This is the provision that was incorporated into the current constitutional text.

2.2. CONSTITUTIONAL REFORM THAT PREVENTS CONVICTED PERSONS FROM RUNNING FOR PUBLIC OFFICE OR POSITIONS OF TRUST

On September 15, 2020, Act No. 31043 was published in the *El Peruano* (Peruvian official newspaper), which was enacted by the President of the Republic, Martin Vizcarra. The purpose of this constitutional reform law is to guarantee that in the next General Elections of April 11, 2021, suitable candidates with an adequate professional profile will participate. Previously, according to Act No. 30717, which modified the Organic Law of Elections in January 2018, the impediment was only applied to those persons who had a "consented or executed" sentence or in second instance issued by the Judiciary. In this direction, now, the requirements and standards for running for public office have been raised, since people who have a conviction against them may not participate in elections. It must be emphasized that the impediment to run for public office requires the existence of a conviction in the first instance for the commission of an intentional crime, as perpetrator or accomplice; they also may not hold public office in positions of trust.

2.3. REFORM OF ARTICLE 16 OF THE CONSTITUTION TO STRENGTHEN THE EDUCATION SECTOR

Act No. 31097 was published in the *El Peruano* on December 29, which amends Article 16 of the 1993 Constitution, specifically the last paragraph thereof. The additional text introduced indicates that "[e]ducation is a fundamental human right that guarantees the development of the individual and society, for which the State annually invests no less than 6% of the PBI". The purpose of this constitutional reform is to increase investment in the education sector in order to guarantee the satisfaction of the right to education and, in turn, to promote the development of the individual and society. Specifically, the reform indicates that the State is obliged to invest annually no less than 6% of the GDP, a situation that translates into the Ministry of Education and other competent entities implementing educational policies at the national level, in order to promote better levels of development and participation of people in the public sphere and, of course, the promotion of equal opportunities.

2.4. RETURN TO BICAMERALISM: CONSTITUTIONAL REFORM PENDING

On December 2, the Constitutional Commission of the Congress of the Republic approved the constitutional reform bill that proposes the return to the bicameral system, i.e., that said entity should have a chamber of deputies and a chamber of senators. The proposed composition is that the Senate will have 60 members, while the Chamber of Deputies will have 130 members. We should mention that this reform is a pending issue in the constitutional agenda, since for several years the implementation of bicameralism in the country has been demanded, including, in the referendum that took place on December 9, 2018, the population was consulted to establish bicameralism in the Congress of the Republic, however, it was rejected by the population because the parliament, at the time, introduced some modifications that perverted the purpose of the same. Considering these annotations, it is clear that it is a constitutional reform that should be promptly implemented.

As it is a constitutional reform, it requires two consecutive votes in the plenary of Congress to be implemented, since so far it has only been approved at the level of the Congressional Commission of the Congress of the Republic. It should also be noted that this constitutional reform bill includes other reforms, such as: prohibition of the power of the President of the Republic to dissolve the Senate, elimination of the obligation of the President of the Council of Ministers to request a vote of confidence after the appointment of a new cabinet, the Executive Branch may not extend the state of emergency without the authorization of the Senate or the Permanent Commission, among others[3]. In this regard, we should also mention that the aforementioned constitutional reform project accumulates around 33 bills, seeking to amend Article 65 and the incorporation of other provisions to the Constitution.

2 The previous wording of Article 93 provided that "Congressmen represent the nation. They are not subject to mandatory mandate or interpellation. They are not liable before any authority or jurisdictional body for the opinions and votes they issue in the exercise of their functions. They may not be prosecuted or imprisoned without prior authorization of the Congress or the Permanent Commission, from the time they are elected until one month after they have ceased to hold office, except for flagrant crimes, in which case they are placed at the disposal of the Congress or the Permanent Commission within twenty-four hours, in order to authorize or not the deprivation of liberty and prosecution".

3 See <https://canaln.pe/actualidad/bicameralidad-comision-constitucion-aprobo-dictamen-retorno-dos-camaras-n428316> Accessed on January 8, 2021.

2.5. THE RETURN TO THE 1979 CONSTITUTION AND THE DEFINITION OF THE VACANCY CAUSE OF PERMANENT MORAL INCAPACITY

On May 11, 2020, a bill is presented that seeks to "repeal" the 1993 Constitution and reestablish the 1979 Constitution (bill 5162/2020-CR), using the Constituent Assembly mechanism. Such a body would have the purpose of approving a new Constitution within 6 months. The purpose of the project is to replace or completely change the 1993 constitutional text, since it is considered unconstitutional and illegitimate. At present, this proposal is before the Commission of Constitution and Regulations of the Congress of the Republic.

In the month of December, constitutional reform bills were presented to clarify the interpretation of the grounds for presidential vacancy. The objective was that article 113 and clause 2 of the Constitution should be modified to establish the cause of permanent moral, psychological or physical incapacity, declared by the Congress, in order to vacate the president. At present, the regulation included in Article 113, paragraph 2, is that the vacancy is produced by permanent moral or physical incapacity; however, it is not precise as to the exact meaning of moral or physical incapacity. These reforms will still be discussed in future congressional sessions, therefore, results are expected for 2021.

In general, these are the constitutional reform projects and initiatives, some of which have already been finalized and others are pending review. All the laws and constitutional reform initiatives analyzed so far are amendments to the Constitution, since the mechanisms provided for in the Peruvian Constitution have been used, especially Article 206, a clause that allows for the valid introduction of reforms to the constitutional text. In this sense, the reforms have not entailed any alteration or distortion of the Constitution, except for the one that seeks to replace the current Constitution of 1993 with that of 1979[4], and in the other cases they are in accordance with the provisions of the constitutional text. What we will note is that the constitutional reforms have no pretensions of making structural changes in the Constitution, since the activation of the power of constitutional reform is produced respecting its content and the procedure established by the Constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

3.1. CONSTITUTIONAL REFORM ELIMINATES PARLIAMENTARY IMMUNITY

The purpose of the constitutional reform law that eliminates parliamentary immunity (Act No. 31118) is to legitimize the actions of the congress before the society, due to the fact that during the last years, several congressmen have used this prerogative to avoid being investigated for crimes committed and thus paralyze the criminal process. This constitutional reform removes that obstacle that existed in relation to the fact that congressmen could not be investigated for the commission of common crimes or crimes not related to the exercise of the position of congressman. The guarantee serves to protect the congressman to prevent him from being judicially prosecuted or detained for political reasons, however, in fact, this has not been happening, since the congressmen have used it to avoid judicial investigations in other cases. This, evidently, has distorted this guarantee.

It should also be noted that this constitutional reform has generated controversy, since other institutions have such immunity, i.e., parliamentary immunity was granted to the President of the Republic, the Ministers of State, the magistrates of the Constitutional Court, the supreme judges and prosecutors as well as other authorities. Now, with the constitutional reform this guarantee disappeared. This fact has been considered as a weakening of the democratic model of the State, since some authorities such as the magistrates of the Constitutional Court require this guarantee to ensure autonomy, independence and impartiality, otherwise, they are exposed to complaints or common investigations (proceedings that are not related to their functions).

3.2. CONSTITUTIONAL REFORM THAT PREVENTS CONVICTED PERSONS FROM RUNNING FOR PUBLIC OFFICE

The purpose of the constitutional reform law (Act No. 31043) is to prevent persons sentenced in first instance from running for public office. In this sense, the referred constitutional reform law introduces two new articles to the Constitution: 34-A and 39-A. In the first one, it is made explicit that persons sentenced in first instance for an intentional crime, whether as perpetrator or accomplice, cannot run for a position of popular election. In the second one, it is established that persons are prevented from exercising public functions or positions of trust if they have been convicted in the first instance, as perpetrators or accomplices, for the commission of an intentional crime. The motivation that emerges from the constitutional reform is to make the public function transparent and promote suitability for the performance of the position, in spite of this, it has not been exempt from criticism, due to the fact that it violates the principle of presumption of innocence and the double instance.

There are discrepancies in relation to this constitutional reform law, because it violates principles and guarantees, since by requiring a final conviction in the first instance, it jeopardizes the right to a plurality of instances, specifically, the right to a second instance. It is likely that judges may make mistakes, therefore, there must be a second instance of review to correct those eventual mistakes. As it is known, judges can make mistakes and if the first instance sentence is sufficient, then the right to double instance will be put at risk, since that mistake cannot be reversed or when the reversal is made, it will have already produced negative effects. Apart from all this, what the legislator valued at the time of issuing the rule is the purpose behind it: to ensure the access of adequate and suitable persons to perform representative functions or positions of trust within the public administration.

3.3. THE ROLE OF THE CONSTITUTIONAL COURT

During the year 2020, the Constitutional Court has not exercised constitutional control of constitutional reforms, however, it has issued several rulings related to topics such as the protection of fundamental rights, the expulsion of norms incompatible with the Constitution,

4 Even for this reform it was necessary to use the constitutional reform procedure provided for in the 1993 Constitution.

among others. Special emphasis should be placed on two rulings: (i) *Exp. No. 01739-2018-PA/TC:* it is an amparo (*proceso de amparo*) lawsuit where a homosexual couple requested the Constitutional Court to recognize their marriage celebrated in Mexico. The lawsuit was declared inadmissible (four justices voted against and 3 in favor of upholding the lawsuit), despite that decision, in the minority votes it can be noticed that there is openness to debate and recognize the rights. What the sentence makes clear is that these matters should be discussed in parliament, since there it can be channeled into a constitutional reform initiative recognizing same-sex marriage and (ii) *Exp. No. 00002-2020-CC/TC:* the Constitutional Court declared the competence lawsuit filed by the Executive Branch against the Legislative Branch inadmissible, the petition of the lawsuit was that said body could fix the meaning or the way in which the cause of permanent moral incapacity (Article 113, paragraph 2) should be understood, but it did not do so. The reasoning used to reach this conclusion is that the matter in dispute has been removed, therefore, the court cannot issue a ruling on the merits, since the facts that motivated the filing of the lawsuit have disappeared.

In both cases, the Constitutional Court has not played a countermajoritarian, representative or illuminist role, since its purpose was not to invalidate a measure adopted by another power, satisfy social demands or promote social progress. Rather, the role was more restrictive and, to a certain extent, limited because the rulings analyzed show that these matters, the recognition of same-sex marriages or the establishment of criteria for the interpretation of the ground of permanent moral incapacity, were not the object of pronouncements. This shows that these matters were left in the hands of the Legislative Branch, since it is the competent body to amend the Constitution, which in turn can ensure broad debate and openness to social problems; certainly, it could be said, they fulfilled a role that promoted deference to the democratic legislator. By renouncing the possibility of issuing a decision in relation to the matters discussed herein, said body did not fulfill any of the roles mentioned at the beginning of this paragraph.

IV. LOOKING AHEAD

There are still pending as part of the constitutional reform agenda some topics, in addition to those mentioned above, such as: (i) the recognition and expansion of the catalog of fundamental rights, especially the rights of minorities, (ii) the constitutional reforms to be carried out in the future must be much more reflective and inclusive, allowing the concurrence of diverse stakeholders in the same, in that way, the reforms will be democratic and the questionings will be reduced, (iii) the reform of the structure and organization of the State, among others. In addition to this, there is an open agenda of national interest: the total constitutional change. There are political forces and, especially, the citizens themselves have been promoting the need to replace the current Constitution (drafting a new Constitution). This is still a progressive work that will be implemented little by little during the next few years, since there are currently no adequate political conditions to modify the Constitution, in spite of this, it is time for a panorama of change to be generated.

The decisions issued by the Constitutional Court leave the way open for the legislative process to discuss the possibility of recognizing same-sex marriage and, of course, the delimitation of the content or scope of the vacancy due to permanent moral incapacity. Since the Constitutional Court has not provided an answer to this problem, it is therefore appropriate to proceed by legislative means, despite the divergences that both topics may arouse in the members of parliament. In this direction, within the agenda of the constitutional reform, two issues are placed: the recognition of same-sex marriage (including other minority rights), as well as the delimitation of the areas or the way in which permanent moral incapacity should be understood. In this direction, these are the points to be dealt with by the current Congress and the one that will take office as of April 11. These are not the only ones, rather there are many more, but they can be progressively advanced.

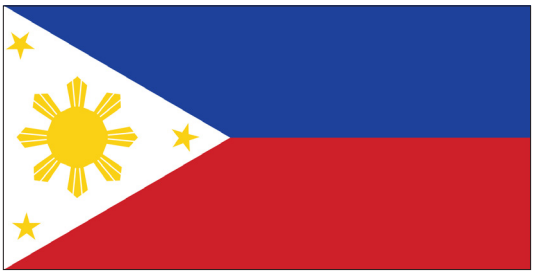
V. FURTHER READING

César Landa Arroyo, *Crisis constitucional en el Perú: Tres Presidentes en siete días* (Diálogo derechos humanos Blog, 19 November 2020).

César Landa Arroyo, *Perú: la inconstitucionalidad en declarar la vacancia del presidente Martín Vizcarra* (CIJ Blog, 15 November 2020).

Galimberty Ponce Flores, *La Constitución antidemocrática* (Zela Grupo Editorial, 2020).

Philippines



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I. INTRODUCTION

All the Presidents of the Philippines since 1992 to the present (Fidel Ramos, Joseph Estrada, Gloria Macapagal-Arroyo, Benigno Aquino III, and Rodrigo Duterte), attempted to or entertained the idea of amending the thirty-three-year-old Constitution of the Philippines. Rodrigo Duterte, who was elected President in 2016, is no exception.

However, Duterte's initiative is the most disorganized and least motivated effort at constitutional amendment. Duterte's campaign platform included a pitch for the adoption of a federal system of government. He appointed a 25-member panel in December 2016 to make specific recommendations for the constitutional amendment effort. The panel finished its work in mid-2018 but polls weighed heavily against federalism and this effort fizzled.

It seemed that the Duterte Administration was refocusing its attention on constitutional change. On October 31, 2018, Duterte issued Memorandum Circular No. 52, "Creating the Inter-Agency Task Force on Federalism and Constitutional Reform." The IATF was mandated to integrate, harmonize, and coordinate ongoing efforts towards Federalism and constitutional reform. More specifically, it was directed to:

> (**a**) Develop strategies and implement such activities necessary and proper to raise public awareness on Federalism and constitutional reform;
> (**b**) Prepare an Information Dissemination and Public Communication Plan to ensure an effective, efficient and uniform undertaking of advocacy activities;
> (**c**) Undertake consultations with the former members of the Consultative Committee, government agencies, the private sector, and the public in general concerning Federalism and constitutional reform;
> (**d**) Liaise with Congress to initiate the process of and address the roadblocks to constitutional reform.

The IATF managed to perform its tasks under a uncooperative atmosphere generated by mixed signals from the President. In January 2019, Duterte claimed that he was *not* giving up on the campaign to adopt a federal form of government. By June 2019, he said that he *has given up* on federalism. In 2020, the Duterte government migrated online its signature gathering campaign online in support of revising the 1987 Constitution—with a goal of collecting two million signatures by July 2020. The Administration, however, said that constitutional amendment was not its priority and it would focus its resources on dealing with the COVID-19 pandemic.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

On February 2020, the House of Representatives' committee on constitutional amendments was set to vote on the proposed amendments to the 1987 Constitution presented by the IATF.[1]

The amendments proposed by the IATF that are contained in this draft resolution are the following:

1. FISCAL STRENGTHENING OF LOCAL GOVERNMENT UNITS

Proposed amendment: The IATF proposed to revise Sections 6 and 14 of Article X (on Local Governments) to provide local government units a just share in *all* national taxes and to empower regional development councils (RDCs). The present Constitution states that local government units will have a "just share in the national taxes as determined by law."

In the proposed amendment, the "just share for local government units" will be based not only on their population, land area, and equal sharing (the present bases), but on financial needs, organizational capacities, and resources.

Local government units will be mandated to allocate 5% of their just share in national taxes to the RDCs.

Section 14 of the same article mandates the President to provide for RDCs, which shall facilitate administrative decentralization. The IATF wants to incorporate the formulation, implementation, and monitoring powers of the RDC in the Constitution. Representatives from non-governmental organizations will also be included in RDCs.

On the RDC provision, the IATF argued that presently, submissions of the RDC are "mere recommendations" that do not hold in

1 This section relies heavily on Loreben Tuquero, 'What are the IATF's proposed amendments to the 1987 Constitution?' (Manila, 19 February 2020) <https://www.rappler.com/newsbreak/iq/iatf-proposed-amendments-1987-philippine-constitution> accessed 14 February 2021.

policy-making. In addition, the approval of RDC proposals before being endorsed for funding from the national expenditure program requires a "highly centralized procedure."

2. STRENGTHENING THE POLITICAL PARTY AS A DEMOCRATIC INSTITUTION

Proposed amendment: A section will be added to Article V (on Suffrage) promoting the development of political parties as democratic public institutions with the following premises:

1.1 Political parties will be freely established and open to all citizens who take part in the party's program, constitution, and discipline.
1.2 They will have their own democratic system when it comes to internal decision-making and active citizen participation.
1.3 Party officials and candidates for public office will be nominated and selected through democratic processes. These may include marginalized and underrepresented sectors.
1.4 Parties will pursue public education and promote democratic values in society.
1.5 Further, political parties will provide for the equal representation of women candidates in every election.
1.6 The state will be proactive in ensuring that marginalized and underrepresented sectors may organize into political parties.

Rationale: The IATF argued that it is not the political parties, but the political leaders who are the principal players in the country's political contests. Under the present system, parochial interests override party interests and weakens governance.

3. REGULATING CAMPAIGN FINANCE

Proposed amendment: A section on regulating campaign finance will be added to Article V of the Constitution. In all elections, the state will regulate campaign finance of political parties and candidates, both from public and private sources.

The Commission on Elections will regulate all election campaign-related expenditures and contributions. Congress will update laws on election expenditures.

Financial contributions from religious organizations, foreigners, foreign governments, and illegal sources will be prohibited.

The proposed amendment will provide for the establishment of a Democracy Fund to serve as a repository of all campaign funds and contributions.

Congress will provide for a party development fund for qualified and registered political parties for party strengthening and campaigns. These include party work, maintenance, and activities, as well as election campaigns. The fund will be drawn from the annual national budget. The amount will be determined by the number of actual voters in previous elections multiplied by the maximum expenditure per voter allowed by law.

The Commission on Audit will examine and audit all funds pertaining to both the Democracy Fund and the party development fund.

Rationale: Philippine elections are characterized by heavy overspending, including vote-buying and electoral fraud. The proposed Democracy Fund will "govern the finances" of political parties and candidates.

4. ANTI-TURNCOATISM

Proposed amendment: A section that will mandate the state to ensure "strong and cohesive" political parties will be added to Article V of the Constitution.

Party members in public office will not be allowed to change political parties within their term, and a year after election and one year before the next election.

Violators will be removed from office, barred from appointment to any government position for one electoral cycle, prohibited from running for office in the next election, and will be required to return any party funds used for the campaign.

Political parties may not accept violators of this provision, and violating this provision may serve as grounds for the cancellation of registration.

Political parties will be periodically required to submit to the Commission on Elections an updated list of their members and any changes caused by violations.

Parties are also disallowed from nominating more candidates than the number required for an elective position, except for proportional representative seats in the House of Representatives.

Candidates are also prohibited from accepting nominations from more than one political party, except in aggrupation or coalitions.

Rationale: Party-switching causes factions within political parties and may lead to splits related to candidate selection for elections. Thus, they proposed provisions that will limit the practice of shifting parties.

5. ANTI-POLITICAL DYNASTY PROVISION

Proposed amendment: A section will be added to Article V defining political dynasties and providing penalties for such.

The section will provide a definition of a political dynasty: "A political dynasty exists when a family, whose members, including the spouse, are related up to the second civil degree of consanguinity or affinity, whether such relations are legitimate, illegitimate, half, or full blood, maintains or is capable of maintaining political control."

Thus, those who are related to an incumbent elective official as a spouse and within the second civil degree of consanguinity or affinity, may not run for the same position in the next election.

Moreover, they will not be allowed to run simultaneously and hold office for governor and vice governor, mayor and vice mayor, respectively.

Rationale: Article II, Section 26 of the 1987 Constitution states: "The State shall guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law." Defining political dynasties allows the provision to be self-executory, bypassing the need for an enabling law that prohibits dynasties to persist.

Apart from the IATF's proposed amendments, the draft resolution to be voted on also contains the following proposed amendments that will:

1. Increase the term of members of the House of Representatives to five years, and barring them from serving for more than two consecutive terms.
2. Local officials (except village officials) will also have a five-year term, and are likewise barred from serving more than two consecutive terms.
3. Tandem voting for president and vice president (Presently, the President and Vice-President are elected separately.
4. Liberalizing economic provisions of the Constitution.

The earlier resolution–which was previously approved then recalled–would lift restrictions on foreign investments through the addition of the phrase "unless otherwise provided by law" in Section 2, Article XII of the Constitution. This addition will allow Congress to pass a law that would ease foreign investments in the country.IATF provided a more specific amendment, placing the exploration, development, and utilization of natural resources towards sustainable development, including the conservation and protection of the environment, under the full control and supervision of the State.

When the COVID-19 pandemic struck, the momentum for constitutional amendment sputtered. Amidst the pandemic, the DILG revived the campaign, was criticized for focusing on constitutional change instead of relief for those affected by the pandemic. The DILG reframed the campaign "We would like to push for constitutional reform so that there is greater regional development, so that next time a pandemic comes, the entire Philippine economy will not shut down just because Metro Manila is in a standstill because of a lockdown," he explained.

In July, the House of Representatives committee on Constitutional amendments announced that it would convene to consider constitutional amendments proposed by the League of Municipalities of the Philippines's. These proposed charter changes, are (a) lifting restrictions on foreign investments, and (b) institutionalizing a 2018 Supreme Court decision which held that the share of local governments in the internal revenue allotment should be computed on the basis of all national taxes, and not just those collected by the Bureau of Internal Revenue.

Notwithstanding these developments, the national government claimed that "charter change" is not a priority and that it is focused on addressing COVID-19.

Discussions on constitutional amendment in 2020 ended after the House of Representatives' committee on constitutional amendments opted to meet in 2021 so it could focus on pandemic response and budget deliberations.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The most striking anomaly of the proposed amendments discussed in Part II, is that the IATF have left out two of the most divisive issues which have stalled attempts at constitutional change: (1) the shift to a parliamentary form of government, and (2) the adoption of a federal form of government. So one may view the IATF as a more palatable set of proposed amendments.

Another issue that consistently surfaces are the proposals to liberalize the economy to allow foreign investments in areas that are reserved for or limited to Filipinos. This too has met resistance from those who are wary of foreign control of the economy. To make this more palatable, the DILG is reframing the issue as a way to strengthen the economic base of local governments, ultimately to address emergencies such as the pandemic. Proponents of this proposal are claiming, whether it is true or not, that the restrictions on investments are the reason local governments were caught unprepared for the pandemic.

Those opposed to constitutional change may seek relief from the judiciary. The Supreme Court of the Philippines was modeled after the United States' Supreme Court and may similarly strike down acts of the elected officials of government. The Philippine Supreme Court's power under the 1987 Constitution is broader. Judicial power under Article VIII, Section 2 of the Constitution provides that "includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

Judicial review may cover discretionary acts of the political branches of government, and may be struck down if there is an abuse of that discretion.

The adoption of the US model of judicial review and the subsequent broadening of the Court's powers, however, barely evokes the countermajoritarian objections heard frequently in the United States.

In the Philippines, courts claim to be more genuinely democratic than the elected branches of government. In a flawed democracy like the Philippines, the courts channel "the people's true voice, not the distorted sounds heard during elections." Pangalangan explains that "Congress is elite-dominated, ideologically opportunistic and mercenary, and when the courts strike down legislative acts, they actually carry out a 'General Will' to which judges above anyone else are privy." Voters need to be protected against themselves by "the learned, lofty magistrates."

Neither set of the proposed amendments (political and economic) is constrained by constitutional design. Everything in the Constitution of the Philippines can be amended. Controls in constitutional reforms deal mostly with procedure. The Constitutional provisions on constitutional change provide:

> ARTICLE XVII
> Amendments or Revisions
> SECTION 1. Any amendment to, or revision of, this Constitution may be proposed by:
> (1) The Congress, upon a vote of three-fourths of all its Members; or
> (2) A constitutional convention.
> SECTION 2. Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered voters therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter.
> The Congress shall provide for the implementation of the exercise of this right.
> SECTION 3. The Congress may, by a vote of two-thirds of all its

> Members, call a constitutional convention, or by a majority vote of all its Members, submit to the electorate the question of calling such a convention.
> SECTION 4. Any amendment to, or revision of, this Constitution under Section 1 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the approval of such amendment or revision.
> Any amendment under Section 2 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the certification by the Commission on Elections of the sufficiency of the petition.

Amendments and revisions may be done by Congress sitting in as a constituent assembly or by calling a constitutional convention. Amendments may also be done by initiative. Amendment by initiative, however, is not self-executing, and requires an enabling law before it can be used. Revisions cannot be done by an initiative.

Those challenging attempts at constitutional change may ask the Supreme Court to intervene. In fact, the Supreme Court has stepped in two times to block attempts to change the 1987 Constitution.

The first time the Court stepped in, it stopped a drive to lift term limits for public officials and held that Republic Act No. 6735, ostensibly the enabling law for amendment through initiative, "inadequate to cover the system of initiative on amendments to the Constitution, and to have failed to provide sufficient standards for subordinate legislation" (Defensor Santiago v. Commission on Elections, G.R. No. 127325, [March 19, 1997], 336 PHIL 848-930). In other words, there was nothing in the enabling law that provided the procedure for amending the Constitution. Republic Act No. 6735 was limited to initiatives for local government ordinances and laws for the national government.

Republic Act No. 6735 has never been amended to provide for the procedure for constitutional amendment through initiative so proponents of change are left with congressional avenues for change (constituent assembly and constitutional convention).

The second time the Court stepped in, there was a campaign to change the Constitution to adopt a parliamentary form of government. However, the Court held that this proposal amounted to a revision of the Constitution—and cannot be done through initiative. The Court held that the proposed changes overhaul two articles—Article VI on the Legislature and Article VII on the Executive—affecting 105 provisions of the entire Constitution. The proposed changes alter substantially the basic plan of government, from presidential to parliamentary, and from a bicameral to a unicameral legislature.

Said the Court:

> A change in the structure of government is a revision of the Constitution, as when the three great co-equal branches of government in the present Constitution are reduced into two. *This alters the separation of powers in the Constitution*. A shift from the present Bicameral- Presidential system to a Unicameral Parliamentary system is a revision of the Constitution. Merging the legislative and executive branches is a radical change in the structure of government. (Lambino v. Commission on Elections, G.R. Nos. 174153 & 174299, [October 25, 2006], 536 PHIL 1-364)

The more palatable amendments, arguably, do not amount to revisions of the Constitution. There will be no overhaul of the power dynamics among the branches of government that would be clear under a proposal to adopt a federal, or a parliamentary form of government. The proponents of constitutional change, under present law, may use initiative to push their agenda. Failing that, there are two other avenues for amendment—Congress sitting as a constituent assembly or calling for a constitutional convention. In every case, the electorate will have the final say on whether the 1987 Constitution will be amended. In the end, proponents will have to find a way to assuage the fears of the members of civil society who have been actively objecting to proposals that serve the agenda of politicians.

IV. LOOKING AHEAD

President Duterte opened 2021 with a swipe at the party-list system. The party-list system was introduced through the 1987 Constitution as a way to allow different political persuasions to participate in the electoral system. Since it was implemented, left-leaning parties have consistently won seats. The present bloc of left leaning parties that are critical of Duterte. Duterte claims that the party-list system is being abused by those linked to communist rebels. The President accused groups of supposedly acting as fronts for the Communist Party of the Philippines, its armed wing New People's Army, and its political arm National Democratic Front. Duterte's allies, for their part, are interpreting his comments as a call for constitutional change, to constrict, or possibly remove the party-list mechanism from the Constitution.

The pandemic, and the President's lackluster support will most probably keep the campaign for constitutional change in the background.

Civil society suspicions of the personal interests of politicians also keep it glued to this issue and will no doubt raise objections at the proper time.

V. FURTHER READING

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Poland

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I. INTRODUCTION

In 2020, Polish authorities continued the illiberal remodeling of the constitutional system.[1] The system that has been created since 2015 may be defensibly labeled as illiberal constitutionalism.[2] This kind of constitutionalism is based on a longing for a charismatic leader and specific national identity, combining individual freedom with non-liberal values, and distances itself from western standards comprising the rule of Law, democracy, and human rights protection. Weak restraint is provided by the EU and international norms and procedures. The illiberalization of constitutionalism started in 2015 and was mostly aimed at weakening the independence of the judiciary and the impartiality of judges. The constitutional changes have been made informally, as the ruling political force did not gain a constitutional majority in the 2015 and 2019 general elections. In March 2020, when the Covid-19 pandemic broke out, a movement towards authoritarianism became possible. The presidential election in the shadow of multiple infections seemed to be rich fuel for an authoritarian turn. Among other legislation, a constitutional amendment was proposed to extend the term of office of the Polish President. This legislation and the constitutional amendment had the aim of allowing the ruler to remain in power for a longer period. Finally, they backed off and the system stayed within the bounds of illiberal constitutionalism. However, the informal changes to the constitutional status of the judiciary persisted. Despite the reduction of judicial independence, the changes affected the status of EU law within the Polish legal order. In addition, the 1997 Constitution was bypassed and an extraconstitutional emergency (state of epidemic) was pronounced to fight the pandemic threat, notwithstanding that an appropriate emergency had already been provided for in the Constitution. Moreover, the executive used an already created extraconstitutional power to delay the publishing of the rulings of the Constitutional Tribunal (CT).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. PROPOSED AND FAILED FORMAL AMENDMENT

According to Article 235 of the 1997 Constitution, an amendment may be adopted by the *Sejm* by a majority of at least two-thirds of the votes of the statutory number of Deputies, and by the *Senat* by an absolute majority of votes of the statutory number of Senators. From a theoretical perspective, the 1997 Constitution is relatively "flexible"; its adoption requires a qualified majority but there is no eternity clause.[3] The power of amendment may be called "weak", as an amendment can only be passed by Parliament during one term of office.[4] A referendum is not obligatory but may be held in relation to fundamental rules of the constitutional system, human rights, and the constitutional amendment procedure.[5] Thus, the Polish amendment design is of a multi-tier character[6] and, as otherwise classified, is exceptional with its multi-track procedure.[7] As said, the ruling coalition lacks a constitutional majority and there is no support among the opposition parties for constitutional changes. Therefore, formal amendments are generally not submitted, proceeded with, or even expected.

In 2020, only one amendment was proposed. The bill had the aim of extending the term of office of the Polish President from 5 to 7 years. The goal was to break the impasse affecting the presidential election. The election procedure had been commenced before the outbreak of the COVID-19 pandemic and had been scheduled for 10 May 2020. However, the epidemiological situation did not allow for a regular election campaign and voting. The constitutional emergency that would allow for the extension of the term of office of the President was not activated. Therefore, the proposed constitutional amendment was put forward by one of the allies of the ruling PiS (Law and Justice) party. However, the bill did not achieve the necessary political support within and outside the coalition, and thus failed.

1 T Drinóczi and A Bień-Kacała, *"Illiberal constitutionalism: the case of Hungary and Poland"*, (German Law Journal, 2019) 8 (20), 1140–1166.

2 T Drinóczi and A Bień-Kacała, *'Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law'* (Routledge, forthcoming).

3 However, achieving such a majority is politically difficult, which makes the Polish Constitution functionally rigid. D Grimm, 'Types of constitutions' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 109.

4 Y Roznai, *'Unconstitutional constitutional amendments: a study of the nature and limits of constitutional amendment powers'*, PhD thesis, (The London School of Economics and Political Science—LSE, n.d.), 158–160. <http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf>.

5 The 1997 Constitution was amended twice with the support of the opposition but without the involvement of the Polish people. The first amendment, in 2006, barred those sentenced to imprisonment by a final judgment for an intentional indictable offence from election to the *Sejm* or the *Senat*. The second amendment allowed the European Arrest Warrant to be introduced into the Polish legal system (2009).

6 Dixon, R., Landau, D., *'Tiered Constitutional Design'*, (2017), SSRN, 1, 63. <https://ssrn.com/abstract=2953755>.

7 Richard Albert, *'Constitutional amendments'*, (Oxford University Press, 2019) 265.

2. INFORMAL CONSTITUTIONAL CHANGES

The Polish authorities have developed a practice of effecting informal constitutional changes.[8] The changes are made by the legislature or/and the executive, and are accepted as being within constitutional practice and supported by the captured CT. They modify the meaning of the constitutional norms without altering the constitutional text. The formal amending procedure is not involved.

Since 2015, the CT has been packed and captured (2015–2017), the National Council of Judiciary (NCJ) has been remodeled and politicized (2017), and the disciplinary procedure has been changed and adjusted to suppress the independence of the judiciary (2018–2020).

The reforms that continued in 2020 were connected to remodeling the judiciary but also affected supranational obligations and rules. The informal constitutional change that had been made by the CT alone had the potential to alter the relationship between Poland and the EU. In November 2019, the Court of Justice of the European Union (CJEU) delivered its ruling on Polish preliminary questions concerning the independence of the disciplinary chamber of the Polish Supreme Court (SC) and that of the NCJ.[9] It ruled, briefly, that it was doubtful that the chamber was independent, as the politicized NCJ played a role in the nomination procedure, but the CJEU left the referring court to decide on this matter. The Polish judicial and political/legislative branches interpreted the decision differently. While the former embraced the doubts raised by the CJEU concerning independence and implemented the ruling accordingly,[10] the latter, as early as December 2019, took legislative measures to disable this implementation,[11] assisted by the two newly created and already packed chambers of the SC.

In April 2020, the CT was activated to consider in detail the relations between Poland and the EU, referring to Poland's symbolically stressed sovereignty. The first ruling of 20 April 2020 related to the resolution of the non-packed chambers of the SC of 23 January 2020. The CT created its competence to the review the SC resolution by making the resolution a normative act. That allowed it in turn to settle the disputes between the *Sejm* and the SC and between the President and the SC in the second ruling of 21 April 2020. The CT said that the SC had infringed the *Sejm*'s legislative competences and the President's prerogative to appoint judges. In addition, the CT stressed that the SC had abused its competence to implement the CJEU judgment of 19 November 2019. The Tribunal held that the SC had emphasized its primary duty of loyalty to EU law and to rulings of the CJEU, disregarding the Polish Constitution of 1997. In addition, the CT considered that the SC, using preliminary rulings, acted in breach of and in abuse of this institution. Finally, in the opinion of the CT, the SC falsely assumed the absolute binding nature of the CJEU judgments in issues that were not transferred by the Member State to the EU. This logic led the CT to assess the CJEU's judgment as being non-binding.

The rulings of the CT are therefore a turning point in the relations between Poland and the EU, and a first step towards another informal change. While the narrative presented by the CT was visible in the political space, it has now been converted into decisions changing the Polish legal and constitutional systems. The judgments concern the foundations of the functioning of a Member State of the EU, namely, the supremacy of EU law and EU law-friendly interpretation, and the recognition of the competence of the CJEU and the preliminary rulings procedure. Without recognition of these rules, it is not possible to operate within the EU legal sphere, which is built not only on the basis of the direct application of EU law in the Polish legal order (Article 91 of the Constitution), but also on respect for binding international law, as expressed in Article 9. Stressing the importance of Article 8 of the 1997 Constitution, which recognizes the Constitution as the supreme law of the Republic of Poland, the CT disregarded Article 9 and took a confrontational stance instead of a conciliatory approach. The consequences of this position could be deeply harmful to the Polish legal system. The sovereignty of Poland and the supremacy of the 1997 Constitution have become a barrier against EU law and EU competences.

3. BYPASSING THE 1997 CONSTITUTION

Informal constitutional change may also occur in the practice of bypassing the 1997 Constitution. The legislative power circumvented the Constitution when the COVID-19 pandemic broke out. However, the ruling majority cannot be accused of acting directly contrary to the 1997 Constitution when it comes to the declaration of any emergency, as no epidemic is mentioned in the Constitution but only in two separate Acts. These are the Act on a state of natural disaster and the Act on infectious diseases. The activation of either of these Acts has to follow the circumstances that they prescribe. In the case of a "state of natural disaster", this is a massive infection; and in the case of a "state of epidemic", it requires the occurrence of a new infectious disease or a disease that is visibly more infectious than previously. In the midst of the COVID-19 pandemic, the most suitable action would have seemed to be the declaration of the constitutional emergency regime, i.e., the "state of natural disaster". This state is based on a statute and could be activated by a governmental regulation for a constitutionally assigned period. The Act on the state of natural disaster was enacted in 2002, which means that the legal basis was prepared *ex-ante* and is separate from other legislation that covers the normal functioning of the state. The Government chose not to activate the available constitutional "extraordinary measure" but merely followed its usual train of thought and illiberal political goals. It applied the statute-based regime for the coronavirus pandemic, regardless of its direct and severe impact on society and the economy, and adopted a new law as well. In this way, in a sense, it created a new statute-based emergency to bypass the 1997 Constitution. Combining this new law on COVID-19 and the amended Act on infectious diseases, the Ministry of Health introduced the "state of epidemic threat", a measure already existing in the legal system but adjusted to the pandemic by the Act on COVID-19 by the addition of new tools and the granting of new competences to the Government. As the crisis evolved, the "state of epidemic" was declared. The logic of the statutory regime of "state of epidemic threat" and a "state of epidemic" is similar to that of constitutionally prescribed "extraordinary measures". What distinguishes the "state of epidemic" and the "state of natural disaster" is the quantity and severity of the infection. The

8 Bień-Kacała, A., *'Informal constitutional change: the case of Poland'*, (Przegląd Prawa Konstytucyjnego 2017), 6(40), 199–218.

9 Judgment in Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

10 Rulings issued by the Supreme Court are available at: https://ruleoflaw.pl/translation-of-supreme-court-rulings-applying-ecj-judgment-of-19-november-2019/.

11 See the latest step in the Polish judicial reform process. The so-called Muzzle Law from 2020 forbids statements that can undermine the office of another judge.

most important difference between the constitutional and statutory emergency regimes is that the latter allows the organization of elections, such as the presidential election that was originally planned for 10 May 2020. During the "state of natural disaster" and 90 days after its termination, however, the election could not have been organized, and the President's term of office would have been extended. Therefore, the ruling majority decided not to declare a "state of natural disaster" but gradually introduce the "state of epidemic". Eventually, the election was postponed, being held in two rounds in June and July 2020.

Failure to introduce a state of natural disaster has further consequences that equal the breaching of the Constitution. Let us explain. Outside the constitutional emergency, "normal" constitutional law-making procedures are in place, in particular constitutional standards with regard to limiting freedoms and rights.[12] The premises for the admissibility of constraints on the exercise of constitutional freedoms and rights are contained in the general limitation clause expressed in Article 31(3) of the Constitution. In formal terms, this provision requires that limitations be introduced only in statute, thus excluding their introduction in acts of a lower rank, and in material terms it allows only such limitations as do not violate the essence of a given freedom or right, and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, health, public morals, or the freedoms and rights of other persons. The minimum and necessary criterion of formal correctness requires that this can be done by the appropriate authority in the relevant act. Conducting a proportionality test and public justification of the limitations introduced is legally possible and acceptable only if this minimum condition is satisfied. The principle of the exclusivity of statute for this type of regulation is included by the CT as an element of the idea of the rule of law.[13]

In the situation of the Covid-19 pandemic, some limitations have been introduced, and the state authorities decided not to use the solutions appropriate for constitutional states of emergency but to use the legislative tools appropriate for the normal functioning of the state, which is the introduction of a state of epidemic and which in most cases took the form of regulations of the Council of Ministers or its members. Constitutional doubts are raised by the fact that the burden of regulating limitations on the freedom and rights of the individual has been transferred from statute to regulation level. For example, the prohibition of assembly established by governmental regulation banned all kinds of assemblies, excluding assemblies organized on the basis of notification or decision, with the maximum number of participants being no more than 5 and the distance between assemblies being no less than 100 metres. Thus, the prohibition applies both to spontaneous gatherings and to other types of gatherings. The depth of the interference with this constitutionally guaranteed freedom—which equates to its total elimination—violates its essence.

12 Wróblewska I., Włoch W., 'Accommodation Through Regulations – The Limitation Of Constitutional Freedoms In Poland During The COVID-19 Pandemic And Its Impact On Polish Constitutional Identity' in Martin Löhing, Zbigniew Witkowski, Maciej Serowaniec (eds.), *Pandemic Poland. Impacts of Covid-19 on Polish Law* (Brill Publishing House, forthcoming).

13 Judgment of the CT of 12 January 2000, P 11/98.

4. EXTRACONSTITUTIONAL POWER OF THE EXECUTIVE CONFIRMED

In 2016, the Polish Prime Minister had informally created a legal basis for delaying the publication of the decisions of the CT, which runs counter to the Tribunal's role in the Polish legal system and the constitutional obligation to publish judgments in the Official Journal. According to Article 190, a judgment of the CT shall take effect from the day of its publication. Only the Tribunal may specify another date for the end of the binding force of a normative act, but it cannot delay the publication of its judgment. Delaying such publication created a legal situation in which the Prime Minister in fact became a body superior to the CT, as the Prime Minister could decide whether and when to publish the rulings of the Tribunal, which is not provided for in the Constitution.

The situation was repeated in relation to the judgment of the CT (22 October 2020) which almost totally banned abortion (finally published in January 2021).

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. FORMAL AMENDMENT

The only attempt to formally change the Constitution in 2020, if it had successfully passed, would have been assessed from a theoretical perspective as amendment. The change would have affected only the length of the term of office of the President (7 years instead of 5 years) and the possibility of re-election. According to the 1997 Constitution, the Polish President can be re-elected only once. After a second term of office, a person cannot be elected again for the third term. Under the proposed amendment, a person could be elected only once without possibility of re-election.

The amendment did not intend to change the systemic character of the President, the scope of his/her competences and prerogatives. Thus, the change would have been made within the existing system with a reformative aim.[14]

2. INFORMAL CONSTITUTIONAL CHANGES AS INCREMENTAL DISMEMBERMENT

Before the illiberal turn started in Poland in 2015, the major actor as regards informal constitutional change was the CT. No other branches of the government could get involved because their subconstitutional actions were deemed unconstitutional and were annulled. Abusive constitutional amendments had never been a practice, which left both the jurisprudence of CT and the scholarly community unfamiliar with the issue of unconstitutional constitutional amendments and the possibility of their constitutional review, let alone informal constitutional change.[15] Constitutional amendments have always been perceived as the acts of the constituent (and not a derivative) power, and once they are adopted, review is impossible, because it would mean review of the Constitution itself, which the CT is not empowered to do.

14 Albert, n 7, 76-81.

15 Bień-Kacała, n 8, 199-206.

After 2015, new actors joined the CT in the informal constitutional amending exercise. In Poland, because of the lack of a majority for formally amending the 1997 Constitution, and due to the COVID-19 pandemic, both the legislative and the executive powers got involved. What is more, while in the pre-2015 period any unconstitutional measures would have been annulled by the CT, now the Tribunal allows or even facilitates them. The frame is the technique of abusive constitutional review, as Rosalind Dixon and David Landau label it.[16] The CT is activated by the ruling majority when a political gain is expected (presidential pardon without final judgment in the case of a political ally[17]), new constitutional interpretation is necessary for the remodeling of a constitutional body (NCJ[18]), or if the ruling majority wants to resolve a disagreement without involving discussion within the parliamentary debate (abortion[19]).

These informal constitutional changes are at the same time unconstitutional. They have been achieved by the political power (the legislature and the executive) through ordinary legislation, which has led to a change of meaning of the Constitution's text without a formal amending procedure and observance of the legal hierarchy. Paradoxically, in a state where the CT is captured by the ruling majority, it seems unlikely that the constitutionally flawed provisions will be removed from the Polish legal system. Such systemic reality was well illustrated by Kelsen's thesis that the lack of independent and effective constitutional review (i.e., if the ordinary legislator alone determines the constitutionality of legislation) may result in the creation of forms of law-making alternative to the Constitution,[20] and thus a real and informal change of the Constitution.

The informal constitutional changes, one by one, push the constitutional system in a more illiberal direction. Therefore, we have decided to call them incremental, as the individual changes are small and make only a slight difference within the system. But when we view these changes all together, and how they relate to or denote an increase or addition to the system, we are able to detect their combined effect on the constitutional system. In Poland, it means the creation of and an advance in illiberal constitutionalism, which is largely manifested by weakening the judiciary and the rule of law. Statutory changes to both the common and constitutional courts have weakened the principle that courts and tribunals shall constitute a separate power and shall be independent of other branches of government. Moreover, the exercise of extraconstitutional powers by government violates the principle that the organs of public authority shall function on the basis of, and within the limits of, the law and that the Constitution shall be the supreme law of Poland. Eventually, incremental informal changes have led to the morphing of the existing system into something different (less liberal and less democratic); therefore, this may be named the "dismemberment" of the Polish constitutional system.[21]

Due to the close relationship between the majority of the judges of the CT and the parliamentary majority, the Polish constitutional court cannot play a countermajoritarian role.[22] The legislation put forward by the ruling majority is not questioned by the Tribunal by reference to the fundamental rights or the principles of democratic competition. The question who is the author of an act is more important than its compliance with the Constitution. Similarly, it is difficult to say that the CT acts as a representative of social attitudes and demands (which was shown in case of abortion). However, individual judges can and do adopt this role when they publicly articulate their position and dissent. The CT also does not evince enlightenment, as it is not an independent body that conducts rationalized and progressive jurisprudence autonomously within the socio-political context. Due to the specificity of Polish political and legal remodeling, the judiciary may play two basic roles: (a) the classic role of an independent judiciary, or (b) a judiciary "sensitive" to political issues. Within the latter type, it may favor either the political majority or the opposition. Therefore, the greatest threat to the Polish judiciary is its politicization. The situation is particularly difficult, as simply adhering to constitutional standards may provoke accusations of "taking the side" of one of the political options.

IV. LOOKING AHEAD

If the term "constitutional reform" is understood as introducing improvements to increase the quality of the current constitutional order, we can say that in 2020 no constitutional reform was carried out in Poland However, we can observe constitutional changes that are not formal amendments and that amount to informal dismemberments. Political practice consolidates incremental informal changes that have created and serve to increase the stability of the new system (illiberal constitutionalism). On the one hand, due to the lack of a constitutional majority, in the coming years it is unlikely that the Constitution will be formally amended. On the other hand, we expect that the process of informal changes will continue. It can be assumed that the captured CT will not play a significant role in restoring liberal constitutionalism.

V. FURTHER READING

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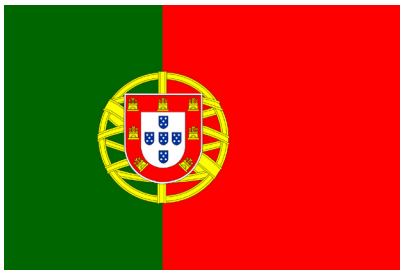
16 Dixon, R., Landau, D., *"Abusive Judicial Review: Courts Against Democracy"*, 53 UC Davis Law Review (2020) 1313.
17 The CT judgment of 17 July 2018 (K 9/17).
18 The CT judgments of 20 June 2017 (K 5/17) and of 25 March 2019 (K 12/18).
19 The CT judgment of 22 October 2020 (K 1/20).
20 Hans Kelsen, "*Reine Rechtslehre*" (Verlag Franz Deuticke, 1967) 276–277.
21 Albert, n 7, 78–79, 84.
22 Barroso, L. R., *"Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies"*, (The American Journal of Comparative Law, 2019) 125–142.

Portugal



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I. INTRODUCTION

1. Given the fact that this contribute inaugurates the International Review of Constitutional Reform, it is important to provide an overall framework of this topic in what concerns the Portuguese jurisdiction[1]. The Constitution of the Portuguese Republic that was passed on 2 April 1976 gave the Parliament (*Assembleia da República)*[2] the power the revise the Constitution itself. Indeed, Part IV of the Constitution ('Guarantee of the constitution') includes on its Title II rules regarding the 'Revision of the Constitution' (Articles 284-289).

In 45 years, this prerogative was exercised for seven times[3], bearing in mind that Article 284/1 of the Constitution (on competence and time for revisions) sets that "[T]he Assembly of the Republic may revise the Constitution five years after the date of publication of the last ordinary revision law". Article 284/2, however, enables extraordinary revision powers ('However, by a majority of at least four fifths of all the Members in full exercise of their office, the Assembly of the Republic may take extraordinary revision powers at any time.')

2. The first one was a mandatory reform, determined by the text of the Constitution of 1976, and was performed in a long process of revising the initial text (from 30 April 1981 to 30 September 1982). The original document reflected political and ideological options which arose out of the revolutionary period that followed the break with the previous authoritarian regime. It confirmed a transition to socialism based on the nationalization of the main means of production and the continued participation of the Armed Forces Movement in the exercise of political power, via the Council of the Revolution. The 1982 Constitutional Revision[4] sought to reduce the ideological content of the Constitution, make the economic system more flexible[5] and redefine the organisational structures through which political power was exercised. The Council of the Revolution was abolished and the Constitutional Court created[6].

3. The 2nd Constitutional Revision took place in 1989[7]. It made the economic system more open, particularly by ending the principle of the irreversibility of the nationalisations that had occurred immediately after the Revolution on the 25th of April 1974. Furthermore, it introduced the figure of the national referendum.

4. The subsequent Constitutional Revisions, in 1992[8] and 1997[9], sought to adapt the text of the Constitution to the principles of the European Union Treaties and the Treaties of Maastricht and Amsterdam. It also aimed to make a number of other changes, especially by giving foreign citizens the right to vote, making it possible to create uninominal constituencies, broadening the participation of citizens in the political process by giving them the right to initiate legislation, and also strengthening the *Assembleia da República*'s exclusive legislative powers.[10]

5. The Constitution was again revised in 2001[11], to make it possible for Portugal to ratify the Convention that created the International Criminal Court by changing the rules on extradition. Some other new

1 '*Constitutional revisions*', (n.d), Assembleia da República. <https://www.parlamento.pt/sites/EN/Parliament/Paginas/Constitutional-revisions.aspx>

2 In what concerns the parliamentary exclusivity: F. Paulo Gonçalves, *'La Problemática de la Revisión Constitucional'*, in AA.VV. (J. Tajadura, coord), La Constitución portuguesa de 1976 (Centro de Estudios Políticos y Constiucionales, 2006) 263.

3 Further Reading may be found in: José de Melo Alexandrino, *Reforma Constitucional—Lições do Constitucionalismo Português*, in Estudos em homenagem ao Prof. Doutor Martim de Albuquerque (Faculdade de Direito da Universidade de Lisboa, 2010) 9-36; Andoni Pérez Ayala, *Tres Décadas de Evolución Constitucional en Portugal (1976-2006)* (Revista de Derecho Político, n.º 70, UNED, 2007), 65-134, and F. Paulo Gonçalves, *'Las Revisiones de la Constitución de 1976'*, in AA.VV. (J. Tajadura, coord), La Constitución Portuguesa de 1976 (Centro de Estudios Políticos y Constiucionales, 2006) 291.

4 Lei Constitucional 1/1982 (Diário da República, I Série A, n.º 227, 30 September 1982).

5 Maria Manuel Leitão Marques, *'A Constituição Económica Portuguesa depois da Segunda Revisão Constitucional'* (Revista de Direito Público, V, 9, 1991) 9-33, 9.

6 The Constitutional Court was legally created by Lei n.º 28/82, 15 November. For further readings on this topic, see also: Giovanni Vagli, *'L'Evoluzione del Sistema di Giustizia Costituzionale in Portogallo'* (Edizioni ETS, 2001).

7 Lei Constitucional 1/1989 (Diário da República, I Série A, n.º 155, 8 july 1989). On this revision, see also: Vital Moreira, *'A segunda revisão constitucional'* (Revista de Direito Público, IV, n.º 7, 1990) 21.

8 Lei Constitucional 1/1992 (Diário da República, I Série A, n.º 273, 25 november 1992). On this matter : Jorge Miranda, *'La Constitution Portugaise et le Traité de Maastricht'* (Revue Française de Droit Constitutionnel, n.º 12, 1992); Guilherme D'Oliveira Martins, *'Europa e Constituição. A Revisão Constitucional de 1992'* (Estado & Direito, n.º 11, 1993); and Giovanni Vagli, *'Sulla terza revisione costituzionale della II Repubblica Portoghese'* (Edizione ETS, 1994).

9 Lei Constitucional 1/1997 (Diário da República, I Série A, n.º 218, 20 september 1997. On this revision: Paulo Otero, *'O Acordo de Revisão Constitucional: Significado Político e Jurídico'* (AAFDL, 1997); António de Araújo, *'A revisão Constitucional de 1997'* (Coimbra Editora, 1999); Alexandre Sousa Pinheiro and M. João Fernandes, *'Comentário à IV Revisão Constitucional'* (AAFDL, 1999); and Jorge Bacelar Gouveia, *'The Fourth Review ot the Portugese Constitution'* (European Review of Public Law/Revue Européenne de Droit Public (ERPL/RDPR, 1999), Vol. 11, n.º 1, 206.

10 On the reform performed of the legislative system: Carlos Blanco de Morais, *'As Leis Reforçadas'* (Coimbra Editora, 1998).

11 Lei Constitucional 1/2001 (Diário da República, I Série A, n.º 286, 12 december 2001). On this specific revision: Jorge Bacelar Gouveia, *'Reflexões sobre a 5.ª Revisão da Constituição Portuguesa'*, in AA.VV., Nos 25 anos da Constituição da República Portuguesa de 1976 (AAFDL, 2001), 629.

rules were introduced concerning the granting of rights and restriction of military rights, e.g..

6. The 6th Constitutional Revision, which was passed in 2004[12], introduced a real revolution with regard to regional legislative autonomy—in terms that somehow may have altered the concept of state unity or legal order -, granted broader political and administrative autonomy to the Madeira and Azores Autonomous Regions, principally by increasing the powers of their legislative assemblies and abolishing the office of "Minister of the Republic", which was replaced with that of "Representative of the Republic". Rules concerning international relations and International Law were also amended and clarified. Examples include those on the effectiveness of European Union treaties and rules in the Portuguese legal system.

7. The 7th and last [as to February 2021] Constitutional Revision was passed in 2005[13]. By adding a new article to the Constitution, it allowed the holding of referenda on the approval of treaties aimed at the construction and deepening of the European Union.

This was indeed the last revision to be enacted, although we may address the most problematic issues on public agenda nowadays.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. As previously stated, Title II of Part IV of the Constitution enshrines the rules concerning Constitutional Reforms, in the following terms:

> Article 284 (Competence and time for revisions)
> *1.The Assembly of the Republic may revise the Constitution five years after the date of publication of the last ordinary revision law.*
> *2. However, by a majority of at least four fifths of all the Members in full exercise of their office, the Assembly of the Republic may take extraordinary revision powers at any time.*
>
> Article 285 (Initiating revisions)
> *1.The competence to initiate revisions pertains to Members of the Assembly of the Republic.*
> *2. Once a draft revision of the Constitution has been submitted, any others have to be submitted within a time limit of thirty days.*
>
> Article 286 (Passage and enactment)
> *1. Amendments to the Constitution require passage by a majority of two thirds of the Members of the Assembly of the Republic in full exercise of their office.*
> *2. Amendments to the Constitution that are passed shall be combined in a single revision law.*
> *3. The President of the Republic may not refuse to enact the revision law.*
>
> Article 287(New text of the Constitution)
> *1. Amendments to the Constitution shall be inserted in the proper place by means of the necessary replacements, eliminations and additions.*
> *2. The new text of the Constitution shall be published along with the revision law.*
>
> Article 288 (Material limits on revision)
> *Constitutional revision laws must respect:*
> *a) National independence and the unity of the state;*
> *b) The republican form of government;*
> *c) The separation between church and state;*
> *d) Citizens' rights, freedoms and guarantees;*
> *e) The rights of workers, workers' committees and trade unions;*
> *f) The coexistence of the public, private and cooperative and social sectors of ownership of the means of production;*
> *g) The existence of economic plans, within the framework of a mixed economy;*
> *h) The appointment of the elected office holders of the entities that exercise sovereignty, of the organs of the autonomous regions and of local government organs by universal, direct, secret and periodic suffrage, and the proportional representation system;*
> *i) Plural expression and political organisation, including political parties, and the right of democratic opposition;*
> *j) The separation and interdependence of the entities that exercise sovereignty;*
> *l) The subjection of legal norms to review of their positive constitutionality and of their unconstitutionality by omission;*
> *m) The independence of the courts;*
> *n) The autonomy of local authorities;*
> *o) The political and administrative autonomy of the Azores and Madeira archipelagos.*
>
> Article 289 (Circumstances in which revision is restricted)
> *No act involving the revision of the Constitution maybe undertaken during a state of siege or a state of emergency.*

2. In 2020, the Portuguese system of constitutional reform has had several challenges.

On the first hand, because of the Covid pandemic crisis, the Portuguese system had to deal with the circumstances—state of siege or state of emergency—in which revision is prohibited, stated in article 289[14].

In March 2020, one initiative was handed over to parliament by a member of parliament from CHEGA —a right-wing to far-right political party in Portugal formed in 2019 that won one seat in the Parliament of Portugal in the 2019 elections—but was withdrawn, considering that it 'did not fit' with the situation caused by the pandemic and by the declaration of the state of emergency[15]. In October, CHEGA delivered a

12 Lei Constitucional 1/2004 (Diário da República, I Série A, n.º 173, 24 july 2004).

13 Lei Constitucional 1/2005 (Diário da República, I Série A, n.º 155, 12 august 2005). In what concerns the participation on the European process, the need of a previous revision was clearly pointed out by the Portuguese Constitutional Court on Acórdão 704/2004, of 17 december 2004. On this specific revision, see also: Rui Machete, *'O Referendo Português sobre a Constituição Europeia. Uma Nova Forma de Revisão constitucional?'* (Revista de Relações Internacionais, n.º 5, 2005), 22.

14 *'Projeto de Revisão Constitucional 4/XIV/2'*, (n.d), Assembleia da República. <www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45430>.

15 Details can be found on: *'Projeto de Revisão Constitucional 3/XIV/2'*, (n.d.), Assembleia da República. <www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45272>.

new project[16], triggering an ordinary review process. According to article 285/2, *"[O]nce a draft revision of the Constitution has been submitted, any others have to be submitted within a time limit of thirty days"*. Only one other party—Liberal Initiative—has accompanied it[17]. But the process had to be stopped because of the declaration of the state of emergency.

3. Furthermore, the discussion on constitutional reform took into account the need to densify the circumstances of the definition of the state of siege or a state of emergency, mostly designed for questions of political nature and having to cope with unprecedented sanitary issues. The question of the scope of this extra-legal measures had already been discussed about the economic crisis of 2012/2013[18] and once again came back into the spotlight. The possible restriction or suspension of some fundamental rights, in the context of epidemiological need, has been also the focus of discussion.

4. In addition, public opinion and political forces discussed—even if without formally presenting a review initiative—the possibility of interrupting the declared state of emergency to carry out a chirurgical review that could allow the postponement of the presidential elections scheduled for January 2021. Even if it could be considered as a fraud to the constitution, the idea of interrupting the general confinement for a few days in order to carry out a chirurgical reform seems totally unreasonable, considering the imminent collapse of the NHS and the increasing number of infections and mortality Covid-19. Furthermore, suspending the elections *sine die* would be an increased risk of democratic erosion to be absolutely avoided.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. As explained, due to the declaration of the state of emergency, there were no successful Constitutional Reforms during 2020.

However, the unamendable material limits on revision—mainly Article 288 d)—have also been challenged by the intentions and projects presented—even if not voted, as explained—by the recently formed far-right political party. Indeed, among other minor changes, the project handed over by CHEGA intended to delete the preamble of the constitution[19], and to reform article 30 that nowadays state that "*No sentence or security measure that deprives or restricts freedom may be perpetual in nature or have an unlimited or undefined duration*", and article 49 making it mandatory to vote. [20] If voted—or more over approved—could obviously lead to a dismemberment, taking into account Portuguese tradition and legal awareness. [21]

2. In fact, let us bear in mind that article 288 lists: *"d) Citizens' rights, freedoms and guarantees as"* unamendable principles to be respected even in the context of constitutional review.

Portuguese doctrine[22] tends to distinguish between those who question the legitimacy of those material limits and those who stress there must be a nuclear set of standards that must be preserved because constitutional review is merely a partial vicissitude. A medium position is the one that accepts unamendable limits but also make it possible to change those limits through a double revision process: with a first revision a limit is removed and in a later revision the articles which were based on the previously abolished principle would be altered. However, this possibility is only feasible if we do distinguish between two levels of material limits on article 288. 1st level material limits are not compatible with a double revision process, because even if they are removed from article 288, they would always be considered as implicit material limits (eg those contained in article 19, paragraph 6). [23]

3. The Portuguese Constitution is a rigid one, so the constitutional reform procedure is different from the ordinary legislative one.

Thus, article 286/3 dictates that "*the President of the Republic may not refuse to enact the revision law*". Even if the article does not mention a deadline for promulgation, but Jorge Miranda defends the application of the term of 20 days provided by article 136 by analogy.

Only if what is handed out to the President of the Republic as a constitutional review law is just a mere 'appearance', may he veto it. Furthermore, and likewise, the President of the Republic cannot consider the previous constitutionality control of the projected revision.

4. This given explanation makes indeed no room for a discussion of the so called weberian ideal types of judicial roles. However, it will be important to follow through the process if some of the mentioned intentions of handling "*Citizens' rights, freedoms and guarantees*" would come across again—as it is probably bound to happen.

IV. LOOKING AHEAD

It is likely to predict that we will have a constitutional reform in the near future, as soon as there are conditions to abandon the state of emergency. Article 285/2, that we already referred to, set the pace for the need of coming together within a time limit of thirty days in order to benefit from a common ground for discussion of several drafts simultaneously.

16 Details can be found on: *'Projeto de Revisão Constitucional 6/XIV/2'*, (n.d.), Assembleia da República. <www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45457>.

17 Details can be found on: *'Projeto de Revisão Constitucional 5/XIV/2'*, (n.d.), Assembleia da República. <www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45445 >.

18 On the discussion considering the economic crisis: Jorge Reis Novais, *'Direitos Fundamentais e Justiça Constitucional em Estado de Direito Democrático'* (Coimbra Editora, 2012); Jorge Reis Novais, *'Em Defesa do Tribunal Constitucional'* (Almedina, 2014); Jorge Silva Sampaio, *'O Controlo Jurisdicional das Políticas Públicas de Direitos Sociais'* (Coimbra Editora, 2015); Brito, M. N., Coutinho, L. P., Freitas, T. F., Sampaio, J. S., *'O Tribunal Constitucional Português e a Jurisprudência da Crise'* (e-Pública, 2017), v. 4, n. 1.

19 The nature of the preamble is the historical certificate of the portuguese political regime, as stated by: Canotilho, J. J. G, Moreira, V., *'Constituição da República Portuguesa Anotada'* (Coimbra Editora, 1984) 44; José Joaquim Gomes Canotilho, *'Preâmbulo de la Constitución de Portugal de 1976'*, in AA.VV. (A. Torres del Moral and J. Tajadura, Dirs.): *Los Preâmbulos Constitucionales en Iberoamérica* (Centro de Estudios Políticos y Constiucionales, 2001), 369.

20 Details can be found on: *'Projeto de Revisão Constitucional 6/XIV/2'*, (n.d.), Assembleia da República. <www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45457>.

21 On this topic, please consider grasping: Botelho, C. S., Terrinha, L. H., and Coutinho, P., *'Constitutionalism in a Plural World'* (Universidade Católica Editora, 2018).

22 Further readings on: Miguel Nogueira Brito, *'A Constituição Constituinte. Ensaio sobre o Poder de Revisão.'* (Coimbra Editora, 2000).

23 On the rule of law as a structural principle, vide: Jorge Reis Novais, *'Os Princípios Constitucionais Estruturantes da República Portuguesa'* (Coimbra Editora, 2004) 49.

The prospective challenges for 2021 derive from what has been previously stated. Indeed, the system will have to consider three major discussions that have already arose:

1. the extend and content of unamendable material limits on revision;
2. the circumstances—state of siege or state of emergency—in which revision is prohibited;
3. the possible reform of the conditions of the declaration of state of siege or state of emergency—notwithstanding the need to guarantee political checks and balances and citizen's rights -, not forgetting that a multilevel system may consider the possible benefit from the application of article 15.º of European Convention on Human Rights.

On May 13th 2021, the President of the Assembly of the Republic took the swore of the Members of the Eventual Commission for Constitutional Revision, constituted by Deliberation n.º 2-PL/2021, of May 12th, published in the Supplement to the Official Gazette, Series II - A, n.º 131, possibly leading to the 8th revision of the Constitution of the Portuguese Republic.

V. FURTHER READING

Botelho, C. S., *'Estados de Exceção Constitucional: Estado de Sítio e Estado de Emergência (Constitutional State of Exception: State of Siege and State of Emergency)'*, in Carla Amado Gomes e Ricardo Pedro (eds.) Direito Administrativo de Necessidade e de Excepção (AAFDL, Lisboa, 2020) 47-95.

CEJ, Lopes, E., Caçapo, A., (coords), *'Estado de Emergência—COVID-19—Implicações na Justiça'* (Coleção: Caderno Especial, Centro de Estudos Judiciários, 2020), <www.cej.mj.pt/cej/recursos/ebooks/outros/eb_Covid19.pdf>.

Gouveia, J. B., *'O Estado de Excepção no Direito Constitucional'* (2 volumes) (Almedina, 2020).

ICJP, *'Estado de excepção e crise epidémica'*, (*e-Pública*, AAFDL, 2020), vol.7, n.1, <https://e-publica.pt/pt/anteriores.html>.

Romania

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I. INTRODUCTION

The Constitution of Romania was adopted in 1991, in the context of the transformations determined by the fall of communism in Central and Eastern Europe, marking the transition to a democratic regime, and consequently, the creation of new constitutional bases. The Constitution was revised only once, in 2003, at the parliamentary initiative, which was a moment characterized as a "reference in the constitutional evolution of the State[1]". The reform's main goal was to meet the constitutional requirements for Romania's integration into the European Union (EU)[2] and accession to the North Atlantic Treaty Organization. Other significant changes concerned regulation of fundamental rights and freedom, optimization of public authorities› decision-making process, strengthening of the Constitutional Court and the People›s Advocate.

The Constitution adopted in 1991 and revised in 2003 contains 156 articles divided into VIII titles. Titles I-IV regulate the general principles, fundamental rights, freedoms and duties, public authorities, the economy, and public finances. Title V regulates the Constitutional Court, characterized as the guarantor of the Constitution›s supremacy and the sole authority of constitutional jurisdiction. The constitutional review model is the Kelsenian/European one. Title VI refers to Euro-Atlantic integration, Title VII regulates the procedure and limits for revising the Constitution, and Title VIII contains final and transitory provisions.

There were also other initiatives for revising the Constitution; some were found unconstitutional, others abandoned (lacking political or civic support) or unfinished[3].

Three revision initiatives with a partially identical object, being promoted in 2019, were in Parliament in 2020 and continue, in part, in 2021. We have to mention that both 2019 and 2020 were electoral years in Romania. Some of the main topics of public discourse, also reflected in the revision proposals, concerned integrity, the fight against corruption and limiting the power of the Government to adopt regulations in critical areas, namely justice and criminal matters.

The following sections will present these initiatives, their unconstitutional provisions sanctioned by the Constitutional Court (*CCR*), context in which substantial and procedural issues will be addressed, regarding the revision of the Romanian Constitution and the role of the CCR.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In order to identify the contextual elements, as well as the stages taken by the ongoing proposals to revise the Constitution, the applicable regulations will be briefly presented.

Thus, according to Article 150 of the Constitution, the initiative for revision belongs to: the President of Romania, on the proposal of the Government; at least one-quarter of the number of Deputies or Senators; at least 500,000 citizens with the right to vote, who must belong to at least half the number of the counties in the country, and in each of these counties/Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative.

According to Article 151, the draft or proposal of revision must be adopted by the Chamber of Deputies and the Senate, in separate sittings, by a majority of at least two-thirds of the members of each Chamber of Parliament. If the two Chambers adopt different texts, the mediation procedure shall be used. If a mediation procedure can reach no agreement, the Chamber of Deputies and the Senate shall decide thereupon, in joint sitting, by the vote of at least three-quarters of the number of MPs.

The revision shall be final after the approval by a referendum held within 30 days of the date of passing in Parliament the revision law. The Constitution's revision law enters into force on the date of publication of CCR's decision confirming the referendum's returns.

Within the revision procedure, CCR plays a key role exercising the constitutional control on the initiatives to revise the Constitution[4] and on the laws for the revision of the Constitution passed by Parliament[5]. The purpose of the control is to comply with the revision procedure and its limits. Likewise, *CCR* guards the observance of the procedure for the organization and holding of a referendum and confirms its returns.[6]

As regards the proposals initiated in 2019, the first one was

1 For explanations, see also Tudorel Toader, Marieta Safta," Development of constitutionalism in Romania", RDC no.1/2015,http://www.revistadedreptconstitutional.ro/wp-content/uploads/nr_revista/2015_1/Revista-de-Drept-Constitutional-nr-1-2015.pdf, accessed on 5 January 2021

2 See CCR's Decision no.148/2003 (Official Gazette no.317/12 May 2000)

3 In the 30 years since the adoption of the Constitution, *10 initiatives to revise the Constitution* have been promoted, as follows: 5 by MPs [1996, 2003, 2014, 2019 (2 initiatives)], 4 by the citizens (2000, 2007, 2016, 2019) and one by the President of Romania on the proposal of the Government (2011).

4 Article146 a) the second thesis of the Constitution, https://www.ccr.ro/wp-content/uploads/2020/11/constitutie-engleza.pdf

5 Power introduced in 2004, by Article 23 of Law no.47/1992 on the organization and functioning of CCR, republished (Official Gazette no. 807/3 December 2010)

6 Article146 i) of the Constitution

supported by over 800,000 citizens and concerns the amendment of the provisions of Article 37- Right to be elected, in the sense of excluding citizens sentenced to imprisonment for intent crimes until a situation removing the consequences of the conviction arises. According to the explanatory memorandum, the initiative envisages a constitutional regulation of a unitary integrity condition, similar to that of the Government members (of infraconstitutional level, being more severe), for election in local public administration bodies, in the Chamber of Deputies, in the Senate and for the office of President of Romania. This change is necessary because the legislation governing the conditions for access to a public office or dignity must be coherent, predictable, and uniform, applicable to all State authorities' representatives. The persons holding an office involving the exercise of State authority have to meet certain integrity requirements, legality, and fairness, meant to strengthen citizens' trust in public management and to prevent slippages from the principles of democracy through law. CCR found that the revision initiative is constitutional[7], and the proposal continues its procedural course, being in the parliamentary stage.

The other two revision initiatives, belonging to the MPs, are similar in terms of subject -matter, overlapping in part, as they aim to implement the result of a consultative referendum initiated by the President of Romania in 2019. The referendum recorded 85.91% votes for "YES" to the question aimed at "banning amnesty and pardon for corruption offenses" and 86.18% for "YES" to the question aimed at "prohibiting adoption by the Government of emergency ordinances regarding crimes, punishments and judicial organization and expansion of the right to appeal ordinances directly before the Constitutional Court". In the decision confirming the returns of the referendum[8], CCR underlined that the effects of the consultative referendum are not legal but political, guiding public authorities. The public authorities' approach can be embodied "in various measures of public authorities, without imposing an option for one category or another of measures, such as the revision of the Constitution." Despite this reasoning, the political forces within Parliament initiated separate revision proposals with a similar subject -matter.

Thus, MPs proposed the amendment of the classes of laws (Article 73), meaning the prohibition of granting amnesty and collective pardon for corruption acts, the amendment of the provisions regarding the legislative initiative (Article 74), meaning that amnesty and collective pardon for corruption acts cannot be the subject-matter of a legislative initiative of Deputies, Senators, and Government, as well as the amendment of the provisions regarding the powers of the President of Romania (Article 94) meaning the prohibition of granting individual pardons for corruption acts.

They proposed also the amendment of Article 115—Legislative delegation (allowing the Government to adopt normative acts in the domain of law, by ordinance or emergency ordinance[9]) in the sense of prohibition to adopt emergency ordinances (GEO) regarding crimes, punishments and their enforcement, granting amnesty and collective pardon, organization and functioning of the Superior Council of Magistracy, courts of law, the Public Ministry and the Court of Accounts. Other proposals aim to broaden the scope of subjects who can directly challenge the constitutionality of the GEO[10] (the President of Romania, 50 Deputies or 25 Senators, the High Court of Cassation and Justice, the People's Advocate), and also the amendment of the regime of the exception of unconstitutionality raised directly before CCR by the People's Advocate.

MPs proposed also the amendment of the Article 37- Right to be elected and, correlatively, Article 38-Right to be elected in the European Parliament, meaning the regulation of a new ban for the citizens definitively sentenced to custodial sentences for intentional offences until a situation removing the consequences of the conviction arises, as concern their election as members of local public administration bodies, the Chamber of Deputies, the Senate, the office of President of Romania and the European Parliament.

CCR found, in part, the unconstitutionality of the revision initiatives, namely on the proposals to impose an absolute prohibition on the regulation/granting of the leniency measures, as well as on eliminating the possibility of the People's Advocate to challenge the laws directly before CCR. Likewise, it found constitutional the proposed amendments concerning more restrictive regulation of the right to be elected, the restriction of the domains in which the Government can regulate by emergency ordinances, and the expansion of the possibility to challenge the GEO before the Constitutional Court directly.[11]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Therefore, some of the proposals subject to revision initiatives continued the procedural course in 2020, entering the parliamentary debate procedure.

Some of the proposals were found unconstitutional, as they violated the limits to revise the Constitution. These limits are enshrined in Article 152 in three paragraphs, classified in the legal literature[12] into: material limits [(1)], meaning those values considered intangible by the constituent power ("the national, independent, unitary and indivisible character of the State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language" shall not be subject to revision), teleological limits [(2)], meaning "the result of the procedure that is not desirable"[13] (no revision shall be made if it results in the "suppression of the citizens' fundamental rights and freedoms or of the safeguards thereof") and limits concerning exceptional situations [(3)] ("The Constitution shall not be revised during a state of siege or emergency, or in wartime").

These limits are subsumed under the requirements of extrinsic constitutionality [Article 152 (3)], and of intrinsic constitutionality of the revision [Article 152 (1) and (2)] analysed by CCR in carrying out the control of initiatives/laws to revise the Constitution.

As long as the requirements of intrinsic constitutionality (regarding material and teleological limits of the revision) are likely, in general terms, to give the difference between amending the Constitution and a

7 Decision no.222/2019 (Official Gazette no. 425/30 May 2019)
8 Ruling no.2/2019 (Official Gazette no.803/3 October 2019)
9 A controversial institution in Romania–see Marieta Safta, "Constitutional limits of law-making through the Government's emergency ordinances" in *Directive-Act of European Union Law-and Romanian law*, UniversitarĐ Publishing House (2016), pp.111-131
10 Currently, only the People's Advocate can directly challenge the GEO before CCR; for the other subjects of law, an indirect way is provided, meaning the exceptions of unconstitutionality raised before the courts of law or commercial arbitration—see Article146 d) of the Constitution
11 Decisions no.464/2019 (Official Gazette no.646/5 August 2019) and no.465/2019 (Official Gazette no.645/5 August 2019)
12 See Dan Claudiu DĐniĐor, "Critical considerations regarding the limits of the power to revise the Romanian Constitution", in RDC no.1/2018, Universul Juridic Publishing House
13 Ibidem

new Constitution, it can be stated, both in terms of procedural and content-based approach, that initiatives infringing these limits can be qualified, broadly, as dismemberments, not amendments[14]. However, the different nature of the limits circumscribed to intrinsic constitutionality conditions requires a nuanced approach within the constitutional control.

Thus, regarding the first category, namely the material limits, the scope of potential violations is precisely determined, as the components defining the essence of the State, considered intangible by the originator constituent power, are provided by an express and limiting enumeration. Consequently, the effect of revision initiatives in terms of amendments/dismemberments is more obvious. This kind of amendments includes, for example, previous proposals to revise the Romanian Constitution (2014), aiming at Article 3-Territory, in the sense of delimitation of some "traditional areas", Article 6-Right to identity, meaning to establish for the legal representatives of the national minorities the possibility to set up their own decision-making and executive bodies, as well as Article 12—National symbols, meaning to include in this phrase the own symbols of the national minorities. CCR found those amendments as unconstitutional because they affect the national and unitary character of Romania.[15]

As for the violation of teleological limits, this can be as obvious as in the case of material limits, when the revision proposal simply eliminates a fundamental right/freedom or an expressly regulated guarantee. Thus, for example, there are previous initiatives (1996, 2003, 2011) eliminating the presumption of legally acquired assets, established by the second sentence of Article 44 (8), according to which "Legality of acquirement [A/N property] shall be presumed". Consistently, CCR has found these proposals as unconstitutional[16], noting that it results in abolishing a guarantee of ownership, thus infringing the limits of revision.[17]

However, the violation of teleological limits is often subtler when by amending a constitutional institution(s) (not only the regulation of fundamental rights/freedoms), it comes to the suppression of constitutional guarantees of fundamental rights/freedoms. The effect is also destructive by reference to the Constitution in force, as long as such amendments can divert the powers of the State from their finality by indirect methods. The suppression of a right, fundamental freedom or their guarantees, broadly, can be achieved through a multitude of amendments to the Constitution, seemingly neutral, but which, in essence, weaken/change the constitutional bases established by the originator constituent power.

The 2019 proposals to amend the Constitution found unconstitutional fall into the latter category, as they do not concern either the material limits of revision or the direct elimination of some of the fundamental rights/guarantees. Thus, apparently for achieving a legitimate goal, to implement the citizen's will to "stigmatize" corruption, the initiators proposed restrictions on the powers of Parliament, Government and the President of Romania regarding the regulation/granting, as appropriate, of clemency measures (amnesty and pardons) for corruption offenses. Consequently, examining the formulated proposals' intrinsic constitutionality imposed a systematic approach of the constitutional guarantees applicable to fundamental rights and freedoms, determining whether or not they are suppressed within the meaning of Article 152 (2).

CCR noted, at the beginning of its analysis, that "Title II of the Constitution is entitled Fundamental Rights, Freedoms and Duties and comprises four chapters: Common Provisions, Fundamental Rights and Freedoms, Fundamental Duties and the People's Advocate. Chapter I-Common provisions regulate the principles establishing the premise for the enforcement of fundamental rights and freedoms, meaning that the principle of equality plays a key role". Concerning the principle of equality, as well as the whole catalog of fundamental rights and freedoms, CCR found that "they are based on one of the supreme values of the Romanian people, namely human dignity. (....) Since the principle of equality refers to the essence and function of human dignity, it follows that equality is a characteristic and intrinsic component of human dignity. (...).Therefore, it results that there is an organic relationship between the supreme values of the State on the individual's human condition enshrined in Article 1(3), the principles inherent in fundamental rights and freedoms, as well as fundamental rights and freedoms expressly provided for by the Constitution, all being a reference standard in analysing the limits to revise the Constitution in the light of Article 152(2)."[18] Within this approach, CCR noted that, although the general prohibition on amnesty or pardon in respect of "corruption acts" concerns one side of public power, "the effects of the planned prohibition affect the principle of equality, a guarantee of fundamental rights and freedoms, and, implicitly, human dignity, the source of fundamental rights and freedoms, and their associated guarantees."[19]

Likewise, such constitutional revision "enters into conflict with the conception of the originator constituent legislator regarding the possibility and manner of granting amnesty/pardon" which "limited the citizens' legislative initiative on amnesty/pardon (...) This initiative was regulated only for the elected representatives of the people, MPs, and State authorities, the Government, precisely for not allowing an emotional/subjective assessment by citizens and eliminating the possibility to initiate such a legislative proposal even by the subjects referred to through them. Therefore, its initiation and adoption are the prerogatives of the State. Furthermore, the originator constituent legislator, since it recognized such a power belonging to the State, it recognized it in fullness, meaning that amnesty/pardon was regulated as measures regarding the totality of crimes. (...) Such a prohibition, ultimately limiting the State's prerogative to grant amnesty/pardon, seriously undermines the citizens' principle of equality, resulting artificially in creating different legal situations, bringing to the fore the social stigmatization of a certain category of citizens. (....) Therefore, the reconfiguration of the constitutional architecture regarding amnesty/pardon does not refer only to the regime of State institutions since it produces direct effects on the principle of equality, a premise for ensuring fundamental rights and freedoms."[20]

14 As concern distinction between amendments and dismemberments see Richard Albert—*Constitutional Amendments: Making, Breaking and Changing Constitutions* (OUP 2019)

15 Decision no.80/2014 (Official Gazette no.246/7 April 2014); with broad parliamentary support, this initiative proposed amendments to most of the Constitution. CCR found 26 unconstitutional amendments and submitted to Parliament numerous comments on removing/rewording/reorganizing amendments, reconsidering legislative solutions; see also Venice Commission [CDL-AD(2014)010-e]. The initiative was abandoned.

16 Decisions no.85/1996 (Official Gazette no.211/6 September 1996), no.148/2003, no.799/2011, cited above; moreover, a useless proposal, the sense in which there are the recitals of Decision no.799/2011

17 See M. Safta—Presumption of lawful acquirement of property and confiscation of unlawfully acquired property in the case-law of the Romanian Constitutional Court. The reference constitutional framework for regulating of the extended confiscation—Juridical Tribune—Number Vol.2 N.1, 2012

18 Decision no.464/2019, para.31-33

19 Ibidem, para.31

20 Ibidem para.38

Ultimately, the general prohibition proposed by the initiators violates the limits of revision because it "excessively limits the State powers and its possibility of assessment, affecting impermissibly the exercise of public power in favor/benefit of citizens. As an effect of limiting the public power, a category of citizens is deprived of a vocation based on a circumstantial nature, contrary to human dignity."[21]

Regarding the intention to revise, CCR noted that "it is true that at a time in the evolution of society it can be appreciated-even through the consultative referendum (...) that amnesties/pardons shall not be granted in respect of all or some criminal "acts", but such an assessment envisages the need of the competent authorities to refrain from exercising the discretionary power they enjoy in these areas, and not to limit their discretionary power conferred by the Constitution itself. Therefore, analyzing the opportunity and political liability belongs to the authorities vested by the Constitution with the power to grant amnesty/pardon, through a case-by-case analysis, starting from considerations related to social peace/criminal policy to humanitarian ones".[22]

As concern the proposal to eliminate the power of the People's Advocate to challenge the constitutionality of existing laws directly, CCR found that it violates the limits of revision, as it leads to the suppression of an institutional guarantee associated with the protection of fundamental rights and freedoms. CCR reiterated the interpretation given to Article 152(2) contained in its case-law, according to which "the constitutional protection of citizens is ascendant, so that constitutional revisions must also give greater protection to the protection of fundamental rights and freedoms"; "within the meaning of Article 152(2), the protection of fundamental rights and freedoms can only have an ascending orientation".[23]

These decisions and, in general, the evolution of CCR case-law in carrying out the mandatory constitutional review in the procedure to revise the Constitution is in the sense of extending and refining the control instruments, through an approach placing it not only in the position of counteracting possible dismemberments, but also to direct the legislator towards the identification of those solutions likely to preserve the constitutional harmony. The conferment in 2004 of the power of constitutional review regarding the law for the revision of the Constitution adopted by Parliament (before being submitted to the referendum) strengthened the CCR's role within the revision procedure. Until that moment, CCR ruled, ex officio, only on initiatives to revise the Constitution, so that in the subsequent parliamentary procedure could appear, theoretically, amendments contrary to the limits of revision that escaped the constitutional control. By the current double constitutional review, this risk is eliminated. As the CCR's decisions are generally binding, an initiative/law to revise the Constitution found as unconstitutional will not be able to be either adopted by Parliament or subject to the referendum for the revision of the Constitution.

The development of the case-law regarding the constitutional review of the initiatives to revise the Constitution follows the general evolution of CCR as a fundamental democratic institution, from a preponderant counter-majoritarian role to the consolidation of the representative role, with aspirations towards the enlightened one[24]. This evolution has not been exempted from criticism, on the contrary, with the apodictic proclamation of the role of constitutional courts as "negative legislators"[25].

IV. LOOKING AHEAD

The general topic for the revision of the Constitution was frequently mentioned in 2020, the year corresponding to the parliamentary elections. However, the proposals for the revision of the Constitution, submitted to Parliament following the constitutional review, have not advanced. In this light, the contextual elements must also be taken into account, namely the state of emergency and then the alert one established in Romania as a result of the COVID-19 pandemic as well as the fact that, as we have mentioned, the Romanian Constitution provides limits of revision concerning exceptional situations.

After the parliamentary elections at the end of 2020, the new Parliament decided, in February 2021 "the termination of the legislative procedure" for the revision proposals initiated by MPs in 2019[26], "by not complying with the provisions of Article 63 (5) of the Constitution."[27] It is ongoing, in the parliamentary procedure, the revision proposal initiated by the citizens regarding Article 37- Right to be elected, in the sense of excluding citizens sentenced to imprisonment for intent crimes until a situation removing the consequences of the conviction arises.[28]

In the current Program of the governing coalition[29], the chapter dedicated to Justice emphasizes "the urgent need to rearrange the relationships among the most important State institutions, their competences, as well as to strengthen the operating principles of Romania", affirming the commitment to "initiate" and "insist" on the debate to revise the Constitution. Besides the previous proposal, a main topic of "constitutional reform" appears in the Program, namely "the reformation of the Constitutional Court". In fact, the year 2020 was marked by criticism of the CCR from political actors, the context of the COVID-19 pandemic being a potentiating factor. Among others, the decisions of the CCR by which it ruled on the limits of executive power, finding the unconstitutionality of restricting the exercise of fundamental rights and freedoms by the GEO, were strongly criticized by the Government leadership. The theme of "reforming" the CCR was promoted, from the perspective of the competence, attributions, and, especially, of constitutional judges' appointment/status.[30]

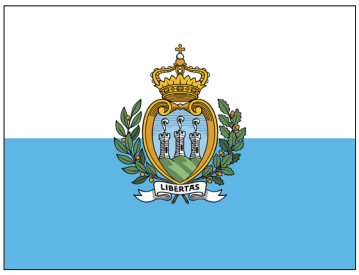
Therefore, it is expected that the next period will be rich in debates on the necessity and the chapters to revise the Romanian Constitution.

V. FURTHER READING

Linos-Alexandre Sicilianos, *Procès équitable: perspectives régionales et internationales/fair trial: regional and international perspectives*—Liber amicorum, (Anthemis, 2020).

21 Ibidem, para.43
22 Ibidem para.41
23 Decision no.465/2019, cited above
24 As concern the role of the courts see L.R Barroso, "Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies", *The American Journal of Comparative Law*, Vol.67, Issue 1, March 2019, Pages 109–143
25 Understood in an excessively restrictive sense
26 http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17975; http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17976
27 Article 63(5) of the Constitution: "Bills or legislative proposals entered on the agenda of the preceding Parliaments shall be carried over int he session of the new Parliament".
28 http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17842
29 https://gov.ro/ro/obiective/programul-de-guvernare-2020-2024
30 Being even expressed ideas of abolishing CCR and taking over the constitutional control by the High Court of Cassation and Justice; for a critical position on the pressure of abolishing a Kelsenian constitutional court and taking over constitutional review by a court of law, see also Schnutz Rudolf DÐrr-*Constitutional Courts: an endangered species?*-LGDJ, Lextenso-Collection Grandes Coloques, 2019, p.117

San Marino



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I. INTRODUCTION

When approaching the issue of constitutional reform in San Marino, it is convenient to recall some peculiarities concerning the Sammarinese system of sources of law.

The Sammarinese sources are characterized by centuries of stratification and the constitutional level sources include the *Leges Statutae* (dating back to 1600) and their subsequent reforms (so called *Reformationes*), and the Ancient Customs, integrated by the *ius commune*. Only recently, when compared to the majority of continental Europe legal systems, in 1974, San Marino has adopted the *Dichiarazione dei diritti dei cittadini e dei princìpi fondamentali dell'ordinamento sammarinese*-DD (Declaration of Citizen Rights and of Founding Principles of the Sammarinese Legal System). Furthermore, since the 2002 reform of the DD, both the European Convention of Human Rights and international covenants protecting rights and freedoms are among the top sources, thus prevailing in case of contrast with domestic legislation.

As the naming of the document suggests, the DD is not a proper constitution. Nevertheless, following the 2002 amendment, at Article 3bis, the DD expressly provides for constitutional laws in order to enact the principles stated in the DD. To be more precise, according to the transitory norms of the DD (introduced with the 2002 amendment), these constitutional laws must be passed within 3 years from the enforcement of the DD. Moreover, the procedure to pass constitutional laws is by a vote by 2/3 majority by the Consiglio Grande e Generale (Grand and General Council), whilst in case of absolute majority a referendum has to be held.

The very same procedure is provided at Article 17 in order to amend the DD. This article, introduced by the 2002 amendment, has given a rigid character to the DD, which it was previously lacking.

In the year 2020, no amendments to the DD were neither proposed nor approved. Nonetheless, it seems convenient to mention that two constitutional laws have been passed: const. law 1/2020 and const. law 2/2020. Furthermore, an important debate has started in 2020 on the necessity for the Sammarinese legal system to undergo a significant constitutional reform in the upcoming years.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2020, the Grand and General Council passed by a qualified majority two constitutional laws.

Const. law 1/2020 deals with a technical amendment to Article 10, paragraph 2 const. law 2/2019 establishing a commission of inquiry within the Grand and General Council on alleged political and administrative liability in the crisis of Sammarinese banks. Whilst the much more relevant const. law 2/2020 modifies Article 2, paragraph 5 const. law 144/2003. Const. law 144/2003 is one of the constitutional laws passed in the aftermath of the 2002 amendment in order to regulate the functioning of the judiciary. The amended paragraph regulates the civil liability regime of the members of the judiciary as well as the competence of the judges responsible for the civil liability procedure (Giudici per l'azione di responsabilità civile).

This latter amendment is of particular interest, because it involves the judiciary, whose reform has been requested by the GRECO (Group of States against Corruption) by the Council of Europe. Furthermore, it seems convenient to address it, because it may be considered as a preliminary step to the institutional reforms that the Republic has announced for the upcoming years.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Even though no amendments to the DD have been passed in 2020, it seems convenient to point out two key elements which will affect any future reform: the scope of any amendment and the role that may be played by the Collegio Garante della Costituzionalità delle Norme (Guarantors' Panel on the Constitutionality of Rules).

With respect to the former, Article 17 DD reads that any provision of the Declaration can be amended. Thus, no rule is explicitly qualified as unamendable. The procedure to pass amendment laws follows the same as for constitutional laws, i.e., either a vote by 2/3 of the Grand and General Council or an absolute majority by the Council and then a referendum. The fact that the DD does not provide for any unamendable rule reflects its character of not being a proper constitution. Moreover, as previously outlined, even the rigidity of the DD is quite recent, dating back only to 2002.

The Guarantors' Panel on the Constitutionality of Rules, which is the Sammarinese constitutional court, is one of the major innovations introduced by the 2002 reform of the DD. In order to better understand the innovative character of this body, it is enough to say that it is the only Sammarinese institution which is not provided for in the *Leges Statutae* of 1600. Moreover, until San Marino did not pass some sort

of rigid constitutional document, i.e., the DD following the 2002 reform, there was no need for a body like the Guarantors' Panel on the Constitutionality of Rules.

With respect to the sources, the Panel can scrutinise only primary legislation and customs having the force of law. Nonetheless, it is worth recalling that since the 2002 DD reform, the European Convention of Human Rights as well as international covenants protecting rights and freedoms are constitutional parameters.

It seems worth noting that microstates are the object of particular scrutiny by the Council of Europe and of its advisory bodies. Indeed, even though not with respect to San Marino, the Council of Europe has scrutinized very closely both the constitutional arrangements and the constitutional reforms of their microstate members (on Monaco constitutional arrangements before its accession in 2004 and on the 2003 constitutional reform in the Principality of Liechtenstein).

When considering the role played by the Panel in the Sammarinese institutional architecture, despite the Panel being a young court, it plays mainly a countermajoritarian role. Nevertheless, considering the micro size, concerns persist over a fully independent judiciary, the majority of the members of the Panel are Italian citizens.

IV. LOOKING AHEAD

San Marino is bound to start a significant institutional reform in the upcoming years in order to further modernize the constitutional arrangements and to align the Sammarinese system to the best practices requested by the Council of Europe. In particular, San Marino considers that it is of paramount importance to integrate the new instances and the challenges of the XXI century with the Sammarinese institutional tradition.

Indeed, the principle of institutional continuity is the key principle that has guided all Sammarinese reforms. Therefore, it seems likely that a series of amendments to the constitutional laws will be put forward and amendments also to the DD cannot be excluded.

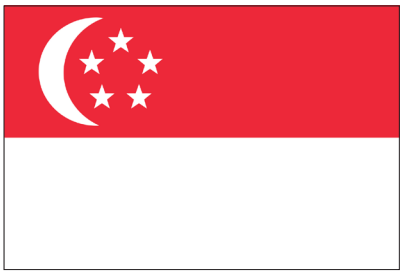
Following the September 2020 report by GRECO, the first point on the reform agenda is the reform of the judiciary, starting with the Consiglio Giudiziario (Judiciary Council). This body, which represents the judiciary, is however regulated under a qualified law (qualified law 145/2003).

The issues that San Marino has with respect to the independence of the judiciary is shared with all the other microstates.

V. FURTHER READING

GRECO, *'Fourth Evaluation Report'* (GrecoEval4Rep (2019), 2020).

Singapore



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I. INTRODUCTION

It is now common to call 2020 unprecedented, among other adjectives like disruptive, exhausting, and even apocalyptic. Amidst the chaos, constitutional law, at times, struggled to be relevant; public health measures seemed to bypass constitutional questions as countries opted to enter into states of emergency in order to gain control over the pandemic. In Singapore, there were few constitutional reform measures, with the Singapore Government instead undertaking a series of technocratic approaches to address the Covid-19 pandemic. Nonetheless, even while the Constitution remained in the background, it never receded into obsolescence. The strength of the Singapore state has always been manifest in its sophisticated adherence to the rule of law, including the rule of constitutional law. This is perhaps made easy by the fact that the ruling People's Action Party ("PAP") consistently holds more than 90% of the seats in the Singapore Parliament. Their seat-share decreased slightly after what can only be seen as a pandemic election held in July 2020, where the main opposition party managed to win 10 out of 92 seats in Parliament, the best showing for an opposition party since Singapore's independence in 1965.

From a constitutional government perspective, Singapore's 2020 general election results were momentous as it led to a historical change in the relationship between the government and the opposition. Following the 2020 elections, the government formally recognized the post of Leader of Opposition for the first time in Singapore's post-independence history. In the United Kingdom's parliamentary tradition, from which Singapore's political system was drawn, the Leader of the Official Opposition is the leader of the largest opposition party, a role that commands an additional salary to the parliamentary salary received as a Member of Parliament. In the UK, the Leader of the Official Opposition also creates a shadow cabinet to follow the work of government departments. In Singapore, the Leader of the Opposition will receive confidential briefings on select matters pertaining to national security and external relations and may be called on to attend state functions, visits and meetings. He will also receive an additional allowance, be provided an office and the use of a meeting room in Parliament House, among other privileges, and will be expected to lead the opposition in presenting alternative views in parliamentary debates.[1] Interestingly, despite the historic nature of this development, it was not instituted through any formal constitutional amendment. No laws were changed to formally create the office of the Leader of the Opposition, or to institute safeguards for this office. To be fair, there was also no call for this change to be formalized through formal constitutional or legal instruments. However, given Singapore's usual dedication to the rule-of-law, the fact that such a momentous development with clear constitutional implications occurred with such a lack of legalization is surprising.

1 Office of the Speaker of Parliament and Office of the Leader of the House, "Joint Press Statement: Duties and Parliamentary Privileges of Leader of the Opposition" <https://www.parliament.gov.sg/docs/default-source/default-document-library/press-release-on-leader-of-opposition.pdf> ("LO Press Statement") accessed 1 March 2021.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Within the context of a dominant party Parliament like in Singapore, it makes little sense to talk of unsuccessful constitutional reforms as long as they are initiated by the ruling party. At the same time, asking the question of what constitutional reforms were initiated raises interesting questions about what it means for a reform to be constitutional. Is it necessary to speak of textual amendment or is it sufficient for a legal and even policy change to have constitutional implications, even without formal amendment? Asking these questions is crucial for an analysis of constitutional reforms. This is because there are constitutional amendments that are substantively limited while there are policy changes without constitutional amendments that are substantively momentous. In this part, we will discuss both such changes as constitutional reform; the first two sets of reforms involve constitutional amendments, though they can be seen substantively limited; the third involves no constitutional amendment but which substantively changes the way constitutional government works in Singapore.

The first group of constitutional changes were responses to the COVID-19 pandemic. Singapore had taken largely a "legislative approach"[2] in countering the Covid-19 outbreak, first employing existing legislation and later, when existing legislation appeared inadequate, to urgently pass new legislation.[3] The Constitution was nonetheless amended to create a mechanism for separate but contemporaneous meetings among Members of Parliament. A new article was inserted to allow for Parliament to resolve that "it is or will be impossible, unsafe or inexpedient for Parliament to sit and meet in one place" and for

2 Jaclyn Neo and Darius Lee, "Singapore's Legislative Approach to the COVID-19 Public Health 'Emergency'" (Verfassungsblog, 18 April 2020) <https://verfassungsblog.de/singapores-legislative-approach-to-the-covid-19-public-health-emergency/> accessed 1 March 2021.

3 Covid-19 (Temporary Measures) Act 2020 (No 14 of 2020).

> a) applies for a period of 6 months after the appointed date, and thereafter for a period of 6 months if —
> (i) Parliament resolves that it is or will be impossible, unsafe or inexpedient for Parliament to sit and meet in one place; or
> (ii) the Speaker presents to Parliament a notice in writing given by a majority of all Members of Parliament stating that it is or will be impossible, unsafe or inexpedient for Parliament to sit and meet in one place; but

All members of Parliament, including those in the opposition, voted unanimously for the amendments.[4] The Amendment Bill has a sunset clause, providing that the mechanism would be valid for six months after it came into force (on 5 May 2020), but could be extended in the future for six months at a time if Members consider it "impossible, unsafe or inexpedient" for Parliament to meet in one place. These "continuity arrangements" authorizes Parliament and its committees to "sit, meet and despatch business with Members of Parliament being present at 2 or more appointed places and in contemporaneous communication with one another".[5]

The second group of constitutional changes involved the constitution of Singapore's Supreme Court. In 2019, Parliament passed constitutional and statutory amendments[6] restructuring the Supreme Court and creating a new Appellate Division of the High Court. The amendments came into force on 2nd January 2021. Prior to these reforms, Singapore's Supreme Court consisted of a High Court and a Court of Appeal, the latter being Singapore's apex court. The reforms split the High Court into two divisions: a General Division and an Appellate Division.[7] Generally, proceedings before the General Division will be presided over by one Judge, while proceedings before the Appellate Division will be presided over by at least three Judges.[8]

The Appellate Division in the Supreme Court was created to sieve out appeals from the High Court (now, the General Division) on relatively trivial or uncontentious cases, thereby lightening the caseload of the Court of Appeal and allowing the latter to focus on cases raising questions of law which are novel and/or of public importance.[9] However, Parliament's intention was not to reproduce in the Supreme Court a three-tiered judicial structure, which allows greater judicial deliberation on all matters uniformly.[10] Instead, the reforms are meant to create two tracks of appeals—the first, for trivial disputes, to the Appellate Division; the second, for important disputes, to the Court of Appeal—but with the Court of Appeal having final authority over case management. The "flexibility" and "efficiency of Court processes", rather than the quality of judicial deliberation, is thus the primary focus of these reforms,[11] although improving the former should indirectly improve the latter as well.

Today, all cases brought to the Supreme Court go first to the General Division. On appeal, the cases will go to the Court of Appeal as of right only if it falls within the Sixth Schedule of Singapore's Supreme Court of Judicature Act.[12] These cases are typically those of considerable public interest, relating to constitutional and administrative law, criminal law, contempt of court, arbitration, insolvency or restructuring, patent law, Singapore International Commercial Court disputes ("SICC"), and the Parliamentary Elections Act, amongst others.[13] Otherwise, parties can appeal only to the Appellate Division as of right; any further appeal to the Court of Appeal would require the latter's leave.[14] The Court of Appeal nevertheless retains final authority over case management: it retains the power to transfer any case ordinarily allocated to the Appellate Division to itself, and the power to transfer any case ordinarily allocated to itself to the Appellate Division.[15]

The third group of reforms introduced the office of the Leader of the Opposition ("LO") into Singapore's constitutional system. Although Singapore has a Westminster system of government, it has never had a formal LO. This may be attributed to the distinct lack of an opposition presence in Singapore politics, given the ruling PAP's dominance of politics since Singapore's independence. Opposition members of Parliament ("MPs"), by contrast, numbered in the single digits, and while "leaders" were identified among them, these were purely informal titles with no constitutional or legal import.[16]

The LO reforms were introduced after Singapore's 14th general elections, held on 10 July 2020, which, in light of the above history of elections in Singapore, were a watershed. Singapore's main opposition party, the Workers' Party ("WP"), captured two large electoral districts for the first time, and narrowly lost in a third district to a high-profile PAP team. Thus, while the PAP still won a supermajority of parliamentary seats, and while the opposition captured only 10 elected seats, in relative terms the 2020 election results were the PAP's worst since independence. The next day, Prime Minister Lee Hsien Loong held a press conference recognizing that the results showed a "clear desire" for a diversity of voices in Parliament, "especially [among] younger voters" who "want to see more opposition presence in Parliament".[17] He then announced that the office of the LO would be created, and that the WP's Secretary-General, Mr Pritam Singh, would be appointed LO.[18]

Details about the office of the LO were set out in a Joint Press Statement issued by the Office of the Speaker of Parliament and Office of the Leader of the House on 28 July 2020.[19] No constitutional amendments, laws or formal regulations were passed. The Press Statement

4 See Second Reading of Constitution of the Republic of Singapore (Amendment) Bill, *Singapore Parliamentary Debates,* Official Report (5 May 2020), vol 94.
5 Constitution of the Republic of Singapore ("Singapore Constitution"), art. 64A, inserted by the Constitution of the Republic of Singapore (Amendment) Act 2020 (No. 22 of 2020).
6 Constitution of the Republic of Singapore (Amendment) Bill (No. 30 of 2019); Supreme Court of Judicature (Amendment) Bill (No. 32 of 2019).
7 Singapore Constitution, art. 94(1)(b).
8 Supreme Court of Judicature Act (Cap. 322, 2007 Rev. Ed.) ss 10(1), 32(1).
9 Edwin Tong (Senior Minister of State for Law), speech during the Second Reading of the Supreme Court of Judicature (Amendment) Bill, *Singapore Parliamentary Debates*, Official Report (5 November 2019), vol 94.
10 Ibid. ("To be clear, so that I do not come across as suggesting that there are automatically three stages, three tiers of Courts … [w]here an appeal lies from a decision of the General Division, then the appeal will lie either to the Appellate Division or to the Court of Appeal. It will not be commonplace for appeals to be brought to the Appellate Division first and then further brought on to the Court of Appeal.")
11 Ibid.
12 Ibid s 29C(2).
13 Ibid Sixth Schedule.
14 Ibid s 29C(1).
15 Ibid ss 29D, 29E.
16 Indranee Rajah (Leader of the House), Ministerial Statement on Duties and Privileges of the Leader of the Opposition (*Prime Minister's Office, Singapore*, 31 August 2020) <https://www.pmo.gov.sg/Newsroom/Ministerial-Statement-on-Duties-and-Privileges-of-the-Leader-of-the-Opposition-Aug-2020> accessed 1 March 2021.
17 Jalelah Abu Baker and Lianne Chia, "GE2020: PAP has a 'clear mandate', but popular vote share 'not as high' as hoped: PM Lee" (*Channel NewsAsia*, 11 July 2020) <https://www.channelnewsasia.com/news/singapore/ge2020-result-pap-lee-hsien-loong-general-election-12922974> accessed 1 March 2021.
18 Ibid.
19 LO Press Statement (n 1).

recognises the office of the LO and outlines several privileges: the right to ask the lead question to Ministers on policies, Bills and motions; a speaking duration for speeches akin to that of Ministers; a right to briefings on confidential issues of national security and external relations, and on national crises and emergencies; a larger allowance; and additional staff support. Since the Press Statement was issued, the first two and last two privileges appear to have come into effect. The third privilege, however, involving the receipt of confidential information, remains untested. The PAP maintains that "the matters to be briefed will be determined by the Government".[20] Moreover, it remains unclear whether these briefings will be periodic or *ad hoc*, and whether the LO may share the information he receives with his party members or the public. These details must be clarified if the LO is to play any part in adding to the quality of debate in Parliament: the PAP has been slow to share government records with the public,[21] and the WP frequently cites this information asymmetry as justification for its inability to propose policy alternatives in Parliament.[22]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

None of these constitutional changes constitute dismemberments of the constitution.[23] As mentioned, two of the constitutional changes were substantively limited, bringing about a change in procedure and structural allocation of resources respectively. The third change could be said to conform to pre-existing constitutional practice within the Westminster parliamentary tradition, which in the United Kingdom had been accepted as constitutional convention. None of these reforms offered scope for real constitutional challenges. There was one constitutional challenge related to the 2020 elections, but it had nothing to do with constitutional reforms. The applicant argued that the government's calling of election in the middle of a pandemic was contrary to the right to vote. The case was dismissed ex tempore by the Singapore Court of Appeal.[24]

Challenges to constitutional amendments are not common in Singapore, but in previous challenges, the courts have grappled with the question of whether the basic structure/features doctrine should be applied in Singapore. At present, one can say that the Singapore courts accept the legal fact that the Singapore constitution has a basic structure, but have not settled conclusively on what legal doctrine should arise from that.[25] The Singapore courts have expressed scepticism but have not completely ruled out the possibility that it could strike down as unconstitutional certain constitutional amendments that violate the basic structure.[26]

The first group of reforms relating to COVID-19– allowing for parliamentary sessions to occur in multiple locations are procedurally extraordinary, though its substantive impact on the structure of constitutional government is limited.[27] Nonetheless, the specific design choices reflect constitutional commitment to preserving the continuity and survival of Parliament. Furthermore, the requirement that Members be in contemporaneous communication is crucial as it ensures accurate and complete flow of information among Members in different locations, and is key to voting integrity. During parliamentary debate on the amendment, the government was asked about the possibility of remote participation in Parliament, but this was rejected as unnecessary because of Singapore's small size. It was also deemed crucial for members to be "physically and fully present" so as to fully participate in the business of Parliament free from interference.[28] There would also be security concerns if Members were allowed to participate remotely.[29]

The mechanism was used for the first and only time at the Opening of Parliament following the July 2020 parliamentary elections.[30] Since then, Parliament has sat with all Members in the same location, with safe distancing measures. The mechanism has since lapsed after the six months' mark. The broad wording of the provision—focusing on when it is or will be "impossible, unsafe or inexpedient" for Parliament to meet in one place—means that the mechanism could be invoked beyond the COVID-19 pandemic. The threshold required to invoke this mechanism also differs—impossible or unsafe to meet, is not the same as inexpedient to meet. Expedience could simply mean convenience. This would be too low a threshold for Parliamentary sessions to be split up. The only safeguard appears to be that the majority of Parliament must support the mechanism being used. During parliamentary debates, the government stated clearly that this mechanism is to be used only in "truly exceptional" circumstances. Since the dominant interpretive approach in Singapore is purposive, relying heavily on parliamentary debates, this assurance from the government will be crucial in any future judicial interpretation, should the invocation of this mechanism be challenged in court.

The second group of reforms, involving the constitution of Singapore's Supreme Court, are typical of reformative constitutional amendments: they reshape the constitutional judiciary, but in a manner that leaves the fundamental principles undergirding the institution untouched. Courts in Singapore do maintain that the "judicial power" and the "separation of powers" form part of the "basic structure" of Singapore's Constitution.[31] These reforms, however, do not affect the judiciary's role

20 Rajah (n 18).

21 See Tee Zhuo, "Parliament: Only 8% of 2 million public government records searchable on National Archives online portal" (*The Straits Times*, 4 September 2019) <https://www.straitstimes.com/politics/parliament-only-160000-of-two-million-public-government-records-have-metadata-on-nas-web> accessed 1 March 2021.

22 Ili Nadhirah Mansor, "WP's ability to advance policy alternatives depends on Govt's willingness to share information: Pritam Singh" (*TODAY*, 20 July 2020) <https://www.todayonline.com/singapore/wps-ability-advance-policy-alternatives-depends-govts-willingness-share-information-pritam> accessed 1 March 2021.

23 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019) 83-92.

24 *Daniel De Costa Augustin v Attorney-General* [2020] SGCA 60.

25 See Jaclyn Neo, "Towards a "Thin" Basic Structure Doctrine in Singapore" (I-CONnect Blog, 17 January 2018) <http://www.iconnectblog.com/2018/01/towards-a-thin-basic-structure-doctrine-in-singapore-i-connect-column/> accessed 1 March 2021.

26 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 [69] (Court of Appeal); *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 [66] (High Court).

27 Shirin Chua and Jaclyn Neo, "COVID-19 as an Opportunity for Democratic Consolidation?" (Verfassungsblog, 24 February 2021) <https://verfassungsblog.de/covid-19-as-an-opportunity-for-democratic-consolidation/> accessed 1 March 2021.

28 Chew Hui Min, "MPs allowed to 'meet' in various locations for Parliament sittings under new article in Constitution" (*Channel NewsAsia*, 5 May 2020) <https://www.channelnewsasia.com/news/singapore/mps-meet-various-locations-parliament-sittings-consitution-12703880> accessed 1 March 2021.

29 Ibid.

30 Office of the Clerk of Parliament, "Press Release by Parliament of Singapore: Opening of Parliament to be Held at Parliament House and the Arts House" (21 August 2020) <https://www.parliament.gov.sg/docs/default-source/default-document-library/press-release-opening-of-parliament-(21-aug-2020).pdf> accessed 1 March 2021.

31 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 [11] and [16] (High Court).

in the separation of powers. Judicial independence is unaffected, since all justices of the Supreme Court are still appointed through the same process,[32] and still retain the same security of tenure and remuneration.[33] Moreover, while courts have affirmed that they retain an "inherent jurisdiction" to "protect [their] own process and authority",[34] and that any attempt to oust the jurisdiction of the courts would be unconstitutional,[35] nothing in these reforms limits the judiciary's jurisdiction or powers. The General Division retains the same general jurisdiction the High Court possessed before the reforms, and the Court of Appeal retains the power to transfer any dispute ordinarily allocated to the Appellate Division to itself, or grant parties leave to appeal to it from the Appellate Division. The reforms thus do not affect the values underlying the Constitution's provisions on the judicial power, and are thus unlikely to ever be the subject of a serious constitutional challenge.

The third group of reforms, involving the LO, raise considerable constitutional quandaries, because the quotidian manner through which they were instituted highlights tensions in the sources of constitutional law and modes of constitutional change in Singapore, in particular the role of constitutional conventions therein. The LO reforms must at least be considered amendments to Singapore's Constitution, because they elaborate on and arguably restore a heretofore overlooked element of Singapore's Westminster system of government: the existence of an institutionalized opposition with a formal office of LO, which is par for the course in most Westminster systems. From the broader perspective of Singapore's constitutional culture, the LO reforms are not just amendments but significant ones at that, because they mark a distinct shift in how Singapore's dominant party views the opposition. Where once opposition politicians were seen as mere annoyances or obstructions to effective government, the institutionalization of the LO signals the notion that an elected opposition plays an important role in Singapore's democracy.

Given their obvious constitutional significance, it is striking that the PAP Government decided to introduce the LO reforms with a mere Press Statement, rather than by passing constitutional amendments or even legislation. Press Statements, of course, have no binding legal force whatsoever. The PAP Government thus seems intent to preserve for itself the discretion to shape and reshape parliamentary practice in Singapore, at least insofar as it relates to the opposition's privileges and powers in Parliament. But one might question whether this is legally or constitutionally appropriate. The Constitution, for its part, states that Parliament must enact Standing Orders "for the regulation and orderly conduct of its own proceedings";[36] yet no amendments to the Standing Orders have been made to formalize the LO's office and privileges.[37] Moreover, Section 3(1) of Singapore's Parliament (Privileges, Immunities And Powers) Act[38] states that the "privileges, immunities and powers" of MPs "shall be the same as those of the Commons House of Parliament of the United Kingdom and of its Speaker, Members or committees at the establishment of the Republic of Singapore." By 1965, when Singapore achieved independence, English parliamentary practice had long recognised a formal LO which enjoyed most of the privileges recognised in the PAP's Press Statement.[39] If Section 3(1) of the Act were taken seriously, the LO's office and privileges should have been in place since 1965, and should not today be subject to definition or alternation by the Government of the day.

There is thus an apparent conflict between the formal legal and constitutional modes through which parliamentary practice should be changed, and the manner in which the PAP Government has effected such change on the LO: by instituting these changes through a Press Statement, the PAP Government appears to be taking the position that constitutional conventions on parliamentary practice retain some legitimate role in Singapore's legal system. This throws into sharp relief controversies about the role of constitutional conventions in legal system with written Constitutions such as Singapore. At its core, there is the question of whether constitutional conventions should continue to persist despite the enactment of a written Constitution; although some take the position that codification excludes what it does not expressly include,[40] others have argued that a written Constitution cannot be interpreted without the constitutional traditions and practices that both preceded and evolved with it.[41] Even if constitutional conventions remain relevant in Singapore, it bears asking whether legislation such as Section 3(1) of the Act could in principle have the effect of crystallising English parliamentary practice as part of Singapore law. English constitutional practice suggests that the codification of a pre-existing convention in legislation extinguishes the convention, with the rule existing thereafter in law. However, in a legal system which ascribes to constitutional supremacy rather than parliamentary supremacy, it surely must be problematic for mere legislation to extinguish constitutional conventions.

Thus, if one accepts that constitutional conventions could remain relevant alongside a written constitution, it would be productive to regard these recent developments surrounding the LO as the emergence of a constitutional convention even if it would be regarded as a "top-down" rather than "bottom-up" convention based on long usage and practice.[42] This is necessary to grant a degree of legality to the position of the LO. Even if there are no binding laws entrenching this position, the agreement among the relevant parties to work with this new role must be taken seriously and cannot be overridden without violating a constitutional norm.

32 By the President on the advice of the Prime Minister, after consulting with the Chief Justice; Singapore Constitution arts. 95(1), 95(6).

33 Supreme Court Judges have security of tenure until the age of 65, and their remuneration cannot be altered to their disadvantage after their appointment; ibid arts. 98(1), 98(1A), 98(8).

34 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 [98] (Court of Appeal).

35 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 [73]-[74] (Court of Appeal).

36 Singapore Constitution art. 52.

37 They were last amended in 2017; see *Standing Orders of the Parliament of Singapore* (8 May 2017) <https://www.parliament.gov.sg/docs/default-source/default-document-library/standing-orders-of-the-parliament-of-singapore43d430dbcb5f64e2b198ff00006af031.pdf> accessed 1 March 2021.

38 Cap. 217, 2000 Rev. Ed.

39 At least the right of first question and reply, and salary privileges; see Mark Hutton et al eds, *Erskine May: Parliamentary Practice* (LexisNexis, 2019, 25th Ed), [4.6].

40 CJG Sampford, "'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions" (1987) 7 *Oxford Journal of Legal Studies* 369, 395-396.

41 VK Rajah, "Interpreting the Singapore Constitution" in Jaclyn Neo ed, *Constitutional Interpretation in Singapore* (Singapore: Routledge, 2016) 24-25.

42 Adam Perry and Adam Tucker, "Top-Down Constitutional Conventions" (2018) 81(5) *Modern Law Review* 765, 770-774; Kenneth Wheare, *Modern Constitutions* (OUP, 1951) 180.

IV. LOOKING AHEAD

In the wake of the 2020 general elections, which saw a record loss of parliamentary seats to the opposition, there seems to be little on the PAP's constitutional reform agenda; this may be contrasted with the PAP's post-2015 general election approach, where the party, vested with a strong mandate, immediately pledged constitutional reform on matters ranging from Singapore's Presidency to the composition of Parliament and the voting powers of various categories of MPs. By contrast, parliamentary debate in Singapore appears to have picked up steam: since the 2020 general elections, the PAP appears open to debating important issues such as women's rights,[43] climate change[44] and criminal justice reform[45] at greater length than before, even taking the lead on the first of the two matters. Yet, even if these debates result in proposals for legal reform, these are likely to take the form of legislative initiatives rather than constitutional amendments. With a supermajority, the PAP government would have no difficulty passing amendments to the constitution to institute their reform agenda. However, there remains an aversion towards employing constitutional devices except in terms of institutional structure. Indeed, the rights provisions in Part IV of Singapore's Constitution have been untouched since independence, for better or for worse. This raises interesting questions about the government's philosophy on constitutional amendments and constitutionalism.

V. FURTHER READING

Marcus Teo, *Interpreting Frequently Amended Constitutions: Singapore's Dual Approach*, Statute Law Review (published on 7 July 2020, advance access available at https://doi.org/10.1093/slr/hmaa009).

Darius Lee, *Covid-19 in Singapore: 'Responsive Communitarianism' and the Legislative Approach to the 'Most Serious Crisis' Since Independence*, Singapore Journal of Legal Studies (2020) 630.

Kevin YL Tan, *Is Singapore an Authoritarian Constitutional Regime? So What If It Is?*, in Weitseng Chen and Hualing Fu (Eds.), Authoritarian Legality in Asia: Formation, Development and Transition (Cambridge University Press, 2020).

43 See Tan Tam Mei, "Singapore to conduct review of women's issues to bring about mindset change for gender equality" (*The Straits Times*, 20 September 2020) <https://www.straitstimes.com/singapore/singapore-to-conduct-review-of-womens-issues-to-inculcate-mindset-change-for-gender> accessed 15 February 2021.

44 See Rei Kurohi, "Singapore Parliament declares climate change a global emergency" (*The Straits Times*, 1 February 2021) <https://www.straitstimes.com/singapore/politics/singapore-parliament-declares-climate-change-a-global-emergency> accessed 15 February 2021.

45 See Tham Yuen-C, "Parliament: Criminal justice system works, and vital to uphold its integrity, says Shanmugam" (*The Straits Times*, 4 November 2020) <https://www.straitstimes.com/singapore/politics/parliament-criminal-justice-system-works-and-vital-to-uphold-its-integrity-says> accessed 15 February 2021.

Slovakia

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I. INTRODUCTION

Two factors heavily influenced the Slovak constitutional development in the year 2020: the landslide victory of the opposition in the general election and the Covid-19 pandemic. The election, which took place early in the year, resulted in the most significant shift in the executive since 2012. The new government's resolve and ability were immediately put to the test by an outbreak of the Covid-19 pandemic, which did not recede for the remainder of the year. The disease continues to affect the rights, liberties and lived reality of millions of people in Slovakia and around the world. Let us consider both of these factors in closer detail.

The general election in Slovakia took place on February 29, 2020. It is not an exaggeration to say that it was still dominated by the horrific murder of a journalist and his fiancé in 2018.[1] The result of the election can be attributed to the perceived moral responsibility of the outgoing government for the murder. Two junior govt coalition parties were ousted from the Parliament, while the largest government party SMER-SD, which has been in the executive for more than a decade, moved to the opposition. The investigation of the murder unearthed a web of corruption on a systemic scale. The cache of messages seized in this case led to the prosecution of more than a dozen judges, advocates and civil servants.[2] Other investigations into corruption and abuse of power resulted in the arrest of the special prosecutor, two former heads of police, and multiple high-ranking government officials.[3] These developments enabled the new government to push for a radical political and judicial reform in order to "clean up" the system.

The second significant factor affecting the constitutional development in Slovakia in 2020 was, of course, Covid-19. The pandemic revealed that global society was unprepared to cooperate and confront the practical challenges caused by the deadly and rapidly spreading virus. The Slovak constitutional framework governing the emergency response was also shown inadequate. Doubts about the constitutionality of several government anti-pandemic measures led to a call for the reform of the legal framework in light of the new experience.

1 Agence France-Presse, '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>

2 'Kočner's judges charged and detained' (*The Slovak Spectator*, 11 March 2020) <https://spectator.sme.sk/c/22355425/kocners-judges-charged-and-detained.html>

3 'Police arrest top special prosecutor, suspected of helping a mafia group' (*The Slovak Spectator*, 22 October 2020) <https://spectator.sme.sk/c/22516192/police-arrest-the-special-prosecutor-suspected-of-helping-a-mafia-group.html>

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2020, the whole world was plunged into a health crisis caused by the novel coronavirus. Governments gradually employed imperfect techniques to mitigate and contain adverse effects of the pandemic in their respective societies. These actions constrained human rights and liberties and inevitably affected state economies. The choice between less restrictive but also less efficient emergency response, and more stringent, but also costly measures, became a tricky balancing act. This extraordinary situation likely contributed to a decreased activity level of the amending actors in Slovakia as most of the other agenda has been put on the backburner. The Parliament only debated five constitutional amendment bills in 2020, which is a low number by recent trends in the behaviour of amending actors.[4] Of the five constitutional bills, two were submitted by the far-right Kotleba—People's Party Our Slovakia and did not pass the first reading. The remaining three constitutional bills were all sponsored by the government. Two of the government proposals passed and one is expected to make into law later in 2021.

We analyse the successful amendments later in the report. In this section, let us consider the failed and pending constitutional amendment proposals. The constitutional amendment that is still pending in Parliament is an indirect amendment to the Constitution,[5] which means that it seeks to modify one of the stand-alone constitutional acts that subsist parallel to the master-text document; in this case, the Constitutional Act on Budgetary Responsibility.[6] The change would tighten the institutional oversight by the Council for the Budgetary Responsibility over the state deficit, which is calculated as a percentage of the GDP. The legislation provides incentives for the government to keep the public spending sustainable and observe the proposed limits on expenditures.

The failed amendment proposals by the Kotleba Party both sought to enhance direct democracy at the expense of representative institutions. The first bill sought to reduce the number of MPs from 150 to 100; ostensibly to reduce state spending on MPs salaries. The second

4 The submission rate of constitutional amendment bills for the preceding five years has been 17 bills per year on average, with most draft constitutional amendments submitted in the year 2019 (25) and the fewest in 2016 (13). Based on data reported by the Parliament. Accessible at: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/sslp>

5 Accessible at: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=7963>

6 Constitutional Act No. 493/2011 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2011/493/20150101>

bill proposed lowering the signature threshold for a referendum initiative from 350 000 to 250 000 citizens. The bill also advocated for a decrease of the threshold for the validity of a referendum, proposing a model whereby the voter turnout in the general election preceding the referendum is the validity threshold. The Parliament declined both proposals in the initial stage of the legislative process. These proposals were never seriously considered by any other political party. Nor were they discussed in the academic circles, or the mainstream media discourse. It seems that the failed constitutional amendment proposal catered only to the electorate of the far-right party.[7]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Two of the five constitutional bills submitted to the Parliament in 2020 successfully made it into law. The first of the two introduced large-scale judicial reforms that were prompted by the investigation into judicial corruption but also a general need for updating of the legal framework on the organisation of the judiciary. The second amendment modified the stand-alone Constitutional Act on State Security in the Time of War, State of War, State of Emergency, and Crisis.[8] We examine both of the amendments in turn.

The constitutional amendment on judicial reform was arguably the most significant constitutional change in recent years. Public demand for a reform of the "least accountable branch" of the government gained momentum after the criminal investigation into judicial corruption revealed significant distortions of justice and the rule of law in Slovakia. The constitutional amendment introduced by the Minister of Justice, however, was not revolutionary. The MoJ introduced a comprehensive amendment proposal that consisted of a mix of minor reforms tweaking the system and a few significant changes to the organisation of the judiciary. Despite the fact, several members of the judiciary challenged the amendment for lack of inclusion in the drafting process and a perceived hast of the process. The Minister used the deep general discontent with the judiciary to push for this reform. The amendment passed with little resistance in December 2020, although only with a narrow majority of 91 MPs.[9] It remains to be seen if the reform will ultimately contribute to a more effective, transparent and independent decision-making.

The amendment introduced several changes that can be grouped into categories based on their principal focus. The first group of changes concerned the Constitutional Court of the Slovak Republic. The amendment increased the requisite majority for the selection of CC candidates in the Parliament. The Parliament could previously select candidates for the position of a judge on the Constitutional Court by a simple majority of the MPs present at the vote (at least 39-76 votes based on the number of MPs voting). The new rule increases the vote threshold to at least three-fifths majority of all parliamentarians (90 votes). This super-majority threshold applies only to the first round of voting. If the first vote on nominees fails, there is a default anti-deadlock mechanism that kicks in to lower the threshold in all subsequent rounds of voting to a simple majority of all MPs (76 votes).

The rationale for the increased threshold is to ensure that CC candidates cannot be selected without the meaningful participation of the opposition. Theoretically, the higher majority should lead to consensus-finding and preference for moderate candidates that enjoy broader backing. The anti-deadlock mechanism ought to prevent stalemates from completely blocking the selection and appointment process and ultimately disabling the Constitutional Court. The drawback of the decreasing-majority design is that the dominant political actor may forgo voting in the first round of the selection, sabotaging the vote, and focus instead on subsequent rounds with the lower threshold to maximise the number of its preferred picks for the position.

Another addition to the nomination process is the codification of an eligibility requirement that the "previous life and moral qualities of a candidate" serve as a guarantee for the proper execution of her judicial duties. The condition is vague and thus, prone to various interpretations. It is challenging to predict how this provision may play out in future nomination processes. The amendment also contained some other modifications intended to enhance the efficacy of the Constitutional Court, including the introduction of mandatory retirement age for constitutional judges, set at 72 years of age (67 years for judges of general court), the introduction of the concrete judicial review of legislation stemming from constitutional complaint cases, and stripping of the CC jurisdiction in cases of detention of criminally charged lower court judges.

The most interesting change from a comparative perspective has undoubtedly been the explicit prohibition of the power of the Constitutional Court to review constitutional amendments. The change may seem inconsequential since the Court never had such power in the Constitution. The doctrine of unamendability has been judicially construed. Yet, this is a very complicated question that multiple scholars will certainly examine in the near future. According to the prevailing view in domestic academia, the Slovak Constitution does not contain unamendable provisions that could support the judicial review of constitutional amendments.[10] However, this textualist reading did not prevent the Court from claiming the power, when the Court in January 2019 invalidated a constitutional amendment in the (in) famous decision PL. ÚS 21/2014.[11] The provision in the constitutional amendment on judicial reform that effectively denies the CC claim to the power was a direct reaction to the decision.

7 See Simon Drugda, 'Behaviour of the Far-Right in the Slovak Parliament: Constitutional Amendment as a PR Tool' (*BRIDGE network*, 4 December 2019) <https://bridgenetwork.eu/2019/12/04/behaviour-of-the-far-right-in-the-slovak-parliament-constitutional-amendment-as-a-pr-tool/>

8 Constitutional Act No. 227/2002 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/227/20201229>

9 Such a narrow margin of success is not unprecedented. Seven constitutional amendments have been adopted with a narrow majority of 1-2 votes. Although the vote on an amendment is a good indicator of the legitimacy of a constitutional change, as perceived by contemporary political actors, that need not always be the objectively correct assessment. Amendments that received the most votes in favour have historically been the constitutional acts on shortening the term of the Parliament, which are considered suspect in academia and doctrine. See the database compiled by one of the authors, Simon Drugda, 'Constitutional change in Slovakia 1993-2020' (11 February 2020) <https://docs.google.com/spreadsheets/d/1SE65B1Mo_DzCYfax2RKzidhHPIK1-yQtnrE2ydwTWF8/edit#gid=0>

10 For example, Ján Svák and Boris Balog, 'Hlasovanie l'udu v referende a vo vol'bách z pohl'adu nezmenitel'ných náležitosti ústavy,' in Ladislav Orosz and Tomáš Majerčák (eds), *Aktuálne problémy volebného práva—nové volebné zákony—IV. ústavné dni* (Pavol Jozef Šafárik University 2015) 96-97; Yaniv Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (OUP 2016) 268. For opposing views claiming the existence of unamendable constitutional provisions see Radoslav Procházka, L'ud a sudcovia v konštitučnej demokracii (Aleš Čeněk 2011) 47-48.

11 The decision was heavily criticised as a judicial overreach by several academics but also vigorously defended by others. For criticism see Marek Káčer and Jakub Neumann, *Materiálne jadro v slovenskom ústavnom práve: Doktrinálny disent proti zrušeniu sudcovských previerok* (Leges 2019). For a defense see Tomáš L'alík, 'The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (PL. ÚS 21/2014)' (2020) 16 European Review of Constitutional Law 2 https://doi.org/10.1017/S1574019620000140.

Many experts, academics and constitutional lawyers, including the newly appointed CC president, tried to discourage the amending actors from taking the step.[12] The chief argument against doing away with the CC's power to review constitutional amendment was the theoretical prospect of the Parliament abusing its amendment powers.[13] The Constitutional Court had previously constructed the unamendability doctrine based on a justification from domestic constitutional law, specifically the Constitution's implicit core.[14] There is currently a case pending before the Constitutional Court, challenging the prohibition of judicial review of constitutional change. It remains to be seen if the Court accepts the case and reviews the amendment despite the clear intention of amending actors to prevent precisely that.[15]

The second group of changes concerned the general judiciary. The amendment laid the foundations for the establishment of a new specialised apex court, which should start adjudicating in mid-2021. The Supreme Administration Court will review: the acts of public authorities; adjudicate on the constitutionality and legality of elections to local self-government bodies; decide on the dissolution or suspension of the activities of a political party or political movement; preside over the disciplinary proceedings against judges, prosecutors and, if the law so provides, other subjects. The last of the listed competence generated heated debated, for the new court will have the power to discipline not only judges but also prosecutors and other legal professionals such as notaries, or attorneys. Historically, each legal profession disciplined their peers for misconduct. The decentralised system generated inconsistencies and lack of enforcement, which contributed to a general feeling of distrust toward the legal profession among members of the general public.[16] The establishment of the Supreme Administration Court with a general power to discipline lawyers across the professions is seemingly intended as a step towards the recovery of some of the lost trust.

The third cluster of changes wrought by the amendment pertained to the organisation of the Judicial Council, newly described as a "constitutional body of judicial legitimacy." The first important change has involved the composition of the Council. The amendment introduced a new principle of regional representation of judges on the Council to ensure that its membership is not concentrated in the capital region. The Council consist of 18 members, out of whom nine members are elected from all Slovak regions, more or less proportionally, by all judges. Additionally, the other nine Judicial Council members, appointed or elected in equal numbers by the head of state, Parliament, and the government must be newly non-judges. The principal purpose of this last change was to enhance the political oversight over the discredited judiciary. Other changes have controversially reintroduced (watered-down) background checks for lower court judges that the Constitutional Court had previously invalidated.[17]

Perhaps the last important change on the menu rewrote Article 148(4) of the Constitution to allow the criminal prosecution of judges for the abuse of power. The provision states that neither a judge nor lay judge may be prosecuted for decision-making, "even after the termination of their office unless the criminal offence has been committed thereby; the disciplinary liability of a judge is not affected thereby."[18] Judges had been wholly protected from criminal prosecution since 2014, without exception, which led to multiple unjust or absurd decisions. The new text of the provision is a reaction to the abuse of judicial immunity by prominent judges.[19]

The second constitutional amendment that successfully passed the legislative maze in 2020 was a change to the constitutional act on emergencies. The amendment was adopted in an accelerated legislative procedure, which is relatively rare for constitutional change,[20] and ultimately approved by the amending actors decimated by the coronavirus on December 29 (within 21 days of the submission).[21] There were two principal reasons for the amendment: extending the constitutional time limit on emergencies and updating the constitutional framework in light of the first experience of Slovakia with an epidemic.

The primary reason for the amendment was to enable the government to extend the state of emergency beyond the constitutionally permitted maximum of 90 days. The need to change the time limit became urgent when the state of emergency declared by the government on October 1,[22] was about to expire at the end of December.[23] The government argued that there was an objective need to keep the measures implemented to contain the spread of Covid-19 in place because of the pandemic situation. This would not be possible, were state of

12 For more details on the process see Simon Drugda, 'On Collision Course with the Material Core of the Slovak Constitution: Disabling Judicial Review of Constitutional Amendment' (Verfassungsblog, 3 December 2020) <https://verfassungsblog.de/on-collision-course-with-the-material-core-of-the-slovak-constitution/>

13 For potential problems see Tomáš Ľalík, 'Slovakia on its way to Illiberal Democracy: Nullifying the Power of the Constitutional Court to Review Constitutional Amendments' (*I·CONnect*, 18 December 2020) <http://www.iconnectblog.com/2020/12/slovakia-on-its-way-to-illiberal-democracy-nullifying-the-power-of-the-constitutional-court-to-review-constitutional-amendments>

14 Richard Albert identifies eight possible justifications for the exercise of judicial review. The shift in Slovakia corresponds to a change of focus from an argument for the exercise of judicial review of amendments based on an evolved norm to a justification based on supra-constitutional law. Both of these strategies are content-based. See *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2020) 218-222

15 Accessible at: <https://www.ustavnysud.sk/documents/10182/132547263/f5393b8d-5a4f-4dbf-a870-4706eb5c7f87>

16 The most recent euro-barometer (2019) showed that 72% of the respondents tend not to trust the legal system in Slovakia, which is the second worst result among the EU member states. Accessible at: <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/getChart/themeKy/18/groupKy/100/chartType/barChart/savFile/927>

17 Simon Drugda, 'Slovak Constitutional Court Strikes Down a Constitutional Amendment—But the Amendment Remains Valid' (*I·CONnect*, 25 April 2019) <http://www.iconnectblog.com/2019/04/slovak-constitutional-court-strikes-down-a-constitutional-amendment-but-the-amendment-remains-valid/>

18 Constitutional Act No. 422/2020 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/422/20210101.html>

19 Michaela Terenzani, 'Harabin in trouble over verdicts' (*The Slovak Spectator*, 10 July 2015) <https://spectator.sme.sk/c/20058739/harabin-in-trouble-over-verdicts.html>

20 The expedited legislative procedure has been used to pass only 12 direct and indirect constitutional amendments since adoption of the Constitution in 1993. See the database compiled by one of the authors, Simon Drugda, 'Constitutional change in Slovakia 1993-2020' (11 February 2020) <https://docs.google.com/spreadsheets/d/1SE65B1Mo_DzCYfax2RKzidhHPIK1-yQtnrE2ydwTWF8/edit#gid=0>

21 A special exemption issued by the national chief health officer allowed MPs, who tested positive for coronavirus to vote on the constitutional amendment in-person. Otherwise, the bill would certainly have not passed. 'It will be possible to prolong national emergency. MPs approved the change' (*The Slovak Spectator*, 28 December 2020) <https://spectator.sme.sk/c/22562962/national-emergency-will-be-prolonged-mps-approved-the-change.html>

22 Slavomíra Henčeková and Simon Drugda, 'Slovakia: Change of Government under COVID-19 Emergency' (*Verfassungsblog*, 22 September 2020) < https://verfassungsblog.de/slovakia-change-of-government-under-covid-19-emergency/>

23 The emergency was initially declared for only 45 but later extended to 90 days. 'National emergency will be declared on Thursday' (*The Slovak Spectator*, 30 September 2020) <https://spectator.sme.sk/c/22499672/coronavirus-in-slovakia-national-emergency-declared-on-october-1-2020.html>

emergency to expire.[24] The amendment enabled the government to exceed the state of emergency by 40 days over the 90-day limit.[25] The text of the amendment did not specify if there was a limit to the number of extensions allowed or the maximum duration of the state of emergency. To control government overreach and abuse, the amendment contained a checking mechanism, requiring an ex-post approval of every extension by the Parliament within 20 days. Without the subsequent approval, the state of emergency expires by default. The second reason for the amendment on emergencies was to adopt a more comprehensive set of rules for constraint on fundamental rights during an emergency. The change permitted the government to limit the freedom of movement and residence further.

Concluding this section, we can say that it is too early to assess the effects of the analysed constitutional amendments since both of them were adopted towards the end of the year 2020. The amendment on judicial reform was shortly followed by a statutory change to the "court map" supposed to root out corruption and break up regional ties between the judges.[26] The government will most certainly pass additional legislation and constitutional law to achieve its ambition of large-scale political reform.

Both of the discussed amendments were continuous changes to the constitutional framework, perhaps except for the provision taking the power of review of constitutional amendment away from the Constitutional Court. However, there remains substantial normative disagreement in Slovakia about the legitimacy of this doctrine and its exercise by the Court. The power of judicial review of the constitutional amendment had not been part of the bargain at the founding. It is possible that it could become a "load-bearing structure, or a core feature of the identity of the Constitution," but that will depend on the popular and inter-branch response to the activist claim to authority by the Court.[27]

IV. LOOKING AHEAD

In the first year in office, the government succeeded in delivering one of its key promises, namely the constitutional amendment on judicial reform. The reform was a point on its programme proclamation, an important document that sets the government agenda for the next four years. We can use the programme as a guide to future and planned constitutional reform.

Based on the programme, we can anticipate that the government will pursue three further changes to the pension system, the constitutional act on fiscal responsibility and the act on the protection of public interest in the exercise of public office. Each of the changes is expected to be adopted as an indirect amendment, either modifying previous stand-alone constitutional acts or further extending the constitutional system through an annexe. We have already discussed a constitutional bill pending in the Parliament that seeks to alter the Constitutional Act on Budgetary Responsibility. Additionally, the Ministry of Labour, Social Affairs recently submitted a constitutional amendment bill on the Old-Age Pension into the interdepartmental review, which is a stage before the legislative process. This amendment is designed to be a stand-alone constitutional act that comprehensively governs the retirement and pension outside of the master-text Constitution.[28]

At the time of the writing of this report, the Ministry of Culture confirmed for the media that it is also drafting a new stand-alone constitutional act, outside of the government programme proclamation, on the freedom of the press.[29] The constitutional act will be based on two broad principles of journal source protection and access to information from the state or local governments, which had been previously impeded or straight out denied. The Ministry of Environment reportedly also seeks to constitutionally prohibit the import of radioactive waste into the constitutional law, but the form of this ban is still to be discussed.[30] The Constitution already prohibits the export of natural resources and water. The new rule would add to provisions on the protection of the environment in the Constitution.

24 Political actors believed that the constitutional framework did not allow for an extension of the 90-day period, which therefore necessitated a change.

25 Constitutional Act No. 414/2020 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/414/20201229.html>

26 For more on this subject Peter Đuroš and Hans Petter Graver, 'Dissimilar Similarities: Structural Reforms of the Courts in Norway and Slovakia' (*Verfassungsblog*, 26 November 2020) <https://verfassungsblog.de/dissimilar-similarities/>

27 See Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale Journal of International Law 1, 4

28 The constitutional amendment on judicial reform also contained provisions on pension and sustainable fiscal policy that were added to the bill through a rider. Thus the amendment was technically an omnibus bill. We did not analyse these aspects of the amendment because they were of relatively lower importance. The main modification of the old-age pension system as well as economy will be adopted through dedicated single-subject constitutional amendments. Accessible at: <https://www.slov-lex.sk/legislativne-procesy/SK/LP/2020/549>

29 Miro Kern, 'Novinári a ich zdroje dostanú ústavnú ochranu a nemalo by im hroziť stíhanie za ohováranie' (*Denník N*, 20 January 2020) <https://dennikn.sk/2232033/novinari-a-ich-zdroje-dostanu-ustavnu-ochranu-a-nemalo-by-im-hrozit-stihanie-za-ohovaranie/>

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Slovenia

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I. INTRODUCTION

The Slovenian Constitution stipulates a more demanding procedure for its change or supplementation (constitutional revision procedure). Therefore, it is a rigid constitution. In 2020 there were no constitutional changes, however since the adoption of the Slovenian Constitution in 1991, there have been 7 constitutional changes. Among them, the most important are those concerning Slovenia's attitude towards the European Union.

According to the constitutional revision procedure, the Slovenian Constitution is changed by the National Assembly (mandatory form), but citizens can also participate with a popular initiative and a referendum (optional form). So far, the constitutional revision referendum has never been requested or called. Namely, the voters cannot demand a referendum directly, but the call for a referendum is in the hands of the deputies of the National Assembly, and they decide whether they will enable the voters to approve the constitutional change.

The procedure is uniform regardless of the scope, meaning, role and place of individual constitutional provisions.

The Constitution does not give proposers the right to propose a change of the Constitution directly, but the right to propose the commencement of proceedings for the change of the Constitution. The nominators can be 20 deputies of the National Assembly, the government or at least 30,000 voters.

The Constitution does not determine the constitutional revision technique, but the practice has chosen the novelty technique. Its essence is that with the novelties it directly interferes with the original text of the Constitution and supplements, changes and repeals its provisions. The norm from the constitutional revision act replaces the norm that is in the constitution or supplements it. In this way, the constitution remains actively uniform and transparent. The change is carried out by the Constitutional Act changing the Constitution. Actually, among all 7 changes there were only two real amendments adopted up to now (3a and 70a), therefore the constitution's numerical structure was preserved.

The changing procedure has two obligatory stages: a proposal to initiate the procedure for changing the Constitution and deciding on it; adoption of an act changing the Constitution.

While the laws are promulgated by an order of the President of the Republic no later than eight days after their adoption, the constitutional law is promulgated by a decree of the National Assembly itself. The Rules of Procedure of the National Assembly stipulate that the National Assembly promulgate a constitutional law changing the Constitution no later than the eighth day after its adoption, unless a request is submitted by at least thirty deputies to submit the change to the constitution in a referendum. If the change of the Constitution is approved in a referendum, the National Assembly shall promulgate the Constitutional Act no later than the eighth day after receiving the report on the outcome of the referendum. Otherwise, if the change of the Constitution is not approved in a referendum, the procedure for changing the Constitution is completed. An important difference between the two types of law is that the law enters into force on the fifteenth day after its publication, unless otherwise provided (*vacatio legis*), and the constitutional law enters into force by promulgation in the National Assembly. An exception to the principle that regulations must be published before they enter into force is therefore valid for a constitutional law, since a constitutional law enters into force before it is published.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Since the adoption of the Slovenian Constitution in 1991, there have been 7 constitutional changes.

1. 14 JULY 1997: CONSTITUTIONAL LAW ON CHANGE OF ARTICLE 68(2) (OFFICIAL GAZETTE RS NO 42/97).

Under the former constitutional regulation of 1991 foreigners were only entitled to acquire title to property affixed to land under the conditions provided by law (Art. 68 (1), Constitution). They were not entitled to acquire title to land except by inheritance in circumstances where the reciprocity of such rights of acquisition was recognized (Art. 68 (2), Constitution). Prior to ratification of the European Agreement Establishing an Association between the Republic of Slovenia, of the One Part, and the European Communities (hereinafter: Community) and their Member States, Acting within the Framework of the European Union, of the Other Part of 9 June 1996, it was necessary to adapt the provisions of Article 68 of the Constitution to the EEC standards for the normative regulation of the respective matters (the Constitutional Law on the Change of Article 68 of the Constitution of the Republic of Slovenia, Official Gazette RS no 42/97). Under the

changed constitutional provision, foreigners can now acquire title to property affixed to land under the conditions provided by law or a treaty ratified by the National Assembly, subject to reciprocity.

The mentioned constitutional change was the result of a constitutional dispute on the conformity with the Slovenian Constitution—of the Europe Agreement Establishing an Association between the Republic of Slovenia, of the one part, and the European Communities and their Member States, Acting within the Framework of the European Union, of the other part (MESP). This (preventive) dispute was resolved (upon the request of the Government in the procedure of ratification) by the Slovenian Constitutional Court in the form of an opinion binding on the National Assembly (Case Rm-1/97 Constitutional Court 5 June 1997 Official Gazette RS no 40/97 and Official Digest VI, 86). The mentioned MESP, based on the free movement of capital and the real estate market, was in disagreement with the provision of the Slovenian Constitution according to which foreigners may not acquire title to land except by inheritance subject to reciprocity (paragraph 2 of article 68 of the Constitution). The Constitutional Court ruled that by passing a law on ratification of the MESP, the Republic of Slovenia would bind itself to adopt legal instruments which would guarantee the rights contained in the provisions of the MESP. The Constitutional Court declared that the most important legal instrument which the Republic of Slovenia would bind itself to adopt should be an enabling statute for changing the then constitutional provision according to which foreigners could not acquire title to land (paragraph 2 of article 68 of the Constitution).

2. 25 JULY 2000: CONSTITUTIONAL LAW ON CHANGE OF ARTICLE 80 (OFFICIAL GAZETTE RS NO 66/00).

The constitutional change regulated the Slovenian proportional electoral system in more detail.

Deputies, except for those representing the national communities, are elected according to the principle of proportional representation, with a 4% threshold being required for election to the National Assembly and with due consideration that voters have a decisive influence on the allocation of seats to the candidates (new Art. 80(4), Constitution).

3. 7 MARCH 2003: CONSTITUTIONAL LAW ON AMENDMENT AND CHANGES OF I CHAPTER AND (ART. 3A ADDED) AND ARTICLES 47 AND 68 (OFFICIAL GAZETTE RS NO 24/03).

The Constitution was amended to enable Slovenia's integration into international organizations, in this case the EU and defense alliances such as NATO. The amendment and changes met two basic demands: they ensured that some of Slovenia's sovereign rights could be transferred to the Union and its institutions and met the EU regulation on the free flow of capital. On one hand, the amendment establishes that the legal acts and decisions of international organizations shall be applied in Slovenia: "in accordance with the legal regulation of these organizations," which enables the direct application and primacy of EU law. On the second hand, the same amendment refers to the motives for the integration of Slovenia into international organizations (respect for human rights, democracy and the principles of the rule of law), and it enables the Constitutional Court to interfere in individual exceptional cases if these values were in any manner endangered by EU law.

Additionally, the National Assembly changed Articles 47 and 68 of the Constitution. Concerning Article 47 of the Constitution, whereas before the changes were instituted citizens of the Republic of Slovenia could not be extradited to a foreign country, the changed Article 47 enables extradition of Slovenian citizens to other EU Member States.

Furthermore, Article 68, which regulates the property rights of foreigners, was changed for the second time since the Constitution came into force. The strict conditions for acquiring ownership rights to real estate (inheritance and condition of reciprocity) contained in the first version have been relaxed substantially. Aliens may acquire ownership rights to real estate under conditions provided by law or by a treaty ratified by the National Assembly.

4. 23 JUNE 2004: CONSTITUTIONAL LAW ON CHANGES OF ARTICLES 14, 43 AND 50 (OFFICIAL GAZETTE RS NO 69/04).

The constitutional Act changing Article 14(1) of the Constitution (regulating the prohibition of discrimination) inserted a general prohibition on discrimination due to a disability.

Additionally, this constitutional change aimed at tackling the under-representation of women in elected representative bodies was the change of Article 43 of the Constitution on the 'right to vote'. A new paragraph was added to Article 43 conferring on the law the responsibility for defining measures for promoting equal opportunities for men and women in standing for election to state and local-community bodies.

The same Constitutional Act changed Article 50 of the Constitution, explicitly inserted among constitutional rights the right to a pension.

5. 20 JUNE 2006: CONSTITUTIONAL LAW ON CHANGES OF ARTICLES 121, 140, AND 143 OF THE CONSTITUTION OF THE REPUBLIC OF SLOVENIA (OFFICIAL GAZETTE RS NO 68/06).

The constitutional change provided an opportunity to transfer some state powers to some lower bodies. So legal entities and natural persons may be vested by law or on the basis thereof with the public authority to perform certain duties of the state administration. In addition, the state may by law transfer to municipalities the performance of specific duties within the state competence if it also provides financial resources to enable such.

Additionally, the constitutional change also introduced the possibility of dividing the state into regions, but this constitutional provision has not been implemented so far. A region is a self-governing local community that manages local affairs of wider importance, and certain affairs of regional importance provided by law.

6. 24 MAY 2013: CONSTITUTIONAL LAW ON CHANGE OF ARTICLE 148 (OFFICIAL GAZETTE RS NO 47/13)

The constitutional change, in line with the austerity policy of the state, laid down the so-called "golden rule".

Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing, or revenues must exceed expenditures. Temporary deviation from this principle is only allowed when exceptional circumstances affect the state.

The manner and the time frame of the implementation of such principle, the criteria for determining exceptional circumstances, and the course of action when they arise, shall be determined by a law adopted by the National Assembly by a two-thirds majority vote of all deputies.

If a budget has not been adopted by the first day it is due to be implemented, the beneficiaries financed by the budget are temporarily financed in accordance with the previous budget.

7. 24 MAY 2013: CONSTITUTIONAL LAW ON CHANGES OF ARTICLES 90, 97 AND 99 (OFFICIAL GAZETTE RS NO 47/13).

The constitutional change limited the referendum to certain areas:

The National Assembly shall call a referendum on the entry into force of a law that it has adopted if so required by at least forty thousand voters.

Additionally, a referendum may not be called:

- on laws on urgent measures to ensure the defense of the state, security, or the elimination of the consequences of natural disasters;
- on laws on taxes, customs duties, and other compulsory charges, and on the law adopted for the implementation of the state budget;
- on laws on the ratification of treaties;
- on laws eliminating an unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality.

A law is rejected in a referendum if a majority of voters who have cast valid votes vote against the law, provided at least one fifth of all qualified voters have voted against the law.

8. 30 NOV 2016: CONSTITUTIONAL LAW ON AMENDMENT OF III. CHAPTER (ARTICLE 70A ADDED) (OFFICIAL GAZETTE RS NO 75/16).

Following the general trends in the field of protection of water resources, the constitutional amendment introduced the right to drinking water.

Everyone has the right to drinking water.

Water resources shall be a public good managed by the state. As a priority and in a sustainable manner, water resources shall be used to supply the population with drinking water and water for household use and in this respect shall not be a market commodity. The supply of the population with drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Constitution of the Republic of Slovenia as a constituent republic of the former Yugoslav federation of 1963 envisaged the first Slovenian Constitutional Court. The then Yugoslav constitutional review was an exception among the communist/socialist countries.

The current Slovenian model of constitutional review, reintroduced by the Constitution 1991 (in force), is the standard Continental (European) model of concentrated constitutional review whereof the organizing structure and the powers have mainly been adopted from the German system of constitutional review, which is more modern than its predecessor, the Austrian system. Furthermore, the Constitution of the Republic of Slovenia of 1991 brought basic changes in the position and powers of the Constitutional Court as the Constitutional Court is the highest body of the judicial branch for the protection of constitutionality, legality, human rights and basic freedoms (Article 1.1 of the Constitutional Court Act).

The Slovenian Constitutional Court assumed almost all the standard powers of the constitutional court such as adopted by later systems following the German model.[1] Concerning Weber's classification, the Slovenian Constitutional court could be described as a national-legal charismatic.

Besides the prevailing system of repressive constitutional review, the preventative constitutional review has been adopted by the Constitutional Court but only in the adoption process for international agreements. In this case the Slovenian Constitutional Court performs a consultative function, although its opinion is obligatory, which gives to such opinions the force of decision.

In principle, proceedings before the Constitutional Court require an 'outside' petition, which means that the Constitutional Court cannot start constitutional review proceedings ex officio.

In the period of transition after the Slovenian independence, the Constitutional Court played a more important role based on new extended powers. The Court assumed the role of a negative legislature. Then, the National Assembly was not always able to follow the development nor able to impose standards for all shades of the legal system and its institutes. However, in compliance with the principle of judicial self-restraint, a clear limit has been imposed on the Slovenian Constitutional Court due to the fact that the Court has actively been creating the legal rule both negatively (e.g., the abrogation), a function theoretically reserved for the legislature.

However, concerning constitutional changes, the Slovenian Constitutional Court is not empowered to access acts on constitutional nature at all. Such Court's position was confirmed many times by constitutional case-law as follows:

> The Constitutional Court defined the legal nature of the resolution of the National Assembly on the commencement of proceedings for changings to the Constitution. This resolution is not a regulation, but an act of deciding on procedural issues of the transition from one phase of the legislative procedure to another, so the Constitutional Court is not competent to assess it (Case U-I-176/97 Constitutional Court 10 July 1997 Official Digest VI, 108).

The Constitutional Act on the Change of the Constitution itself is a constitutional act in the form of a law that changes the content of the constitutional matter and is adopted following a special constitutional review procedure. Its legal force is equal to the legal force of the

1 See the classification on <www.concourts.net> accessed 8 January 2021.

constitution it changes. The attitude of the Constitutional Court towards the review of this act is rather rigid and self-restraining. Namely, the Constitutional Court has adopted a formal criterion for review in this connection: The Constitutional Act has the same level of validity as the Constitution, so the Constitutional Court is not competent for its review (Case U-I-214/00 Constitutional Court 14 September 2000 Official Digest IX, 201). In recent practice, the constitutional law is really applied exclusively in the field of constitutional revision to change the constitution.

The Constitutional Court is also not competent to assess the constitutionality of the procedure for the adoption of a constitutional law changing the Constitution (Case U-I-262/00 Constitutional Court, 7 December).

However, from the point of view of content, the Constitutional Court has taken the position that other constitutional laws that have not been adopted to change the Constitution will also be judged according to substantive criteria—the content and nature of provisions contained in constitutional law (Case U-I-214/00 Constitutional Court, 14 September 2000, Official Digest IX, 201) are decisive.

Taking into account the self-restraining attitude of the Slovenian Constitutional Court in this area, it must be taken into account that on the other hand it cannot be ruled out that the National Assembly could even violate the constitutional provisions on constitutional review procedure; however, in addition, it may constitute an abuse of the legal constitutional revision form.

In the concrete case (Case U-I-332/94 Constitutional Court, 11 April 1996, Official Digest V, 42), the Constitutional Court found that Article 174 of the Constitution only stipulates that "a constitutional law shall be adopted for the implementation of this Constitution and for ensuring the transition to the application of the provisions of this Constitution." This does not mean, however, that this is the only type of constitutional law and that the National Assembly could not adopt a constitutional law with a different purpose and a different content, insofar as it has a constitutional nature.

The disputed provisions are contained in the Constitutional Act adopted by the National Assembly for the implementation of the Basic Constitutional Charter on the Independence and Autonomy of the Republic of Slovenia. He adopted it in order to implement one of the starting points that were the basis for the adoption of the Basic Constitutional Charter. This starting point is "the determination that the Republic of Slovenia respects the equal rights of other Yugoslav republics and with them equally, democratically and peacefully gradually regulates all issues of the common life so far, respects their sovereignty and territorial integrity". One of the elements of living together was also foreign currency savings deposits, which were guaranteed by the National Bank of Yugoslavia. In the present case, therefore, it is not a question of regulating an issue related to the takeover of the exercise of rights and duties which were transferred to the bodies of the former SFRY by the SRS Constitution and the SFRY Constitution and which were taken over by the Republic of Slovenia. It is a matter of regulating one of the issues arising from the previous common life, which arose during the transition to the new constitutional order of the Republic of Slovenia. Therefore, since this is one of the issues of transition to the new constitutional order, which is also supposed to be part of the content of the agreement on legal succession and on assumption of obligations and claims of the former SFRY and legal entities on its territory, the Constitutional Court considers the disputed provisions to be constitutional norms, for which the assessment is not competent. Therefore the Constitutional Court rejected the initiative and did not enter into an assessment of the merits of the allegations contained therein.

The constitution otherwise provides a referendum in the constitutional review process, but it is only a so-called confirmatory referendum (Case U-I-204/00 Constitutional Court 14 September 2000 Official Digest IX, 200). According to the provision of Article 170 of the Constitution, the National Assembly must submit the proposed change to the Constitution for adoption by the electorate in a referendum if at least 30 deputies so request. It is obvious from these provisions that when changing the Constitution, the National Assembly is not bound by a preliminary legislative referendum. This is also understandable, as the Constitution requires a certain quorum for a confirmatory referendum in which voters decide on the adoption of constitutional changes. Pursuant to the provision of the second paragraph of Article 170, a change to the Constitution is adopted in a referendum if a majority of the voters who voted for it, provided that a majority of all voters take part in the voting.

Constitutional Act Changing Article 80 of the Constitution of the Republic of Slovenia (Official Gazette RS no 66/00 is not an individual act against which a constitutional appeal would be allowed (Case Up-353/00 Constitutional Court, 29 May 2001). In its content, Constitutional Act Changing Article 80 of the Constitution is an act of constitutional rank, as it supplements the Constitution (act changing the Constitution, Article 169 of the Constitution), and in its implementing part it provides for the transition to the application of changed provisions (second paragraph of Article 174 of the Constitution). In the hierarchy of general and abstract legal acts, the Constitution is the highest act with which all general and individual acts must comply (Article 153 of the Constitution).

IV. LOOKING AHEAD

The rigid or difficult constitutional revision procedure is a formal feature, which in practice is not the only criterion for the frequency of constitutional changes. They are also influenced by political reasons. From this point of view, it cannot be said that the Slovenian constitution changes too often. Furthermore, the relatively modest number of constitutional changes to the constitution of independent Slovenia could otherwise be explained on the one hand as a reflection of respect for the stability of the constitutional text. On the other hand, this may be a reaction to the too frequent party program-directed constitutional changes during the former Yugoslav federation of which Slovenia as a former constituent republic was a member at the time. In Slovenia, legal experts have argued that the Constitution, as a fundamental and supreme legal act, must be significantly more permanent than laws and other legal acts. Therefore, the National Assembly, as a legislator, also strives to protect its norms as much as possible from too frequent changes. There was a slogan in political jargon that the constitution should be changed "with a shaking hand." Some of the fathers of the constitution of independent Slovenia also pointed out that the constitution for every country must be the inviolable foundation on which

things stand (Case U-II-1/06 Constitutional Court, 27 February 2006, Official Gazette RS no 28/2006 and Official Digest XV, 17).

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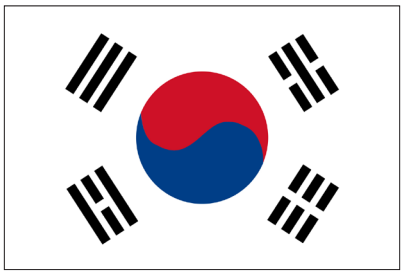
South Korea



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I. INTRODUCTION

Since its emancipation from Japanese colonial rule, the Republic of Korea had revised its Constitution nine times. The history begins with the enactment of the Constitution in 1948 and continues to the latest constitutional revision in 1987.

Most of the constitutional revisions that proceeded under the authoritarian administration before 1987 aimed at expanding the power of the ruling party or justifying the power attained by coup d'état.

Not all nine constitutional revisions were, of course, instigated by autocracy and authoritarian rule. The democratization movements fulfilled the people's desire to ensure fundamental rights and recognize democracy, thus also deriving two constitutional reforms in 1960 and constitutional revision in 1987.

Because the logical sequences in constitutional modification were based on the justification of either the expansion of power or coup d'état, the most critical point of issue in revision was regarding the political system section, especially the government system.

However, regardless of its motives for constitutional revision, the ruling power was not able to set aside the changes in the international and domestic environment and the needs of the people. In particular, when the ruling party did not have democratic legitimacy, it tried to make up its legitimacy by (nominally) reflecting the people's democratic demands on the Constitution.

As a result, whenever the constitution was revised, not only the political system and power structure were revised, but the provisions of fundamental rights and other basic principles for the operation of the community of state were also revised. Every revision gradually improved in reflecting the changing trend within the civil society.

However, these constitutional provisions were often decorative or nominal and were not actually carried out in the course of state action. Then, the democratization that led to constitutional reforms in 1987 first introduced the Constitutional Court system. This included the restoration of constitutional adjudication such as the constitutional review of legislation and individual constitutional complaint, thereby, effectively implementing the constitution on the community.

After 1987, the appeals for the changes in constitutional norms continued to increase along with the community's socioeconomic transition. There were several attempts to change the Constitution, but the actual constitutional revisions did not happen. It is largely due to the difficulties in proceeding with the process itself, for the constitutional reform and the difficulties in reaching agreement among political parties under the polarized politics.

The aim of this report is to summarize the process and contents of the 1987 constitutional reform and examine the subsequent attempts to revise the Constitution. We are going to find out the attributes of the process and contents of the modification of the Korean Constitution by reviewing the drafting process and contents of the constitutional revision most recently submitted to the National Assembly of Korea in the current government, along with the revision attempts at the National Assembly itself.

II. THE PROCEDURE AND CONTENTS OF THE 1987 CONSTITUTIONAL REVISION

1. MILITARY DICTATORSHIP AND DEMAND FOR DEMOCRATIZATION OF THE PEOPLE

President PARK Chung-hee, who continued to impose the military authoritarian rule since the military coup in 1961, was assassinated by his protégé, KIM Jae-gyu in October 1979. The people's claim for democratization had increased since then, but the so-called "new military" forces, led by CHUN Doo-hwan took power with cost of many lives of civilians, causing military coup d'état (12/12 military coup d'état); and subduing the people's request for democratization by force under emergency martial law in Gwangju, a southwestern city in the in Korean peninsula (the May 18 Democratization Movement).

The 1980 constitutional revision was made in line with the political requirements of the military coup leaders. A constitutional revision prepared by the government was confirmed through a referendum, while the National Assembly was suspended by military forces. Subsequently, the 'National Security Legislative Council', an emergency legislative body acting on behalf of the National Assembly, was organized under the changed Constitution, which established subsidiary laws necessary for constitutional enforcement, such as the Party Act, various election laws, the National Assembly Act, and the Court Organization Act.

Although the 1980 Constitution secured formal approval through a referendum, it was formed under a coercive situation with political activities banned by military coup forces. The major laws to implement were also enacted through emergency procedures, so it was difficult to have proper justification.

Since then, people's resistance to a regime without democratic legitimacy continued and became even stronger, and the government has

tried to shatter it and maintain the regime through authoritarian rule.

Besides the misuse of state power and the shriveling of the judiciary, the fundamental rights of the people continued to be violated by state power. The Constitution in those days was, generally speaking, merely a set of ornamental and nominal provisions.

The people continued to protest against military tyranny and joined democratic movements because of their desire for democratization, the achievement of the rule of law, and the guarantee of the fundamental rights of the people. Ultimately, the 'June Democratic Uprising', in 1987, forced the government and the ruling party to accept the people's demand for democratization. The constitutional revision was made through the agreement between the ruling and opposition parties in the National Assembly in the fall of 1987.

2. CHARACTERISTICS OF THE 1987 REVISED CONSTITUTION

Prior to 1987, the presidential system with absolute power had been dominant for a long time. During the period of the military government, the presidential power arose to integrate power between the administration and the legislature through political parties, which prevented the National Assembly from functioning properly in management of state; and continued a vicious cycle of more power given to the president. As a result, the fundamental rights of the people stipulated in the Constitution were not fully guaranteed; and various systems to prevent infringement of fundamental rights from arbitrary and unjust state actions did not work properly.

The current Constitution, which was created through the 1987 Democratic Movement, introduced various systems to protect the fundamental rights of the people in line with a more balanced separation of powers framework while maintaining the presidential system based on reflecting on the vicious cycle of the constitution history.

The National Assembly established and added principles of due process to guarantee the fundamental rights of the people; notification of reasons for confinement and notification of custody; prohibition of permission and censorship of the speech, publication, assembly, and association; the right to claim relief for crime victims; implementation of the minimum wage system; the state's obligation to implement policies for improvement of the welfare of women, senior citizens and youth; the need to prevent disasters; and maternity protection regulations.

In the political system, they reinstated the parliamentary inspection of the administration system and deleted annual session regulations to strengthen the power of the National Assembly; the abolition of presidential authority of the dissolution of the National Assembly; the adoption of the direct presidential election system and the five year single term system; the abolition of the president's specific emergency power which had the same effect as the constitutional provisions and elaborating of the requirements of the remained emergency power; the appointment of the Justices of Supreme Court by the President with the consent of the National Assembly after the recommendation of Chief Justice of the Supreme Court; the appointment of general judges by Chief Justice of the Supreme Court with the consent of Conference of Supreme Court Justices; and the establishment of the Constitutional Court.

The most outstanding point in the 1987-revised constitution is the resurrection of the Constitutional Court. The Constitutional Court was adopted for the first time under the June Revision following the April 19 Revolution in 1960, but it was not carried out by the following military coup d'état. That is, a constitutional court was planned in the Chapter 8 in the 1960 Constitution, but it did not actually exist and function because of the short life (1960-1961) of the Second Republic of Korea.

Article 111(1) of the 1987 Constitution stipulate that the Constitutional Court shall have jurisdiction over the following five points : "the constitutionality of a law upon the request of the courts; impeachment; dissolution of a political party; competence disputes between State agencies, between State agencies and local governments, and between local governments; and constitutional complaint as prescribed by Act." The Constitutional Court safeguards the Constitution so that all state powers are subject to the constitutional order by ensuring the normative power and effectiveness of the Constitution; realizing fundamental rights; and ensuring the constitutionality of state actions. The Constitution, as the substantial and fundamental law of Korea, was implemented by introducing the Constitutional Court system and securing the rule of law; and provides the people with the effective guarantee of their fundamental rights.

Despite these achievements, the constitutional system revised in 1987 is still controversial. Above all, as for the political system, power is still concentrated on the president; and the inadequate operation of the National Assembly is repeated because of unilateral way of majority party's workings and subsequent die-hard way of struggle on the part of minority party.

Combined with the specialization of administration, which is a general trend in modern society, a government centered on the president plays a prominent role in the policy-making process. It is a task that must continue to be realized practically to envision the separation of power and protect the fundamental rights of the people by still controlling power.

Until the recent days, the guarantee of fundamental rights of the people is showing a huge progress through the Constitutional Court's active works and interpretation of constitutional decrees. In particular, the Constitutional Court actively responds to the requests for new fundamental rights protections by widely using general regulations and making a broad interpretation of abstract constitutional provisions. Nevertheless, there are bound to be limitations in interpretation due to the nature of written Constitution. In some cases, even the interpreter (the Court) seeks the needs for changes. Thus, in many ways, the revision of constitutional provisions has continuously been in demand.

III: THE ATTEMPTS AND CONTENT OF CONSTITUTIONAL REVISIONS AFTER 1987

1. DISCUSSION ON A CONSTITUTIONAL REVISION IN THE NATIONAL ASSEMBLY

1.1. ACTIVITIES OF THE CONSTITUTIONAL RESEARCH ADVISORY COMMITTEE IN 2009

Discussions on revising the 1987 Constitution continued around the National Assembly and the administration. The most important part

of the discussions within the National Assembly was those of the "Advisory Committees for Constitutional Revision" to directly under the spokesman of the National Assembly in 2009 and 2014. These advisory committees went beyond political debate and presented specific details for the revision.

The "Constitutional Research Advisory Board" was set up in 2008, and was originated in 2007 when President ROH Moo-hyun and delegates of each political party agreed to make the charter revisions led by the National Assembly, instead of putting forward the president's end-of-term reform.

KIM Hyung-oh, the Speaker of the 18th National Assembly, established a "Constitutional Research Advisory Committee" comprising of 13 members (most of them, academics) to prepare for statutory modification, collecting data for the constitutional revision to review issues. The results of these discussions were not concluded in constitutional revision draft with provisions, but the discussions were organized as a report and a collection of data for reference to follow-up research or the National Assembly's special committee on constitutional revision.

As for fundamental rights, in express terms, they stipulated a corporation (legal person)'s fundamental right; established life rights, safety rights, right to information, political asylum rights, freedom of conscience, rights for childbirth and child rearing, etc.; and proposed the strengthening of equal rights and freedom of expression.

They suggested the 'semi-presidential system', in which the president and the prime minister divide power as the first plan in the political system; two four-year presidential systems of the president and vice-president as the second plan; the introduction of a bicameral legislature; the strengthening of the fiscal control of the National Assembly; and the reorganization of the Supreme Court and the Constitutional Court.

The results of the advisory panel's works were not submitted as a specific constitutional revision draft, because the ruling and opposition parties did not agree on the constitutional revision.

1.2. ACTIVITIES OF THE CONSTITUTIONAL REVISION ADVISORY COMMITTEE IN 2014

After entering the 19th National Assembly, lawmakers formed a "constitutional revision promotion meeting" and began discussing on constitutional reform.

The Speaker, KANG Chang-hee, proposed to create a cross-party political conference to discuss the constitutional change in 2013; launched an advisory commission under the Speaker in 2014, whose 15 members appointed by the Speaker on the recommendation of the ruling and opposition parties, comprised of eight scholars, two politicians, two lawyers, two journalists, and one former official. They proposed a revised constitution draft, covering the results of debates on constitutional revision by existing academia, political circles, and civil society.

They changed the term for the subject of fundamental rights from the 'citizens' to 'human'; inserted the following rights in express term—the right to life, the integrity of body and spirit, the right to safety, gender equality, the protection of the rights of the children/youth/elder/handicapped, the right to asylum, the fundamental right to information; expanded existing rights such as the rights to seek lawyers, right to claim for aid of criminal victims; stipulated the principle of investigation without detention, the independence of investigation and trial; restricted the principle of discretionary prosecutions (the power of Korean Prosecutor's Office which has quite comprehensive power of investigation, indictment, and execution).

In terms of political system, they proposed a bicameral system; strengthened the power of the National Assembly; weakened the privilege of non-arresting and immunity of lawmakers; brought in the decentralized presidential system (the share of state administration between the president and prime minister, dual executive system); and strengthened the local autonomy.

This draft revision was overall similar to the result of the previous advisory committee in 2009, but with additional advances. It is meaningful that it was proposed in a specific form of provisions.

This time again, the reform attempt was ended as an advisory committee draft, without meaningful result, because of disagreements between the ruling and opposition parties. An official proposal of the National Assembly for the revision of the Constitution was not established.

2. GOVERNMENT'S SUBMISSION OF CONSTITUTIONAL REVISION

After the impeachment of President PARK Geun-hye and the inauguration of the MOON Jae-in administration in 2017, the National Assembly began discussions on constitutional reform again.

The National Assembly set up a special panel on constitutional revision and formed an advisory committee to support it. As previous ones, this advisory committee presented a general review and a draft of provision, and selectively presented the form of government with a dual executive system or a four-year double-term presidential system. Based on this, the committee continued to have a discussion for preparing a constitutional revision. However, there were inaction of the National Assembly in amending the National Referendum Act(NRA). NRA were struck down by the Constitutional Court in 2014 on the grounds that it violated the right of Koreans who are living abroad to vote in constitutional referendum. Without amendment of NRA, enabling the constitutional referendum joined with the local elections in 2018 was not possible.

And then, the President proposed a constitutional revision. That is, there had been another constitutional revision drafting process promoted by the government and the President; the government had established a Special Committee for the National Constitutional Advice under the direct control of the President, comprising 33 members, including scholars and civic groups; organized issues by field; gathered public opinions; toured nationwide debates and held conferences; gathered public opinion from major institutions, related organizations, and civic groups; then reported the Constitutional Revision to the President. Based on this, the president proposed a constitutional revision on March 26, 2018. The focus of this constitutional revision proposal includes: adding and refining basic rights; improving local autonomy; enhancing checks and balances; and to facilitate public welfare. In particular, in the political aspect, a four-year consecutive term of the president was proposed. And the president's powers are subject to more checks under this constitutional revision proposal.

However, the ruling and opposition parties failed to agree on the revision. As the Speaker put it to a vote on the constitutional revision at

the plenary session of the National Assembly on May 24, 2018, 114 people took part in the vote, who are less than two-thirds of the registered members which is required to pass a constitutional revision bill in the National Assembly. So, the vote came to nothing, and that proposal of the president did not get through the National Assembly, apart from the referendum stage.

IV. LOOKING AHEAD

Since the constitutional revision in 1987, discussions on constitutional reform have kept on around the political community. In particular, there have been many discussions centering on the National Assembly for preparation, but they could not attain substantial results.

There has been little controversy on the field of fundamental rights, etc. but they were unable to reach a compromise on the government's design.

As for the fundamental rights, they are solving many problems without revision of the Constitution through positive judgment by the Constitutional Court, such as guaranteeing new fundamental rights or expanding existing fundamental rights. Therefore, due to the Constitutional Court's judicial work, one can say that there have been reasons to believe revising the current Constitution is not that urgent.

It is crucial and necessary, however, to solve issues such as concentration of power in areas of political systems- government type and strengthening of local governments- unless the Constitution is revised. The negotiation on the modification in this field is related to the control of political power, thus it is laborious to settle between political parties. It is troublesome to change the Constitution, because there is no consensus on the core content.

Conservative and progressive major parties are taking control of the National Assembly with some exceptions in the so-called 1987 system. Therefore, it is problematic to meet two-thirds of the quorum of the constitutional revisions without a reconciliation between the two parties.

In the second half of the current presidential term, under a single five-year presidency, influential candidates with prospects for the next president in both the ruling and opposition parties begin positioning themselves to run. If they were likely to take power under the current constitution, they would probably not be motivated to revise the constitution in terms of the government type. These aspects make it challenging to agree on a constitutional revision.

Spain

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I. INTRODUCTION

Formal constitutional reforms, understood as those carried out through the established procedures that allow the modification of the constitutional text, are marked, in Spain, by a significant passivity. In forty-two years since the Spanish Constitution was adopted in 1978 (SC), only two reforms have been passed: one in 1992, to introduce the right of passive suffrage of foreigners in local elections (art.13.2 SC) and another in 2011, to introduce the budgetary stability and give priority to the payment of public debt over any other concept (art.135 SC). 2020 is not, in this sense, any exception to that tendency but rather the opposite. In general, that inactivity is due both to the rigidity of constitutional reform procedures -especially that of art.168 SC- and to the absence of political will to reform the Constitution. In fact, when it does exist, as it happened in 2011, the text can be modified in a very short time, especially if the art.167 SC procedure is followed and also the urgent and single reading legislative procedures.

It is worth noting, however, that the Covid-19 pandemic led to trigger the state of alarm last year in Spain. It is one of the emergency states set forth in the Constitution (art.116 SC)—together with the exception and siege states—designed to deal, inter alia, with 'health crises such as epidemics', according to art. 4b Organic Law 4/1981, 1st June, on alarm states, exception and siege. Whether declared in all or part of the national territory, during the term of that state the initiative of constitutional reform is forbidden (art. 169 SC)—not so the parliamentary processing of those previously presented-. Thus, driving a constitutional reform was not possible during much of the year: the state of alarm was first activated—and throughout the whole national territory—from 14th March to 21st June 2020[1]; subsequently—and only in nine municipalities of the Community of Madrid[2]—from 9th to 24th October 2020[3] and finally, throughout Spain, from 25th October to 9th May 2021[4]. However, in the absence of Covid-19, and for the reasons set out above, no amendment would have been likely to have been proposed either. That is, in fact, what has been happening since 2011. However, as it will be further analyzed in the following pages, if a broad concept of constitutional reform is handled, it is possible to notice how the Spanish Constitution has undergone other variations, although informal in nature.

1 Royal Decrees 476/2020, 27th March; 487/2020, 10th April; 492/2020, 24th April; 514/2020, 8th May; 537/2020, 22nd May; y 555/2020, 5th May.
2 Alcobendas, Alcorcón, Fuenlabrada, Getafe, Leganés, Madrid, Móstoles, Parla, Torrejón de Ardoz.
3 Royal Decree 900/2020, 9th October.
4 Royal Decrees 926/2020, 25th October and 956/2020, 3rd November.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Although no constitutional reforms were passed in Spain in 2020, one proposal was, nevertheless, registered. Due to the aforementioned political passivity in this field, this fact is also uncommon, as in the row of years no proposals for constitutional reform have been presented before the Spanish Parliament. The case we are dealing with is the *Proposal for the reform of the second additional provision of the Spanish Constitution for the effective reintegration of Valencian Civil Law*[5]. It was presented in February 2020 by the Courts of the Valencian Community, pursuant to arts. 166 and 87 SC, which attribute the initiative of constitutional reform to the Legislative Assemblies of the Autonomous Communities. This proposal does not aim at eliminating anything in the Constitution, just to introduce a second Additional Provision into it so that the Valencian regional law can be recognized, since currently—as it will be explained afterwards—it is not. That provision would be as follows: *'The civil legislative competence of the Autonomous Communities, assumed by its own statutes in accordance with article 149.1.8a of the Constitution, shall extend to the recovery and updating of its historical private law in accordance with constitutional values and principles'*. At present, this proposal for reform is filed for processing and awaits to be taken into consideration by the Plenary of the Congress of Deputies.

If we use a non-strict concept of constitutional reform, however, it can be argued that during 2020 there were modifications, although informal, since they contributed to change the content of the Constitution without altering the text itself and, therefore, without following the established constitutional reform procedures of Title X. These were carried out by the hands of different actors: mainly the legislator, the Government and the Constitutional Court.

Thus, from this non-strict or anti-formalist perspective, it could be argued that the *Organic Law 3/2021, 21st March, for the Regulation of Euthanasia,* constitutes an informal constitutional reform. As its Preamble explains, it creates nothing less than *'a new right in our legal order'*, the euthanasia, understood here as the right to freely dispose of one's own life, with the assistance of third parties, in the event of serious physical or mental sufferings. By its very nature, such a right is a complex one. It brings together manifestations of several fundamental

5 *Official Bulletin of Parliament*, Congress of Deputies, serie B, nº 46-1, 31st January 2020.

rights, mainly two: the right to life (art.15.1 SC)—whose content did not so far comprise the 'right to death'—and the right to physical and moral integrity (art.15.2 SC)—since this possibility of one's life disposition may be a way of safeguarding it -. In addition, it is also linked—even if they are not fundamental rights—to the respect for human dignity and the free development of personality (art.10 SC). The legislative is introducing, in this sense, a right which can be considered as fundamental since it is a manifestation of those of art.15 SC. It thus incorporates a new right to the catalogue of those provided for by the Constitution itself and, in so doing, reforms it in an informal way. This proposal was taken into consideration by the plenary of the Congress of Deputies on February 17th, 2020, was passed by the latter on December 17th, 2020 and got its final approval by the Senate on March 18th. Spain thus becomes the sixth country in the world—after the Netherlands, Belgium, Luxembourg, New Zealand and Canada—to recognize the right to a dignified death.

Finally, with regard to informal reforms produced by the practice of political actors, the abusive use of decree-laws cannot be ignored. According to art. 86.1 SC, these norms—which have legal force—can only be enacted by the Government in cases *'of extraordinary and urgent need'*. However, the political practice shows that these have been mere substitutes for ordinary laws. The Government has used them to regulate situations that are not of such nature and, therefore, could have perfectly followed the legislative procedure—including the urgent one—before Parliament. This practice logically changes (informally) the Parliament-Government relations constitutionally designed. The latter plays an undisputed protagonist role in the exercise of the legislative power which should be played by the Parliament (Congress and Senate) as the body trustee of the popular sovereignty. That is why the Constitution restricts the Executive's legislative power to the concurrence of situations of extraordinary and urgent need.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The only formal proposal for constitutional reform submitted during 2020—*Proposal for reform of the second additional provision of the Spanish Constitution for the effective reintegration of Valencian Civil Law*—arises in a very particular context and can be explained from very specific reasons. Art. 149.1.8 SC provides for the State's exclusive competence in civil law *'regardless of the conservation, modification and development by the Autonomous Communities of civil, regional or special law, wherever they exist'*. In this regard, the Valencian Statute of Autonomy, in its reform of 2006, stablished that *'the legislative development of the powers of the Generalitat will seek the recovery of the corresponding contents of the Fueros of the historic Kingdom of Valencia in full harmony with the Constitution and with the requirements of Valencian social and economic reality'* (art.7). In addition, it recognized the exclusive competence of the Generalitat over the *'conservation, development and modification of Valencian regional civil law'* (art.49.2).

On the basis of those provisions, the Valencian Community enacted several regional laws relating to civil matters: Law 10/2007, 20th March, of the Generalitat on the Valencian matrimonial property system—subsequently amended by Law 8/2009, 11st November, of the Generalitat-; Law 5/2011, 1st April, of the Generalitat, on family relations of sons and daughters whose parents do not live together, and Law 5/2012, 15th October, of the Generalitat, on common-law relationships of the Valencian Community. These three regional laws, however, were declared unconstitutional by judgments 82/2016, 28th April, 110/2016, 9th June and 192/2016, 16th November respectively.

The Spanish Constitutional Court considered that, on the basis of art.148.1.8 SC, the Autonomous Communities can preserve, modify or develop regional laws (whether they were compiled or not, being just local customs) provided that they existed at the time of entry into force of the Constitution of 1978. However, the Valencian Community was unable to prove the existence of a previous customary regional regime of the institutions that it aimed at regulating (matrimonial property system, common-law relationships and guardianship) existing in its territory at the time of adoption of the Constitution and enduring at the time of approval of those laws. The Court therefore considered that the Valencian Community created a new regional civil law, which was constitutionally outlawed, since the competence over civil matters is exclusively attributed to the State. This refusal of the Constitutional Court to the recognition of the Valencian regional civil law, due to the infringement of art.149.1.8 SC, led the Valencian Community to propose the constitutional reform to introduce a second Additional Provision. Although it finally did so in 2020, there was a previous attempt in 2018[6]. Nonetheless, that first proposal for constitutional reform failed to reach the national Parliament since the dissolution of the Valencian one led to the expiry of the initiative, which only managed to be taken into consideration by the regional chamber.

This reform, like any other one of a formal nature to be proposed before Parliament, does not raise any concerns from a substantive point of view: the Spanish Constitution lacks intangibility clauses, both express—since it is entirely reformable ex arts.167 and 168 SC—and tacit that, as such, could be opposed by the Constitutional Court. On several occasions, the latter has highlighted that all constitutional provisions can be subject to reform provided that this is carried out through the established procedures, since the Spanish is not a system of militant democracy in which there is an *'inaccessible core to constitutional reform procedure'*[7]. That is why, at least in part, the Constitutional Court's role in (formal) constitutional reforms is notably smaller than in other jurisdictions because it is strictly procedural. The Court—and, in any event, *ex ante*—merely checks whether the reform complies with the procedural requirements laid down in the Constitution and, where appropriate, in the Parliament Standing Orders, but does not assess the constitutionality of its content. Since the proposal for reform presented this year has not yet been taken into consideration by the Plenary of the Congress, no judicial review has been exercised over it by the Court.

Regarding the context and content of the *Organic Law 3/2021, 21st March, for the Regulation of Euthanasia*, it is worth noting that it is not the first proposal in this matter, since different legislative attempts had

6 *Proposal for the reform of the second additional provision of the Spanish Constitution for the effective reintegration of Valencian Civil Law*, presented by the popular, socialist, Compromís y Podemos-Podem parliamentary groups (*Official Bulletin of the Valencian parliament*, nº284, 13rd June 2018, pp.49188 onwards)

7 Constitutional Court Judgements 48/2003, 12nd March; 5/2004, 16st January; 31/2009, 29st January; 42/2014, 25st March 136/2018, 13rd December.

previously, but unsuccessfully, taken place in Spain[8]. To understand why this proposal has been launched it should be taken into account that euthanasia constituted a criminally sanctioned conduct in our country under art.143.4 of the Penal Code*: 'whoever causes or actively cooperates in the necessary, direct acts causing the death of another, at the specific, serious, unequivocal request of that person, in the event of the victim suffering disease serious that would unavoidably lead to death, or that causes permanent suffering that is hard to bear, shall be punished lower by one or two degrees described in sections 2 and 3 of this article [crime of assisted suicide]'*. This can be explained by the fact that the right to life (art.15 SC) has traditionally been conceived as a classic negative right, aimed at protecting the physical life of the individual from attacks of public authorities or third parties. Hence, those who fail to develop that active duty of protection are criminally punished.

However, the question at stake changes its perspective if, in an advanced democratic society, what protects the right to life is not so much the physical life but rather the vital choices of the individual, one of which may be death. The right to a dignified death thus becomes a negative right, opposable to the State or third parties who wish to attack such vital choices (whether living or dying); and, at the same time, a positive right that demands the cooperation of the public power so that it can be exercised in conditions of freedom and equality. The reform, following this logic, attributes to certain subjects the right to apply for the aid to die: to Spanish people, legal residents in Spain or those who have a census certificate that proves a time of stay on Spanish territory longer than twelve months, who are of legal age and able and conscious at the time of the application. However, the right is provided only for cases of serious and incurable illnesses or a serious, chronic and disabling condition. In addition, the patient must have in writing all information about his or her medical process, give his or her informed consent and make two requests, voluntarily and in writing, to receive the aid. Furthermore, the proposal sets up regional guarantee and evaluation commissions which are responsible for making a previous control over the provision of the aid to die. Their decisions can be appealed before the administrative courts. Finally, the proposal provides also for the right to conscientious objection of health professionals.

Such regulation shall be foreseeably appealed before the Constitutional Court, who will have the final say on its assemblage in our legal order and, therefore, who will interpret the scope and content of art.15 SC. Although in the early jurisprudence of the 1990s it ruled that the right to life did not comprise the right to death, the latter being, at the most, a manifestation of *agere licere*, it made this interpretation not in regard to a case of euthanasia but of several hunger strikes. However, if this is finally the case, it is highly likely that the Constitutional Court will delay the decision. In fact, this is what has happened, with a quite similar issue, the right to abortion: after ten years the appeal to the constitutional judgement has not yet been rendered.

8 For example, the *Proposal for reform of the Organic Law 10/1995, 23st November, of the Penal Code, on the decriminalization of eutanasia and assisted suicide,* presented by the Parliament of Catalonia in December 2019; the *Organic Law Proposal on eutanasia*, presented by the parliamentary group Unidas Podemos-En Comú Podem-Galicia en Común, in January 2017 (not taken into consideration by the Plenary of the Congress) and in July 2019 (expired); or the *Organic Law Proposition for the regulation of euthanasia,* presented by the socialist parliamentary group, first in May 2018 and then in July 2019, both expired.

Finally, and with regard to the abuse of decree-laws, it should be noted that this practice is not unique to 2020 but to many of the previous years. The noteworthy thing about 2020 is that it reaches a record mark, becoming the year with most decree-laws since the adoption of the Constitution in 1978: 39 versus 11 ordinary laws, 3 organic laws and a legislative decree[9]. This means that decree-laws represented, in the last twelve months, more than 70% of the legislative production of the State, with the residual role that this entails for Parliament.

It could be argued that the Covid-19 pandemic increased the number of situations which can be considered extraordinary and urgent. Nonetheless, it is also true that in Spain there are emergency states (such as the alarm state) that allow to manage, through exceptional tools, the health crisis we are facing; unlike, for example, in Italy, where such a thing can only be done by decree-laws, which would explain a greater presence of them. In addition, some of those decree-laws have nothing to do with the coronavirus crisis (they are even previous to it). Other ones, even if linked to it, were enacted many months after the hatching of the pandemic. Thus, predictable situations that they intended to tackle could have been addressed by laws. It should be kept in mind that the state of alarm does not interrupt the normal functioning of Parliament (art.116.5 SC).

Nevertheless, it should not be forgotten that this abuse is due, to a great extent, to the excessively lax interpretation that the Constitutional Court has been making of what must be regarded as circumstances of extraordinary and urgent need. This case-law is, at the end, what has contributed to mutate art. 86.1 SC. Therefore, the excessive number of decree-laws issued by the Government together with the fact that not all, of course, are or will be appealed before the Constitutional Court and that, even if they are, the chances of being declared constitutional are very high, the informal reform of art. 86.1 SC seems quite obvious. Decree-laws are, in short, an alternative to ordinary legislation in the hands of the Government, which is not, however, the position that the Constitution had originally conferred on them.

IV. LOOKING AHEAD

The Spanish Parliament has three constitutional reforms, at least to date, pending. One is the above-mentioned *Proposal for reform of the second additional provision of the Spanish Constitution for the effective reintegration of Valencian Civil Law*, presented in early 2020, which awaits to be taken into consideration by the Plenary of the Congress. Nevertheless, even if they were not formally presented in 2020, two proposals for constitutional reform from previous legislatures are also pending before Parliament. As they were promoted by the Legislative Assemblies of two Autonomous Communities (Asturias and the Balearic Islands) they did not expire with the dissolution of the national Parliament, being just transferred to the next legislature. Despite being pending before the Chambers for more than six and two years respectively, in 2020 they also failed to be processed last year. They are still waiting to be taken into consideration by the Plenary of the Congress of Deputies.

The first one is the '*Proposal for the reform of art. 69.3 of the Spanish Constitution so the island of Formentera could choose its own Senator,*

9 These data can be found in the Congress official website: *'Iniciativas legislativas aprobadas'*, (n.d.), Congreso de los Diputados. <https://www.congreso.es/web/guest/iniciativas-legislativas-aprobadas?last_search=1>.

regardless of who chooses the island of Eivissa'[10]. It was initially presented by the Parliament of the Balearic Islands in October 2018 (XII Legislature). The reform aims to amend art. 69.3 SC with regard to the election of regional Senators in the Balearic Islands: instead of the Ibiza-Formentera island complex choosing together a Senator, it is intended that each of the islands can choose its own one.

The second one is '*the Proposal for reform of articles 87.3, 92 and 166 of the Constitution*'[11], which was initially presented by the Parliament of the Principality of Asturias in October 2014 (X Legislature) and whose origin was a citizen initiative exercised through the right of petition (art.29 SC). This proposal seeks, first, to remove some of the limitations that the Constitution imposes on the popular legislative initiative (art.87.3 SC) to make it more effective. Basically, it aims to eliminate the prohibition to present a popular initiative in matters reserved to organic law, since this implies, inter alia, that citizens cannot submit proposals related to fundamental rights and public freedoms. Secondly, it provides for the possibility that, at the initiative of 500,000 voters—and not only at the request of the President of the Government with the approval of the Chambers—a plebiscite on political decisions of particular significance could be convened (art.92). Thirdly, it introduces the abrogative referendum of laws, at the initiative of the same number of voters, providing that it does not affect tax, budgetary or international matters, and the prerogative of grace. It stablishes a participation quorum of the majority of voters and demands, for its success, the majority of the votes cast (art.92 SC). Fourthly, the proposal includes the citizens' initiative of constitutional reform, currently forbidden (art.166 SC). It thus equates the subjects who hold legislative initiative—Government, Congress, Senate, Legislative Assemblies of the Autonomous Communities and citizens (art.87 EC)—with those who have that of constitutional reform.

Apart from these already registered proposals, the President of the Government and some of the members of his Cabinet announced, in 2020, possible future reforms of the Constitution. Although they have not been formally presented yet, they seem to be on the roadmap of the current Executive. One of these is the reform of art. 49 SC in order both to change its terminology—replacing the term 'diminished' by 'persons with disabilities'- and to recognize the rights of this collective. On this matter, a '*Preliminary Draft Bill to reform article 49 of the Constitution, on the rights of persons with disabilities*'[12] was adopted in 2018. However, it expired with the dissolution of the national Parliament. Apart from this, the possibility of reforming the Constitution to eliminate or to limit the immunity of the Monarch (art. 56 SC), which currently covers all his acts (public and private) and, apparently, the actions carried out after his abdication, has also arisen. In fact, during 2020, some proposals of laws were submitted in this regard which were dismissed by the Bureau considering that that matter required constitutional reform. Apart from these specific issues that came to light in the public debate, the Spanish constitutional system also has pending major reforms such as the territorial organization of the State or the Senate, among others[13].

10 *Official Bulletin of Parliament*, Congress of Deputies, serie B, nº 2-1, 20th December 2019.

11 *Official Bulletin of Parliament*, Congress of Deputies, serie B, nº 1-1, 20th December 2019.

12 It can be found here: *'Anteproyecto de Reforma del Artículo 49 de la Constituición Española'*. https://www.mpr.gob.es/prencom/notas/Documents/071218_Art49Consti.pdf

13 For example, the Proposal of Law regarding the actions of the King covered by the immunity, presented by the plural parliamentary group, in September 2020.

V. FURTHER READING

C. Castillo Martínez, *'Derecho foral valenciano y Derecho civil valenciano. Reflexiones para una reflexión y desarrollo constitucional de nuestro derecho'* (Actualidad Jurídica Iberoamericana, 2020) 12 866, 889.

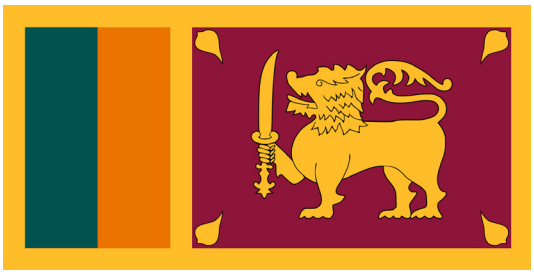
MA Presno Linera, *'La eutanasia como derecho fundamental'* (Teoría y Derecho. Revista de Pensamiento Jurídico, 2021)

GM Teruel Lozano, *'Los decretos-leyes en la crisis del coronavirus: perspectiva constitucional'* (Extra 8 Cuadernos Manuel Giménez Abad, 2020) 216, 225.

D. López Rubio, *'Radiografía de una propuesta olvidada: la proposición de reforma constitucional de la Junta General asturiana sobre democracia semidirecta'* (Estudios de Deusto, 2019) 263, 295.

R. De Asís Roig, *'De nuevo sobre Constitución y discapacidad'* (Universitas, 2020) 52, 64.

Sri Lanka



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I. INTRODUCTION

The Constitution of Sri Lanka has been transformed through constitutional amendment and constitutional jurisprudence since it was adopted in 1978. In 1987, a semi-federal system was introduced, and in 2015, a more balanced form of constitutional government was introduced, both by way of constitutional amendments. Last year saw another transformation when the democratic changes of 2015 were unraveled, and the country reverted once more to a strong presidential system. Towards the end of the year a committee was established to propose a new constitution for the country. There was a constitutional vacuum for a few months when Parliament was dissolved in early March and the scheduled election could not be held in April because of the pandemic. Parliamentary elections were finally held in August 2020.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

One of the first acts of the new government, elected in August, was to table the 20th Amendment (20A) to the Constitution, within a month of its electoral victory. The 20A was passed by a two-thirds majority in October 2020 and returned the country to hyper-presidentialism with power concentrated in a strong elected president. The 20A unravels many of the democratic changes introduced by the 19th Amendment (19A) passed in 2015.

A few of the constitutional changes introduced in 2015 remain. The term limits of both the President and Parliament remain at five years, the right to information remains a part of the Bill of Rights, and the President's official acts are still subject to scrutiny under the Supreme Court's fundamental rights jurisdiction.[1]

However, many of the powers the President previously exercised before the 19A, have been restored. The President may remove the Prime Minister at will, hold any cabinet portfolio and has the discretion to assign other ministerial portfolios among members of the Cabinet. The President is restrained by the provision that the Prime Minister must be able to command the confidence of the majority of the members of Parliament. The limitations on the size of the Cabinet have also been removed. The President may dissolve a democratically elected legislature after half its term, two and a half years, without assigning any reason.

The Constitutional Council which acted as a check on the President's power to make appointments to the independent commissions and the higher courts, has been abolished and replaced by an ineffective Parliamentary Council, consisting of the Speaker of the House and four other members of Parliament. There is no civil society representation in the Parliamentary Council. The President is required to consult the Parliamentary Council in making appointments but is not bound to follow its observations. As a result, appointments to the higher judiciary (the Court of Appeal and the Supreme Court) and to the independent commissions may be made by the President with no checks. The abolishment of the Constitutional Council could potentially have implications for the continuity of three independent commissions: The Right to Information Commission; the Office on Missing Persons; and the Reparations Commission. Appointments to all three of the commissions require a recommendation of the Constitutional Council in terms of the statutes under which they were set up. In the absence of a Constitutional Council, it is unclear how the commissions will operate once the current terms of its members ends.

A last-minute amendment while the bill was being debated in Parliament resulted in the number of judges in the Court of Appeal and Supreme Court being increased by half the total number in both courts. The 20th Amendment also abolished the Audit Service Commission and the National Procurement Commission both of which sought to ensure a better use of public resources, transparency, and public integrity. The constitutional recognition that the Commission to Investigate Allegations of Bribery and Corruption previously enjoyed, has been repealed.

Towards the end of 2020, the government set up a committee to draft a new constitution for Sri Lanka. The committee called for written public representations. At the time of writing, it is not clear how many representations were received.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The radicality of the 20A, as discussed above, appears to reflect characteristics of a 'constitutional dismemberment'. According to Richard Albert, a 'constitutional dismemberment' goes beyond an amendment and results in an unmaking of the constitution that alters essential features such as rights, structure, and identity but does so without breaking legal continuity. Whether 20A reflects a constitutional amendment or dismemberment that substantially restructure the constitutional order,[2]

1 'Twentieth Amendment to the Constitution', Certified on 29th October 2020, available at http://www.documents.gov.lk

2 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019).

is incomplete without an analysis of the social and political context within which the existing constitutional structures, rights, and identity were formed. Central to this analytical difficulty is the contested notion of constitutional identity in Sri Lanka, that fundamentally impacted constitutional structures and rights. In Sri Lanka's multi-ethnic and multi-religious society, the dominant constitutional identities are conceived based on ethnicity, religion, and majoritarianism. The two Republican Constitutions of Sri Lanka (the 1972 Constitution and the 1978 Constitution Constitution) entrenched the majority ethnic and religious identity in two significant provisions; the unitary nature of state and the clause that affords 'foremost place to Buddhism'. The Republican Constitutions therefore can be understood as acquiescent constitutions that preserved majoritarian societal values instead of engaging in social transformation towards the construction of a more inclusive society. The constitutional entrenchment of one identity over the others in Sri Lanka's plural society, amongst other political issues, paved way for sustained violence in two insurrections by the Sinhalese youth and a thirty-year civil war between the Government of Sri Lanka and the Tamil separatist movement, the LTTE that ended with the LTTE's military defeat in 2009.

Despite the constitutional entrenchment of the majority identity, the preamble, that forms the foundation of the Constitution of Sri Lanka is based on five intangible heritages namely freedom, equality, justice, fundamental human rights, and the independence of the judiciary. These conflicting textual commitments in the constitution has created complex questions on what constitutes Sri Lanka's constitutional identity and the basic structure which came to the fore during several judicial determinations on constitutional amendments.[3]

Amidst these competing visions on constitutional identity and the basic structure, the Constitution of Sri Lanka established a governance structure that aggrandized the executive president with minimal checks and balances, undermining the essential features of a constitutional democracy. Subsequent amendments fundamentally changed this original structure introducing both pro-democratic and anti-democratic constitutional changes resulting in significant restructuring of the constitutional order.

An important preface relevant to the discussion on the recent 20A is that its effects can be identified as the latest of a series of constitutional dismemberments that fundamentally deconstructed the original structures, rights, and identity of the 1978 Constitution without breaking the legal continuity as it relied on the constitutional amendment procedures set out in the constitutional text. It is also noteworthy that these constitutional dismemberments undid the changes introduced by previous dismemberments. The 20A is a near repeal of 19A and can be described as a constitutional dismemberment that threatens the democratic structure of the constitution as it enhanced the powers of the president that were curbed by 19A. For example, the Constitutional Council, established to minimize the president's power when making appointments to the public service, was replaced by a Parliamentary Council whose observations have no binding effect on the president. This process gives the president sole discretion to appoint all judges in the superior courts, as well as the Attorney-General, the Inspector General of Police and members to the Independent Commissions. Similarly, the president is no longer subjected to stringent procedures pertaining to parliamentary dissolution introduced by 19A, a process that was frequently abused by past presidents. The modest democratic gains of 19A were thus reversed by 20A. The 19A was introduced at a unique juncture in Sri Lanka's constitutional politics. In January 2015, the citizenry of Sri Lanka democratically ousted President Rajapakse, marking a clear rejection of authoritarian politics. A political atmosphere that valued good governance, the rule of law and democracy resurfaced, making it vital to initiate constitutional reforms to solidify the democratic gains. In addition, it sought to repeal the 18th Amendment (18A) that contained anti-democratic elements including the removal of presidential term limits and repealing the de-politicized public appointment process that was introduced by 17th Amendment.[4] What is noteworthy is that all these three recent amendments to the constitution, i.e. 18A, 19A, and 20A sought to fundamentally alter the constitutional structure[5] and rights.[6] Thus, Sri Lanka's constitutional order underwent a surge of constitutional changes: from a constitutionally mandated authoritarian governance through 18A, to a democratic revival through 19A, and once again, took a plunge into an anti-democratic constitutional structure in 20A—all these variations in the constitutional order took place without breaking the legal continuity in the span of ten years, with a constitutional transformation occurring every five years. While the volatility of constitutional change, and the effects thereof are intriguing, what makes it equally noteworthy is the reliance on legal continuity which occurs as a result of adhering to the constitutional amendment rules.

The Constitution of Sri Lanka does not contain unamendable provisions. Amendments to Sri Lanka's Constitution can be introduced by two-thirds majority in parliament save for changes to the entrenched clauses which require not only a two-thirds majority in parliament but also approval by the people at a referendum. The entrenched provisions are the unitary nature of the state (Articles 1-3), the status of Buddhism (Article 9), fundamental rights incorporated in Articles 10 and 11, the extension of the president's term of office (Article 30(2)) and the extension of the term of parliament (Article 62(2)).

The Supreme Court, the apex court of Sri Lanka enjoys exclusive jurisdiction to interpret the constitution, but its authority is limited to pre-enactment judicial review and it can only determine whether a proposed amendment violates the entrenched clauses requiring approval by the people at a referendum. Yet, amendments that contained significant changes to the entrenched provisions have been passed by only two-thirds majority in parliament. In Sri Lanka's constitutional history, a referendum was only conducted once and that too for

3 For example, during the 13th Amendment determination, the petitioners argued the violation of the basic structure based on the unitary nature of state and the Buddhism chapter; see *In Re-Thirteenth Amendment to the Constitution* (1987) 2 SLR 312. However, during the 20th Amendment determination, the petitioners premised their basic structure argument on the intangible heritages specified in the preamble; see *The Twentieth Amendment to the Constitution* (2020) SC SD 1/2020.

4 The 17th Amendment passed in 2001 too can be described as a significant pro-democratic constitutional dismemberment that reduced the powers of the president when making appointments to the public service by introducing a Constitutional Council whose recommendation/approval were binding on the president.

5 One significant structural change that took place was with reference to president's powers when making appointments to the public service. The 18A repealed the Constitutional Council whose recommendations are binding on the President, and replaced it with a Parliamentary Council that has no binding effect on President. The 19A re-instated the Constitutional Council only to be repealed and replaced by the Parliamentary Council through the 20A.

6 The 19A expanded the fundamental rights jurisdiction. It introduced the right to information as a fundamental right and removed presidential immunity for fundamental rights actions against him/her.

undemocratic ends, i.e., to extend the life of the parliament with its constituents unchanged. Thus, there is a general reluctance by the political branches to conduct referenda when proposing constitutional change, especially when the party in power can easily secure a two-thirds majority in parliament to pass an amendment. Ultimately, it is the Supreme Court that has the authority in determining the additional requirement of a referendum to pass an amendment, and in doing so, the Court exercises a vast amount of discretion[7] as evinced in their determinations discussed below.

When the 20A Bill was challenged in the Supreme Court, relying on the intangible heritages spelt out in the preamble, the petitioners' argued that the Bill would fundamentally alter the basic structure of the constitution that would undermine the independence of the judiciary and therefore cannot be passed as law under any circumstances. This argument on unamendability was categorically rejected by the Supreme Court citing previous determinations and the Court held that the core features described in the preamble are encapsulated in Articles 1-3, alterations to which are possible through an additional requirement of a referendum.[8] While the petitioners pressed the Court to consider the effects of the purported amendment, the Court adhered to a strict interpretation of the procedural rules. Central to this approach of judicial interpretation was situating the proposed amendments with reference to popular sovereignty. Whilst declaring at the very outset that none of the proposed clauses sought to amend, repeal and replace the entrenched clauses, the Court stated that judicial scrutiny is exercised to ascertain if the purported changes had a prejudicial impact on sovereignty, and if so, such a Bill would require approval of the people at a referendum. On this basis, the Court approved amongst others, the re-imposition of the president's discretion in removing the prime minister, replacing the Constitutional Council with a Parliamentary Council, introducing a Defeated Bill in parliament to the people at a referendum by the president, reducing safeguards against the president's power to dissolve parliament, reducing the time period between Gazette publication and placing it on the Order Paper, and re-introduction of the 'Urgent Bill' procedure that limits the time for judicial review. This rationale in constitutional adjudication subordinated constitutionalism to the superficial application of popular sovereignty. For example, the 19A precluded the president from holding a Ministerial portfolio as the president is not answerable to parliament—the body that exercises people's legislative power. The 20A overturned it making it possible for the president to assign to himself any subject or function. The Court interpreted this as an instance that will enhance the people's executive power that does not warrant the people's approval at a referendum.[9]

Thus, even when significant changes to the constitutional structure and identity were proposed, the Supreme Court held that a special majority in parliament would suffice provided that adequate reforms are made at the Committee Stage for the four clauses that required a referendum.[10] Therefore, whilst the Constitution does not provide for unamendable provisions to safeguard the basic structure or identity of the Constitution, it requires instead a special and a more stringent procedure to change the core components of the Constitution. Yet, the Court in most instances has even attempted to dispense with this requirement.

That said, it is also interesting to see how the Court refused to restore blanket immunity on the president under 20A and held that this required approval at a referendum. This part of the decision preserved the enhanced scope of fundamental rights under 19A in which the Court's stance on the matter has significant positive implications for constitutional democracy in Sri Lanka and can be identified as performing a representative role[11] in rights guarantees.

In assessing the overall conduct of the Supreme Court, the Court seems to be conscious of the political and social context of the day, and appears to exercise self-restraint in engaging in politically-charged constitutional adjudication. This could also be due to the weak judicial institutional model external to the case or other branches as factors influencing judicial decisions. But as pointed out earlier, there have been instances where the Court was unfaltering in its decision, even when such deliberations did not support the changes proposed by the ruling regime. The Court resolutely pushing back against restoring full presidential immunity is one such instance. Could this be an instance of defending the Court's authority? Could this be a judicial strategy in defending aspects of democracy that the judges find more important? Why does the Court find some democratic vestiges of 19A easy to defend and some not?[12] These are interesting questions that help us understand constitutional change as well as constitutionalism in Sri Lanka.

IV. LOOKING AHEAD

Several critical issues pertaining to constitutional design continue to challenge constitution makers. These include the distribution of powers among the three organs of government and the fourth-branch institutions; power-sharing between the majority Sinhalese community and the Tamil and Muslim minorities in the North and Eastern parts of the country; the role and place of Buddhism in the constitution; the electoral system for national, provincial and local elections; the question of a mandatory quota to increase women's representation in political institutions; the expansion of the Bill of Rights to include economic and social rights, environmental rights, and the right to life; the applicability of the Bill of Rights to private action; the re-introduction of a second chamber; and the power of the courts to strike down legislation.

Of these issues the most divisive have been the questions relating to the Executive Presidency, power-sharing, and the place of Buddhism in the constitution. The Executive Presidency was established first by a constitutional amendment in 1977 and followed by the adoption of a new Constitution in 1978. The 1978 constitution created a powerful

7 A point highlighted by Dinesha Samararatne in 'Chameleon Constitutions and Sri Lanka's 20th Amendment' (*Law and Other Things*, 11 January 2021) <https://lawandotherthings.com/2021/01/chameleon-constitutions-and-sri-lankas-20th-amendment/> accessed 11 February 2021.

8 See The Twentieth Amendment to the Constitution (SC SD 01/2020-39/2020).

9 Ibid 30.

10 The four clauses referred to presidential immunity, duties of the president to ensure proper conditions for the conduct of free and fair elections, president's power on dissolution of parliament and failure to comply with guidelines of the Election Commission. The Attorney-General at the very beginning of the proceedings submitted to the Court the amendments that the Government plans to make at the Committee Stage. However, during the court proceedings, the submissions were based on the Bill based on the Order Paper. Subsequently, a substantial change took place during the Committee Stage that increased the number of judges in the Court of Appeal from 6-11 to 6-19, and in the Supreme Court from 6-10 to 6-16, and under 20A, the president has now the sole discretion to make these appointments.

11 On the representative role played by constitutional courts, see Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 The American Journal of Comparative Law 109.

12 Dinesha Samararatne raises similar questions in 'Chameleon Constitutions and Sri Lanka's 20th Amendment' (n 7).

Executive Presidency with very few checks and balances, a constitutional structure that has now been restored by the 20A.

The political transition of 2015 enabled a significant transformation of the 1978 Constitution by way of the 19A. The amendment reduced the President's and Parliament's term from six to five years; restored the two-term limit on holding Presidential office; and provided that the President cannot dissolve Parliament before four and a half years of its term. The President's official acts were made subject to the Supreme Court's fundamental rights jurisdiction, he or she was precluded from holding cabinet portfolios, and the size of cabinet was capped at 30. The 19A reintroduced the Constitutional Council, which either proposed or vetted appointments to independent commissions and the judiciary. Of the 225-member legislature, 215 members voted in favour of the amendment across the political spectrum.

For a brief period, Sri Lanka experienced a vibrant constitutional culture, a tolerance of dissent and the re-emergence of robust institutions.[13] However, poor governance, rifts between the President and Prime Minister, and the Easter bombings of April 2019, created a momentum for change and the return to a strong Presidential system with a growing perception that the hybrid system was not working.

Power-sharing with the Tamil minority has been the other divisive issue in constitutional reform. In the Northern-Province, Tamils make up almost 90% of the population and in the Eastern-Province constitute roughly one-third of the population. The Tamil claim for autonomy is rooted in the idea of discrimination: mainly in employment opportunities in the public sector; a denial of language rights and Tamil identity; and access to an equal share of resources. However, the claim of discrimination is contested by many Sinhalese who instead contend that the Tamils were a privileged minority during colonial times.

Before independence in 1947, constitutional debates focused on Tamil participation in the central legislature. This was reflected in the Donoughmore Constitution of 1931 that provided limited self-government to colonial Ceylon. In fact, it was the Kandyan Sinhalese who first presented proposals for a federal Ceylon prior to independence. In the 1950s, Tamil political parties began to press for federal arrangements and geographical-based autonomy. These claims have been resisted by the state and other actors including the clergy. Tamil actors have sought control over policing, the distribution of land, and a merger of the Northern and Eastern Provinces, all of which have remained highly contentious. In 1987, under pressure from India, the state agreed to a system of provincial councils with limited autonomy for the nine provinces, a system that has not worked well in practice.

The military victory for the state over the Tamil Tigers in 2009 has resulted in power-sharing and federalism slipping off the reform agenda. Although there have been several proposals to share power since the 1950s, none have been implemented mainly because of pressure from Sinhala-Buddhist forces.

The place of Buddhism in the constitution has also been contested. Many Buddhist groups have advocated for Buddhism to be made the state religion. The 1972 constitution gave 'foremost' place to Buddhism for the first time and this provision was retained in the 1978 constitution. For one of the architects of the constitution, this clause on Buddhism was a compromise, between those who advocated that Buddhism be made the state religion, and those who favoured a secular state.

Transitional justice also remains divisive and controversial. The previous government pledged to establish four mechanisms to address the past. These included an Office on Missing Persons (OMP), an Office of Reparations, a Truth Commission, and special court and prosecutor with the participation of foreign judges. The OMP was set up under statute and has developed an initial register of disappearances. The Reparations Office has also provided compensation in select cases. The other two mechanisms were not established and are unlikely to be set up in the near future, despite pressure from international actors, including the UN Special Procedures and the Human Rights Council.

V. FURTHER READING

Mario Gomez, *Sri Lanka's Dance with Democracy*, International Association of Constitutional Law Virtual Roundtable on, 'Democracy 2020: Assessing Constitutional Decay, Breakdown, and Renewal Worldwide' (Nov 2020) Blog — ROUNDTABLE (iacl-democracy-2020.org).

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Nihal Jayawickrama, *The 20th Amendment: A violation of procedure?*, (*Daily FT,* 29 September 2020.)

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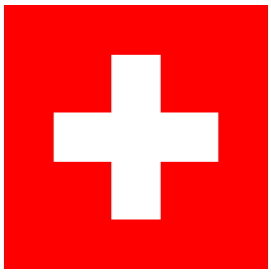
13 Mario Gomez, *The Courts Respond to Executive Tyranny in Sri Lanka*', Int'l J. Const. L. Blog, Jan. 24, 2019, at: http://www.iconnectblog.com/2019/01/the-courts-respond-to-executive-tyranny-in-sri-lanka

Switzerland



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I. INTRODUCTION

In Switzerland, as in many other countries, the year 2020 will be remembered as a year like no other. The coronavirus pandemic (COVID-19) reached the country in February 2020 and spread rapidly. As a response to the outbreak, the Federal Council adopted three ordinances[1] that were amended multiple times.[2] While the majority of measures were in conformity with the constitutional framework for an emergency situation, several were beyond the scope of the relevant provision and in clear violation of federal laws and the Swiss Constitution.[3] Switzerland thus drifted into an extraconstitutional emergency.[4]

Not only did Switzerland have a comparatively high per capita count of infections, the pandemic also affected Switzerland's democratic institutions considerably: among other things, the parliamentary spring session was suspended and the popular vote scheduled for 17 May 2020 was postponed.[5] Yet, by the end of the year, Switzerland had voted on—and rejected—four constitutional amendments concerning social housing, autonomous regulation of immigration, the financing of war material, and human rights obligations for businesses.

This report begins by briefly recounting the proposed constitutional reforms of 2020. It then gives an overview of the legal provisions on constitutional revisions before it discusses their limitations and the debates sparked by the 2020 revisions.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In comparison with other countries, the Swiss Constitution (Cst.) is easily amendable, hence the procedure for partial constitutional revision is frequently initiated. Ever since the last total revision of the Constitution in 1999, Switzerland has voted on 125 partial revisions. Only 32 of them reached the majority of the People's and cantons' votes necessary for an initiative to pass.[6]

A partial constitutional revision is possible at any time, and can either be decreed by the Federal Assembly[7] or initiated by the People through a popular initiative. The latter requires the signatures of 100,000 citizens with the right to vote (which represents only an approximate 2% of the population eligible to vote) within a timeframe of 18 months after its publication in the Federal Law Gazette (Art. 139(1) Cst.). As a response to the COVID-19 pandemic, however, the Federal Council suspended this deadline for more than two months and issued a temporary prohibition for the collection of signatures.[8] Moreover, the time periods for examination of popular initiatives by the Federal Council and Parliament were suspended.[9] With the exception of the 'financing of war material' initiative, which was postponed from May to September, the COVID-19 measures did not affect the four popular initiatives that were submitted to the People and cantons for a vote in 2020:

1 RO 2020 573 'Ordonnance sur les mesures destinées à lutter contre le coronavirus (COVID-19) du 28 février 2020' (28 February 2020), abrogated by RO 2020 1333 'Ordonnance 2 sur les mesures destinées à lutter contre le coronavirus (COVID-19) du 13 mars 2020' (13 March 2020), which was abrogated in turn by RO 2020 2195 'Ordonnance 3 sur les mesures destinées à lutter contre le coronavirus (COVID-19) du 19 juin 2020' (19 June 2020).

2 At the time of writing, there were over 150 amendments. All amendments of the COVID-Ordinances are published in the official compilation at <https://www.fedlex.admin.ch/de/oc?news_period=last_day&news_pageNb=1&news_order=-desc&news_itemsPerPage=10> accessed 10 February 2021.

3 Giovanni Biaggini, '„Notrecht" in Zeiten des Coronavirus—Eine Kritik der jüngsten Praxis des Bundesrats zu Art. 185 Abs. 3 BV' [2020] ZBI 121/2020 254, 256.

4 *Ibid.*

5 Federal Council, 'Coronavirus: La votation populaire fédérale du 17 mai 2020 n'aura pas lieu' 18 March 2020. <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-78485.html> accessed 3 February 2021. This was not the first time that the Federal Council postponed a vote: in 1951, a foot-and-mouth disease outbreak led to the suspension of a vote, and in 2009, the national government postponed the ballot on the reorganization of the disability insurance (DI).

6 The majority of the People's votes (fr. "*la majorité du peuple*") is reached at 50% of all votes cast. The required majority of the cantons (fr. "*la majorité des cantons*") is reached with 12 votes (twenty cantons count as one vote, while the six smaller cantons of Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden only count as half a vote, hence the total number of cantonal votes is 23). It is the majority of the popular vote within a canton that determines the cantonal vote. In case of a tie, with 11.5 cantonal votes on each side, this will count as a rejection.

7 In this paper, the terms 'Parliament' and 'Federal Assembly' are used as synonyms. The Swiss Parliament is composed of two chambers of equal standing (Art. 148(2) Cst.). The National Council is composed of 200 members representing the People (Art. 149 Cst.). The Council of States is composed of a total number of 46 representatives of which each canton sends two with the exception of the six smaller cantons mentioned in Footnote 6, which only send one representative each (Art. 150 Cst.). The Parliament or the Federal Assembly have to be distinguished from the United Federal Assembly (Art. 157 Cst.), which refers to the joint proceedings of both chambers for instance in order to elect the Federal Councilors.

8 RO 2020 847 'Ordonnance sur la suspension des délais applicables aux initiatives populaires fédérales et aux demandes de référendum au niveau fédéral' (20 March 2020). Only the time limit in Art. 71(1) PRA is mentioned in the ordinance, but the suspension also concerns the constitutional time frame of Art. 139(1) Cst., which is not expressly mentioned. *See also* Giovanni Biaggini, 'Der coronavirusbedingte Fristenstillstand bei eidgenössischen Volksbegehren—eine Fallstudie zur Tragfähigkeit von Art. 185 Abs. 3 BV' [2020] ZBI 121/2020 278.

9 *Ibid.* In the ordinance, the time limit is not coupled with a treatment ban for the Federal Council. The treatment periods for the Federal Council are thus effectively extended.

1. The popular initiative for 'More affordable homes' was launched by the Swiss Tenants' Association in 2016. By amending Art. 108 of the Constitution, it sought to increase affordable housing by the means of expanded government subsidies. The initiative aimed to ensure that the percentage of non-profit housing construction per total of newly built apartments would be increased to 10%.[10] The Federal Council introduced an indirect counter-proposal[11] increasing the *Fonds de Roulement* for the benefit of non-profit housing construction by a framework credit of 250 million Swiss francs over ten years.[12] As the initiative was rejected, the indirect counter-proposal came into force without being subject to a referendum.[13]

2. In 2018, the strongest party in Switzerland, the right-wing Swiss People's Party, launched the popular initiative 'For moderate immigration (limitation initiative)', aiming at an independent regulation of the immigration of foreign nationals through a new Art. 121b of the Constitution. The initiative requested that the Federal Council should negotiate the suspension of the Agreement on the Free Movement of Persons with the EU (AFMP) within twelve months after the adoption of the initiative. Otherwise, Switzerland would have to unilaterally terminate the AFMP in the following 30 days. Yet, the AFMP is directly linked to other six bilateral agreements between Switzerland and the EU. Based on the so-called guillotine clause (Art. 25(4) AFMP), the other agreements would have been automatically terminated six months after receipt of Switzerland's termination of the AFMP. As this would have caused Switzerland considerable problems in terms of access to the EU single market, and possibly would have endangered other treaties such as the Schengen and Dublin Association Agreements (SAA and DAA), the Federal Council and the Federal Assembly recommended the rejection of the initiative.[14] The Swiss people responded to this call with a clear rejection by 61.7% of the votes cast.[15]

3. The popular initiative 'For a ban on financing war material manufacturers' was launched by the Young Greens Party and the Group for Switzerland without an Army (GSoA) in 2018. After the introduction of Art. 107a to the Constitution, the Swiss National Bank (SNB), foundations, and state and occupational pension institutions would be prohibited from financing producers of war materials. According to the initiators, this would lead to a reduction of the amount of war materials available in crisis regions. It would further strengthen Switzerland's neutrality and create the basis for a credible security and foreign policy. While the Federal Council "understood the concerns of the initiators to contribute to a more peaceful world"[16], their apprehension about negative effects on Swiss banks and pension funds and on the Swiss mechanical, electrical and metal industries prevailed, and it thus recommended the rejection of the initiative. Subsequently, only 42.5% of the People voted in favor of the initiative.[17]

4. The popular initiative 'For responsible businesses—protecting human rights and the environment' was the most expensive popular initiative campaign in Swiss history, with an estimated 18 million Swiss Francs spent by the supporters and opponents of the initiative in the run-up to the vote.[18] The initiative was launched by several church aid organizations and NGOs after a parliamentary motion on the topic was rejected in 2015. Based on a proposed new article Art. 101a of the Constitution, they sought to enhance Swiss businesses' accountability for violations of human rights and environmental standards committed abroad. Not only would companies have had to report on the measures taken, they also would have been liable for the damage caused by the companies they controlled.[19] As the majority of Parliament found this went too far, it introduced an indirect counter-proposal limited to weaker reporting obligations. The counter-proposal also had the support of the Federal Council. After one of the most heated campaigns in Swiss history, the initiative reached 50.7% of the popular vote but was ultimately rejected given that only 8.5 of the required 12 cantons voted in its favor.[20] Consequently, the indirect counter-proposal will enter into force 100 days after its publication in the Federal Law Gazette if the optional referendum is not requested. Until 5 August 2021, the optional referendum for the indirect counter-proposal can be requested.[21]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Switzerland's constitution does not contain unamendable provisions. The only limitations to constitutional amendments are consistency of form and subject matter for partial revisions (Art. 139(3) Cst.). Both total and partial revisions must respect 'mandatory provisions of international law' (Art. 139(3) Cst.). A further criterion, although not expressly mentioned

10 FF 2018 2253 'Message relatif à l'initiative populaire «Davantage de logements abordables» et à un crédit-cadre destiné à alimenter le fonds de roulement en faveur de la construction de logements d'utilité publique' (21 March 2018).

11 Parliament as well as the Federal Council have the possibility to elaborate a counter-proposal (Art. 139(5) Cst.). A distinction is drawn between a direct counter-proposal, which contains an alternative on the constitutional level, and an indirect counter-proposal, which suggests an alternative on the level of ordinary legislation. If a direct counter-proposal is submitted to the People and the cantons, the citizens can cast a 'double yes' for the initiative and the counterproposal, and can indicate their preference in case that both versions are accepted. The procedure for counter-proposals follows the normal legislative procedure and, depending on the type of enactment, are submitted to a referendum (Art. 140, Art. 141 Cst.).

12 FF 2020 4931 'Arrêté fédéral relatif à un crédit-cadre destiné à augmenter la dotation du fonds de roulement en faveur de la construction de logements d'utilité publique' (11 March 2019).

13 *Ibid*. Art. 3.

14 FF 2019 4807 'Message relatif à l'initiative populaire «Pour une immigration modérée (initiative de limitation)»' (7 June 2019) 4834.

15 Federal Chancellery, 'Votation populaire du 27.09.2020' <https://www.bk.admin.ch/ch/f/pore/va/20200927/index.html> accessed 10 February 2021.

16 FF 2019 4897 'Message concernant l'initiative populaire «Pour une interdiction du financement des producteurs de matériel de guerre»' (14 June 2019) 5116.

17 Federal Chancellery, 'Votation populaire du 29.11.2020' <https://www.bk.admin.ch/ch/f/pore/va/20201129/index.html> accessed 10 February 2021.

18 Dominik Feusi, 'Der teuerste Abstimmungskampf der Geschichte' *Tagesanzeiger* (Zurich, 19 November 2020). Both the supporters and the opponents claim that the estimate of 18 million CHF is too high; without, however, indicating the exact costs of their campaigns.

19 FF 2017 5999 'Message relatif à l'initiative populaire «Entreprises responsables—pour protéger l'être humain et l'environnement»' 15 September 2017.

20 Federal Chancellery, 'Votation populaire du 29.11.2020' <https://www.bk.admin.ch/ch/f/pore/va/20201129/index.html> accessed 10 February 2021.

21 FF 2021 890 'Code des obligations (Contre-projet indirect à l'initiative populaire «Entreprises responsables – pour protéger l'être humain et l'environnement»)' (27 April 2021). Even in case the optional referendum is not requested, the entry into force of the indirect counter-proposal is not expected until 2022.

in the Constitution, is feasibility. If a popular initiative is of obviously unrealistic content, it will not be submitted to the People and the cantons.[22]

Art. 139(3) Cst. requires the proposed constitutional revision to be compatible with 'mandatory provisions of international law'. While this term seems at first glance to be a reference to the international concept of *ius cogens*,[23] the Swiss Federal Council leans towards an autonomous and more encompassing interpretation.[24] In its 2015 report, the Federal Council listed the prohibition of torture, genocide and slavery, the prohibition of the use of force in the UN Charter, the principle of equality of States, some norms of international humanitarian law and the non-refoulement principle among the 'mandatory provisions of international law'. It further suggested that it counted the non-derogable rights contained in the European Convention of Human Rights (ECHR) and some provisions of the International Covenant on Civil and Political Rights (ICCPR) among them.[25] Until today, only two initiatives were invalidated because of a *ius cogens* violation. In 1996, the popular initiative 'For a reasonable asylum policy' suggested the immediate deportation of asylum seekers who had entered Switzerland illegally. Because this constituted a violation of the principle of non-refoulement under customary international law, the popular initiative was declared invalid as a whole.[26] In 2015, the 'enforcement initiative' was declared partially invalid because it sought to create an exhaustive list of norms with *ius cogens* character, which did not reflect the state of practice.[27] The autonomous interpretation of 'mandatory provisions of international law' is subject to debate: one doctrinal strain argues that, for reasons of legal certainty, the term should not deviate significantly from the public international law notion of *ius cogens*.[28] Other scholars understand the wording to allow the inclusion of regional *ius cogens* (such as for example the prohibition of the death penalty) as well as legally or factually non-terminatable treaty obligations.[29] Whereas the latter position does not stand the test of a historical interpretation, the Parliament has not objected to the Federal Council's autonomous interpretation and the Federal Council has confirmed its position ever since.[30]

Concerning the consistency of form, an initiative may take the form of a general proposal or of a specific draft of the proposed constitutional provisions (Art. 139(2) Cst.). In case of a general proposition, the Parliament will be in charge of preparing a draft provision. In practice, however, most initiatives are already submitted as a specific draft. In case the two forms are mixed, Parliament will declare the initiative invalid in part or in its entirety (Art. 139(3) and 194(3) Cst.; Art. 75(1) PRA). The absence of an instrument of direct democracy for ordinary legislation translates into increasingly detailed constitutional provisions that are proposed by Swiss citizens.

The consistency of subject matter requires a material connection between the different suggested provisions (Art. 139(3) and 194(2) Cst.; see also Art. 75(2) PRA). The reason behind this is that voters should be able to express their actual will when casting their ballots. If however, various unrelated matters are submitted in one single draft, voters will have to accept or reject the draft in its entirety, and are thus unable to express their free will. In practice, this requirement is interpreted in a very lenient manner. In recent years, several initiatives were not declared invalid, even though they combined several unrelated subject-matters in one constitutional amendment.[31]

In the event that a popular initiative or a federal decision on a constitutional revision violates "mandatory international law" or the criteria of consistency of form or subject matter, it falls upon the Federal Assembly to declare it invalid (Art. 139(3), 194(2 and 3) Cst.; Art. 98 ParlA; Art. 75(1) PRA). This can be done either in whole or in part.[32] Through a partial invalidation, the Federal Assembly thus has the power to slightly amend the text of the initiative.[33] Otherwise, an initiative which is submitted as a specific draft needs to be put before the People and the cantons without changes. The Parliament's decision on the validity of a popular initiative is final (Art. 173(1)(f), 189(4) Cst.). There is no recourse possibility to the Federal Supreme Court and thus no judicial control over constitutional amendments in Switzerland. This has come under criticism as the Federal Assembly—a political organ—takes a final decision of a sometimes legally sensitive nature.

The constitutional revisions that were voted on in 2020 did not present special challenges regarding the criteria of consistency of form and subject matter and respect for 'mandatory provisions of international law'. Yet, two of the initiatives sparked heated debates about the role of the Protestant and Roman Catholic Churches in political campaigns, the double majority required for partial revision and the increase in popular initiatives violating Switzerland's international obligations of non-mandatory character.

Following the launch of the 'responsible businesses' initiative, a relentless fight between initiators and opponents took place both in the media and in Parliament.[34] A compromise solution in the form of a counter-proposal failed to receive the approval of the Council of States. The indirect counter-proposal that was finally approved by Parliament was restricted to only weak reporting obligations for businesses. Consequently, the initiators did not withdraw the initiative. The enormous media coverage before the vote on 29 November 2020

22 FF 1997 I 441 'Message relatif à une nouvelle constitution fédérale du 20 novembre 1996' 20 November 1996.

23 *Ibid*. The topic of *ius cogens* was in itself subject to debate and thus included in the International Law Commissions' programme of work in 2015. Governments were asked to submit comments and observations on the ILC's draft conclusions to the Secretary-General by 1 December 2020. *See* International Law Commission, 'Summaries of the Work of the International Law Commission, Peremptory norms of general international law (Jus cogens)' < https://legal.un.org/ilc/summaries/1_14.shtml> accessed 12 February 2021.

24 Federal Council, 'Clarifier la relation entre le droit international et le droit interne—Rapport du Conseil fédéral en exécution du postulat 13.3805' 12 June 2015 13.

25 *Ibid*.

26 FF 1994 III 1483, 'Message concernant les initiatives populaires «pour une politique d'asile raisonnable» et «contre l'immigration clandestine» du 22 juin 1994' 22 June 1994.

27 FF 2015 2487, 'Arrêté fédéral concernant l'initiative populaire «Pour le renvoi effectif des étrangers criminels (initiative de mise en œuvre)»' 20 March 2015.

28 Ulrich Häfelin, Walter Haller, Helen Keller, Daniela Thurnherr, *Schweizerisches Bundesstaatsrecht* (Schulthess Juristische Medien AG, 2016) 535.

29 Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft*, (3d edn, Stämpfli Verlag AG, 2011) 546.

30 FF 2008 6929, 6930, 'Message relatif à l'initiative populaire «contre la construction de minarets»' 27 August 2008.

31 There were certain issues regarding the consistency of subject matter in the so-called 'self-determination' initiative, the 'food sovereignty' initiative, the 'energy instead of VAT' initiative, the 'Ecopop' initiative, and the 'health' initiative.

32 However, if it is only partially declared invalid, this part must be of subordinated importance, otherwise the initiative will be declared invalid in whole. *See* Ulrich Häfelin, Walter Haller, Helen Keller, Daniela Thurnherr, *Schweizerisches Bundesstaatsrecht* (Schulthess Juristische Medien AG, 2016) 571.

33 Daniel Moeckli, 'Die Teilungültigerklärung und Aufspaltung von Volksinitiativen' [2014] ZBI 115/2014 597.While a partial invalidation makes sense in case of a violation of mandatory provisions of international law, it is questionable in case of a violation of the consistency of subject matter, where the separate parts would be valid on their own. In the latter case, the initiative would have to be invalidated as a whole.

34 Dennis Bühler, Carlos Hanimann, 'Völlig losgelöst und komplett entgleist' *Republik* (Zurich, 19 November 2020).

aimed in large parts also at discrediting the initiators, among them the Protestant and Roman Catholic Churches. The opponents argued that the public law status of the churches in most of the cantons obliged them to act politically neutrally. They further criticized the churches for conducting a one-sided political campaign with public funds stemming partly from church taxes. The Federal Supreme Court rejected the interim measures requested in order to obtain an injunction against further campaign activities by the churches. In March 2021, the Federal Supreme Court terminated the proceedings concerning several voting rights complaints, thus leaving the question of the churches' involvement in political campaigns unanswered.[35]

The 'responsible businesses' initiative also gave rise to another debate of constitutional importance. While the initiative was largely met with approval in urban regions and the cantons of the French- and Italian-speaking parts of Switzerland, opponents of the initiative focused on the rural cantons. Their strategy proved successful: the initiative was rejected despite having gathered 50.7% of the popular vote as it failed to achieve the majority of the cantonal votes. The supporters of the initiative therefore raised a debate about the requirement for a double majority. The double majority is an expression of the Swiss federal system. It was introduced into the Constitution of 1848 as a concession to the small cantons. Ever since, however, cantonal population disparities are increasing, and this gives the citizens of small cantons an ever-growing weight. That said, it is unlikely that initiatives will be able to pass with only a simple majority of the people in the future, as this would require a revision of the Constitution—which in turn requires the majority of both People and cantons.

The 'limitation initiative' points to the growing problem posed by popular initiatives that are incompatible with Switzerland's international obligations. As mentioned before, the requested termination of the AFMP would have led to the termination of the other six of the so-called Bilateral I agreements because of the guillotine clause (Art. 25(4) AFMP). Consequently, Switzerland would have been excluded from the EU single market, which was not foreseen by the initiative and would have been particularly straining for Switzerland's economy.[36] The question arose whether popular initiatives that would give rise to *de lege* or *de facto* violations of irrevocable treaties should be declared invalid on the grounds of impracticability. This, however, bears the risk that the impracticability would serve as an easy argument to invalidate politically complicated initiatives. Given the fact that the Federal Assembly—a political body—takes the invalidity decisions, and that there is no possibility of recourse, the impracticability argument should only be applied with caution.

In recent years, several popular initiatives raised concerns regarding Switzerland's international commitments.[37] While initiatives are invalidated if they infringe 'mandatory provisions of international law', those that are contrary to international law of non-mandatory character are validly submitted to the People and the cantons for a vote. Following the acceptance of such an initiative, the legislator will face an inevitable constitutional problem: the legislator can only comply with international obligations if the original intentions of the initiators are to a certain degree neglected.[38] If the legislator chooses, however, to prioritize the intentions of the initiators, Switzerland risks a violation of its obligations on the international level.

IV. LOOKING AHEAD

Three popular initiatives have reached the procedural stage of being submitted to the People and cantons for a vote in 2021.

The 'Yes to a ban on veiling' initiative, which was accepted with 51.2% of the popular vote on 7 March 2021, is the most recent example of the trend concerning initiatives that are potentially problematic in terms of Switzerland's international obligations.[39] With the introduction of Art. 10a to the Constitution, face-covering in public spaces will be banned. Exceptions will be made for reasons of health, safety, climatic conditions and local customs.[40] The initiative illustrates several tendencies that prevail in the Swiss constitutional debate: first, as the popular initiative for a partial constitutional revision is the only instrument of direct participation for Swiss citizens, increasingly provisions of non-constitutional, very detailed nature are enshrined in the Constitution. Second, the initiative joins the ranks of constitutionally problematic popular initiatives that were launched or supported by the strongest party in Switzerland, the right-wing Swiss People's Party. The 'ban on veiling' initiative is the second initiative of the 'Egerkinger Committee', which fights against the 'Islamization of Switzerland'. In 2009, they successfully launched a popular initiative for the ban on minarets, the construction of which is now prohibited under Art. 72(3) Cst.[41]

The two other popular initiatives that will be submitted to the People and the cantons in 2021—the 'Pesticide-free Switzerland' initiative and the 'Clean drinking water and healthy food' initiative—are part of the 'green wave' that has taken over Switzerland as well as other countries. The results of the 2020 'For responsible businesses—protecting human rights and the environment' initiative have shown that environmental matters can henceforth attract a popular majority.[42] Due to the fact that the creation of stronger environmental standards through ordinary legislation is hampered by the conservative majority in the Swiss parliament, the Swiss people increasingly resort to popular initiatives to enhance environmental protection. Besides the two initiatives that will be voted on in 2021, there are several others that the Federal Council is currently discussing.[43] Constitutional amendments concerning the environment will thus remain part of the public debate in the years to come.

35 Federal Supreme Court rulings 1C_627/2020, 1C_631/2020, 1C_633/2020, 1C_639/2020 and 1C_641/2020 (23 March 2021). Moreover, the Court did not admit two further complaints, see Federal Supreme Court judgements 1C_713/2020 and 1C_715/2020 (23 March 2021).

36 Federal Supreme Court rulings 1C_627/2020, 1C_631/2020, 1C_633/2020, 1C_639/2020 and 1C_641/2020 (23 March 2021). Moreover, the Court did not admit two further complaints, see Federal Supreme Court judgements 1C_713/2020 and 1C_715/2020 (23 March 2021).

37 Stéphane Grodecki, 'La démocratie directe en Suisse au XXIe siècle—une évolution nécessaire' [2013] ZRS 132/II 112.

38 Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft*, (3d edn, Stämpfli Verlag AG, 2011) 547.

39 Several other countries, such as France, Belgium and Germany, have adopted similar provisions in ordinary legislation. The indirect counter-proposal equally regulates the issue in a federal law. In Switzerland, the cantons of Ticino and St. Gall already banned the wearing of a niqab in 2013 and 2018 respectively. Cst. In Switzerland, the cantons of Ticino and St. Gall already banned the wearing of a niqab in 2013 and 2018 respectively.

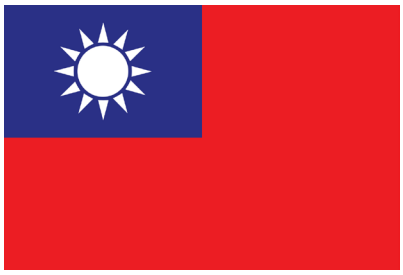
40 FF 2019 2895 'Message relatif à l'initiative populaire «Oui à l'interdiction de se dissimuler le visage» et au contre-projet indirect (loi fédérale sur la dissimulation du visage)' (15 March 2019).

41 Several other countries, such as France, Belgium and Germany, have adopted similar provisions in ordinary legislation. The indirect counter-proposal equally regulates the issue in a federal law.

42 This trend has started as early as in the 1950ties, with the 'Rheinau' initiative, which was however rejected. Other important environmental initiatives included the 'Rothenthurm' initiative (accepted in 1987), the 'alpine protection' initiative (accepted in 1994) or the 'second home' initiative (accepted in 2012).

43 The 'biodiversity' initiative, the 'landscape' initiative and the 'glacier' initiative are currently pending at the Federal Council.

Taiwan



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I. INTRODUCTION

Taiwan's last constitutional amendments were enacted in 2005. Between then and now, there were several attempts proposed by either the political parties or civil society to amend the Constitution, but to no vail. In 2020, there emerged a new campaign for amending the Constitution again.

After winning her second presidential election in January 2020, President Tsai Ing-wen, in her inauguration speech delivered on May 20, 2020, called on the Legislative Yuan (parliament) and the society for another constitutional amendment. Under Taiwan's current Constitution, only the Legislative Yuan may introduce a constitutional amendment bill, to be approved by a national referendum.[1]

This article will first discuss these amendment proposals that have been introduced by the Legislators as of the end of 2020, with special emphasis on the issues concerned and their potential impact on the existing Constitution, if adopted. Then this article will comment on the odds of these proposals being adopted by the Legislative Yuan and approved by the national referendum eventually.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In response to the calling by President Tsai in May, the Legislative Yuan formally established an *ad hoc* Committee on Constitutional Amendments on October 6, 2020. This Committee consisted of 39 members from all of the four party caucuses based upon their proportion of seats in the Legislative Yuan. Accordingly, 22 seats went to the ruling Democratic Progressive Party (DPP) , which, out of courtesy, set aside two seats to invite two independent Legislators to join this Committee. Fourteen members belonged to the main opposition party, Nationalist Party (aka Kuomintang or KMT). The second opposition party, the Taiwan People's Party (TPP), had two seats and the smallest opposition party, the New Power Party (NPP), had one seat. Under Additional Article XII of the existing Constitutional Amendments, it needs at least 29 Legislators (one-fourth of the total 113 members) to introduce an amendment bill. Cross-party proposals are allowed. Any Legislator may initiate or co-sign more than one bill, together with his/her own or other party's members.

As of the end of 2020, there have been 38 bills pending before the Committee on Constitutional Amendments.[2] Among them, 17 bills were initiated by the DPP Legislators, 15 bills by the KMT, two by the TPP and one by the NPP. With the support of the DPP members, two independent Legislators initiated three bills.

The abovementioned 38 bills touched upon a wide spectrum of constitutional issues ranging from rights to powers. There were 24 bills concerning the individual rights and/or fundamental state policies.[3] A total of 14 bills all were proposed to lower the voting age, from the current 20 to 18. They stood out as the highest number of bills on a single issue and were endorsed by all of the four party caucuses and independent Legislators in the Legislative Yuan. Another 10 bills covered a variety of human rights and policy issues, from express recognition of human dignity and the digital right, to youth development and children education, to protection of animals, bio-diversity, climate and environment, and to transitional justice.

On the issues regarding the separation of powers, there were a total of 16 bills. Six of them were about the President, five about the Legislative Yuan and five about the abolition or reorganization of two peculiar governmental branches, the Examination Yuan and the Control Yuan (equivalent of Ombudsman).[4]

Finally, there was a bill proposed to lower the procedural threshold for constitutional amendments. Under current Taiwan's Constitution,

1 Additional Article XII of the Constitution provides "Amendment of the Constitution shall be initiated upon the proposal of one-fourth of the total members of the Legislative Yuan, passed by at least three-fourths of the members present at a meeting attended by at least three-fourths of the total members of the Legislative Yuan, and sanctioned by electors in the free area of the Republic of China at a referendum held upon expiration of a six-month period of public announcement of the proposal, wherein the number of valid votes in favor exceeds one-half of the total number of electors. The provisions of Article 174 of the Constitution shall not apply." As the total numbers of the Legislative Yuan is 113, it thus needs at least 29 members to introduce an amendment bill.

2 For the list of the proposed amendment bills, *see* The Legislative Yuan, 'The List of Pending Bills before the Committee on Constitutional Amendments of the 10th Legislative Yuan' (in Mandarin) <https://www.ly.gov.tw/Pages/Detail.aspx?nodeid=44173&pid=202974> accessed 15 February 2021.

3 Chapter XIII of Taiwan's Constitution (Articles 137-169) includes a list of written constitutional policies on six domains: national defense, foreign policies, national economy, social security, education and culture, and frontier regions. Additional Article X of the Constitution contains 13 Paragraphs amending many provisions in the said Chapter XIII. Except for the two Sections regarding national defense and foreign policies, the remaining four Sections of Chapter XIII and Additional Article X all address issues directly or indirectly related to individual rights.

4 Current Taiwan's Constitution provides for five separate branches at the central government level, named the Executive, Legislative, Judicial, Examination and Control Yuan, respectively. These five bills aimed to transform the existing Five-Power to a more common Three-Power governmental structure.

TABLE: BREAKDOWN OF THE AMENDMENT BILLS BY THE PARTIES AND BY THE ISSUES

Party Issue	DPP	KMT	Independent	TPP	NPP
Voting Age	Nos. 2, 3, 5, 7, 9, 23, (24), 30 & 31	Nos. 1, 4 & 10,		No. 21	No. 38
Other Human Rights	No. 36: Human Dignity	No. 17: Digital Right No. 26: Children Education	No. 8: Human Dignity		
Fundamental State Policies		No. 15: Budget for Youth Development No. 18: Climate and Environment No. 19: Bio-diversity and Animals Protection No. 34: Financial Discipline	No. 27: Transitional Justice	No. 37: Animal Protection	
President	No. 22: Candidacy Age	No 13 & 14: Annual Address to the Legislative Yuan No. 20: Oath No. 14: Term of Office No. 25: Presidential System			
Legislative Yuan	No. 29: Election of Indigenous Members No. 32: Hearing and Investigative Powers	No. 12: Confirmation of Premier and Veto-Override Threshold Nos. 16 & 26: Confirmation Thresholds for the Appointment of the Justices/Members of the Judicial, Examination and Control Yuans			
Abolition of the Examination and Control Yuans	Nos. 6, 11, 24, 33 & 35				
Amendment Threshold			No. 28		

* Please refer to the numbering of each bill in 'The List of Pending Bills before the Committee on Constitutional Amendments of the 10th Legislative Yuan' in Footnote 2

Source: The Legislative Yuan

an amendment bill needs to be approved by at least three-fourths of the total members of the Legislative Yuan (*i.e.*, 85 out of 113), and sanctioned by a national referendum with more than one-half of the total number of electors[5] voting in favor, so that it may formally become an effective constitutional amendment. This high threshold was adopted in the Amendments of 2005, which remain the last amendments thus far.

As of December 31, 2020, all of the above 38 bills were still pending before the Committee on Constitutional Amendments of the Legislative Yuan, waiting to be reviewed. Please refer to the following Table for the breakdown of these 38 bills.

5 In the last presidential election held in January 2020, there were a total of 19,312,105 eligible electors nationwide. *See* Central Election Commission of Taiwan, '2020 Presidential and Vice Presidential Election' <https://web.cec.gov.tw/central/cms/101_election_14/6970> accessed 15 February 2021.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

After the failed attempt to amend the Constitution in 2015, campaigns for another constitutional amendment finally gained its momentum after the 2020 presidential election. Reelected President Tsai decided to respond to the campaigns for constitutional reforms waged by the civil society and small political parties for years. After completion of the pension reforms for the military, civil servants and public school teachers, the legalization of same-se marriage, and the legislation to settle the ill-gotten party assets of the KMT during the authoritarian era, as well as well as the launching of massive economic and social welfare reforms, and judicial reforms, among others, in her first term, President Tsai is now in a less-burdened and more secured position to promote constitutional reforms.

In fact, some of the amendment issues have been campaigned for years by the civil society. The two procedural requirements mandated by the current amendments, *i.e.,* approved by the three-fourth of the total Legislators and endorsed by an absolute majority of the total eligible voters, have long been regarded as extremely rigid thresholds that have effectively obstructed all attempts for constitutional amendments since 2005. There has been a strong demand for lowering these two thresholds.

On the issues concerning the separation of powers, there have been persisting criticisms against the current Five-Power structure of the central government. Both the Examination Yuan and the Control Yuan have long been considered redundant, as the functions of the Examination Yuan[6] can be re-assigned to the Executive Yuan and those of the Control Yuan[7] may be re-attributed to the Legislative Yuan. If so reformed, the structure of central government may be transformed from the more complicated Five-Power to a much simplified Three-Power framework, more in line with the design of the (horizontal) separation of powers in most modern democracies.

There is another issue regarding the separation of powers that remains constantly debated in Taiwan: the choice among the presidential, semi-presidential and parliamentary system. Against the dictatorial leadership of late President Chiang Kai-Shek and the following authoritarian control under his son President Chiang Ching-Kuo between 1945 and 1988, the then opposition and the civil society preferred a parliamentary system in place of the abused presidential system. It was an understandable and rational policy preference in that context. Beginning from the Constitutional Amendments of 1991, Taiwan's once-omnipotent presidency has gradually evolved into an office that has been checked and balanced more effectively under a new constitutional democracy. The Constitutional Amendments of 1997 further transformed the government structure to a semi-presidential system. Under the current Constitution, the President shares much of his policy-making powers with the Premier, though the President retains the unilateral power to appoint and replace the Premier without being subject to the confirmation by the Legislative Yuan. However, many still debate over the wisdom of the current semi-presidential system in practice and in theory. After losing the presidential election in March 2000, the then opposition KMT, still a majority party in the Legislative Yuan, began to campaign for a switch to the parliamentary system so that the President may only appoint the Premier upon confirmation by the Legislative Yuan. It is not surprising that the opposition KMT proposed to restore the confirmation power of the Legislative Yuan over the presidential appointment of the Premier again in 2020. Moreover, the KMT Legislators also proposed several bills aiming at further constraining the presidential powers by raising the confirmation threshold of the Justices of the Constitutional Court and other high-ranking offices appointed by the President from the current simple majority to a two-thirds majority of the Legislative Yuan, among others. Nevertheless, the KMT seemed somehow divided on the choice of the parliamentary system. There was another KMT-initiated amendment bill that proposed to adopt a U.S. model of the presidential system. It remains to be watched how serious the KMT is on this issue, or the KMT simply proposed it as a bargaining chip.

The thorniest issues should be those amendments involving Taiwan-China relations. The Constitution of Taiwan was originally promulgated in China in 1947. Then the Republic of China government under the KMT rule extended the application of its Constitution to Taiwan, of which China took administration from the defeated Japan in October 1945 pursuant to General Order No. 1 issued by the Office of the Supreme Commander for the Allied Powers on 2 September 1945.[8] In October 1949, the Chinese Communist Party's Red Army defeated the KMT-led Nationalist Army and established the People's Republic of China government as the new Chinese government. The said Chinese Constitution of 1947 was abolished. However, the defeated KMT government relocated itself to Taiwan in December 1949 and continued to apply the said Constitution of 1947 in Taiwan. Since the Constitution of Taiwan was originally enacted to govern China as its supreme law of the land, it is not surprising that it included many specific provisions related to the historic, social, geographic and demographic contexts of China.

Since the beginning of democratization and constitutional reforms in early 1990s, the then opposition DPP and many social leaders have been advocating to either adopt a brand new Constitution of Taiwan in place of the said Chinese Constitution of 1947, or transform the latter into a genuine Taiwan's Constitution via constitutional amendments. From 1991 to 2005, there were seven Constitutional Amendments to the said Constitution of 1947, modelled after the U.S. Amendments. Though these Amendments were written carefully to eliminate or weaken many institutional designs or elements with Chinese characteristics, the original text of the said Constitution of 1947 remains on the book. That explains why there is still a strong demand for adopting a new Constitution for Taiwan.

Given the external constraints imposed mainly by the military threat of China, the likelihood of writing a brand new Constitution for Taiwan in place of the current Constitution is not high, if possible. The

6 Additional Article VI, Section 1 of the Constitution provides that "The Examination Yuan shall be the highest examination body of the State, and shall be responsible for the following matters; and the provisions of Article 83 of the Constitution shall not apply: (1) Holding of examinations; (2) Matters relating to the qualification screening, security of tenure, pecuniary aid in case of death, and retirement of civil servants; and (3) Legal matters relating to the employment, discharge, performance evaluation, scale of salaries, promotion, transfer, commendation and award of civil servants."

7 Additional Article VII, Section 1 of the Constitution provides that "The Control Yuan shall be the highest control body of the State and shall exercise the powers of impeachment, censure and audit; and the pertinent provisions of Article 90 and Article 94 of the Constitution concerning the exercise of the power of consent shall not apply."

8 General Order No. 1 (2 September 1945) in U.S. Department of State, *Foreign Relations of the United States, 1945*, vol. VI: The British Commonwealth, The Far East (Washington 1969) 635-639. Under this Order, Japanese military forces within China (excluding Manchuria) and French Indo-China North of 16 degrees North latitude also surrendered to Generalissimo Chiang Kai-Shek of China.

more feasible option will be to transform the current Constitution via amendments in a piecemeal and incremental process. Along this line, it may be considered to enact new Amendments to suspend or delete all Constitutional provisions referring or related to China, or expressly limit the application area of the Constitution to Taiwan (including its adjacent islands and those under its effective control) only. That said, it seems unlikely that such amendment bills to these effects, if proposed, will receive enough support within the Legislative Yuan and cross the high threshold for constitutional amendments.

Taiwan Constitutional Court once issued two decisions (called "J.Y. Interpretation") involving the unamendable rules in the Constitution. Interpretation No. 499 of 2000 declared the Amendments of 1999 unconstitutional for violating several unwritten unamendable rules of the Constitution.[9] In Interpretation No. 721 of 2014, the Taiwan Constitutional Court upheld the constitutionality of the Amendments of 2005.[10] In spite of the above two Interpretations, this author believes all of the amendment proposals pending the Legislative Yuan, if adopted, will not be ruled unconstitutional, except for those touching upon the change of Taiwan's state title or redefinition of the reach of state territory, and the like. In reality, the odds of getting such amendment bills adopted is very low. However, it would be an intriguing question to examine whether such reforms to these effects, if enacted, should be considered constitutional dismemberments, instead of amendments.

IV. LOOKING AHEAD

In an interview made in September 2020, Legislative Speaker You Si-kun once indicated that there had been a tentative consensus among caucuses of all parties to hold a constitutional amendment referendum in conjunction with the local government elections in late November or early December of 2022. Additional Article XII of the Constitution mandates that the amendment bills must be announced at least six months before an amendment referendum ballot is held. Accordingly, the Legislative Yuan has to approve the amendment bills by 29 March, 2022 in order to achieve this goal.[11]

Nonetheless, there remain both legal and political barriers to be overcome. Section 23 of Taiwan's Referendum Act, amended in June 2019, provides that the referendum day shall be scheduled to be held on the fourth Saturday of August, once every two years starting from 2011. It is all but impossible that the Legislative Yuan will pass any amendment bill before 27 February, in order to hold an amendment referendum on 22 August, 2021 as scheduled by the said Section 23. For an amendment referendum ballot to be held together with the local government elections in the winter of 2022, the Legislative Yuan needs to amend the Referendum Act again to exempt the amendment referendums from being governed by the said Section 23.

The political barrier lies in the odds of a referendum bill approved by at least three-fourth of the total Legislators (85 out of 113) present at a meeting attended by at least three-fourths of the total members of the Legislative Yuan. As the opposition KMT has 38 seats (about 34% of the total members), it alone can block any amendment bill from being approved, even without any additional vote support by other opposition or independent Legislators.

Politically and ideologically, the DPP and the KMT share few agreements or common goals on the constitutional amendment issues. For the pro-independence DPP, its top priorities include the lowering of the voting age, lowering of the amendment thresholds, and reorganization of the central government from the current Five- to Three-Power structure via abolition of both the Examination Yuan and the Control Yuan. For the pro-unification KMT, the said second and third priority issues, if adopted, will further erase the remaining Chinese characteristics of the current Taiwan's Constitution and pave the way for transforming Taiwan's Constitution into a more genuine Taiwanese Constitution. It is quite doubtful that the KMT will cooperate and reach a deal with the DPP on these two issues.

It seems that the proposal to lower the voting age remains the only feasible goal in the real politics. This proposal has gathered overwhelming support from the society, particularly among the younger generations. Each political party caucus of the Legislative Yuan proposed one or more bills of similar effect. Neither the ruling nor the opposition parties dare to sail against the wind. As to the bills on the lowering of amendment threshold and reorganization of the central government, the KMT members are somehow still divided or inclined to oppose both, despite the DPP will give its best shot to accomplish both proposals. If the KMT eventually chooses not to decouple the voting age proposal from the other two proposals, then even the voting age bill will become an empty shot in the end.

That said, there is still a slim possibility that the proposals to lower the amendment threshold and to reorganize the central government might be two more shots to be hoped for. The odds of both or either proposal being placed on the referendum ballot will depend upon whether the two major parties, the DPP and the KMT, can eventually cooperate again and strike a deal on the amendment bills, as in the case of the latest amendment in 2005.

V. FURTHER READING

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Thailand

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I. INTRODUCTION

The demand for constitutional reform is advocated mainly by pro-democratic protesters, known as the People's Movement 2020. Constitutional reform is one of the three demands: (1) constitutional amendment, (2) the prime minister's resignation, and (3) the reform of monarchy.[1]

The drafting of the 2017 Constitution was supervised by the National Council of Peace and Order (NCPO), the junta that grabbed power in 2014. One of the key purposes of the charter is to enable the NCPO leader, General Prayuth Chan-ocha, to transform into a democratically indirect-elected prime minister. It thus contains several mechanisms that give a political party backed up by the NCPO unfair leverage in an election.[2] Despite the widely suspicious approval in the 2016 referendum, its unpopularity remains obviously noticeable.

Due to the highly controversial and unprecedented electoral rules and the questionable umpire, which were indirectly designed and cherrypicked by the junta, the 2019 election was deeply suspicious of being rigged in favor of Prayuth.[3] The election fails to bring a government that is inclusive and responsive to the highly polarized polity. The authoritarian nature of Prayuth cabinet meant that it was occupied with curbing dissents while disastrously handled COVID-19 pandemic.[4] Fury over Prayuth's incompetence fueled the People's Movement protest, the largest Thailand has ever witnessed. Several political parties expressed their interest and support for constitutional amendments. Seven drafts were altogether proposed. One draft in particular was initiated by more than 100,000 voters.

The government did not reject these proposals outright. In fact, it even proposed its own amendment. Unfortunately, this seems to be a delay-and-derail tactic. While the Parliament agrees to create a committee to carry out an amendment, it ignores those demands by the People's Movement.[5] Gradually the public's interest in the amendment process fades away. The reform becomes even more complicated when the government insists that the reform agenda must not address any issue relating to the monarchy, which is actually the heart of the ongoing movement.[6] The reform might be captured to serve the government's agenda even further.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Because one of the main objectives of the 2017 Constitution was to facilitate the junta's transition, not to restore genuine electoral democracy, the charter contains several provisions that the people later found opposable. The new electoral system—the mixed-membered proportional representation (MMP) with a single ballot—where ballots cast in a constituency is used to define the winner of that constituent election as well as, taken the number of votes cast in 350 single-member constituencies altogether, to proportionately allocate the remaining 150 MP seats across political party lists.[7] This electoral system is intended to favour mid-size new parties, such as the Palangpracharath Party or the PPRP, the NCPO's proxy, and create a fractious weak government. Plus, it imposed unrealistically stringent requirements for a party's continuation. Before the election, most members of the Constitutional Court and other watchdog agencies, i.e. the Election Commission (EC) were appointed by the National Legislative Assembly, whose members had been selected by the Junta, so the PPRP was able to dominate the landscape, as many believe.[8] For example, while all electoral accusations against the PPRP were either dismissed or suspended by the EC, two main parties in the opposition—The Thai Raksachat Party and the Future Forward Party—were dissolved by the Constitutional Court based on the EC's application.[9] The 250 senators, which were supposed to be non-partisan, were also handpicked by the junta.[10] These senators were granted privilege to vote for a prime minster alongside the 500

1 คณะประชาชนปลดแอก—Free People, 'Announcement of Free People', *Facebook Official Page* (12 August 2020) at <https://www.facebook.com/FREEPEOPLEth/posts/116256496854008> accessed 11 February 2021.
2 Eugenie Merieau, 'Thailand in 2018: Military Dictatorship under Royal Command' in Daljit Singh & Malcolm Cook (eds) *Southeast Asian Affairs 2019* (ISEAS-Yusof Ishak Institue 2019) 329-330.
3 See Jacob I. Ricks, 'Thailand's 2019 Vote: The General's Election' (2019) 92 Pacific Affairs 443.
4 Khemthong Tonsakulrungruang & Rawin Leelapatana, 'Health before Rights and Liberties: Thailand's Response to COVID-19' *VerfBlog* (8 May 2020) at <https://verfassungsblog.de/health-before-rights-and-liberties-thailands-response-to-covid-19/> accessed 11 February 2021.
5 iLaw Charter Draft Favoured by Protesters Rejected' *Bangkok Post* (18 November 2020) at <https://www.bangkokpost.com/thailand/politics/2021823/ilaw-charter-draft-favoured-by-protesters-rejected> accessed 11 February 2021.
6 Randy Thanthong-Knight, 'Thai Parliament Rejects Monarchy Reform Through Charter Overhaul' *Bloomberg* (18 November 2020) at <https://www.bloomberg.com/news/articles/2020-11-18/thai-parliament-to-vote-on-constitution-as-protests-turn-violent> accessed 16 February 2021.
7 Richard Albert et al., *2018 Global Review of Constitutional Law* (I·CONnect-Clough Center 2019) 310
8 'NLA votes in approval of final two election commissioners' *Bangkok Post* (22 November 2018) at <https://www.bangkokpost.com/thailand/politics/1580318/nla-approves-final-two-election-commissioners> accessed 25 February 2021.
9 Const. Ct. Decision 3/2562 (2019) & Const. Ct. Decision 5/2563 (2020).
10 Ricks, *Thailand's 2019 Vote*, 449.

MPs.[11] This arrangement means that the senators would be the real determinative factor in choosing the prime minster. Unsurprisingly, the senate unanimously voted for Prayuth Chan-ocha, despite the fact that his PPRP came the second in the 2019 election.[12] Moreover, the rules and procedure for constitutional amendment also precisely require at least one-third of senators' approval in the first and third readings.[13] Without this, any amendment to the Constitution is impossible, even in case of the unanimity of MPs' votes. Lastly, the 2017 Constitution entrenched the junta's influence in Thai politics by introducing the national strategic committee and the national strategic plan, which last for 20 years and legally bound incoming government to follow.[14] In conclusion, the 2017 Constitution provided layers of guarantee that the NCPO would be able to either rule or at least domineer Thai politics long after disguised democracy resumes.

Politicians on both sides had been considering amending the 2017 Constitution since before its enactment. The anti-junta camp, such as Thaksin's Pheu Thai and the Future Forward, were aware that the Constitution worked intentionally not in their favour, creating an unfair playing ground.[15] They would also like to stop the junta's meddling with politics. Even those allies of the NCPO felt that the electoral rules were unfriendly and costly.[16] Pro-democratic activists had been campaigning for a new constitution. But it is the People's Movement mass demonstration that trigger the sense of crisis and urgency, spurring all sides to act.

Two factors must be considered when setting a reform agenda. First, how urgent does the party regard about an amendment? Must a reform be carried out at once? If not, will a delay bring chaos and violence? Second, how comprehensive should a reform be? Is the 2017 Constitution beyond any rescue? Does it need only a quick fix? Or should it be a complete overhaul of the charter? An amendment on an electoral system would be mere technical and therefore more agreeable for most involving parties as not addressing any structural problem. In contrary, a reform over the Constitutional Court and watchdog agencies will surely challenge the status quo. It strikes at the heart of the junta's main political weapon, as many argue. Fierce debate and fighting are ensured. An overhaul, of course, seems like the more sustainable solution to Thailand's tumultuous politics but that would take considerable time. Most likely a new constitution is needed so another constitution drafting assembly (CDA) has to be convened and spend many more months while the protest is escalating. A quick fix, amending a few contentious sections, can be done rather quickly but it is less likely to be acceptable to the angry public. Sooner or later another constitution is inevitable.

The government coalition is not in hurry as they would still be in power until 2023. Traditionally, an immediate resignation after an amendment coming into effect is required. While the PPRP prefers the status quo, its coalition parties want a more reasonable electoral system. Thus, MPs in the coalition propose a new constitutional drafting assembly whose members and agendas are manipulable.

The opposition is torn between setting up a CDA to overhaul the charter, an ideal path that risks being captured by the government, or a more pragmatic option of amending a few crucial sections e.g., electoral system and the senators' privilege. Moreover, due to stringent procedural requirement, the opposition has to make a compromise in order to gain support from the senators. As a result, the opposition ally proposes five amendment proposals, one of which was the creation of a CDA, and the remaining fours about (1) the cancellation of senators' privilege in selecting PM, (2) the reintroduction of a simpler and fairer electoral system, (3) the alteration of senators' recruitment method from being appointed to being directly elected by the people, and (4) the abolition of all the existing NCPO's orders which hamper democratic processes and people's rights and liberties.

The seventh proposal is a popular initiative led by iLaw, an NGO working on law and internet freedom. The proposal is an attempt to combine the best of both short- and long-term strategies. It includes the following revisions; (1) a prime minister must only be a duly elected MP, (2) senators must be elected and have their privilege stripped down; (3) incumbent constitutional court judges and watchdog agency members must be dismissed en masse and new sets must be chosen; (4) the procedure of nominating the judges and members must be re-designed to be more transparent; (5) all national strategic plans must be abolished; (6) an amnesty clause for the NCPO must be rescinded; (7) the parliamentary procedure for adopting a new constitutional amendment should require only an absolute majority of its members; and (8) a new constitution must be drafted by the CDA, all whose members are directly elected. Most of the points could have been amended in a fairly short time and a constitution could have been ready within the next 12 months.

Another point of contention is regarding the limit of an amendment. As the protest shifts to address the issue of the monarch, King Vajiralongkorn, who was accused by protesters of meddling with politics, wasting taxpayers' money on frivolous lifestyle, and masterminding abduction of anti-royalist activists,[17] there grew a demand for monarchical reform, mostly concerning wealth management and constraints on the monarch's role in politics. These demands actually have little to do with a constitutional amendment since little is written in the formal constitution. The meddling, if any, is the result of actual power relation, not law. Still, the government insisted that a proposal must explicitly forbid any change in the constitution as regard the monarchy, some even forbid any discussion thereon.[18] On the contrary, the protesters and many opposition MPs argued that such topic was allowed by the constitution itself.[19] The debate reflected the government's paranoid as well as the protesters' understanding about the purpose and limit of a constitutional amendment upon the actual politics.

Yet, the Parliament, under the suspected domination of Prayuth, showed no awareness of the people's enthusiasm. On 17 November, when the Parliament convened to consider the seven proposals, protesters gathered outside the Parliament. Suddenly police began firing

11 Thai Constitution B.E. 2560 (2017), sec 272.

12 Office of Election Commission, ข้อมูลสถิติการเลือกตั้งสมาชิกสภาผู้แทนราษฎร พ.ศ.2562 [Statistcs and Figures from 2019 Election], p. 333.

13 2017 Constitution, sec 291. See Khemthong Tonsakulrungruang, 'Constitutional Amendment in Thailand: Amending in the Spectre of Parliamentary Dictatorship' (2019) 14 The Journal of Comparative Law 173, 186.

14 2017 Constitution, chpt 16.

15 'Opposition campaigns for charter rewrite' *Bangkok Post* (9 August 2019) <https://www.bangkokpost.com/thailand/politics/1727563/opposition-campaigns-for-charter-rewrite> accessed 25 February 2021.

16 'Chuan does not recognize this Constitution, but disagrees with dumping it' *Thai PBS* (5 November 2019) at <https://www.thaipbsworld.com/chuan-does-not-recognize-this-constitution-but-disagrees-with-dumping-it/> accessed 25 February 2021.

17 'Why are Thai students protesting against King Vajiralongkorn?' *Al Jazeera* (26 August 2020) at <https://www.aljazeera.com/news/2020/8/26/why-are-thai-students-protesting-against-king-vajiralongkorn> accessed 11 February 2021.

18 See Termsak Chalermpalanupap, *Constitutional Amendments Stalled: Thailand's New Normal Politics Deadlocked* (ISEAS Yusof-Ishak Institute 2020).

19 Id.

tear gas and rubber bullets into the unarmed crowd.[20] Plus, organized militias assaulted protesters. Fighting ensued, lasting from mid-afternoon to late evening when the police finally retreated. The senseless violence infuriated and confused the people. Despite the chaos, the parliament, especially the senate, voted to delay making any decision for another months, setting up a sub-committee to study the proposals further. When the Parliament reconvened, almost all MPs in the government coalition and senators adamantly voted to accept only the government's and opposition's proposal for a new Constitutional Drafting Assembly.[21] Other draft amendments, thus, lapsed.

Remarkably, the highly democratic proposal put forward by iLaw was rejected at the first reading.[22] The outright rejection of popular initiative at the very early stage showed a disrespect for the people's endeavor. Indeed, this initiative received over 120,000 signatures of eligible voters, well over two times the minimal number required for a constitutional initiative to be considered by the Parliament.[23] Those signatures were collected manually, and this is one of a few popular initiatives that successfully make their way into the parliament.

At the committee stage, the amendment was captured by professional politicians of conservative faction who intended to make the most use of the charter, for their own political advantage. The committee's meeting was held in private and no public record is allowed.[24] When the amendment reached the parliamentary second reading on February 9, 2021, instead of considering the draft, the PPRP MPs and senators passed a motion to submit the matter to the Constitutional Court for consideration, arguing that the Parliament has the power to merely amend some provisions of the constitution, not the power to substitute it with a new one.[25] Since the creation of the CDA will eventually lead to the promulgation of a new charter; in their view, the draft as such goes beyond the parliamentary authority. However, the opposition and those supporting the process of drafting a new constitution rebut it by explaining that although the CDA's end product is a substituting charter, it still shares the core identity of the 2017 Constitution. In fact, the draft clearly stipulates that all first 24 provisions of the 2017 Constitution, covering Chapter 1—the general fundamental principles, e.g., form of the State, Head of the State, regime of the State government, and Chapter 2—the Monarchy, cannot be altered whatsoever.[26]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Given the content-based approach distinguishing between constitutional amendment, constitutional dismemberment, and a new, actual constitution as suggested by Richard Albert,[27] a constitution to be drafted by the CDA is in the formal sense a new constitution, undoubtedly. Arguably, it can be categorized as dismemberment in the substantive sense as well. Basically, the composition, establishment and working process of the CDA are defined by an amendment passed in accordance with rules and procedure set out in the 2017 Constitution. Any key provision concerning the 2017 Constitution's identity e.g., the Monarchy, are explicitly shielded from any alteration. In other words, the creation, operation and power of the CDA are still procedurally and substantively subject to the derived constituent power. On the other hand, the setting-up of CDA cannot be deemed a mere constitutional amendment because it rearranges the constitutional structure in the matter of constitution-amending body by transferring the amending power from the Parliament to the CDA. Likewise, the CDA, once established, will have the power to alter any key constitutional right or any feature of the constitutional structure. For instance, the 2017 Constitution's features for preserving the junta's powers and legacies e.g., senators' privilege in selecting PM, the national strategic plan, or the guarantee of the constitutionality of the junta's orders can be undermined, or even abolished. These would amount to 'a dismemberment of a constitutional structure', according to Albert's classification.

The 2017 Constitution is the first Thai charter clearly entrusting the Constitutional Court with the power of judicial review of a constitutional amendment. Under Section 256, once a draft amendment has passed the Parliament's third reading and before PM submits it to the King for his signature, one-tenth of MPs, senators or both may file a petition to the President of their chamber, requesting him or her to forward their petition to the Court. The Constitutional Court can make decision on the following issues: *(i)* whether the draft amendment is contrary to Section 255—the eternity clause—and, thus, unenforceable; or *(ii)* whether it falls into any of the category of amendment that a referendum is required.[28]

Previously, under the 2007 Constitution, the Court had intervened in the amendment process on three occasions without any clear-cut enabling provision.[29] The Court justified its intervention on the right to resist undemocratic overthrowing of the government.[30] Section 68 of the 2007 Charter, which is the predecessor of Section 49 of the current one, was interpreted to grant *locus standi* to any person knowing of an act to overthrow the democratic regime of government.[31] If so, the Court had accordingly the power to order cessation of such act and even dissolve any political party involving therein. The Court ruled the first case in 2012, setting a precedent that an amendment to the Constitution carried out in a parliamentary proceeding may lead to, or be counted as, an act to undermine democracy with the king as head of state, although then dismissing all the applications on the ground that all allegations were "merely predictions or concerns and, thus, too

20 'Thailand Protests: Moe than 40 injured as clashes rock Bangkok' *BBC* (18 November 2020) <https://www.bbc.com/news/world-asia-54976112> accessed 16 February 2021.

21 'iLaw Charter Draft Favoured by Protesters Rejected' *Bangkok Post* (18 November 2020) at <https://www.bangkokpost.com/thailand/politics/2021823/ilaw-charter-draft-favoured-by-protesters-rejected> accessed 11 February 2021.

22 Id.

23 'Draft Constitution submitted to parliament with 100,732 signatures' *Prachatai English* (23 September 2020) at <https://prachatai.com/english/node/8810> accessed 25 February 2021).

24 'Constitutional amendment runs into a 'closed door' *Prachatai* (23 January 2021) at <https://prachatai.com/english/node/9033> accessed 16 February 2021.

25 'Govt accused of charter ploy' *Bangkok Post* (9 February 2021) <https://www.bangkokpost.com/thailand/politics/2064723/govt-accused-of-charter-ploy> accessed 16 February 2021.

26 See Termsak, *Constitutional Amendments Stalled*.

27 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 85.

28 2017 Constitution, sec 256 (8) (9)

29 See Khemthong Tonsakulrungruang, 'Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict' (2017) 26 Washington International Law Journal 247, 259-263.

30 Const. Ct. Decision 18-22/2555 (2012), p 21-23; 15-18/2556 (2013) p 11-12; 1/2557 (2014) p. 4.

31 Even though the exact wording of Section 68 and a minute of the drafting committee shows that an application to the Court on the matter has to be screened and endorsed by Attorney General, the Court treated the AG screening stage as a mere preliminary fact-checking. Const. Ct. Decision 18-22/2555, p. 21

remote".[32] The precedent that the Court has power to decide on the issue of procedural and substantive constitutionality of a constitutional amendment was later confirmed in two subsequent cases. There, the Court referred as its philosophical and principled support to the Rule of Law, the separation of powers, the distinction between the constituent power and constituted powers, and the democratic principle.[33] Then, the Court held unconstitutional both draft amendments. While the ruling of unconstitutionality on the procedural grounds sounds reasonable; in our view, that on the substantive does not.

On procedural issues, the Court pinpointed manifest errors in the procedure for considering a draft amendment. First, the draft distributed for deliberation was not exactly the same as the one having been signed and submitted by a group of MPs and senators.[34] Second, the parliamentary debate and meeting to call for votes were rashly adjourned,[35] and too-short period for their members to submit a motion for amendment proposal was imposed.[36] These facts were considered as the abuse of majority position, i.e. curtailing minority MPs' right to effectively participate in a parliamentary debate and deliberation. Third, there were evidences of proxy voting by the government MPs; stealthy proxy voting was deemed a dishonest conduct and, thus, rendered invalid the parliamentary resolution.[37]

On substantive ones, it found that the core substances of the draft amendment were contrary to the fundamental principles and purpose of the 2007 Constitution and, therefore, constituted 'acts to enable all the respondents to acquire national government powers by means which were not provided under the Constitution'.[38] The Parliament then had two chambers: the House of Representatives and the Senate. All members of the former and half of the latter came from election, whereas the other half from selection. A draft amendment that would require all the latter to be elected by people would, in the Constitutional Court's view, undermine the independence and differentiation between these two chambers. Accordingly, it would destroy the characteristic and essence of the bi-cameral system of parliament which supposes to check and balance the other.[39] In our opinion, this line of reasoning is undemocratic and unacceptable. The change from selection to election is democratically much better.

Further, another draft amendment would ease the requirement and process for the Executive to engage in international treaty making. Under the 2007 Constitution, before entering into negotiation on a variety of certain international commitments, the government had to, inter alia, arrange a public hearing, explain details to the Parliament, and propose its negotiation's framework for parliamentary approval.[40] This was impractical, so the then government would like to narrow down the types of treaty that all these mechanisms had to be observed. In the Constitutional Court's ruling, the amendment as such would impair the Parliament's power, destroy the check-and-balance equilibrium according to the principle of Separation of Powers, and deprive people of their right to know and take part in a public hearing.[41] Accordingly, the Constitutional Court equated the amendment with the act of acquiring state power by unconstitutional means. In our view, the equation is overstatement. An overly broad interpretation as such would in effect bar almost all amendments on the power of a constitutional organ.

These decisions let us to conclude that the Thai Constitutional Court's role is most properly classified to be counter-majoritarian.[42]

IV. LOOKING AHEAD

At present, there are two established channels for the Constitutional Court to hear and decide a dispute over a constitutional amendment: (i) a submission by one-tenth of MPs, senators or both after the draft constitution having passed the third reading and before submitting it to the King under Section 256 and (ii) an application by a person knowing of an unconstitutional act to gain state power under Section 49. However, as mentioned earlier, the PPRP MPs (the junta's party) and senators (the junta's appointee) passed a motion to submit the matter to the Constitutional Court for consideration by invoking Section 210 (2) that the Court has the power to decide a jurisdictional dispute among the Parliament, the Cabinet and other constitutional organs. The PPRP MPs are in fact challenging the constitutionality of the draft amendment having been submitted by themselves to the Parliament. This is simply another delay tactic. But the Constitutional Court accepts the matter for consideration.[43] In our view, the claim has not been ripe for judicial review because it rests upon a contingent future event that may not occur, e.g. the draft may receive fewer votes than required in the third reading and, accordingly, lapse. Moreover, there is already a specific channel and step for submitting such an issue to the Constitutional Court.

The amendment to establish the CDA to draft a new constitution should not be unconstitutional on the following reasons. Basically, no procedural impropriety has been observed so far. The setting up of the CDA whose members will be elected by the people is democratic and fair. Although it can draft a new constitution, Chapter I on general principles and Chapter II on Monarchy of the draft is mandated to be preserved as same as those of the 2017 Constitution. The remaining part thereof must conform to the eternity clause. At the proper moment, the Constitutional Court still have the power to review whether the new draft follows these two requirements. And most importantly, to become effective the amendment to establish the CDA and later the CDA's draft constitution must be approved in a national referendum and receive the king's signature, although it is still unclear if he has an absolute veto power.

However, the 2012 decision has a dictum that once a constitution is approved by a referendum, any amendment that would create a CDA and eventually lead to the establishment of a new charter, must first pass a referendum as well.[44] This idea is based on the distinction between the constituent power and the constituted power, that is, the Parliament, a constituted organ, has no power to amend the constitution to the extent that changes a constitutional structure. Although the Parliament in amending it is exercising the derived constituent power, such power has limit. This time, the dictum might take a real effect.

32 Const. Ct. Decision 18-22/2555, p. 25-26.
33 Const. Ct. Decision 15-18/2556, p. 19-22; Const. Ct. Decision No. 1/2557, p. 11-14.
34 Const. Ct. Decision 15-18/2556, p. 22-24.
35 Const. Ct. Decision 15-18/2556, p. 24-25; Const. Ct. Decision 1/2557, p. 16-17.
36 Const. Ct. Decision 15-18/2556, p. 25-26; Const. Ct. Decision 1/2557, p.17-18.
37 Const. Ct. Decision 15-18/2556, p. 26-28.
38 Const. Ct. Decision 15-18/2556, p. 31; Const. Ct. Decision 1/2557, p. 25.
39 Const. Ct. Decision 15-18/2556, p. 30.
40 See Khemthong, *Entrenching the Minority* 256-257.
41 Const. Ct. Decision 1/2557, p. 23.
42 Luis Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 The American Journal of Comparative Law 109.
43 The Office of Constitutional Court, Press Release No. 4/2564 (18 February 2021).
44 Const. Ct. Decision 18-22/2555, p.23.

The Gambia

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I. INTRODUCTION

The Gambia's return to democracy after twenty-two years of authoritarian rule under former dictator Yahya Jammeh marked a turning point. In December 2016, Yahya Jammeh was finally voted out of office, and coalition opposition leader, Adama Barrow, voted in. On 19 January 2017, Adama Barrow was sworn in as President of the Republic of The Gambia. This historic development presented a new blueprint for the transition from an authoritarian regime to a democratic dispensation. Currently, The Gambia is undergoing national reconciliation and comprehensive constitutional reform processes to lay the foundations for a genuine and durable democracy anchored in a new constitutional framework. This report mainly focuses on the drafting of a new Constitution to replace the current 1997 Constitution, which is central to the transition process to a democratic country.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The Gambia adopted its Second Republican Constitution in 1997 following a referendum held on the draft constitution on 8 August 1996. This followed the 22 July 1994 *coup d'ĕtat* led by Yahya A.J.J Jammeh, a young army lieutenant, who overthrew the Government of President Jawara of the People's Progressive Party (PPP), who had dominated political life from pre-independence to 1994.

Following the first post-coup presidential elections in September 1996, the new Constitution came into force in 1997 with Jammeh, who won the 1996 Presidential elections, as the first President of the Second Republic. Not only was the Jammeh regime notorious for the disregard of the rule of law, but he further distinguished himself by a series of amendments to the supreme law with largely anti-human rights and undemocratic provisions

The Gambia began a constitutional building process in 2018 to set aside the 1997 Constitution which was amended more than 50 times by former dictator Yahya Jammeh. Given that 2020 witnessed the culmination of the constitutional replacement project, proposed constitutional reforms were mainly limited to issues around the 2020 Draft Constitution. There was only one amendment made to section 139 on the qualification of a person to be appointed as judge of the High Court.[1]

THE MOVEMENT FOR A NEW CONSTITUTION

Constitutional change and rebuilding of the foundations for good governance and democracy had been a campaign promise of the ruling coalition.[2] Consequently, a key pillar of the new 'National Transitional Justice Programme' became the formulation of a new constitution which led, in December 2017, to the establishment of the Constitutional Review Commission (CRC). The formal process of reviewing the 1997 Constitution and drafting a new one started in June 2018 with the appointment of eleven members (five of whom are women, one of which was the Vice-Chairperson) as Commissioners of the CRC.

The CRC had a two-fold mandate: first, to review the 1997 Constitution and draft a new one, and second, to prepare a report on the draft constitution. The CRC used a participatory and consultative approach to solicit the views and opinions of Gambians and relevant stakeholders about constitutional issues they wished to see addressed in their new constitution. The CRC kicked-off the review of the 1997 Constitution by preparing an 'Issues Document' which contained a comprehensive list of 369 questions and issues on which public opinion was sought. The Commission undertook an initial nationwide tour, which began in November 2018, followed by further consultations in early 2019 as well as additional household and online surveys. It also engaged in dialogue with various actors including political parties, central and local government institutions and civil society organisations. In addition, the CRC consulted with Gambians in the diaspora in Europe, United States, United Kingdom, Saudi Arabia and other African countries.

Following these consultations as well as some in-depth research, the Commission produced a draft constitution, published on 15 November 2019. The CRC then embarked on a second and final nationwide, public consultation tour, this time to make people aware of and to solicit feedback on the 2019 version of the draft constitution. On 30 March 2020, the CRC submitted the 'Final Draft Constitution and Report' to the President. In line with requirements in the 1997 Constitution, the Constitutional Promulgation Bill was twice published in the Government Gazette (first on 28 May and then on 28 August 2020), whereafter it was introduced in the National Assembly (section 226). The Bill was tabled before the National Assembly on 14 September 2020.

1 Constitution (Amendment) Act, 2020.

2 Extracted from S Nabaneh "Attempts at Constitutional Reform in The Gambia: Whither the Draft Constitution?' *IACL-AIDC Blog* (29 September 2020). Available at https://blog-iacl-aidc.org/2020-posts/2020/9/29/attempts-at-constitutional-reform-in-the-gambia-whither-the-draft-constitution.

The Draft Constitution introduced several measures aimed at enhancing and strengthening democracy and good governance. This includes a presidential term limit, limits on executive power, measures to ensure greater political inclusion of marginalised groups (including women, youth and persons with disabilities) and a comprehensive Bill of Rights chapter, compliant with international and regional human rights standards. The public had high hopes for significant constitutional change. The personalised politics of the recent past, the undemocratic provisions in, and frequent amendment of, the 1997 Constitution and a complete disregard of the rule of law by the former President left Gambians with a desire for meaningful change. Sadly, however, these hopes were dashed when the Bill did not receive the requisite majority vote in the National Assembly.

WHITHER THE DRAFT CONSTITUTION?

In 2020, The Gambia witnessed the stalling of the constitutional replacement project. On 22 September 2020, the National Assembly rejected[3] the proposed Constitution Promulgation Bill, 2020 which was aimed at promulgating a new constitution and repealing the 1997 Constitution. Twenty-three lawmakers in the National Assembly voted against the Bill, while thirty-one supported it, in an Assembly with fifty-eight members. This was, however, not a big enough majority to meet the threshold requirement of three-quarters of members needed to proceed to the Third Reading stage for effect constitutional change. The Draft Constitution could not, therefore, be put to a referendum. As noted elsewhere on why the Bill did not pass, partisanship and extreme political polarization killed the draft. There was not enough proactive engagement in consensus building by all political actors.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In response to the growing local and international calls for a new constitution, in October the Cabinet[4] asked the Minister of Justice to initiate a new dialogue process among stakeholders to revive the constitution building process again. Since then, there have been engagements with political parties and civil society with a view to bringing about consensus on the contentious issues of the final draft. Thus, in light of the desire for a new constitution, there are current engagements led by the Former President of Nigeria, Goodluck Jonathan, to support the consensus-building process on the contentious issues for political actors and civil society leaders. These contentious issues include the counting of the current term of the incumbent president for the purpose of the two-term limits, and the requirement for legislative approval of ministerial appointments.

The contentious issues have seemingly been resolved except for whether Barrow's current term should be counted as his first term of office or not. Jonathan has made three trips to The Gambia since December 2020. The last attempt was on 8 March 2021, and efforts to resurrect the rejected draft constitution failed again. This came after some political party leaders were recently flown to Nigeria to continue talks in a different environment.

3 See: https://allafrica.com/stories/202009230283.html
4 See: https://thepoint.gm/africa/gambia/headlines/cabinet-tasks-justice-minister-to-initiate-dialogue-on-draft-constitution

The 1997 Constitution does not provide for term limits even though when it seized power in 1994, the Armed Forces Provisional Ruling Council (AFPRC) did criticize the 1970 Constitution for lacking such a provision. The Military Junta claimed that the lack of a provision on term limits resulted in Jawara being in power for 30 years. The original 1997 draft Constitution contained a provision on term-limit for the president. However, the Military Junta removed the presidential term limit before the 1996 Draft Constitution was subjected to a referendum. The absence of term limits enabled ex-president Jammeh to stand and win elections four consecutive times and even to seek a fifth term unsuccessfully in December 2016. It further provided him the opportunity to misrule the country and govern horribly against his people for twenty-two years.

According to the Memorandum of Understanding (MOU) of the Coalition, one of the key goals of the Coalition government is the institutionalization of term limits. In assuring Gambians that his government will introduce a two-term limit of 5 years[5], President Barrow stated that "with term limits, any president that comes will serve appropriately and have respect for the laws of the land because the person will know that there is an end to his or her tenure." However, the retroactive nature of the provision is serving as the major stumbling block for the constitution replacement project.

The constitution replacement project has been stalled by the tension with the proposed unamendable rule of the two-term limit to be codified in the envisaged new constitution. The proposed "retroactive" clause in the rejected Draft Constitution remains the stand-off issue of contention mainly between the President's party, National Peoples' Party (NPP) and the main opposition party, United Democratic Party (UDP). On the one hand, the NPP argues that that the two-term Presidential limit, related to President Barrow, cannot begin retrospectively in 2017, as proposed in the rejected draft constitution, insisting that the two-term limit must start from 2021. On the other hand, the UDP takes the position that the two-term limit be started from 2017.

Whatever path The Gambia eventually takes, based on key lessons learned in the rejection of the 2020 Draft Constitution, there is a need for coherent and rigorous safeguards against partisan manipulation and interests over national interest. Ultimately, the constitution-making process should be an inclusive one that 'strengthens national unity and a sense of common, national identity.'[6]

ROLE OF THE COURTS

The Gambian judiciary had tried to assert its powers and authority by taking a bold stand against some of the amendments that were made to the Constitution during twenty-two years of authoritarian rule by former President Jammeh. It has, on some occasions, risen to the challenge of its responsibility to determine matters before the courts, even if they affected the other arms of Government such as the National Assembly. For instance, it played a role in ensuring that the rules of political competition are respected, and a culture of legality emerges which results in respect for the rule of law. In this regard, the Gambian judiciary prevented the National Assembly from arbitrarily changing laws or policies to suit its convenience.

5 See: https://allafrica.com/stories/201701110566.html
6 Y Ghai 'The Role of Constituent Assemblies in Constitution Making,' (2012) International Institute for Democracy and Assistance (IDEA) p. 3.

In *Hon. Kemesseng Jammeh v the Attorney General*,[7] the Supreme Court invalidated a substantial part of the Constitution Amendment Act,[8] which aimed at amending several provisions of the 1997 Constitution. The Act was passed by the Parliament on 15 May 2001 and assented to by the President on 25 May 2001. In this case, section 1 (1) of the Constitution, which was an entrenched clause was amended without due process. The procedural requirements for amending the Constitution as provided in section 226(7) of the Constitution was not adhered to. The legislature acted "ultra-vires" by amending section 1 (1) of the Constitution without a referendum being held, which must be conducted and supervised by the Independent Electoral Commission (IEC) as provided by section 226 (5) of the 1997 Constitution. A consequence of this was the dismissal of the then Supreme Court Judge, Justice Hassan Jallow, now the Chief Justice, after presiding over this case in which the Government lost to its political opponent in 2001.

The new democratic dispensation under the Barrow government has since 2017 made several amendments to the 1997 Constitution, some of these were questionable constitutional amendments (in terms of procedure and motivation). On 28 February 2017, the National Assembly passed the Constitution (Amendment) Bill 2017. The Bill amended section 141(2)(b) of the Constitution in extending the age at which a Supreme Court judge should vacate his or her office from seventy to seventy-five years. In addition, the amendment also removed the upper age limit of sixty-five for holding office as President provided under section 62(1)(b).

However, the initial process of amendment by the Government was erroneous as it didn't follow the proper procedures. In a televised statement[9], the former Attorney General and Minister of Justice Abubacarr Tambadou advised President Barrow not to sign the two amended constitutional provisions because the procedures for amendment were misconceived. The proposed amendments to sections 62(1)(b) and 141(2), which are not entrenched provisions fall within the ambit of section 226 (2) whose procedures were not followed. Section 226 (2) provides:

> (a) before the first reading of the Bill in the National Assembly, the Bill is published in at least two issues of the Gazette, the latest publication being not less than three months after the first, and the Bill is introduced into the National Assembly not earlier than ten days after the latest publication;
> (b) the Bill is supported on the second and third readings by the votes of not less than three quarters of all the members of the National Assembly.

This sort of unconstitutional amendment has a history in The Gambia. In several cases, such as *Independent Electoral Commission v Attorney General*[10] and *Jammeh v Attorney General*,[11] the Supreme Court per Jallow JSC (as he then was) held that:[12]

> [g]iven the supremacy of the Constitution over all other laws and acts or omissions of public authorities, it is important for those involved in the exercise of legislative authority of the state to exercise due care and caution to ensure that such legislation is consistent with the provisions of the Constitution and that it is enacted with regard to the requirements and procedures of the Constitution.

The Minister took full responsibility for the error and promised to take actions to remedy the situation as well as avoid such occurrence in the future. He further underscored the urgent need to do a comprehensive review of the Constitution. This public apology and acceptance of responsibility showed the Government's responsiveness to the concerns of citizens who lamented about the non-adherence to constitutional procedures in passing the amendments.

However, the constitutional debate erupting from this was not only in the procedures, but the motivation underlying the removal of the upper age limit. People saw this removal as an amendment for the benefit of one person. The controversies surrounding this came about after the news of the appointment of Mrs Fatoumatta Jallow Tambajang as the Vice President as of 23 January 2017. The public discussion that ensued focused on whether Mrs. Tambajang was qualified to be appointed Vice President as it was deemed that she was above the constitutional age of sixty-five years at the time. Subsequently, a press statement from the Spokesperson of the President responded to the outcry[13] stating that the attention of the President had been drawn to the constitutional provisions and that although Mrs. Tambajang was well suited for the job, the provisions of the Constitution will be respected.

Interestingly, in the interim the Barrow government never appointed a vice president because it was widely believed that he still intended to appoint her, and so she was appointed overseer of the office since March 2017. With the eventual passing of the Constitutional (Amendment) Act[14] on 25 July 2017 and assented to by the President on 27 July 2017, Mrs. Tambajang was sworn in as Vice President on 9 November 2017.

IV. LOOKING AHEAD

THE FUTURE OF THE GAMBIAN CONSTITUTION-BUILDING PROJECT

In 2021, The Gambia is witnessing a revitalization of the constitution-making project in some form given that the rejection of the bill on its merits means that Gambians will not get to see this version of the 2020 draft constitution in a future referendum. Given the highly politicized nature of the contentious issues, there is a need for proactive engagement in consensus building by all political actors. The mediation efforts led by the Former President of Nigeria is premised on the goal of bringing political parties together to develop consensus and possible re-tabling of a revised Draft Constitution in the National Assembly, with a possible referendum in June 2021. It is hoped that this will happen before the planned 2021 December Presidential elections. Nevertheless, the future of the constitution-making process

7 *Hon. Kemesseng Jammeh v the Attorney General* (2001) Supreme Court, Civil Case No 4.
8 No 6 of 2001
9 See: http://www.kaironews.com/constitutional-amendment-ag-admits-procedural-error/
10 Gambia Law Reports [1997-2001] GR 630.
11 (2002) AHRLR 72 (GaSC 2001)
12 As above, para 32.
13 See: https://www.news24.com/news24/Africa/News/gambias-new-govt-mired-in-controversy-over-appointed-vps-age-20170125
14 See: https://static1.squarespace.com/static/5a7c2ca18a-02c7a46149331c/t/5a8461229140b7736f7e4f91/1518625061069/Constitution+%28Amendment+%29+Act%2C+2017.pdf

is uncertain as it remains unclear whether, in the case of agreement amongst political actors, the National Assembly will approve such a revised draft, as well as the referendum process.

V. FURTHER READING

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Gambian Constitutional law database: www.lawhubgambia.com

Turkey

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I. INTRODUCTION

In Turkey, the most recent constitutional reforms were adopted in 2017. These reforms included significant structural changes regarding the executive, legislature, and judiciary. These reforms created fundamental transformations of the Turkish Constitution's pre-change structure. For this reason, they can be defined as "constitutional dismemberments." The 2017 constitutional reforms extended the President's power so that: he could act as head of the state vested with the complete authority of the executive; appoint the vice president and ministers; dissolve the Parliament; declare a state of emergency; make the budget, send it to the Parliament; and issue presidential decrees. The most remarkable change introduced through the presidential decrees is the President's first-hand authority to create general legal norms without a requirement of prior authorization by the Parliament. The 2017 constitutional reforms denoted transition to presidentialism and institutionalized the decline in control and constrain mechanisms over the executive.

Compared to 2017, in terms of constitutional reforms, the year 2020 passed off quietly. There were no constitutional reform proposals, constitutional amendments, or dismemberments. The judicial review of Presidential decrees can be presented as the most important development regarding constitutional reforms. These reviews showed that the President's decree power is not unlimited. The Turkish Constitutional Court (TCC) introduced a two-stage review process for presidential decrees and clarified the reserved areas in favor of the legislative organ.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2020 there were no proposals for constitutional reforms, constitutional amendments, or dismemberments.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Turkish Constitutional Court is the sole body in Turkey that can conduct a judicial review of the constitutional amendments and examine them only with regard to their form. In 2020 there was no constitutional amendment or dismemberment; for this reason, we cannot show any judicial review examples for constitutional reforms adopted. Yet in 2020, by reviewing the subject matter of various Presidential decrees for the first time, the constitutional court showed that the President's decree power is not unlimited, which had an indirect impact on the Constitution's structure. Presidential decrees had been the primary legal tools for implementing the new government system as the normative foundations of all ministries were nulled by the Legislative Decree number 703 dated July 9 2018, officially titled as the Legislative Decree to Amend Some Laws and Legislative Decrees in order to Comply with the Constitutional Amendments. Following the said legislative decree, the structure of ministries and the administrative organization was reshaped with presidential decrees. In 2020 thirteen new presidential decrees were introduced, and nine of them intended to amend the existing administrative structure either by creating new institutions or making changes in the formations of existing ones.

The Turkish Constitutional Court's first judgments related to the review of presidential decrees were published in the Official Gazette on May 12, 2020. These three judgments introduced a two-stage review process for presidential decrees and showed the constitutional court does not recognize a reserved area where the legislative organ is not authorized to make any laws. The first judgment reviewing the presidential decrees is the judgment Merits (M) 2018/125, Decision (D) 2020/4; this was followed by judgments M.2019/31, D.2020/5, and M.2019/78, D. 2020/6. In paragraph 12, common to all three judgments, the TCC stated that the President is not authorized to issue presidential decrees about the subjects which are already covered by existing laws. In common paragraph 13, the court reiterates that the President should observe authorization rules of the Constitution while issuing presidential decrees. If a presidential decree does not comply with the said rules, it would not be constitutional, even in the case that its content fully complies with the Constitution. Consequently, the TCC considers the authorization rules of the Constitution as a preliminary issue in the judicial review of presidential decrees. The court can only review the content if the President is authorized to issue presidential decrees in that specific subject. If the presidential decree is about a subject within the exclusive power of the Parliament it would be automatically unconstitutional according to the provisions of Article 7 of the Constitution stating "Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated"[1]. The court continues to use the authority test in its more recent judgments.

1 Fatma Didem Sevgili Gencay, 'Juridictional Review of Presidential Decrees: First Decisions-First Impressions' (2020) 33 Union of Turkish Bar Associations Review 1, 5.

The issue of reserved areas and the question of whether the Constitution prevents the Parliament from legislative activities in certain areas, especially in organizing the administration, is a heated debate in Turkey. According to Article 104/17 of the Constitution "No presidential decree shall be issued on the matters which are stipulated in the Constitution to be regulated exclusively by law. No presidential decree shall be issued on the matters explicitly regulated by law. In the case of a discrepancy between provisions of the presidential decrees and the laws, the provisions of the laws shall prevail. A presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same matter." In its first three judgments related to the judicial review of presidential decrees, the constitutional court accepts the view that the Parliament has a reserved area of norm creation, but these judgments do not provide a clear answer on whether the President has a reserved area of norm creation that is protected against the interference of the Parliament. Judicial review of the content was a secondary issue in the Constitutional Court's judgments in 2020. Consequently, a satisfactory collection of case law about the presidential decrees and the new government system is not available yet.

Adopting the Kelsenian Model, the TCC decides only on constitutional issues and conducts both abstract and concrete review of norms. The constitutionality of laws, Presidential decrees, and the Turkish Parliament's rules is challenged directly before the constitutional court through an annulment action. This procedure enables the TCC to examine the constitutionality of a law without reference to any specific case. In the Turkish Constitution, the constitutional court's authority over constitutional amendments is limited. Article 148 of the Constitution restricts the constitutional court's power to review constitutional amendments only to procedural grounds.[2] Until 2008 the TCC did not invalidate any constitutional amendment, but in a ruling on June 5 2008, it invalidated a constitutional amendment changing Articles 10 and 42 of the Constitution. The purpose of the amendment was to abolish the ban on wearing headscarves for female university students. The TCC first considered the question of its competence. It ruled that incompatibility with the first three unamendable articles was a matter of substance and a matter of procedure. Examining the case on substantive grounds, the TCC concluded that the abolition of the headscarf ban was against the principle of secularism mentioned in the unamendable Article 2 and that, therefore the constitutional amendment was unconstitutional. This ruling of the Constitutional Court was highly controversial.[3] Since its establishment until 2010, the TCC played counter-majoritarian role. Yet, it adopted a self-restraining approach in the past ten years that can be explained with the court-packing and court curbing practices used by the Justice and Development Party *(Adalet ve Kalkınma Partisi, AKP)* government.[4]

IV. LOOKING AHEAD

Between 2016 and 2018 Turkey was under the rule of state-of-emergency. Although the state-of-emergency was lifted in July 2018, the adverse effects of the emergency ruling continued. In 2020 we witnessed significant constitutional developments: the removal and imprisonment of three opposition members of the Parliament and many democratically elected municipal mayors; amnesty grant that released ninety thousand convicts, including notorious mafia lords; the government's non-compliance with the ECHR decision urging the release of the opposition leader Selahattin Demirtaş; and the amendment of attorneyship law that introduced the possibility of establishing multiple bars. Given all these developments, we can expect another turbulent year. In terms of constitutional reforms, the upcoming years would be of greater significance. As this report is written (February 2, 2021) President Erdoğan stated that it is time to draft a new constitution. Many critics noted that this is a strategic move for power protection. Turkey is scheduled to hold parliamentary and presidential elections in 2023. By changing the Constitution, the President may try to secure its power and rule. If this debate turns into a start of a constitution-making process, we believe that significant developments will await us in the upcoming years.

V. FURTHER READING

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2 Tarık Olcay, 'The Unamendability of Amendabile Clauses: The Case of the Turkish Constitution' in Richard Albert and Bertil Oder (eds.) *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer, 2018)

3 Ergun Özbudun 'Judicial Review of Constitutional Amendments in Turkey' (2009) 15 European Public Law, 533

4 Ergun Özbudun, 'Judicial Review of Constitutional Amendments in Turkey: The Question of Unamendability' (2019) European Journal of Law Reform,

Ukraine

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I. INTRODUCTION

Year 2020 — with heated political competition, change of cabinets, COVID-19 lockdowns, and economic crisis — was not a year of new constitutional initiatives in Ukraine. Instead, President Volodymyr Zelensky, Cabinet of Ministers, and the ruling majority[1] have continued with the constitutional changes that were instigated in 2019 or before.

In regard with the Constitution and its amendments, the president and the ruling majority focused on three major priorities in 2020. First of all, the government continued with the approval process of the constitutional amendments initiated by President Zelensky in 2019. Second, the government persisted with the approval of the norms envisaged in attempts of the constitutional amendments initiated by President Petro Poroshenko (2014-2019) and Prime Minister Volodymyr Groysman (2016-2019) in 2018-2019. Finally, government attempted increasing informal political control of executive branch of power over judiciary and over the Constitutional Court of Ukraine (CCU) — a process that influences application of the fundamental constitutional principles in Ukraine.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Ukrainian government was involved into the constitutional amendments and into the process of the constitutional control in three modes in 2020:

1) to continue with the approval process of the constitutional amendments initiated by President Zelensky in 2019;
2) to persist with the approval of the constitutional amendments initiated by President Poroshenko and Prime Minister Groysman in 2018-2019; and
3) to increase informal political control of the executive over the CCU and judiciary.

First, using the momentum of their landslide victory in the presidential and early parliamentary elections, Volodymyr Zelensky and the SPP-led majority in the parliament have initiated a number of constitutional amendments that partially were promised during the electoral campaign in spring-summer 2019. In order to make these amendments, new government needed to go through a lengthy procedure envisaged by the Constitution of Ukraine. Thus, the process of amendments started in the fall 2019 and was continued in the following year.

There are three packages of the constitutional amendments that are important for the presidential team, but in 2020 their final approval was postponed due to epidemic emergency and lack of votes in the VR (300 votes needed for amending the Constitution). The first package includes amendments to Article 93 of the Constitution of Ukraine that added the citizens to the list of those legal subjects who have the right for legislative initiative.[2] The second package comprises of the amendments to Article 106 of the Constitution that are to increase presidential powers in regard with the newly established anti-corruption institutes.[3] In 2015-20 there was a number of anti-corruption governmental bodies created whose heads, after public selection procedure, were appointed by President; however this is not listed in the exhaustive list of presidential power in the Constitution. Third package includes amendments to Article 131-2 of the Constitution of Ukraine that aim at abolishing the lawyer's monopoly in courts.[4] All three packages remain among the government's priorities and may be finally approved in 2021.

More work on the constitutional amendments was done in regard with the parliamentary reform. First of all, the amendments to Articles 76 and 77 of the Constitution of Ukraine were preliminarily approved on February 4, 2020. These changes envisage reduction of the number of the members of parliament from 450 to 300, as well as change of parliamentary electoral system from the mixed to the proportional.[5] The act's final approval is scheduled for 2021.

There is also a set of amendments to Article 85 of the Constitution that provides the parliament with the bigger flexibility to create analytical and advisory bodies that would support legislative work of the

1 The pro-presidential 'Servant of the People' Party (SPP) has got the majority of mandates (above 226 mandates needed for a majority) in the Verkhovna Rada (parliament of Ukraine, VR) in a result of the early parliamentary elections of 2019.

2 Draft Law "On Amendments to Article 93 of the Constitution of Ukraine (concerning the legislative initiative of the people)" [No. 1015 as of 29.09.2019].

3 Draft Law "On Amendments to Article 106 of the Constitution of Ukraine (concerning consolidation of powers of the President of Ukraine and the Director of the State Bureau of Investigation)" [No. 1014 as of 29.08. 2019].

4 Draft Law "On Amendments to the Constitution of Ukraine (concerning the abolition of the lawyer's monopoly)" [No. 1013 as of 29.08.2019].

5 Draft Law "On Amendments to Articles 76 and 77 of the Constitution of Ukraine (on reducing the constitutional composition of the Verkhovna Rada of Ukraine and consolidating the proportional electoral system)" [No. 1017 as of 19.12.2019].

VR.[6] The parliament has preliminarily approved this act on January 14, 2020. On February 5, 2020, the parliamentary committee on legal policy recommended the VR to adopt the draft law in final reading. Further approval of this law is expected in 2021.

Also the amendments to Article 81 of the Constitution that aim at higher control of party over the MPs elected through the party list, as well as at widening of the possibilities to deprive MPs of their mandates, were not yet approved neither in the first, nor in the final reading.[7] Nonetheless, the parliamentary reform remains a priority for current government and most probably be continued in 2021.

Second, the Zelensky's government continued with the constitutional amendments initiated by the previous administration. Two of such initiatives are worth to be mentioned in this report. First of all, amendments to Article 80 of the Constitution of Ukraine that stipulated decrease of immunity of Ukrainian MPs were enforced on January 1, 2020.[8] The CCU has preliminary examined these amendments back in 2018.[9] In spite of heated political competition with ex-President Poroshenko, Zelensky's administration accepted this amendment as integral part of its parliamentary reform.

The second initiative dated before 2019 is connected with the attempts of Ukrainian government to change the governance structure and administrative-territorial division of Ukraine. During the presidency of Petro Poroshenko, government attempted to amend the Constitution and to change provisions describing governance of administrative-territorial units. However, neither under President Poroshenko, nor under President Zelensky, government had succeeded in having 300 votes in favor of the reform. On January 17, 2020, President Zelensky, witnessing lack of support for the reform, withdrew the draft of decentralization amendments to the Constitution.[10] After the withdrawal, the government made numerous changes to the legal acts since they had enough votes in the Rada for this. In particular, amendments were made to seven laws on decentralization, local government, local communities, and related issues. Not all of these legal changes are in harmony with the Constitution, but so far there was no ruling of the CCU on that matter. Also, the Cabinet of Ministers, not in agreement with — or even contrary to — the constitutional principles of local self-government, approved 23 orders that changed the number, the territory, and administrative centers of the rayons in Ukraine on June 12, 2020. This was subsequently supported by the parliament's resolution.[11] These legal and administrative acts have caused the situation in which the local elections result of 2020 have questionable (from constitutional point of view) legitimacy. This may hinder the stability of legal and political order in Ukraine in future.

Third, the past year has also been marked by conflict between Presidency and executive branch, on one side, and the CCU and judiciary, on the other side. On October 27, 2020, the CCU approved decision that some norms of the Law "On Preventing of Corruption" and related article of the Criminal Code are unconstitutional.[12] Thus, several legal norms that regulated anti-corruption and corruption prevention mechanisms in Ukraine had to be canceled. For example, criminal liability for submitting false data in the e-declaration were recognized as too strong a punishment, and for this reason and the e-assets declarations system should have been suspended. Also, the CCU found that the National Agency for the Corruption Prevention (NACP), as part of an executive branch, had the possibility to oversight judiciary through the e-assets declarations, which contradicts the Constitution. Also, the investigations of National Anti-Corruption Bureau (NABU), executive agency with the power to investigate on all high officials including judges of usual courts and of the CCU, were to be closed as contradictory to the Constitution.[13]

President Zelensky, Security Council, SPP faction, leadership of the major anti-corruption governmental agencies, considerable part of anti-corruption NGOs, and G7 Embassies in Kyiv protested against this decision.[14] Indeed, the CCU ruling abolished norms important for the anti-corruption reform and for the international obligations of Ukraine, e.g. the EU-Ukraine visa liberalization action plan, EU-Ukraine macro-financial assistance agreements, Ukraine-IMF memorandums of understanding, as well as the recently (in 2019) added Constitutional article on the EuroAtlantic direction of Ukraine's development. Also, there are reasons to believe that there were unresolved conflicts of interests among the CCU judges in the process of decision-making.[15]

In this context, the executive branch's institutes have made decisions that either violated the decision of the CCU or sabotaged the work of the Constitutional Court. Presided by President Zelensky Security Council approved the submission of an urgent draft law to the parliament that would declare the CCU decision "insignificant (that does not create legal consequences)."[16] The Cabinet of Ministers has issued an order to restore the activities of the National Agency for Prevention of

6 Draft Law "On Amendments to Article 85 of the Constitution of Ukraine (concerning Advisory, Advisory and Other Subsidiary Bodies of the Verkhovna Rada of Ukraine)" [No. 1028 as of 29.08.2019].

7 Draft Law "On Amendments to Article 81 of the Constitution of Ukraine (concerning additional grounds for early termination of powers of a People's Deputy of Ukraine)" [No. 1027 as of 29.08. 2019].

8 Law "On Amendments to Article 80 of the Constitution of Ukraine (concerning the immunity of people's deputies of Ukraine)" [No. 27-IX as of 30.09.2019].

9 The Resolution of CCU "On the constitutional appeal of the Verkhovna Rada of Ukraine to issue an opinion on the compliance of the draft law on amendments to Article 80 of the Constitution of Ukraine" [2018 N 2-v / 2018] as of 19.06.2018.

10 Draft Law "On Amendments to the Constitution of Ukraine (on decentralization of power)" [No. 2598 as of 13.12.2019].

11 Resolution of the Verkhovna Rada "On the formation and liquidation of districts" [No. 3650 as of 17.07.2020].

12 The CCU Decision "On the case of the constitutional petition of 47 people deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law "On Prevention of Corruption" and the Criminal Code of Ukraine" [No. 1-24/2020 (393/20) as of 27.10.2020].

13 This was also endorsed by the Venice Commission's Opinion (p. 6); see: Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe "On The Legislative Situation Regarding Anti-Corruption Mechanisms Following Decision No. 13-R/2020 of the Constitutional Court of Ukraine" [No. 1012/2020 as of 09.12.2020].

14 For example, see: "At an extraordinary government meeting with the participation of the President, a decision was made to unblock the work of the NACP", President of Ukraine official website, 29.10.2020, https://www.president.gov.ua/en/news/na-pozachergovomu-zasidanni-uryadu-za-uchasti-prezidenta-uhv-64901; "Constitutional Court of Ukraine has struck a blow to anti-corruption reform—NABU statement", The NABU official website, https://nabu.gov.ua/en/novyny/constitutional-court-ukraine-has-struck-blow-anti-corruption-reform-nabu-statement; The G7 Ambassadors call, 29.10.2020, https://twitter.com/G7AmbReformUA/status/1321807180522205184; The anticorruption NGOs open call "Open letter to Venice Commission President Gianni Buquicchio", 04.12.2020, https://antac.org.ua/en/news/open-letter-to-venice-commission-president-gianni-buquicchio/.

15 See: the Venice Commission's Opinion, p. 7.

16 Draft Law "On Restoration of Public Confidence in Constitutional Proceedings" [No. 4288 as of 29.10.2020]; this draft law was not approved by the parliament though, instead the VR came up with more balanced legal act.

Corruption and of the e-assets declaration.[17] None of these acts were in full agreement with the Constitution of Ukraine.

The conflict between the Presidency, parliamentary majority, and executive branch, on one side, and the Constitutional Court and some judiciary self-governing bodies, on the other side, was progressing all November and December 2020. The CCU Head and some of its members for put under scrutiny of the State Investigation Bureau (SIB) and the NABU. Activists protested near the CCU building and the homes of the judges.

In less conflicting manner, the parliament approved less radical bill that reinstated works of the NABU and the NACP, as well as the punishment for the false declarations — but excluded their direct oversight over the judges.[18] This act provided an opportunity for the CCU and government establish a dialogue that would lessen the tensions and found legal and political means to establish constitutional order and proper functionality of the anti-corruption institutions, as advised in the Venice Commission's opinion.

However, the conflict deepened when President Zelensky issued decree on the suspension of the CCU Head Oleksandr Tupytsky from the position of a CCU judge for a period of two months.[19] Since that time, the head of the CCU was not allowed into the office by the CCU guard, which is part of the executive branch. The constitutionality of such presidential decree is highly dubious.

This conflict prevented the CCU from making decision on constitutionality of many legal acts pending such decision.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As we described it in the Part II, the constitutional amendment process was very slow in 2020. New President and his team have started many reforms — including constitutional reform — in the fall of 2019, and the subsequent year was expected to be the period of finalization of these reforms. However, political and economic conditions were changing priorities of government and decreased parliamentary support to President's reforms. Also, the team built by Volodymyr Zelensky as anti-system politician lacked expertise that would let both fight with the epidemic and continue reforms.

However, Zelensky's electoral promise to reduce membership of parliament and decrease the MPs immunity has moved closer to the final approval. The parliamentary reform is partially connected with the proper constitutional amendment, but it also had an element of dismemberment. These amendments are popular among the voters in Ukraine, and Zelensky's electorate was aware about their candidate's plan to reduce the parliament and put MPs under stricter control. The steps done so far show that the Rada will be smaller (which also reflects decrease of Ukraine's population), and the MPs will lose immunity for indemnity. They will also be under stronger control of parties, not constituencies, as envisaged by emerging proportional electoral system.

But emerging new parliament will be a weaker legislature in comparison with the executive that now developed new law-enforcement agencies (NABU, SIB etc.) and stronger oversite over public officials. In the case of political crisis (equal to "The Orange Revolution" (2004-5) or the Euromaidan (2013-14)) the big Rada with MPs having strong immunity was a place that provided fighting political groups with the platform to debate and find political and legal solutions. The small Rada with more vulnerable MPs would most probably not be able to provide Ukrainian political system with the same conflict-resolution capacity. Therefore, the democratically supported parliamentary reform leads the nominally existing parliamentary-presidential republic to a disbalance between the weaker legislature and the stronger executive, and thus, to worsening of the liberal democratic outcome.

Another rising constitutional issue flows from the change in balance of power between the central and local governments. This change is going on in avoidance of the constitutional change. Ukrainian political system is less and less coordinates with the fundamental Constitutional principles and norms. In a short-term perspective, such avoidance does provide reformers with ability to continue decentralization and try modernizing administrative-territorial system of Ukraine. Nevertheless, the ongoing change of country's political constitution without proper amendment of the written Constitution and without following proper amendment process creates direct contradiction between the state of affairs and the Constitution, as well as delegitimating of political order. It also shows how weak and inefficient is the existing constitutional control.

The founders of Ukrainian state have come to a consensus on the Constitution very late. Ukraine was the last among post-Soviet Eastern European states and established its constitution in 1996 when struggle between President, executive, parliament, judiciary, and local self-governance has reached long delayed balance. The Constitutional Court of Ukraine was designed — with the proper description in the Constitution — to be a guardian of this balance. According to the Part XII of the Constitution, the CCU combines a countermajoritarian role with a representative role; an enlightened role was also expected from the CCU, but the Court has never been able to implement it.

In the course of Ukraine's post-Soviet history, the CCU showed itself as a weak institution due to (a) constant strong informal influence of Presidents upon it, and (b) because the CCU could react on the alleged violations of the Constitution only if President or a group of MPs addresses it to do so. Thus, the CCU has had a very limited ability to defending Constitution from the attempts of politicians to pervert it.

From institutionalist point of view, one can compare the CCU with a National Bank, an independent institution dedicated to preserve some specific sector from influence of internal or external political forces. In reality, the CCU has rarely had moments of fulfilling its role. For example, it permitted President Kuchma to be elected for the third presidential term in 2003. Or else it reverted the agreement of fighting camps during the "Orange Revolution" to increase powers of parliament and decrease authority of president in 2010, which made President Yanukovych get more power much bigger than he was elected to. Even though the Constitutional (or Supreme) Courts are almost always are the subject of influence of political actors, the CCU was too often controlled by a political group that controlled Presidency, which prevented the Court to defend constitutional checks and balances.

17 Cabinet's Order "On some issues of the National Agency for the Prevention of Corruption" [No. 1363-r as of 29.10.2020].

18 Law "On Amendments to Certain Legislative Acts of Ukraine Concerning Establishment of Liability for Declaring Inaccurate Information and Failure of a Declaration Subject to Declaration of a Person Authorized to Perform Functions of the State or Local Self-Government" [No. 4460-d as of 03.12.2020].

19 Presidential Decree "On removal from office of a judge of the Constitutional Court of Ukraine" [No. 607/2020 as of 29.12.2020].

The ongoing conflict between President Zelensky and the CCU is a new phenomenon in political history of contemporary Ukraine. It is partially the result of judiciary reform of 2015-19 that made judiciary more self-governing branch. It also stems from ineffective work of presidential office unable to continue with the usual informal control over the CCU. In combination of these factors, the CCU turned out to be the institution experiencing unprecedented political and public pressure that contradicts the Constitution and destroys even the minimal constitutional control in Ukraine. It also united in an unusual solidarity the judiciary and the CCU that adds to deficiency of government where all branches of power are in conflict with each other.

IV. LOOKING AHEAD

The political events of 2019-2020 demonstrated a need in a constitutional reform in Ukraine. Political competition is being conducted with less respect to the Constitution and laws, but law-enforcement agencies and official bodies responsible for constitutional control were not able to return political actors back into the legal framework. Also, the current government, in spite of great expectations back in 2019, have exhibited its inability to fulfill reforms, also constitutional reform, with the respect to constitutional principles, norms and procedures. The dangerous process of divorce between the political regime and constitutional norms deepens.

It is critical that all competing parties and branches of power return to the respect of the Constitution and international obligations of Ukraine as a member of the Council of Europe and as an associated member with the EU. To avoid risks that the current multidimensional conflicts between ruling and opposition parties, among executive, legislature and judiciary, as well as between central and local governments, brings, Ukraine should apply a model of constitutional assembly to proceed with the reform.

Finally, the CCU needs to return to the position of the guardian of working Constitution. Advice provided by the Venice Commission to Ukrainian government offers a viable chart to do so. Restoration of the constitutional order is as important an aim as the return of the seceded communities in Donbas and Crimea.

V. FURTHER READING

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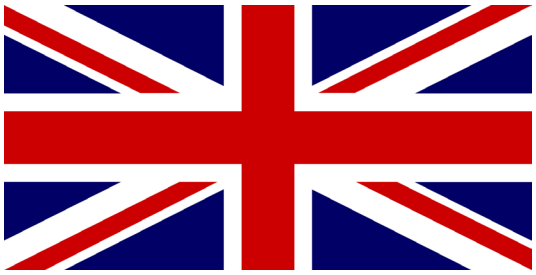
United Kingdom



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I. INTRODUCTION

For the United Kingdom, 2020 will undoubtedly be remembered for two main things: Brexit and Coronavirus. As this report highlights, these have had a significant impact on the UK's constitutional arrangements and operation. Brexit ended an over 40-year relationship between the UK and the European Union and raised a number of significant issues as it barrelled to its crescendo. Coronavirus has similarly raised important questions about the role of law amidst a pandemic, the power of Parliament to scrutinise Government, and how best to balance citizen freedoms with necessary restrictions. These two dominant issues have, unsurprisingly, increased the already palpable tensions within the UK constitution, and potentially threaten the health of the Union.

Although tempting, it would be wrong to consider the year solely through these two lenses. Indeed, 2020 saw the newly-elected Conservative Government embark on a programme of constitutional reform. The Independent Review of Administrative Law (IRAL) was launched, which aims to examine the existing process of judicial review in the UK with a view to its potential reform. Similarly, the Government has also announced a review of the operation of the Human Rights Act 1998, which underpins UK domestic human rights protection. While neither of these tasks will be completed until well into 2021, or perhaps later, the processes are noteworthy and point to ways in which the UK constitution may develop. Further issues surrounding devolution also came into play. Perhaps aggravated by the tensions from Brexit and Coronavirus, amongst other things, multiple polls throughout the year demonstrated increasing support for Scottish independence. Similarly, calls for more discussion about Northern Ireland's future place in the UK grew, particularly in response to Brexit's potential effect on the relationship between Northern Ireland and the rest of the UK.

Thus, while 2020 may have been the year of Brexit and Coronavirus, it may also come to be seen as the beginning of a significant—and perhaps broader—period of constitutional reform in the UK.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

December 2019 saw a general election in the UK, returning a significant majority for the Conservative Party led by Boris Johnson. The Party was elected on a promise to 'Get Brexit Done',[1] arguing the country needed to move on from the 2016 referendum by finishing the process.

The UK's departure from the European Union, 'Brexit', was a central feature of both the UK's political and constitutional tumult in the years since the Brexit referendum. 2020 brought a decisive end to the relationship. The UK formally departed from the EU on 31 January 2020. However, this departure marked the beginning of an 11-month transition period, where 'nearly all EU rules [continued] to apply to the UK. The UK [remained] part of the EU single market and customs union'.[2] Just before the transition period came to an end on 31 December, a new trade deal was agreed between the UK and EU on 24 December. The transition period was the result of the Withdrawal Agreement negotiated between the UK and EU and finalised in October 2019, which entered into force at the point of the UK's departure from the EU.[3]

A central feature and point of contention of the Withdrawal Agreement relates to Northern Ireland: the so-called 'Backstop' arrangement. The aim of this arrangement, formally known as the Northern Ireland Protocol, is to prevent a hard border on the island of Ireland, between the Republic of Ireland (an EU member-state) and Northern Ireland. The Protocol provides that Northern Ireland remains a part of the UK customs area, however, customs checks and controls will be applied where goods move between England, Wales or Scotland (Great Britain) and Northern Ireland, preventing such checks taking place at the border between Northern Ireland and the Republic of Ireland. The UK-EU Joint Committee came to an agreement on all outstanding issues relating to the Protocol on 8 December 2020.[4]

During the transition period numerous issues presented difficulties in the negotiation of a future relationship. One such issue, which became totemic in the later stages of the negotiation process, was fisheries and the access of EU fishermen to UK waters. Similarly, the issue of a level playing field between the UK and EU became a major concern for both parties: neither side wishing the other to have a competitive

1 Conservative Manifesto 2019.
2 S Fella, 'End of the Brexit transition period: What will change?' (*House of Commons Library*, 17 November 2020) <https://commonslibrary.parliament.uk/end-of-the-brexit-transition-period-what-will-change/> accessed 29 January 2021.
3 The Withdrawal Agreement, a treaty, was incorporated by way of the European Union (Withdrawal Agreement) Act 2020, which received royal assent on 23 January 2020.
4 'The Northern Ireland Protocol' (*UK Government*, 10 December 2020) <https://www.gov.uk/government/publications/the-northern-ireland-protocol> accessed 29 January 2021.

advantage. The UK was also concerned that any level playing field arrangements might interfere with its legislative sovereignty after Brexit. Finally, dispute resolution and the role of the CJEU presented a stumbling block to reaching an agreement. The UK did not wish to be tied to an institution where it no longer had representation. Issues such as these led to increased worry on both sides that no agreement would be reached by the end of the transition period.

In early September 2020, the UK Government introduced the Internal Market Bill 2020. The Bill as introduced garnered significant controversy, principally in relation to the Northern Ireland Protocol. Clause 45 provided that certain parts of the Bill (relating to goods moving between Northern Ireland and the rest of the UK and state aid) were intended to 'have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent'. Indeed, Brandon Lewis (Secretary of State for Northern Ireland), responding to a question from Bob Neil, acknowledged that in this respect the Bill did 'break international law' although he stressed that it did so 'in a very specific and limited way'.[5] Whilst the move attracted intense and widespread criticism, it remains possible that this move represented a negotiating tactic, aimed at putting pressure on the EU at a time of tense negotiations.

The EU launched infringement proceedings against the UK. And the publication of the Bill was followed by the resignation of the head of the Government Legal Department, Jonathan Jones, and one of the Government's law officers, Lord Keen QC (the Advocate General for Scotland). The latter noted in his resignation letter that he found it 'increasingly difficult to reconcile what I consider to be my obligations as a Law Officer with [the Government's] policy intentions'.[6]

Following much debate and many amendments between the House of Commons and the House of Lords, including the Government's withdrawal of Clause 45, the Bill received Royal Assent as the Internal Market Act 2020.

After a year of difficult and intense negotiations, and with multiple unofficial deadlines passing, a last-minute trade deal was finally agreed between the UK and the EU on 24 December 2020.[7] This Trade and Cooperation Agreement governs the continued relationship between the UK and EU in relation to both trade and security. In addition to the main agreement there were several joint declarations. These related to issues such as financial services, subsidies, asylum, and the right of the UK to take part in EU programmes. In particular, the agreement ensures that the Court of Justice of the European Union (CJEU) no longer has jurisdiction in relation to the UK, a central issue for many who campaigned for Brexit. Importantly, the Agreement did not supersede the Northern Ireland Protocol which thus takes effect on 1 January 2021, albeit with minor changes to the practicalities of how customs checks take place between Northern Ireland and Great Britain.

From 1 January 2021 the UK is no longer subject to EU rules nor the jurisdiction of any of the EU's organs, ending a relationship which had existed since the UK's accession to the EU in 1973. Nonetheless, the UK and the EU will continue to work closely together in the coming years as their new relationship develops.

5 HC Deb 8 September 2020, vol 679, col 509.

6 'Lord Keen: Senior law officer quits over Brexit bill row' (*BBC News*, 16 September 2020) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-54179745> accessed 29 January 2021.

7 The text of the deal is available here: <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union> accessed 29 January 2021.

In addition to providing a clear mandate for finalising the Brexit process, the 81-seat majority meant that 2020 saw the Conservative Party begin work on a range of manifesto promises, several of which impact the UK constitution. In particular, the Independent Review of Administrative Law (IRAL), a review of the operation of the Human Rights Act 1998 and a proposal to repeal the Fixed-Term Parliaments Act 2011.

The IRAL was set up to meet the Government's 'manifesto commitment to guarantee that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused'.[8] Lord Faulks QC, a lawyer and former junior minister at the Ministry of Justice, was appointed to chair IRAL, and a panel of experts appointed from across the UK to work with him. The remit of the Review is, broadly, to assess whether administrative law could be improved upon, amongst other things by codification and clarification of existing rules and processes. More specifically, IRAL was established to consider:

1. Whether the codification of the grounds for judicial review and of the amenability to review of public decisions was desirable.
2. The justiciability of certain decisions made by the executive branch of government.
3. The grounds for judicial review and the remedies available in such cases.
4. Whether there ought to be any procedural reforms in relation to judicial review to simplify the process.[9]

The report of the Review was originally due to be published late in 2020 but will now come in 2021.

As part of its programme of constitutional review, the Government also announced an Independent Human Rights Act Review (IHRAR), which would be focused on the Human Rights Act 1998, the UK's core human rights legislation, which incorporates the European Convention on Human Rights (ECHR). This review follows a manifesto promise on behalf of the current Government to 'update' the Act. The establishment of the IHRAR was announced on 7 December 2020.[10] The Review, chaired by a retired judge, Sir Peter Gross, examines several questions under two headings: the relationship between domestic courts and the European Court of Human Rights, and the impact of the Human Rights Act on the relationship between the judiciary, the executive, and the legislature.[11] The next stages of the review will take place in 2021, starting with a call for evidence which is likely to frame the scope of the review more clearly.

Alongside these reviews, 2020 saw the publication of the Draft Fixed-term Parliaments Act 2011 (Repeal) Bill.[12] The 2011 Act set

8 'Independent Review of Administrative Law' (*UK Government*) <https://www.gov.uk/government/groups/independent-review-of-administrative-law> accessed 29 January 2021.

9 IRAL Terms of Reference, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf> accessed 29 January 2021.

10 'Independent Human Rights Act Review' (*UK Government*, 7 December 2020) <https://www.gov.uk/guidance/independent-human-rights-act-review> accessed 29 January 2021.

11 IHRAR Terms of Reference, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941778/human-rights-review-tor.pdf> accessed 29 January 2021.

12 Draft Fixed-Term Parliaments Act (Repeal) Bill, available at <https://www.gov.uk/government/publications/draft-fixed-term-parliaments-act-repeal-bill> accessed 29 January 2021.

statutory limits on the length of a Parliament (five years) and provided a statutory process for seeking an early dissolution of Parliament where a Government loses the confidence of the legislature or the legislature votes with a two-thirds majority for an early election. In doing so, it replaced the existing prerogative powers of the Crown to grant the dissolution of Parliament at the request of the Prime Minister. The Draft Bill arises from the failure of the Prime Minister to successfully call a general election under the Act in 2019, and follows manifesto commitments in the 2019 election from both the Conservative Party and Labour Party to repeal the 2011 Act. The Draft Bill was published in December 2020 but will be formally introduced to Parliament in 2021.

Finally, the response to the Coronavirus pandemic impacted on the functioning of the UK's constitution. The unprecedented spread of Coronavirus resulted in a range of restrictions on citizens being introduced to slow transmission. The House of Lords Constitution Committee noted that the legal response to Coronavirus raised several important questions, *inter alia*: the ability of Parliament to hold the Government to account, the scrutiny of emergency powers, and the operation of the courts.[13]

In response to the Coronavirus both the UK and devolved governments initiated lockdowns. During these lockdowns restrictions were placed on movement, businesses required to close, schools and universities switched to online delivery, many workers furloughed, and the majority of workers began to work from home. In response to the economic impact of the lockdowns, the Chancellor of the Exchequer announced a furlough scheme to assist in paying the wages of staff whom businesses could not pay. Additional fiscal provision was put in place to support businesses through loans and grants. The 2020 Spending Review noted that the Government had spent some £280 billion in response to the crisis.[14]

In addition, the response to Coronavirus highlighted tensions between central and devolved administrations. Indeed, each of the constituent nations of the UK responded differently to the crisis and at times there have been significant tensions between London and its devolved counterparts about the appropriate handling of the crisis. Unsurprisingly, this has been particularly evident in the case of Scotland, where frictions about Scotland's place in the UK were already pronounced.

Questions have been raised about the role of Parliament in scrutinising and holding to account the Government in respect of its Coronavirus response, not least because Parliament has not been physically sitting inside Westminster for most of the year. Indeed, Parliament was required to adapt rapidly in the face of the pandemic and for the first time ever sat virtually, allowing members to attend sessions of Parliament and committees remotely and to vote by proxy. In responding to the pandemic, most restrictions imposed on individuals were imposed under legislation such as the Public Health (Control of Disease) Act 1984, section 45R, which provides for emergency law-making by way of statutory instrument, without prior Parliamentary approval. Indeed, the Hansard Society noted that 315 coronavirus related statutory instruments had been laid before Parliament by the end of 2020.[15] These instruments imposed restrictions previously unseen in peacetime, such as the temporary closure of some businesses, restrictions on travel within the UK, and the wearing of face coverings.

In addition to the range of secondary legislation, Parliament also passed the Coronavirus Act 2020 on 25 March 2020. This Act introduced major reform, such as allowing certain court functions to take place online (sections 53-57), extending the time in which a warrant can be retrospectively authorised under the Investigatory Powers Act 2016 (section 23) and the power for public officials to test, isolate and detain a person where it might reasonably be suspected they may be infected with Coronavirus (section 51). The Act also altered the electoral process, with local, mayoral, and other elections in England and Wales being postponed by 12 months from May 2020 to May 2021 (section 59). According to latest reports, these elections may be delayed even further. Despite the Act's significance, it was passed by Parliament using a fast-track process in four sitting days, albeit in the face of little opposition in either House.

On 1 December 2020, the Court of Appeal refused permission for judicial review of the regulations brought against the Secretary of State for Health by Simon Dolan and others.[16] The applicants had previously been refused leave for judicial review by the High Court. The Court of Appeal held that the Secretary of State was acting lawfully within powers afforded under section 45R of the Public Health (Control of Disease) Act 1984 and thus that the restrictions imposed on individuals, such as the closure of places of worship and rules against gathering in groups, were lawful. The court also held that a challenge to the regulations brought under the Human Rights Act 1998 was unarguable. However, possibility of appeal to the Supreme Court remains.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Several important constitutional questions stem from the events that occurred in 2020. An area of key concern is the Union itself. The two big issues of 2020, Brexit and Coronavirus, have highlighted and heightened tensions between central Government in London and the devolved administrations. Scotland particularly has had an increasingly cool relationship with Westminster, and has witnessed growing and sustained support for Scottish independence.

The allocation of power post-Brexit has also impacted on the relationship between central and devolved administrations. On 1 January 2021, the powers which were previously governed by (supreme) EU law will be exercised by the UK Government, and many will be passed on to the devolved administrations. Although central Government claims this will represent a 'power surge' for the devolved entities, the Welsh and Scottish First Ministers have been highly critical of this claim, accusing the UK Government of a 'power grab'.[17] Northern Irish politicians too have been critical of the way in which Brexit has affected its

13 Constitution Committee, 'Constitutional Implications of COVID-19' (*UK Parliament*, 13 May 2020) <https://committees.parliament.uk/work/298/constitutional-implications-of-covid19/> accessed 29 January 2021.

14 HM Treasury, 'Spending Review 2020' (*UK Government*, 15 December 2020) <https://www.gov.uk/government/publications/spending-review-2020-documents/spending-review-2020#responding-to-covid-19-1> accessed 29 January 2021.

15 'Coronavirus Statutory Instrument Dashboard' (*Hansard Society*) <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard#total-coronavirus-sis> accessed 29 January 2021.

16 *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605.

17 David Torrance, 'EU powers after Brexit: "Power grab" or "power surge"?' (*UK Parliament*, 29 July 2020) <https://commonslibrary.parliament.uk/eu-powers-after-brexit-power-grab-or-power-surge/> accessed 29 January 2021.

place in the UK, particularly in respect of the new customs relationship with Great Britain as a result of the Northern Ireland Protocol.

Similarly, tensions have arisen in response to Coronavirus. Devolved administrations have responded differently from the UK Government, highlighting divergent approaches to managing risk and creating a patchwork of differing regulation in the UK. The difference has been particularly marked in response to managing the spread of the virus, with Scotland and Wales attempting to halt inward travel from England. The UK Government, however, has argued that some of these differences in approach have been driven by partisan decision-making. In any event, it seems clear that the tensions already simmering throughout the UK have been heightened by both Brexit and Coronavirus, and that these are unlikely to subside anytime soon.

Another important post-Brexit question is the place of CJEU case-law in the UK and how the courts will navigate this. The reality of how this will operate is highly complex. The Supreme Court is not bound by any EU case-law, nor is the High Court of Justiciary, in Scotland.[18] However, 'other courts and tribunals are to determine issues of retained EU law in accordance with retained EU case law', except in some aspects of competition law, which are also excluded.[19] Moreover, the requirement to abide by the case-law can also be set aside by Statutory Instrument, further adding to the complexity. As this illustrates, the use of the EU's wide-ranging body of case-law post-Brexit is far from clear, and it remains to be seen how this will operate in practice.

An important aspect of the UK's Coronavirus response has been the balance between individual freedoms and liberties and the imperative to stem the spread of the virus. The UK has historically set great store by the freedoms enjoyed by its citizens and much of the opposition to the lockdown restrictions was couched in these terms. Indeed, they have been characterised as 'almost certainly the most severe restrictions on liberty ever imposed' in the UK.[20] Nonetheless, despite the constitutional questions raised by these restrictions, they enjoy 'strong public support'.[21] Moreover, it has been argued that, although these restrictions represent a significant curtailment of liberties, they 'are necessary to combat the appalling threat of Coronavirus and help [the UK's] embattled health and frontline services to cope'.[22] It may be telling that the challenges to the *vires* of these restrictions, such as the *Dolan* case noted above, have failed, suggesting that the courts believe the balance has been struck appropriately.

Beyond the issues of Brexit and Coronavirus, further analysis of both the Draft Fixed-term Parliaments Act 2011 (Repeal) Bill and the ongoing inquiries into administrative law (IRAL) and human rights protections (IHRAR) is warranted.

The Draft (Repeal) Bill seeks to return to the *status quo ante* in that it removes the framework for the dissolution of Parliament which the 2011 Act created, and aims for a return to dissolution being governed by exercise of the royal prerogative. The Government has published a set of principles alongside the Draft Bill which outline the vision for the future of dissolution.[23] Nonetheless, this is a complex area in which a number of questions remain unanswered. The House of Lords Constitution Committee has noted that the changes present significant challenges, suggesting that as 'it is the only piece of legislation setting the length of a parliament. If it were repealed without new provision being made, the current parliament would last indefinitely, without the prospect of another general election'.[24] Additionally, 'there is a contested legal debate as to whether repealing the Act would revive the prerogative power… or, with the Act having removed the power, it is extinguished permanently'.[25] These and other questions will need to be confronted if the Draft Bill is introduced to Parliament in 2021.

Both the IRAL and IHRAR stem from an ongoing debate regarding the proper role and extent of judicial review and human rights in the UK. Arguments have been made that the existing frameworks have allowed the judiciary to adjudicate on political questions by reframing them as legal ones.[26] There has been increasing debate about the operation and expansion of judicial review. Tensions heightened following the Supreme Court's decision on the lawfulness of the decision to prorogue Parliament in 2019, in which the Prime Minister's actions were ruled unlawful.[27] This case illustrated the difficulty of adjudicating such questions, as the Supreme Court reached a different conclusion than other courts on the question. Whilst it remains to be seen what IRAL recommends, and what if anything will be changed, questions regarding the operation of administrative law are likely to remain.

The IHRAR represents a development in the debate about human rights in the UK. Its focus on the operation of the powers afforded to judges by the Human Rights Act 1998 responds to concerns that judges have gained significant power by virtue of their ability to interpret legislation broadly to comply with human rights.[28] Thus, the Review specifically examines 'the impact of the [Act] on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy'.[29] Like IRAL, this Review is at its early stages but it seems likely that there will, in the coming months, be considerable debate about human rights protections and the role of the judiciary.

IV. LOOKING AHEAD

Given all that occurred and was set in motion in 2020, there is little doubt that 2021 will be an important year for further constitutional reform in the UK. The IRAL report is expected early in 2021 and it will inform the Government's view on judicial review reform, potentially

18 See, s 6 of the European Union (Withdrawal) Act 2018. Which has been amended by the European Union (Withdrawal Agreement) Act 2020.

19 David Feldman, 'Departing from Retained EU Case law' (*UK Constitutional Law Association Blog*, 11 January 2021) <https://ukconstitutionallaw.org/2021/01/11/david-feldman-departing-from-retained-eu-case-law/> accessed 29 January 2021.

20 Tom Hickman, Emma Dixon and Rachel Jones, 'Coronavirus and Civil Liberties in the UK' (2020) 25 Judicial Review 151, para 1.

21 Robert Craig, 'Lockdown: A Response to Professor King' (*UK Human Rights Blog*, 6 April 2020) <https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/> accessed 29 January 2021.

22 Hickman, Dixon and Jones (n 20) para 5.

23 Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940028/Dissolution-Principles.pdf> accessed 29 January 2021.

24 Constitution Committee, 'A Question of Confidence? The Fixed-term Parliaments Act 2011' (2019-2021, HL 121) 2.

25 ibid.

26 E.g. Stephen Tierney, 'Turning political principles into legal rules: the unconvincing alchemy of the Miller/Cherry decision' (*Judicial Power Project*, 30 September 2019) <http://judicialpowerproject.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-the-unconvincing-alchemy-of-the-millercherry-decision/> accessed 03 February 2021.

27 *R (Miller) v The Prime Minister*; *Cherry v Advocate General for Scotland* [2019] UKSC 41.

28 Granted by s 3 of the Human Rights Act.

29 'Government launches independent review of the Human Rights Act' (*UK Government*, 7 December 2020) <https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act> accessed 29 January 2021.

affecting how administrative law operates going forward. Similarly, the IHRAR could result in changes to the way human rights are protected in the UK. Although the Conservative Party's earlier pledge to repeal the Human Rights Act and replace it with a British Bill of Rights has been substituted by a commitment to 'update' the Act, its future seems uncertain and 2021 may clarify its future role and operation.

Another significant debate for 2021 and beyond will be around the Fixed-term Parliaments Act 2011 and its potential repeal. The ongoing issue regarding the operation of prerogative power in the UK constitution will amount to significant debate both in the political and academic spheres.

At the close of 2020 the Coronavirus response remained of great concern to lawmakers across the UK, and 2021 seems destined to be coloured by the continuing response to this crisis. Whilst experience has shown that this is a quickly changing area, reactions to the pandemic are likely to be subject to increased scrutiny as responses are analysed and assessed with the benefit of hindsight.

Finally, Union tensions will remain fundamental questions in 2021, and this is especially the case for Scotland. Throughout 2020 polls increasingly illustrated majority support for Scottish independence; similarly, polling indicates that the pro-independence Scottish National Party is on-track to secure another large majority in the 2021 Scottish parliamentary elections. Coupled with increasing tensions between London and Edinburgh, 2021 seems certain to see renewed debate about a second referendum on Scottish independence.

V. FURTHER READING

R Brazier, *Choosing a Prime Minister: The Transfer of Power in Britain* (Oxford, 2020).

R Hazell & B Morris (eds), *The Role of Monarchy in Modern Democracy: European Monarchies Compared* (Hart, 2020).

BC Jones, *Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtenness* (Edward Elgar, 2020).

P Norton, *Governing Britain: Parliament, Ministers and Our Ambiguous Constitution* (Manchester University Press, 2020).

R Cahill-O'Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (Hart, 2020).

USA

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I. INTRODUCTION

The year 2020 brought unprecedented levels of domestic turmoil and political strife to the United States. On January 16, 2020, for only the third time in U.S. History, the U.S. House of Representatives submitted articles of impeachment to the U.S. Senate, formally charging then-President Donald Trump with abuse of power and obstruction of Congress. The primary allegation was that Trump had attempted to use the power of the presidency to coerce a foreign nation into targeting his political rival.[1] In February 2020, Trump was acquitted by the U.S. Senate in a party line vote.[2] Throughout the spring, the COVID-19 pandemic shut down much of the national economy and devastated minority communities. In May 2020, the killing of George Floyd was captured on camera, allowing millions to witness Mr. Floyd pleading for his life for eight minutes while being suffocated by Minneapolis police officers over a counterfeit twenty-dollar bill.[3] Mr. Floyd's killing sparked nationwide protests against police brutality that lasted for months and generated renewed calls to radically reform the carceral state.[4] In September 2020, the Supreme Court's liberal icon, Ruth Bader Ginsburg, passed away in her home due to medical complications.[5] The very next month, conservative judge Amy Coney Barrett was confirmed to the Supreme Court as her replacement in another party line vote.[6] Justice Barrett's confirmation violated assurances that Supreme Court justices would no longer be appointed in an election year and gave rise to debates across the nation on the pros and cons of court packing.[7] In November 2020, Joseph Biden won the U.S. election, making Kamala Harris the first woman, first African-American and first Asian-American vice president in the nation's history. The year ended with protests and unprecedented levels of litigation over pandemic voting rules, as lawyers and supporters of Trump zealously sought to overturn the election results.[8]

These events are all data points in the wider struggle over the scope and meaning of equal citizenship that has engulfed the American public during the Trump presidency and which came to a head in many ways during 2020. The impeachment of President Trump, the nation's response to COVID-19, the George Floyd protests, a conservative SCOTUS, and the election of a woman of color as the vice-president were embedded in various contestations over 1) the disparate impact of COVID-19 and policing on poor communities of color, 2) the influence of white religious conservatives on the president and the Supreme Court, and 3) the competing influences of racial minorities and white religious minorities on elections. As a result, the key events of 2020 were part of a larger national conflict over the scope of equal citizenship for marginalized groups, at least part of which played out in the form of proposed constitutional amendments.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

This section will discuss nine proposed constitutional amendments that draw upon and reflect the narratives generated in the public contestations and deliberation over the presence, power, and positioning of racial and ideological minorities. This section will also discuss the implications of Virginia's late ratification of the ERA, the new textualist supermajority on the Court, and the House's passage of a bill to admit the District of Columbia as the 51st state.

1 'Day in Impeachment: Senate Issues a Summons to President Trump' (*The New York Times* 17 January 2020) <https://www.nytimes.com/live/2020/trump-impeachment-01-16> accessed 9 February 2021.

2 Nicholas Fandos, 'Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote' (*The New York Times*, 5 February 2020) <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html> accessed 9 February 2021.

3 Eliott C. McLaughlin, 'Three videos piece together the final moments of George Floyd's Life' (*CNN*, 23 June 2020) <https://www.cnn.com/2020/06/01/us/george-floyd-three-videos-minneapolis/index.html> accessed 9 February 2021.

4 Ashley Westeerman, Ryan Benk & David Greene, 'In 2020, Protests Spread Across The Globe With a Similar Message: Black Lives Matter' (*National Public Radio*, 30 December 2020) <https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt> accessed 9 February 202; Johnny Perez, 'As we work to make Black Lives Matter, let's remember that incarcerated lives matter, too' (*USA Today*, 30 August 2020) <https://www.usatoday.com/in-depth/opinion/policing/2020/08/30/we-work-make-black-lives-matter-remember-prison-lives-matter-too/3313709001/> accessed 9 February 2021.

5 Robert Barnes & Michael A. Fletcher, 'Ruth Bader Ginsburg, Supreme Court Justice and legal pioneer for gender equality, dies at 87' (*The Washington Post*, 18 September 2020) <https://www.washingtonpost.com/local/obituaries/ruth-bader-ginsburg-dies/2020/09/18/3cedc314-fa08-11ea-a275-1a2c2d36e1f1_story.html> accessed 9 February 2021.

6 Barbara Sprunt, 'Amy Coney Barrett Confirmed To Supreme Court, Takes Constitutional Oath' (*National Public Radio*, 26 October 2020) <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> accessed 9 February 2021.

7 Amanda Frost, 'Academic highlight: The past, present and future of court packing' (SCOTUSblog, 22 December 2020) <https://www.scotusblog.com/2020/12/academic-highlight-the-past-present-and-future-of-court-packing/> accessed 9 February 2021.

8 Pete Williams & Nicole Via y Rada, 'Trump's election fight includes over 50 lawsuits. It's not going well.' *(NBC News*, 23 November 2020) <https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289> accessed 9 February 2021.

INVOLUNTARY SERVITUDE AMENDMENTS

House Joint Resolution 92 was introduced on June 29, 2020, during the George Floyd protests. It attracted four co-sponsors and reads: "Proposing an amendment to the Constitution of the United States to prohibit the use of slavery and involuntary servitude as a punishment for crime."[9] This amendment sought to close a loophole in the 13th Amendment, which was passed in the aftermath of the American Civil War and purported to finally end American slavery. The 13th Amendment did not fully end slavery and forced labor, however, for it created an exception which allowed slavery to continue when adopted as a punishment for a crime. This exception fueled the rise of the prison industrial complex and the mass incarceration of people of color. Closing this loophole has been viewed as a key element of the reforms required to make black lives matter.[10]

No action was taken on H.J. Res. 92, but it was re-introduced on December 2, 2020 as S. J. Res. 81 and H. J. Res. 104.[11] S.J.Res. 81 had four Democratic co-sponsors.[12] H.J.Res. 104 had twenty Democratic co-sponsors.[13]

In his press release about the proposed amendment, Sen. Merkley noted that: "The exception to the 13th Amendment's ban on slavery corrupted criminal justice into a tool of racist control of Black Americans and other people of color, and we see that legacy every day in police encounters, courtrooms, and prisons throughout our country."[14] His co-sponsor, Sen. Van Hollen, directly linked the amendment to the dismantling of systemic racism, a discourse model[15] that underlies the BLM protest movement, stating that: "Systemic racism, in all its ugly forms, must be rooted out and eliminated from American institutions."[16] While eliminating all vestiges of racism and slavery appears on the surface to be a commitment that all Americans could endorse, the co-sponsors of this bill in the House and Senate were all Democrats. In the absence of Republican support, these amendments died in the 116th Congress without ever coming to a vote.

VOTING RIGHTS AMENDMENTS

House Joint Resolution 91 was introduced on June 25, 2020:

> **"1.** The right of a citizen of the United States, who is 18 years of age or older, to vote, shall not be denied or abridged by the United States or by any State, unless, at the time of an election, such citizen is serving a sentence of imprisonment for a felony in a correctional facility.
> **2.** The Congress shall have power to enforce this article by appropriate legislation."

This amendment sought to remedy the lack of a constitutional right to vote. As noted by the Supreme Court in *Bush v. Gore*, there is no independent constitutional right to vote, but only a right to vote *as the state legislature prescribes*.[17] The right to vote in the U.S. is primarily a creature of state law, with federal protection limited to prohibiting states from conditioning access to the right on being of a certain race or gender or age.[18] There is language in voting rights cases suggesting that states are constitutionally prohibited from placing "severe" burdens on the right to vote,[19] but judicial analysis of burdens on voting has often resembled the deferential rational basis standard used for economic policies[20] rather than the strict scrutiny standard reserved for fundamental rights.

Given this, the most significant voting rights claims in 2020 tended to be those which either 1) challenged state voting laws as creating unconstitutional burdens on voters given the pandemic[21] or 2) those which challenged changes to state voting laws made by courts and election officials to ease the burdens on voters created by the pandemic.[22] Courts seemed more sympathetic to the latter than to the former.[23] Moreover, shortly after the election, some states, such as Georgia, began proposing a raft of new "election integrity" voting restrictions which seem likely to limit turnout among Democrats.[24] The interplay of voting integrity and voter suppression claims amidst the 2020 election cycle generated increased popular interest in a federal constitutional right to vote, leading to three amendments being proposed, among them H. J. Res. 91.

In addition to securing a federal right to vote, H. J. Res. 91 also addressed another fraught voting rights issue, the restoration of voting rights to those who have completed their prison sentences. State disenfranchisement of ex-felons and those on probation or parole has increasingly been viewed as part of the system of racist control inherent in the carceral state.[25] This version of the amendment sought to limit felon disenfranchisement to those who were currently incarcerated in a correctional facility.

Though there was no action on H. J. Res. 91, a second voting rights amendment, S. J. R. 75 was introduced on August 4, 2020,[26] with eight Democratic co-sponsors:

> **"1.** Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides.
> **2.** The fundamental right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State or political subdivision within a State unless such denial or

9 H.J. Res. 92, 116th Cong. (2020).
10 Michelle Alexander, *New Jim Crow* (2010).
11 S. J. Res.81, 116th Cong. (2020); H.J.Res.104, 116th Cong. (2020).
12 ibid.
13 ibid.
14 'Merkley, Clay Propose Constitutional Amendment to Close Slavery Loophole in 13th Amendment' (*Jeff Merkley United States Senator for Oregon*, 2 December 2020) <https://www.merkley.senate.gov/news/press-releases/merkley-clay-propose-constitutional-amendment-to-close-slavery-loophole-in-13th-amendment-2020> accessed 9 February 2021.
15 Franciska Coleman, 'Between the Facts and Norms of Police Violence: Using Discourse Models to Improve Deliberations around Law Enforcement' (2018) 47 HLR 489.
16 'Merkley 1.
17 531 US 98 (2000).
18 Eg U.S. Const. amend. XV, XIX, and XXVI.
19 *Burdick v Takushi*, 504 US 428 (1992); *Crawford v Marion County Election Board*, 553 US 181 (2008).
20 ibid.
21 *Tex League of United Latin Am Citizens v Hughes* 978 F3d 136 (2020).
22 *Democratic Nat'l Comm. v Wis. State Legis.*, 141 S. Ct. 28 (2020).
23 978 F3d 136 (2020); 141 S Ct 28 (2020).
24 Zach Montellaro, 'State republicans push new voting restrictions after Trump's loss' (*Politico*, 24 January 2021) <https://www.politico.com/news/2021/01/24/republicans-voter-id-laws-461707> accessed 9 February 2021.
25 Chris Uggeen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, 'Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction' (*The Sentencing Project*, 30 October 2020) <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> accessed 9 February 2021.
26 S.J. Res. 75, 116th Cong. (2020).

abridgment is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

3. The portion of section 2 of the fourteenth article of amendment to the Constitution of the United States that consists of the phrase 'or other crime,' is repealed.
4. The Congress shall have the power to enforce this article and protect against any denial or abridgement of the fundamental right to vote by legislation."[27]

This amendment sought to create a federal constitutional right to vote and to explicitly require that voting regulations be evaluated using the strict scrutiny standard. While it did not contain language limiting criminal disenfranchisement to those currently incarcerated, it did something similar. It repealed the language in the 14th Amendment traditionally interpreted as affirming the constitutionality of criminal disenfranchisement.[28] This meant that any future limitations on the voting rights of felons, incarcerated or not, would have had to pass the most exacting scrutiny. A third voting rights amendment, H. J. Res. 93 was introduced on August 7, 2020. It consisted of the first section of S. J. Res. 75 and the second section of H.J. Res 91 and attracted 41 co-sponsors. Though a fundamental right to vote would seem to be an issue that would garner the support of all Americans, competing partisan narratives of voter suppression and voting integrity meant that all co-sponsors of this bill were Democrats. As a result, none of these proposed amendments were debated in Congress.

ANTI-COURT PACKING AMENDMENTS

House Joint Resolution 95 was introduced on September 24, 2020, six days after the death of Justice Ruth Bader Ginsberg, with four Republicans and one Democrat as co-sponsors. The amendment stated only that: "The Supreme Court of the United States shall be composed of nine justices."[29] The backstory of the amendment, however, spans two presidencies.

On February 13, 2016, Justice Antonin Scalia, a Supreme Court conservative icon passed away. Shortly thereafter, Senate Republicans, who were a majority in the chamber, announced that they would not schedule or hold hearings for any Supreme Court nominee, would not vote on a nominee, and would not even have a courtesy meeting with a nominee.[30] This was a significant departure from existing norms, but according to Senator McConnell, "'The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president.'"[31] Then-President Barack Obama nominated centrist Merrick Garland, chief judge for D.C. Circuit, on March 16, 2016 to fill the vacancy left by the death of Justice Scalia. As promised, Senate Republicans blocked all consideration of Garland's nomination for over ten months, causing the seat to remain vacant until the inauguration of the new president. After Donald Trump won the presidency, Senate Republicans invoked the "nuclear option" of ending the 60 vote threshold for Supreme Court nominees, allowing conservative jurist Neil Gorsuch to be confirmed to the Supreme Court 54-45, in a largely party line vote.[32] In the controversy over this matter, Republican Senators insisted that the refusal to confirm a Supreme Court nominee during an election year was a (new) democratic norm independent of party, with one republican Senator going so far as to say, "I want you to use my words against me. If there's a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said, 'Let's let the next president, whoever that might be, make that nomination.'[33]

As a result, the immediate nomination of Amy Coney Barrett to fill Justice Ginsburg's seat, barely a month before the presidential election and in violation of previous assurances, caused numerous liberal politicians and scholars to propose their own form of norm breaking: enlarging the size of the Supreme Court. H.J.Res. 95 was introduced as a counter to these proposals.

On September 29, 2020, when Barrett's nomination became official, a second anti-court packing amendment was introduced in the House of Representatives, with nine Republican co-sponsors. This amendment did not limit the size of the Court but instead mandated that bills adjusting the size of the Court come into effect a minimum of 10 years after their passage.[34] On October 19, S. J.Res. 76 which was identical to H.J. Res. 95, was introduced. This amendment had 15 Republican co-sponsors. On October 22, 2020, President Biden promised to create a commission to study the various proposals on Supreme Court reform if elected to the presidency.[35] On October 26, 2020, Justice Barrett was confirmed to the Supreme Court 52-48. Though the first anti-court packing amendment received bi-partisan support, Barrett's ultimate confirmation increased the partisan polarization over the Court, and in the absence of bi-partisanship, these amendments died in the 116th Congress.

ADDITIONAL REFORMS

1. On January 15, 2020, Virginia became the 38th state to ratify the Equal Rights Amendment. The effect of this ratification remains unclear due to the fact that the ratification occurred after the 1982 ratification deadline. Though the House of Representatives passed a resolution removing the deadline this year, H.J.Res 79,[36] the bill did not receive a vote in the Republican controlled Senate. Further complicating the status of the amendment is the fact that five states counted in the original 38 ratifiers, Nebraska,

27 ibid
28 US Const. amend. XIV § 2.
29 H.J. Res. 95, 116th Cong. (2020).
30 David M. Herszenhorn, 'G.O.P. Senators Say Obama Supreme Court Pick Will Be Rejected' (*The New York Times*, 23 February 2016) <https://www.nytimes.com/2016/02/24/us/politics/supreme-court-nomination-obama.html> accessed 9 February 2021.
31 Burgess Evereett & Glenn Thrush, 'McConnell throws down the gauntlet: No Scalia replacement under Obama' (*Politico*, 13 February 2016) <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248> accessed 9 Feebruary 2021.
32 Alana Abramson, 'Republicans Just Used the 'Nuclear Option' to Confirm Neil Gorsuch. What's That?' (*TIME*, 4 April 2017) <https://time.com/4723610/neil-gorsuch-supreme-court-nuclear-option-filibuster/> accessed 9 February 2021.
33 Matthew S. Schwartz, 'Use My Words Against Me': Lindsey Graham's Shifting Position on Court Vacancies' *(National Public Radio*, 19 September 2020) <https://www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/19/914774433/use-my-words-against-me-lindsey-graham-s-shifting-position-on-court-vacancies> accessed 9 February 2021.
34 H.J.Res. 95.
35 Sam Gringlas, 'Asked About Court Packing, Biden Says He Will Convene Commission To Study Reforms' *(National Public Radio*, 22 October 2020) <https://www.npr.org/2020/10/22/926607920/asked-about-court-packing-biden-says-he-will-convene-commission-to-study-reforms> accessed 9 February 2021.
36 H.J.Res.79, 116th Cong. (2020).

Tennessee, Idaho, Kentucky, and South Dakota, have since rescinded their ratifications. The legal effect and/or permissibility of rescinding a ratification is uncertain.

2. On June 26, 2020, House Resolution 51, recognizing Washington, D.C. as the 51st state of the Union, was passed by the U.S. House of Representatives, but not by the U.S. Senate. While H.R. 51 is not a constitutional amendment, it fundamentally changes the structure of the U.S. by adding a new state for the first time in 62 years. The addition of two Senators from a small, minority-majority state, would partially correct the underrepresentation of voters of color inherent in the current system.[37] Moreover, given the constitutional prohibitions on decreasing a state's Senate representation without its permission, such a change would likely be permanent.

3. On October 26, 2020, Amy Coney Barrett was confirmed to the U.S. Supreme Court, creating a conservative supermajority on the court. Given the association of conservative jurists with limits on substantive due process and expansions of first amendment protections, her confirmation marks the culmination of a decades long effort to center textual rights at the expense of implied rights.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

These proposed and actual constitutional reforms are embedded in nationwide reform movements designed to promote substantive equality and substantive self-governance by dismantling structures and institutional practices that subordinate racial minorities while privileging political minorities. As such, these reforms seek to continue the equal citizenship project begun with the passage of the 14th Amendment but which remains incomplete even after the Civil Rights Movement. The 14th Amendment sought to fundamentally remake the American polity, promising equal citizenship in a nation originally constructed as a racial apartheid by shifting protection of the fundamental rights of citizens from the states to the federal government. The 14th Amendment can thus be considered a constitutional dismemberment rather than a constitutional amendment. The reforms discussed in this chapter, however, seek to continue that project of equal citizenship rather than to radically restructure the polity yet again. Thus, they can be best described as constitutional amendments rather than dismemberments.[38] These proposed amendments fall into two main categories: elaborative reforms and restorative/regressive reforms.[39]

The involuntary servitude amendments, voting rights amendments, and the resolution on D.C. statehood are all elaborative reforms designed to further the project of eliminating racial asymmetries in the guarantee of equal protection under law and in access to fundamental rights of self-governance.[40] For example, the involuntary servitude amendments target the continuing legacy of white supremacy by removing the financial incentives fueling the mass incarceration of people of color and the attendant creation of a cadre of second-class citizens disproportionately comprised of people of color. Viewed in this way, this amendment continues the unfinished business of the 13th and 14th amendments in seeking to dismantle the last stronghold of the U.S. caste system—the criminal justice system—and to pave the way for poor racial minorities to be equal citizens rather than a subject class. The Voting Rights Amendment is also elaborative, completing the unfinished business of the 14th and 15th amendments in attempting to provide a more robust statement of the right of all citizens to self-governance, and to eliminate the use of the carceral state to confine racial and ethnic minorities to the status of the governed, rather than the governing. The D.C. statehood amendment operates in a similar way, as it would reduce racial disparities in Senate representation flowing from the asymmetries in influence between voters in small states with predominantly white populations and voters in large states with majority-minority populations.[41] The Equal Rights Amendment is also an elaboration on the guarantees of the 14th amendment, raising protections against discrimination on the basis of sex and possibly gender identity to the same level as the protections against discrimination on the basis of racial identity.

The reforms sought through the Anti-Court Packing Amendment and the entrenchment of a more conservative judicial ideology in the Supreme Court are different, being partially restorative and partially retrogressive. These reforms tend to be embedded in an account of the 14th Amendment that construct it as an amendment that largely preserved existing conceptions of state sovereignty[42] rather than as a constitutional dismemberment which functionally reinvented the nation. The narratives of federalism and states' rights are resistant to accounts of the 14th Amendment that make citizens' rights prior to state sovereignty (rather than creatures of state sovereignty).[43] Moreover, the role these narratives assign to text and Founding Era practices tend to result in constitutional outcomes that preserve racial, gender and class hierarchies. Progressive jurists' commitments to dismantling these hierarchies often lead them to privilege federal power and minority rights in ways that are at odds with robust protection of state sovereignty and strong fidelity to Founding Era practices. The appointment of Justice Barrett as the final member of a conservative supermajority and efforts to prevent the use of court packing to undo that supermajority, are all attempts to "restore" prior (but never uncontested) constructions of state sovereignty and fidelity to the Founding Era precedent.

At this time, the nation and its institutions seem almost evenly divided between the forces of elaboration on the one hand and the forces of restoration/retrogression on the other. Until this balance tips definitively in one direction or another, any elaboration or regression/restoration through constitutional reform is likely to be limited and partial.

IV. LOOKING AHEAD

Given the heightened salience of equal citizenship and substantive

37 Nora Caplan-Bricker, 'Is D.C. Finally on the Brink of Statehood?' (*The Washington Post*, 27 January 2021) <https://www.washingtonpost.com/magazine/2021/01/27/dc-statehood-activists/?arc404=true> accessed 9 February 2021.

38 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 12 August 2019).

39 ibid.

40 Catherine A. MacKinnon & Kimberlé W. Crenshaw, 'Reconstituting the Future: An Equality Amendment' (2019) 19 Yale L J 343.

41 New Columbia Statehood Commission, 'Why Statehood for DC' (*statehood.dc.gov* 2019) <https://statehood.dc.gov/page/why-statehood-dc> accessed 9 February 2021.

42 Eg *United States v Stanley* 109 US 3 (1883); *United States v. Morrison*, 529 US 598 (2000).

43 Eg, *Shelby County v Holder* 570 US 529 (2013); *United States v Morrison* 529 US 598 (2000).

majority rule to groups across the nation, there are several big questions ahead for the U.S in the area of constitutional reform. In the immediate future, the question of whether to eliminate the Senate filibuster now that the Democrats have a majority will be key. The filibuster makes 60 votes (rather than a bare majority of 51) the threshold for legislation to pass the Senate. Given that Democrats have only a bare majority in the current congress, eliminating the filibuster is likely to be a precondition for successfully passing bills that grant statehood to the District of Columbia and that enlarge the size of the Supreme Court, both ways to challenge rule by political minorities. How the Supreme Court, with its new conservative supermajority, would respond to the enactment of such dramatic changes through ordinary legislation, is also something to watch. Should the Supreme Court attempt to limit the reforms, the doctrine of judicial supremacy might be called into question in interesting ways. For example, would the current legislative orientation of deference to the Court as the final decision maker hold, given the procedural irregularities underlying the confirmation of a third of the members of the current Court? Lastly, should these bills be enacted successfully, with the Court's blessing or over its objection, the dynamics of constitutional amendment in the enlarged electorate would likely look very different, with the amendability of the constitution potentially becoming far less difficult.

V. FURTHER READING

Joshua Braver, 'Court Packing: An American Tradition?' (2020) 61 BCLR 2747.

Richard Albert, 'America's Amoral Constitution' (2021) 70 AULR 773.

Venezuela

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I. INTRODUCTION

2020 was an important year in Venezuelan constitutional politics. It was the last year of the constitutional period of the National Assembly originally elected for the 2015-2020 period, under the control of the opposition. It was also the last year of functioning of the "National Constituent Assembly" elected in August 2017, an institution that claimed full prerogatives over the remaining branches of power based on the theory of 'constituent power'.

On the one hand, the National Assembly elected in 2015 did not achieve its goal to promote a political transition in Venezuela to restore the Constitution of 1999, following the questionable re-election of Nicolas Maduro in May 2018. This election has been called illegitimate and fraudulent by most of the opposition and dozens of countries. Since the election was considered fraudulent, in 2019 the opposition-leaning National Assembly declared congressman Juan Guaidó as interim President of Venezuela and promulgated a Statute Governing the Transition to Democracy to Re-establish the Validity of the Constitution of the Bolivarian Republic of Venezuela. This Statute established a strategy to conduct a political transition in Venezuela that was suppose to lead to free and fair elections and a legitimate democratic government, and possibly leading to a constitutional reform. The National Assembly's membership and acts enjoyed the recognition and approval of dozens of countries, including the U.S., the European Union and several Latin American democracies.

Meanwhile, the Maduro government has managed to retain power, albeit at the expense of the 1999 Constitution's normal operation. The Maduro regime's effort to preserve power included convoking, electing and establishing the 'National Constituent Assembly' in 2017. Although the supposed goal of the Constituent Assembly was reforming the 1999 Constitution, after three years of functioning, the National Constituent Assembly did not enact a new constitutional text or reformed it. Instead, it limited itself to using its prerogatives to sideline the law-making powers of the National Assembly and eviscerate its role. The Constituent Assembly ceased operations in December 2020.

From that perspective, both the National Assembly elected in 2015 and the National Constituent Assembly elected in 2017 could have reformed the Constitution, but neither achieved that reform. The Constitution of 1999 maintained its validity in 2020—at least formally—and remains the country's enforceable constitutional text, presently and in the foreseeable future.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. BACKGROUND: THE 2017 NATIONAL CONSTITUENT ASSEMBLY

In 2017, in response to an emboldened opposition channeling public discontent against the Maduro government through protests, and given the government's reluctance to allow a recall referendum against the President, Maduro convoked a 'National Constituent Assembly'. Controversial from the start, this Constituent Assembly was supposed to have full prerogatives to modify the Venezuelan Constitution, based on an expansive (and problematic) interpretation of constituent power theory. In this account, the Assembly can make decisions outside the existing constitutional framework, sideline existing branches of power and even usurp its prerogatives representing the 'people's will'. Thus, from the start, Maduro and his allies envisioned the National Constituent Assembly, not so much as a constitution-making or reform exercise, but as a constitutional/legal mechanism to trump the National Assembly's (i.e. the Parliament's) authority and the opposition's exercise of its prerogatives. Although this goal had already been accomplished by the government through the recurrent use of the Constitutional Chamber of the Venezuelan Supreme Tribunal (TSJ)—the country's supreme authority in constitutional adjudication –; the creation of the Constituent Assembly allowed the Maduro regime to usurp the National Assembly's functions and present it as a legitimate power vis-à-vis its allies at home and abroad.

As we have discussed in previous works, the creation of the National Constituent Assembly was denounced by the political opposition, dozens of governments, and constitutional experts as unconstitutional, and anti-democratic. It did not comply with the 1999 Constitution and it was duplicitous—from its conception, the Maduro government did not have a genuine interest in reforming the constitutional text. Moreover, the election of the National Constituent Assembly's delegates in 2017 was also held in contempt of the constitution and applicable legislation. Yet, this Constituent Assembly went on to fulfil a major role in the government's efforts to consolidate its rule, control the opposition and legitimize an increasingly oppressive regime.

The National Constituent Assembly exercised legislative powers, seeking to override or replace the opposition-leaning *Asamblea Nacional* as the country's main legislative institution; it usurped the

appointing powers of the Assembly by handpicking major officials, such as the Attorney General and the head of the Ombudsman's office; and it played a major role in legitimizing several electoral contests. The latter's function ended up being very important in consolidating Maduro's role: It included convoking regional elections right after the Assembly started to function (October 2017), and the May 2018 presidential elections that led to the unconstitutional reelection of Nicolás Maduro. This election worsened the political crisis, leading to the Parliament declaring it as 'non-existent' and, subsequently, choosing to appoint congressman Juan Guaidó as interim President in January 2019. From then on, two parallel processes that could potentially lead to constitutional reform unfolded: The opposition's attempt to cease Maduro's usurpation of power via free and fair elections, on one hand, versus the Maduro government's attempt to protect and consolidate its rule through a variety of measures, including the Constituent Assembly.

2. THE JUAN GUAIDÓ INTERIM PRESIDENCY AND THE (FAILED) TRANSITION

After assuming the presidency on January 23, 2019, Guaidó began leading a national and international effort to ensure a democratic transition in Venezuela. The deep humanitarian crisis was also identified as a problem to be solved during this transitional period, and other goals (such as protecting the country's assets overseas and represent Venezuelans' interest abroad) became important over time.

To guide a political transition and the country's return to democratic rule according to the 1999 Constitution, the opposition-controlled National Assembly enacted the "Statute to Govern a Transition to Democracy to Re-establish the Full Force and Effect of the Constitution of the Bolivarian Republic of Venezuela". Article 2 of the Statute states:

> "For the purposes of this Statute, a transition is understood as the democratization and re-institutionalization itinerary that includes the following stages: Liberation of the autocratic regime that oppresses Venezuela, formation of a provisional Government of national unity and holding free elections."

According to the Statute, the President of the National Assembly (Juan Guaidó in this case) would be the interim President of the Republic until Nicolás Maduro's usurpation of power ceased and free and fair elections took place. These three steps were supposed to be a sequence but, when they did not eventuate, they were then approached as three goals that could take place without a specific order. Nevertheless, these efforts were frustrated by Maduro and his allies, who remained *de facto* in power despite growing discontent, the collapse of the economy and the weight of international sanctions on high-profile government officials. Following a series of missteps and setbacks, the opposition's prospects of achieving a transition reached a nadir in December 6, 2020, when the Maduro regime was able to hold elections to replace the members of the National Assembly (legislature) at the end of their 2015-2020 term. This contest was also marred by lack of electoral integrity since it took place with the exclusion of most of the political opposition (among other major irregularities). In this election a large majority of candidates of the official party were declared victors, allowing the government to claim that they had legitimately won the Assembly for the 2020-2025 term and hence replace the previous opposition-controlled Assembly.

The opposition and an important sector of the international community have declared null and void that election. These attempts were denounced by the opposition, which refused to recognize the election and decided to keep control of the National Assembly—a move rejected by the Maduro government and its international allies but approved by several governments overseas. To these ends, the opposition majority in parliament modified the Statute and has vowed to continue operating until a democratic transition takes place.

Thus, the standoff continues: Two years after being appointed interim President, Juan Guaidó remains President of the 2015 National Assembly controlled by opposition members (including several who are currently in exile, persecuted by the regime) and, hence, retains his role of interim president; whilst Nicolás Maduro retains *de facto* control of the presidency with the support of its allies (including several major authoritarian powers, such as China, Russia, Iran and Turkey).

The failure of a democratic transition also closed the doors for a potential reform to the Constitution at a later stage of that process. Even when it was not recognized expressly in the Statute, one of the main goals in a process of political transition in Venezuela could have been a new democratic Constitution. The 1999 Constitution has always been criticized on a variety of grounds, including its questionable origin, its excessive concentration of power on the executive branch and its strong ideological connection to the Bolivarian political project. Although the current re-democratization efforts seek to enforce the current Constitution, this does not mean that the Constitution could not be reformed to reconsider and correct the institutional framework adopted in 1999. Yet, as the political transition established in the Statute did not succeed, the discussion about a new Constitution in Venezuela (or even a constitutional reform) pushed by the opposition's re-democratization effort will likely not take place. Instead, the underlying change that has happened in recent times in Venezuelan constitutionalism is a turn to autocratic rule.

3. VENEZUELA'S TURN TO AUTOCRACY AND THE NATIONAL CONSTITUENT ASSEMBLY IN 2020

The opposition's lack of success can be largely attributed its own mistakes, but also to the reluctance of the Maduro regime to negotiate, facilitate or allow an electoral transition in Venezuela. Different attempts to break an agreement between Maduro and his ruling elite and the political opposition have failed, including the good-will efforts of third parties such as the Norwegian government. In the meantime, Maduro has been able to consolidate its rule. As mentioned above, the National Constituent Assembly was a key part of this process.

The creation of the National Constituent Assembly was the breaking point of Venezuela's weak rule of law. Its installation was clearly against the Constitution—as it was directly called by the President instead of the Venezuelan people –, and the election of its members was unconstitutional and illegal. The National Constituent Assembly was installed with the deliberate goal of helping the Maduro government to concentrate powers, sidelining the existing constitutional and legal framework as much as possible to protect the regime's stability. It was formed exclusively by pro-government representatives of the ruling

United Socialist Party (PSUV), and led by some of the most renowned leaders of the *Chavista* regime—including Diosdado Cabello, widely considered the country's second most powerful figure within Chavismo after President Maduro.More importantly, the National Constituent Assembly was not really interested in reforming the 1999 Constitution. In fact, after three years, the National Constituent Assembly did not produce a single debate or released a working paper regarding the new Constitution that was supposed to be discussing and drafting.

Moreover, from a political perspective, in 2020, the Constituent Assembly's importance was relatively marginal—as most significant decisions seemed to lie elsewhere in the Maduro regime, with the de facto President himself as the primary decision-maker (in a nominal sense or in practice). However, in 2019 and 2020 the National Constituent Assembly still fulfilled the role of 'last trench' of the regime, making a few decisions that have influence the country's constitutional trajectory in these volatile times. In 2019, the National Constituent Assembly dictated a few "Constitutional Laws", including the "Constitutional Law of the Homeland Plan" or *Plan de la Patria*—an important document that meant to establish the framework for the government's strategic orientation and the key programmatic tenets of the economic and social development of the nation. More recently, in 2020, the National Constituent Assembly once again usurped the National Assembly's legislative powers issuing several statutes or "Laws", such as the "Constitutional Law of the Bolivarian National Armed Forces", several "Laws" to reform important aspects of Tax Law, and a "Law" to incorporate government militias in the National Army. These were all notable pieces of legislation, but none of them with a significant impact on the regime's performance of prospects.

Perhaps the most important "law" emerging from the National Constituent Assembly was the "Ant-Blockade Law", or *Ley Antibloqueo*. This ambitious and far-reaching piece of legislation has sought to equip the government to sort out different challenges related to the economic sanctions placed upon the government and public officials, especially to create a legal environment to promote contracts between the State and the private sector under confidential rules. The Anti-Blockade Law has been denounced by both the opposition and dissident parts of Chavismo as a power grab and/or an excuse to privatize state assets and allocate contracts out of sight, without state or societal accountability.

As mentioned above, after the takeover of the National Assembly by the Chavista majority in the controversial 2020 Legislative Elections, the Maduro government decided to shut down the National Constituent Assembly. Thus, over three years of performance end without a Constitution, and with an uneven record as an authoritarian institution. For scholars at home and abroad, it will likely be seen as a good example of the risks associated with constituent power theory in contexts with authoritarian traits, weak institutions and endemic abuses of the rule of law.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Supreme Tribunal's catalog of judicial adjudication prerogatives established in the 1999 Constitution is wide and has been interpreted generously and expansively by the Venezuelan Supreme Tribunal. Nevertheless, the Venezuelan Constitution does not explicitly recognize constitutional review jurisdiction to the Constitutional Chamber of the Supreme Tribunal of Justice (TSJ), to exercise constitutional control over the process to amend or reform a Constitution or exercise constitutional control over a National Constituent Assembly.

This does not mean, however, that if there was to exist such a process again in the future the Court could not be requested to intervene. On one hand, there is the precedent of the Venezuelan Supreme Court's rulings of 1999, when the intervention of the country's court of last resort was indispensable for activating the constitutional reform process that led to that year's National Constituent Assembly, along with its questionable decision to allow the Constituent Assembly's actions against the existing branches of power, including the judiciary itself. Additionally, the Venezuelan Supreme Tribunal of Justice did issue an important ruling with regards to the 2017-2020 National Constituent Assembly discussed in this report, when it allowed the President of the Republic, Nicolás Maduro, to convoke the Assembly without needing to resort to public consultation via referendum (as the Constitution mandated). Although the Supreme Tribunal is largely discredited as a pro-government institution and has been denounced as a politicized tribunal for years, the ruling was very important in giving legitimacy to the constitution-making exercise vis-à-vis domestic and international audiences.

In any case, one could argue that, according to articles 7, 334 and 335 of the Constitution, the Supreme Tribunal of Justice should make an effort in any case to maintain the integrity of the Constitution. From that point of view, the Supreme Tribunal, through the Constitutional Chamber, should maintain the Constitution's integrity even in the event of a constitutional amendment or reform process. However, the question on whether and to what extent it would be willing to do so will depend on the circumstances. Currently, any prediction with respect to the Supreme Tribunal's role in controlling the government more broadly should be seen through the lenses of the institution's lack of judicial independence vis-à-vis the government and its consistent role as an authoritarian institution during the Chavista regime, especially in the Maduro years. Having that in mind, it does not seem that this jurisdiction will face a constitutional reform process in the foreseeable time.

IV. LOOKING AHEAD

On December 6, 2020 a new legislature (National Assembly) was elected in a very questionable contest, and now is controlled almost entirely by the official party. On one hand, this election weakened the institutional basis of the National Assembly elected in 2015, and therefore the institutional basis of the interim Presidency of Juan Guaidó. Unless future negotiation efforts or a change of trajectory due to other circumstances takes place, the prospects of Venezuela's re-democratization do not seem hopeful.

On the other hand, the election of a government-controlled National Assembly has made the National Constituent Assembly redundant. Despite having functioned over three years in an authoritarian context, it seems that the Maduro regime was not really willing to reform the Constitution. This constitutional reform exercise ends, then, without a reform outcome at all. It's probably best seen not as an effective, truthful constitutional reform process, but as an institution that enabled Maduro's increasingly authoritarian government in a challenging context. At this stage, Venezuelan constitutionalism is better analyzed

from the vantage point of authoritarian constitutionalism and rule by law logics: The Maduro government seems happy with using the 1999 Constitution and following its mandates to the extent that it allows it to preserve its rule.

V. FURTHER READING

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Vietnam

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I. INTRODUCTION

A surprise to many, Vietnam emerged as a highly successful model for developing countries (and even wealthier peers) in controlling the COVID-19 pandemic in 2020.[1] Among other factors, the country's success has been attributed to a comprehensive national response plan orchestrated by the main executive body, the Prime Minister and his Administration.[2] The concentration of emergency power in the Prime Minister's Office, while unsanctioned by Vietnam's Constitution, receives wide support among crucial constitutional actors in Vietnam. We argue that this represents a novel case of constitutional mutation via consent.

In the wake of the pandemic, Prime Minister Nguyen Xuan Phuc rapidly issued several directives setting out restrictive measures that resemble emergency powers. Under the current 2013 Constitution (the "Constitution"), these actions are beyond the Prime Minister's executive power, absent ratification from the Standing Committee of the National Assembly (the "Standing Committee"). While no formal constitutional reform was enacted to legalize this concentration of power, we argue that this situation represents a constitutional mutation via consent by other key constitutional actors. The mutation suggests that in cases of public health exigency, the Prime Minister could implement far-reaching emergency measures without declaring a national emergency—a power constitutionally reserved to either the State President (the "President")[3] or the Standing Committee.[4][5] Although legally questionable,[6] no formal challenge has been lodged, reflecting the widespread support among crucial political actors, including the Standing Committee, the National Assembly, the State President, the Government, the Supreme Court and the Supreme Procuracy.[7]

This paper sets out the policy debates around the mutation, its scope and potential pitfalls, as well as our proposal for a legislative fix regarding this mutation.

II. SOFT EMERGENCY POWER AS A FORM OF CONSTITUTIONAL MUTATION

1. BACKGROUND

Vietnam was among the first nations to report a COVID-19 case in late January 2020, soon after China imposed a harsh lockdown in Hubei.[8] By the time the first two cases were confirmed, the Prime Minister had issued an executive directive, Directive 5, instituting a national response program.[9] Two days later, he established the National Steering Committee (the "NSC"), headed by a Deputy Prime Minister.[10] While

1 See e.g. Nguyen Khanh (UNDP), The key to Viet Nam's successful COVID-19 response: A UN Resident Coordinator blog. https://news.un.org/en/story/2020/08/1070852

2 Id.

3 Article 88.5 of the 2013 Constitution regulates that the President has the power to "*based on resolutions of the Standing Committee of the National Assembly, to issue an order on general mobilization or partial mobilization, to declare or cancel a state of emergency; or, in case the Standing Committee of the National Assembly cannot meet, to declare or cancel a state of emergency nationwide or in a particular locality.*"

4 Article 74.10 of the 2013 Constitution regulates that the Standing Committee has the power to "*to declare or cancel a state of emergency throughout the country or in a particular locality.*"

5 It is noteworthy that under the 2013 Constitution, Vietnam is organized as a parliamentary republic where it regulates that the National Assembly—being the country's top legislature—is "*the highest state power body*" and "*conduct the supreme oversight activities over the activities*" of the state (Art. 69), including the power to hold the Prime Minister and his Administration accountable (Art. 70). The day-to-day activities of the National Assembly is conducted by its permanent body, the Standing Committee, who could perform the constitutional powers of the National Assembly in times this body adjourns (Art. 70). On the other hand, the President of Vietnam mostly performs the ceremonial head-of-state function, although the President is *de jure* commander-in-chief and tasked with the power to nominate or propose the removal of the Prime Minister (Art. 88). Constitutionally, the Prime Minister—as the chief administration officer of the country—is accountable to both the National Assembly and the President, and the Prime Minister does not have a wide power to actively make or implement policies, without the formal approval from the National Assembly (or its SC).

6 Formal judicial-constitutional disputes in Vietnam is probably impossible. Although the setup of a parliamentary republic under the 2013 Constitution suggests some sorts of check-and-balance, it should be noted that as a socialist country with no opposition political party, Vietnam prioritizes the "cooperation" and "labor division" among the political branches. On that note, it usually exists no popular tension or publicly known disputes on how constitutional duties and powers should be understood or used between the crucial constitutional actors. See in general *See* Bui Hai Thiem, *Constitutionalizing Single Party Leadership in Vietnam: Dilemmas of Reform*, 11 Asian J. Comp. Law 219 (2016).

7 Under the 2013 Constitution, the judiciary possesses very limited power to review the Administration's decrees and no power to perform the constitutional review of acts enacted by the National Assembly. Therefore, we do not consider the judiciary as a crucial constitutional actor in Vietnam. Traditionally, the President of Vietnam only holds ceremonial constitutional powers. However, the current President of Vietnam is also the secretary-general of the Communist Party of Vietnam, the only political and ruling party in the country. Therefore, we consider the President to be a crucial (if not the most crucial) constitutional actor for his constitutional and power influence.

8 Infographics: COVID-19 pandemic timeline in Viet Nam. http://news.chinhphu.vn/Home/Infographics-COVID19-pandemic-timeline-in-Viet-Nam/20208/41236.vgp

9 Directive 05/CT-TTg dated 28 January 2020 of the Prime Minister on the prevention and combat against the severe acute respiratory syndrome caused by novel coronavirus (the "**Directive 05**")

10 Decision No. 170/QD-TTg dated 30 January 2020 of the Prime Minister on the assembly of the National Steering Committee to prevent and combat against the severe acute respiratory syndrome caused by novel coronavirus (the "**Decision 170**")

the 2007 Law on Prevention and Control of Infectious Diseases (the "the 2007 Law on Infectious Diseases") grants the Prime Minister authority to assemble the NSC, Decision 170, which established this body, did not cite the 2007 Law on Infectious Diseases or any other legal documents as its legal basis.[11] The Prime Minister's Directive 05, supervised by the NSC, set forth a number of restrictive measures aimed at isolating China, then the most infected country, including the closure of Sino-Vietnamese land, air, and sea borders,[12] extensive contact tracing, and forced, centralized quarantine of infected clusters.[13]

Calls for the government to declare a "medical emergency" arose with the Prime Minister's announcement that he had asked the Ministry of Justice to "prepare a legal basis" and "stand ready" for a declaration of national emergency as soon as the World Health Organization (the "WHO") gave a green light.[14] However, though the WHO declared COVID-19 a global emergency only days after the assembly of the NSC, Vietnam has yet to declared a formal emergency.[15]

Following global outbreaks in March 2020, the Prime Minister issued Directive 15/CT-TTg on "aggressive measures" to combat COVID-19 ("Directive 15") and, four days later, Directive 16/CT-TTg on "urgent measures" (the "Directive 16"), which imposed social distancing requirements and effectively placed the country under lockdown for a month.[16] Directive 16 also prohibited religious services,[17] closed borders,[18] and shut down of all public transportation.[19] Preventive measures under these directives, including social distancing measures, were redeployed in August 2020 and January 2021, just before the Lunar New Year, at worrisome news of outbreaks and that the more infectious variants of COVID-19 had arrived in Vietnam.[20] The Prime Minister's Decision 447/QD-TTg, issued on April 1, 2020, cited to Directives 15 and 16 in finally declaring COVID-19 as a national pandemic.

All these stringent measures are unprecedented. While no national emergency has been declared, restrictive measures such as social distancing, suspension of inbound flights, and border closure constitute executive actions reserved only through emergency power.[21] Directive 16 thus represents the Prime Minister and the NSC's *de facto* emergency power, effectively mutating the country's constitutional emergency power clause.

2. CONSTITUTIONAL AND STATUTORY RULES OF EMERGENCY POWERS

In Vietnam, the Constitution controls the procedures to grant emergency power, while statutes enacted by the country's legislature—the National Assembly and its Standing Committee—fill in the substance. Vietnam's 2013 Constitution stipulates that the Standing Committee shall declare the start and end of a nationwide or local emergency,[22] with the State President assuming this role if the Standing Committee cannot hold a session.[23] The Government is vested with a duty to "implement the emergency order"[24] while the Prime Minister, while cannot himself declare a national emergency, has statutory power to propose that the Standing Committee does so.[25]

"Emergency", in particular "medical emergency", is defined in various statutes. Most relevantly, the 2000 Ordinance on the State of Emergency (hereinafter the 2000 Ordinance on Emergency) lists the "*outbreak of a large-scale pandemic… which seriously threatens the assets of the State and the organizations, health and assets of the citizens, or whose surrounding circumstances seriously threaten the national security and social orders and safety*" as a situation eligible for an emergency declaration.[26] Similarly, the 2007 Law on Infectious Diseases stipulates that a medical emergency could be declared at the Prime Minister's request when an "outbreak of a large-scale pandemic [seriously threatens] human's lives and health and the economic and social conditions of the country".[27]

When a medical emergency is declared, the NSC can impose certain preventive measures, including those that restrict human rights.[28] Article 14 of the 2013 Constitution prescribes that "*human rights, citizens' rights may be restricted as prescribed by a law solely in case of necessity for reasons of national defense, national security, social order and safety, social morality and community well-being.*" Specifically, the following measures can be applied in a medical emergency: lockdown (i.e. prohibit the entry and exit of persons and transportation means in a specific location), curfew (i.e. prohibit human's activities

11 Decision 170 only cites the Law on Organization of the Government, a Prime Minister's Decision in 2007 on the assembly of inter-ministerial bodies, Directive 05, and the request of the Ministry of Health.

12 Clause 4 of Directive 05 mandated the Ministry of Defense to *"prohibit human movements in the open borders with China and strictly control the immigration at Sino-Vietnamese border"* and Clause 5 mandated the Ministry of Transportation to *"temporarily suspend the granting of landing permits for flights from China to Vietnam."*

13 Clause 1 of Directive 05 mandated the Ministry of Health to "strictly quarantine" any persons with syndrome.

14 See Ngoc An, *Prime Minister: Ready to declare a medical emergency for Covid-19 (in Vietnamese),* Tuoi Tre. Available at https://tuoitre.vn/thu-tuong-san-sang-tuyen-bo-tinh-trang-khan-cap-y-te-ve-dich-virus-corona-20200130180826019.htm (Jan. 30, 2020)

15 Sui-Lee Wee, Donald G. McNeil Jr., and Javier C. Hernandez, *W.H.O. Declares Global Emergency as Wuhan Coronavirus Spreads,* The New York Times. Available at https://www.nytimes.com/2020/01/30/health/coronavirus-world-health-organization.html (Jan. 30, 2020).

16 For a comparison of measures under Directive 15 and Directive 16, see Tarah Nguyen, *Clarification of Governmental Directive 15 and Directive 16 on Covid-19 prevention,* Vietnam Times. Available at https://vietnamtimes.org.vn/clarification-of-governmental-directive-15-and-directive-16-on-covid-19-preventation-19690.html (Apr. 23, 2020). Clause 1 of Directive 16 regulates a *"nationwide quarantine for 15 days from 12 am of April 01, 2020 between families, neighborhoods/villages, communes, districts, provinces. Workers in factories shall keep a safety distance, wear facemasks, and sanitize the workplace as prescribed. The people are advised to stay at home and only go outside when strictly necessary such as buying food or medicines, providing emergency treatment, going to work at facilities that are allowed to maintain operation to provides essential goods or services, and in other urgent circumstances; maintain a safety distance of 2 m during communication. Do not form groups of more than 2 people outside office buildings, schools, hospitals and in public places."* These measures were renewed on 15 April 2020 for another two-week period.

17 Clause 1 of Directive 16 prohibits a gathering of more than two persons, effectively restricting any religious services.

18 Clause 7 of Directive 16 a temporarily closure of "the primary and secondary border checkpoints for people along the border with Laos and Cambodia from 12 am of April 01, 2020. Strictly control the entry through international border checkpoints on road; all inbound travelers from Laos and Cambodia shall be quarantined for 14 days."

19 See Clause 4 of Directive 16.

20 See *Da Nang to apply social distancing in six districts from July 28*, Nhan Dan. https://en.nhandan.org.vn/society/item/8919402-da-nang-to-apply-social-distancing-in-six-districts-from-july-28.html (Jul. 28, 2020); See Huu Cong, *HCMC urged to apply social distancing after dozens test positive for coronavirus,* VnExpress. https://e.vnexpress.net/news/news/hcmc-urged-to-apply-social-distancing-after-dozens-test-positive-for-coronavirus-4233394.html (Feb. 8, 2021).

21 Articles 6, 7, and 8 of the 2000 Ordinance on Emergency.

22 Supra note 4.

23 Supra note 3.

24 Article 96.3, the 2013 Constitution.

25 Article 57.2, the Law on Organization of National Assembly.

26 Article 1, the 2000 Ordinance on Emergency.

27 Article 42.1.a), the 2007 Law on Infectious Diseases.

28 Article 54, the 2007 Law on Infectious Diseases. See also Section 2, Decree 71/2002/ND-CP dated 23 July 2002 on guiding the 2000 Ordinance on Emergency.

in a certain time), suspension of citizens' rights (i.e. close theatres and other public forums, suspend the right to strike, the right to assembly and mass gatherings, censor publications, apply special control to mass media and telecommunications means), medical quarantine, and suspension of businesses.[29] On the contrary, certain citizens' rights are protected even under an emergency, for example the right to due process of law.[30]

3. THE INTRODUCTION OF "SOFT" EMERGENCY POWER

Directive 16, though never legally designated as an emergency power order, comprises of many preventive measures that are exclusive to an emergency. Although in at least one circumstance, the Prime Minister suggested that Directive 16 was only meant to "*persuade the citizens to voluntarily adhere to the measures,*"[31] the language of the relevant Directives was no less coercive than a legal document where it called for "strict implementation."[32] The Prime Minister further called for the application of strict penalty and potential criminal charges for any violations.[33] Consequently, the measures under Directive 16 are effectively analogous to measures invoked by emergency powers, rather than mere pandemic preventive measures.

The fact that these emergency measures were not declared by either the Standing Committee or the State President, as prescribed under the 2013 Constitution, poses a question of their legality. Yet, no formal challenge, legal or political, has been lodged against the application or constitutionality of the Prime Minister's directives. On contrary, it appears that the Prime Minister enjoys wide political support for his swift actions. As soon as the nationwide lockdown order came into effect, the State President publicly endorsed the directive, urging citizens to "*act and adhere, in solidarity,... to the guidance of the Government and the Prime Minister.*"[34] Around the same time, the Standing Committee held an extraordinary session to approve the Prime Minister's request for relief and aid to vulnerable population, during which it applauded the Government's prompt response against COVID-19.[35] Enforcement of the directives, however, is decentralized. Local government enjoyed broad discretion in deciding on the specific measures for their provinces, usually even more stringent than those by the central government.[36]

29 Supra note 23.

30 Articles 14.1, 14.2, 19.1, and 19.2, the 2000 Ordinance on Emergency.

31 Chi Hieu, *Prime Minister: "Social distancing is to convince people only"* (in Vietnamese), Thanh Nien. https://thanhnien.vn/thoi-su/thu-tuong-cach-ly-toan-xa-hoi-moi-dung-o-muc-van-dong-thuyet-phuc-1204092.html (Mar. 31, 2020)

32 Clause 1, Directive 16.

33 See, for example, the report of Nghe An Police applies strict penalties against the violation of Directive 16. Hang Nga, *Strict penalties against violations of Directive 16*. https://congannghean.vn/phap-luat/202004/cong-an-huyen-tan-ky-nghe-an-xu-ly-nghiem-cac-truong-hop-vi-pham-chi-thi-16-cua-thu-tuong-chinh-phu-897075/ (Apr. 15, 2020)

34 See *Top leader calls for solidarity against COVID-19*. https://vietnamlawmagazine.vn/top-leader-calls-for-solidarity-against-Covid-19-27105.html (Mar. 31, 2020).

35 See *NA Standing Committee applauds Government's prompt response to COVID-19*. Vietnam News. https://vietnamnews.vn/society/674875/na-standing-committee-applauds-governments-prompt-response-to-covid-19.html (Apr. 8, 2020).

36 For example, in April 2020, local authorities in Quang Ninh, a Northern province, imposed a 10 p.m curfew where violators would be sent to quarantine centers. Such curfew is not included in Directive 16.

III. THE SCOPE OF THE INFORMAL REFORMS ON SOFT EMERGENCY POWERS AND CONSTITUTIONAL CONTROL IN VIETNAM

1. POLITICAL MOTIVES AND CONSTITUTIONAL MUTATION AS A VIABLE THEORY FOR INFORMAL REFORM

The concept of "constitutional mutation" is still novel among constitutional law scholars. Theorizing on constitutional mutation during the Euro Crisis Response, Professor Bruno de Witte summarized a constitutional mutation to have the following features: (i) there is an informal constitutional change that a new constitutional practice has been introduced and superseded or amended the current constitutional rule, and (ii) there is a consent among crucial constitutional actors that the new constitutional practice is effective and replaces or amends the existing constitutional rule.[37] In Vietnam, however, provided the absence of popular and open constitutional debate on ongoing policy issue, we suggest that the endorsement of crucial constitutional actors of a new constitutional practice should be deemed as their agreement on the creation of new constitutional rule. In Vietnam's case, this represents an instance of constitutional mutation via consent.

A question remains on why Vietnam has yet to declare a national emergency. Limited information from public media suggested a sense of reluctance from the country's leadership, despite the Prime Minister's highly publicized "call for readiness." Pursuant to Vietnamese law, the criteria for the declaration of a medical emergency is highly regulated, including the number of infected patients, fatalities, the degree of contagiousness, and the failure of preventive measures.[38] Importantly, the first three criteria appear to be contingent on the last criterion (i.e. failure to prevent). A formal declaration of medical emergency would, in essence, amounts to the government's admission of its failure to contain the pandemic, contrary to its rhetoric for public mobilization. That the government requires emergency authority to contain the pandemic but cannot do so without having to admit its failure in containing COVID-19 outbreaks ostensibly explains the constitutional mutation. Other scholars have theorized on how politicians' agenda can play an outsized role in pushing for constitutional change in socialist countries.[39] Such an instrumentalist approach purports with a Marxist political system, where laws, including constitutional law, can be utilized creatively to achieve a political agenda.[40] Constitutional mutation thus fits into this pattern of political motives and constitutional practice.

In sum, we argue that Vietnam's significant constitutional reform in 2020 is not a formal change, but the introduction of a practice of soft emergency power that the Prime Minister could invoke during a public health exigency, without having to request either the Standing Committee or the State President to formally declare a national emergency as required by the Constitution. However, the mutation does not immune the Prime Minister from an *ex post* check by either the

37 *See* Bruno De Witte, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation*, 11 EuConst 434, 448 (2015)

38 See Tran Manh, *Why Vietnam has not declared an emergency* (in Vietnamese). http://baochinhphu.vn/Thoi-su/Vi-sao-Viet-Nam-chua-cong-bo-tinh-trang-khan-cap/386281.vgp (Feb. 1, 2020)

39 See Bui Ngoc Son, Constitutional Change in Contemporary Socialist World (2020). In Chapter 1, Bui theorizes the patterns and approach to constitutional change in modern socialist countries.

40 See supra note 6, Bui.

Standing Committee or the State President, who could endorse or revoke the Prime Minister's emergency power. As the COVID-19 pandemic is still ongoing, we do not yet know how these actors will react, including the possibility that the soft emergency power granted to the Prime Minister will continue to mutate to cope with practical demands.

Tension with the existing rules on human rights in the 2013 Constitution and the need for a control mechanism

The 2013 Constitution provides that human rights and citizens' rights may only be restricted by a law—meaning a statute enacted by the National Assembly—*"in case of necessity for reasons of national defense, national security, social order and safety, social morality and community well-being."*[41] According to the Constitution, only the National Assembly, through the democratic process of enacting a statute, could justify restrictions to human rights and citizens' rights. Vietnamese scholars widely recognize that this constitutional rule on human rights restrictions (the *"human rights rule"*) is a key progressive feature of the current Constitution, distinguishing it from the country's past constitutions.[42] Since the adoption of this constitutional rule, Vietnamese lawmakers have replaced many of the country's decrees and ministerial circulars having restrictive human rights effect with statutory laws, even though, it has to be said, that these laws sometimes impose the same or even more stringent restrictive effect.[43]

The constitutional mutation on emergency power, however, gives rise to a direct legal tension with the human rights rule. As the result of the mutation, constitutional actors appear to accept that in a public health crisis, the Prime Minister could bypass both the constitutional procedure on declaring the emergency and the human right rule. In other words, the Prime Minister could apply measures that may restrict human rights and citizens' rights without having to refer to any specific statute that allows such power. At best, this is a circumvention to the human rights rule that requires further reconciliation by Vietnam's constitutional actors. At worst, it could be argued that, by agreeing on this constitutional mutation, Vietnamese constitutional actors implicitly agreed on an informal amendment that abrogates the human rights rule. We do not think that the latter situation is the case. If so, it would no longer be a simple mutation but rather a constitutional dismemberment,[44] as a key constitutional provision would no longer be in its traditional shape.

We see a need for Vietnam's constitutional actors to reconcile the current situation with the formal constitutional requirement in order to preserve the Constitution's legitimacy and avoid the risk of constitutional dismemberment. As with other constitutional questions, the National Assembly remains the sole body with power to resolve constitutional conflicts. As of February 2021, there has been no political or legal challenge to the Prime Minister's *de facto* emergency power, and the National Assembly remains silent on this issue.

IV. LOOKING AHEAD

The Vietnamese public as well as international observers have all heaved high praise on Vietnam's approach to the COVID-19 pandemic. No doubt the Prime Minister's swift and effective actions, although legally questionable, have played a key role. However, these executive actions have given rise to an important constitutional question: should an informal grant of executive emergency power be allowed, and if so, how to reconcile it with the human rights rule?

To answer this difficult question, we suggest that the *status quo*, while effective in the short term, may create legal dissonance if left unaddressed. Ideally, a formal constitutional reform process would open up debates on the executive office's emergency power, building on the robust public engagement observed during the 2013 constitutional amendment process. The prospect for another constitutional reform in the near future is, however, rather remote, especially if absent political will and incentives. As a stop-gap measure, the National Assembly could choose to partially address this issue by amending the 2000 Ordinance on Emergency to provide for a control mechanism in both informal and formal emergency powers.

V. FURTHER READING

Bui Ngoc Son, *Constitutional Change in Contemporary Socialist World* (Oxford University Press 2020).

Vu Cong Giao & Vu Thi Thu Quyen, 'Protection of Human Rights in the State of Public Emergency: the Role of Constitution', in in Sarah Biddulph and all (eds), *Law on the State of Emergency.* (Hong Duc Publishing House, 2020).

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Bui Thu Hang, 'Issuance of Legal Documents during state of emergency, a case study of Covid-19' (in Vietnamese), Nghien Cuu Lap Phap <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=210491> (accessed 13 February 2021)

41 Article 14.2, the 2013 Constitution.

42 See Vu Cong Giao and Tran Kien, Constitutional Debate and Development on Human Rights in Vietnam, 11 Asian J. Comp. Law 235 (2016).

43 Id, 260 (2016).

44 For discussion on constitutional dismemberment, see Richard Albert, **Constitutional Amendments: Making, Breaking and Changing Constitutions 76-84 (2019).**

SUMMARY

The Most Important Developments in Constitutional Reform

BY JURISDICTION

Albania

The constitutional reform affected the elections abolishing the pre-election coalitions of political parties and the possibility to run as such during election, linking the electoral threshold with the possibility to profit from the distribution of mandates after election and imposing a gender balance. No constitutional control was exercised because of lack of quorum at the Court.

Australia

The most important development in constitutional reform in Australia in 2020 was the continued evolution of proposals for an Indigenous advisory body called a 'First Nations Voice'. Despite progress, there remains disagreement over basic design questions, including whether such a body should be entrenched in the national Constitution.

Austria

In 2020, the Austrian Constitution celebrated its 100thbirthday.The response to the Coronavirus pandemic brought many adaptations and implementations of legislature; most of these did not interfere on a constitutional level. The Freedom of Information Act—a proposed constitutional reform discussed for years -has been deferred again.

Barbados

The two most important developments in constitutional reform were the creation of a Judicial Appointments Committee to advice on the appointment of judges and a new category for removal of a judge for a delay in judgement of more than six months.

Belgium

In the Coalition Agreement of 30 September 2020, the new Belgian federal government announces several constitutional and institutional reforms. It includes most importantly an intended broad debate as input to modernize, increase the efficiency, and deepen the democratic foundations of the state structure, increase citizen participation and democratic renewal.

Bolivia

The most important reform or constitutional understanding of the year 2020 was the Plurinational Constitutional Declaration 0001/2020 of January 15, by which the Plurinational Constitutional Court declared the constitutionality of the extension of the mandate for both the President of the Plurinational State of Bolivia, and for the Assemblymen of the Plurinational Legislative Assembly.

Bosnia and Herzegovina

The constitutional transition of Bosnia and Herzegovina (BiH) is still not finished, even 25 years after the end of the war and the Dayton Peace Agreement (DPA). Reforms are necessary, for implementing a series of judgments of the European Court of Human Rights and because otherwise EU accession is impossible.

Brazil

The most important developments in constitutional reform are Constitutional Amendment No. 108, which made the "Fund for Maintenance and Development of Basic Education and Appreciation of Education Professionals" (FUNDEB) permanent, and the invigoration of federalism in times of crisis through a provisional order issued by the Supreme Court.

Bulgaria

In Bulgaria 2020 witnessed everyday anti-government protests from July to November. In the heat of the political tension in August the ruling party set a "new Constitution" draft in the political agenda using a purely procedural technique to remain in power. The proposed ostensible constitutional reform failed as expected.

Canada

The three most important constitutional developments in 2020 are related to Quebec's voting system, Senate reform in Alberta and reconciliation with Indigenous Peoples. Consistent with Canada's culture of constitutional amendment, these reforms did not take place by multilateral constitutional amendments, but through the unilateral action of the provinces or the federal order.

Cape Verde

Cape Verde's 2020 political agenda was not marked by the use of the formal procedure of constitutional reform; the CCCV did not recognize any constitutional convention or the incorporation of previously non-included rights in the bill of rights; and no clear informal changes to the constitutional norms were identified.

Chile

The most important constitutional reforms were oriented to modify and execute the plan for a constituent process and to amend certain institutions to face the pandemic outbreak and the economic crisis. In this context, it was possible to appreciate the difficulties faced by the Constitutional Court exercising its counter-majoritarian function.

China

The most important development in Chinese constitutional reform in 2018 is separating the supervisory function from the executive and vesting it in an independent branch (commissions of supervision).

Colombia

Constitutional Amendment 1/2020 opened the door to life imprisonment in Colombia. Lifetime prison sentences can be imposed for certain crimes perpetrated against minors such as intentional homicide and some types of sexual abuse. Review of the conviction shall be granted to assess potential rehabilitation.

Costa Rica

In 2020, two amendments to the Constitution were approved. An addition of a new paragraph to Article 50 to recognize the human right of access to drinking water and its status as a public asset. And an amendment to Article 116 to expedite the legislative process in extraordinary sessions period.

Cuba

The most transcendent issue in constitutional matters in the Republic of Cuba during 2020 was the adoption of several legal provisions, as a legislative complement to the Constitution approved in 2019, mainly focused on defining the powers of state bodies, as well as the exercise of some fundamental rights.

Cyprus

In its landmark decision in *Electoral Petition 1/2019*, the Supreme Court of Cyprus endorsed the doctrines of 'basic structure' and 'unconstitutional constitutional amendments', albeit in an unjustified and incomplete manner. Consequently, the Court for the first time expanded the scope of its implied jurisdiction to the substance of constitutional amendments.

Democratic Republic of the Congo

There were several proposals to revise the 2006 Constitution in 2020. The most important development is the proposal to amend article 71, which provides for the direct election of the President of the Republic by majority in one round.

Ecuador

During the year 2020, the National Assembly debated four proposals of constitutional reform that sought to eliminate and limit the powers of the Council for Citizen Participation and Social Control. The future of this institution is uncertain, but all signals point to its elimination through partial reform via referendum.

Egypt

Egypt's recent Non-governmental Organizations (NGOs) Law went into effect. The law does away with punishments including jail time, heavy fines, as well as a national agency to govern the work of any foreign NGOs. The law promotes substantial restrictions on civil society activities in an environment considered by travel bans, asset freezes, and the arrest of civil society members.

El Savador

Two constitutional amendments were approved by the Legislative Assembly, one referred to the recognition of the fundamental right to water, and the other one referred to the correct terms to name people with disability. There were also some interesting political and juridical events related to constitutional reform.

Eritrea

There has never been any proposed constitutional reform in Eritrea, failed or successful, in the period under review (the year 2020). Eritrea is ruled without a formal constitution, written or unwritten, democratic or undemocratic, thus making it perhaps the only such country in the world.

France

The presidential term of Emmanuel Macron started in 2017 with the announcement of a profound reform of the institutions. Those proposed reforms were formalized in two bills first in 2018 and then in 2019, aiming at renewing French democracy. The 2019 amendment, while still pending, is likely to fail.

Georgia

After the Georgian Government breached the promise to entrench fully proportional system for 2020 parliamentary elections, a massive protest began. Various rounds of dialogue between the opposition and the ruling party resulted in passing an amendment which roughly approximated the electoral system to the promised one.

Ghana

The Imposition of Restrictions Act (IRA) passed ostensibly to equip the president to respond to the COVID pandemic expands presidential power to worrying proportions by allowing the president to, by executive instrument, impose restrictions on the freedoms of assembly, association, movement and privacy.

Greece

The year 2020 was a very difficult and challenging year due to covid-19 pandemic. Emergency-related legal measures taken due to covid-19, led to major constitutional challenges for fundamental rights in Greece, in a peculiar and unprecedented way. Moreover, the impact of the constitutional amendment concluded in 2019, triggered the constitutional dialogue in 2020.

Guatemala

The Constitutional Court of Guatemala in May 6 2020, in an "exhortative ruling" related to the appointment of magistrates of Courts of Appeals and Supreme Court, urged the Congress of Guatemala to carry out a constitutional reform to change the judicial selection process.

Hong Kong

The Chinese Central Authorities enacted and introduced into Hong Kong the Hong Kong National Security Law, which prescribes principles and duties for Hong Kong and its residents for safeguarding national security and establishes institutions and mechanisms for its enforcement in Hong Kong, particularly by way of new criminal offences.

Hungary

The two-thirds Fidesz—Christian Democrat majority in Parliament adopted the Ninth Amendment to the Fundamental Law (2011) in 2020. The Amendment declared that Hungary shall ensure an upbringing in accordance with the values of Christian culture, the family consists of a mother and a father, and certain semi-public funds are exempt from public data scrutinizing.

Iceland

In the year 2020 no formal constitutional amendments were adopted in Iceland. However, the year was interesting from an amendment point of view, for there was robust discussion of constitutional amendments and four proposed amendments were introduced to the public, and two formally in Parliament.

India

The most important development in constitutional reforms was the revocation of Article 370 and Article 35A in 2019, the introduction of the Citizenship Amendment Act in 2019 and the introduction of Farmer's Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020.

Indonesia

From 2002—2020, the proposals for constitutional reform in Indonesia have been made merely from political actors. It is mostly about the elite political agenda on the specific issues of institutional powers, the presidential system, and the election system. Those issues become political bargain among political stakeholders. Propositions of constitutional reform are always made after the result of elections—after the newly political power has been established. On the other hand, issues from the bottom, such as public welfare, have not yet been concerns in the constitutional reform debates.

Ireland

2020 saw the global Covid-19 pandemic dominate Irish politics. It is likely that when the pandemic subsides that proposals for constitutional change mooted prior to the crisis will reemerge. The most significant proposals include amendments to a controversial provision concerning gender roles, to permit Irish citizens outside the State to vote, to provide for a right to housing, and to allow for politicians to vote remotely.

Israel

The most important constitutional reform, resulting from deep distrust between the two major political rivals, concerns the Amendment N. 8 to Basic Law: The Government, which created a power-sharing setting of a rotating government, in which apart from the Prime Minister there is also an 'Alternate Prime Minister'.

Italy

In September 2020, Italy hold a successful constitutional referendum to confirm a constitutional reform amending Articles 56, 57 and 59 of the Constitution. Hence, following this "surgical" amendment, the number of deputies has been reduced from 630 to 400, and the number of senators from 315 to 200.

Japan

The ruling party proposed "four categories" for official revision of the Constitution of Japan, which has never once been revised since its birth in 1946.

Jordan

The Corona pandemic has cast a shadow over the legal and constitutional orientation in the Hashemite Kingdom of Jordan, as the Jordanian constitution has been subjected to a series of changes a short while ago, dealing with constitutional amendments in the field of dual nationality for ministers and the issue of establishing the Constitutional Court. We can say that the constitutional reforms have established specific principles on the road to the rule of law that need more steps to ensure and reap the fruits of these reforms.

Kazakhstan

Despite the fact that Kazakhstan, as a separate legal state, gained independence only 30 years ago, a lot has been done in the formation of independence, rule, justice and legality of the judicial system by today's date. One of the significant projects of judicial reform is the "7 Stones of Justice" Program.

Kenya

The most important development in constitutional reform in Kenya in the last year is the publication of the Constitutional (Amendment) Bill 2020 that seeks to amend a wide range of provisions in the Constitution of Kenya, 2010 including the structure of the national Executive, Parliament, the Judiciary, Devolution and Public Finance.

Kosovo

In 2020, only one change was made, and a new convention was added. Article 22 [Direct implementation of International Agreements and Instruments] *"(9) Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence"*.

Kyrgyzstan

A referendum on a new Constitution will be held on April 11th, 2021. Civil society experts assert that the time and procedures required to approve and adopt the new Constitution are broken. Preliminary analysis of the draft Constitution indicates that its overall effect will be to concentrate further power in the hands of the president, weaken the powers of the parliament and result in a return to the presidential model of government as existed before 2010.

Latvia

In 2020, the Constitutional Court of Latvia has been the main driver behind the constitutional reform initiatives of legal recognition and regulation of same-sex families, amending basic State budget and finance laws to protect vulnerable groups, as well as creating a Council of a State to increase legislative quality.

Lithuania

Individual constitutional complaint, introduced through amendments of Constitution and implemented in 2020, is considered one of the most significant constitutional reform and second major constitutional change after Lithuania's accession to the European Union in 2004, when Lithuanian Constitution was complemented by the appropriate constitutional act.

Luxembourg

Effects of Constitutional Court rulings finally find their place in the Constitution. Aiming at strengthening authority of these rulings and, by extension, the Constitutional Court, unconstitutional provisions will be non-applicable *erga omnes* and constitutional judges will have the possibility to modulate these effects in time.

Malawi

The adoption of the 50%+1 presidential electoral system, replacing the hitherto applicable first-past-the-post system, was Malawi's major constitutional reform in 2020. Arguably, *Chilima and Chakwera v Mutharika and Electoral Commission*—a High Court decision which nullified the May 2019 presidential elections—propelled the implementation of this reform.

Mexico

2020 was a year of constitutional contrasts in Mexico. The number of successful amendments was relatively low, but the number of proposed reforms was the highest in the last 25 years. We discuss the judicial reform proposal, some polemical executive unilateral actions, and account of the Supreme Court's constitutional role.

Netherlands

In the Netherlands, amendment proposals concerning the *duration of the Upper House* and the *second stage of constitutional amendment procedure* have been ratified by the Lower House in the first reading. Amendment procedurals concerning an *Upper House electoral college for non-resident citizens* and a *recalibration of the constitutional amendment procedure* have reached the second reading.

New Zealand

The most important attempt at intentional constitutional reform has been reenfranchisement of members of the prison population. This required legislative reform overturning a blanket ban on prisoners in custody on election day from voting. Judicial decisions had already signaled that the blanket ban was inconsistent with protected voting rights.

Nigeria

Although there are several amendments to Nigeria's constitution, they are rarely consequential in spite of a strong demand for transformative constitutional change. Although not explicit in the amendment rules, the President has effectively become the gatekeeper. The President's role, created by judicial interpretation, significantly distorts the design of the rules.

Norway

Constitutional review-article 89 was amended with administrative review. Altering the material content while purporting not to do so, it demonstrates a flawed amendment procedure. The Supreme Court found licenses in the Barents Sea constitutional under the environment-protecting Article 112, thus demonstrating the connection between formal amendments and informal judicial clarification.

Peru

The three most important developments in Constitutional Reform in 2020 in Peru are: (i) Constitutional reform that removes parliamentary immunity; (ii) Constitutional reform that prevents convicted people from running for public office or positions of trust; and (iii) Constitutional reform of article 16 of the constitution to strengthen the education sector.

Philippines

The Philippines continued to demonstrate a half-hearted attempt at constitutional reform. While an Inter-Agency Task Force on Federalism and Constitutional Reform submitted proposed amendments to the Constitution, mixed from the President showed that constitutional change was not a government priority. The COVID-19 pandemic also derailed congressional action on constitutional change.

Poland

In 2020, Polish authorities continued the illiberal remodeling of the constitutional system using informal changes to the constitutional status of the judiciary and the relationship between Polish and European legal orders. Only one formal constitutional amendment was proposed but it failed as the ruling coalition has no constitutional majority.

Portugal

In 2020, because of the Covid pandemic crisis, the Portuguese system had to deal with the circumstances—state of siege or state of emergency—in which revision is prohibited. The material limits on revision have also been challenged by the intentions and projects presented by a recently formed far right political party.

Romania

The proposals for revision of the Constitution of Romania, currently under parliamentary procedure, following constitutional review, are aimed at a more restrictive regulation of the right to be elected, in the sense of excluding citizens definitively sentenced to imprisonment for intent crimes until a situation removing the consequences of the conviction arises.

San Marino

In 2020, no amendments to the Declaration of Citizen Rights and of Founding Principles of the Sammarinese Legal System are neither proposed nor passed. However, considering an announced institutional reform in the upcoming years, it is worth mentioning const. law 2/2020, amending const. law 144/2003, regulating the judiciary civil liability regime.

Singapore

The institutionalization of the Leader of the Opposition ("LO") is Singapore's most important constitutional reform for 2020. By empowering the LO to better check the incumbent Government, the reforms mark a distinct shift in Singapore's perception of opposition politicians, from obstructions to effective governance to important actors in Singapore's democracy.

Slovakia

In 2020, the amending actors modified two areas of constitutional law governing the pandemic response and organization of the judiciary. The most controversial change, introduced as a part of large-scale judicial reforms, concerned the provision taking the power to review constitutional amendments away from the Constitutional Court.

Slovenia

The Slovenian Constitution stipulates a more demanding procedure for its change or supplementation (constitutional revision procedure). Therefore, it is a rigid constitution. In 2020 there were no constitutional changes, however since the adoption of the Slovenian Constitution in 1991, there have been 7 constitutional changes. Among them, the most important are those concerning Slovenia's attitude towards the European Union.

South Korea

The aim of this report is to summarize the process and contents of the 1987 constitutional reform, which is the most recent, successful and important reform in South Korea, and examine the subsequent attempts to revise the Constitution in the current government in 2018, along with the revision attempts at the National Assembly in 2009 and 2014.

Spain

No formal constitutional reforms have been passed in Spain in 2020, although one proposal for reform on the recognition of the Valencian regional law has been presented. However, there have been two major informal reforms: the introduction of the euthanasia through the ordinary legislation and the Government's abuse of decree-laws.

Sri Lanka

The 20th Amendment to the Constitution, passed in October 2020, transformed the constitution, and returned the country to a hyper-presidential system with power focused in a strong elected-president. Many changes introduced through the 19th Amendment in 2015, that established a better balance between Parliament and the Executive, were removed.

Switzerland

In 2020, due to the COVID-pandemic, Switzerland drifted into an extraconstitutional emergency situation. Despite the restrictions on public life, by the end of the year Switzerland had voted on—and rejected—four constitutional amendments, including the one proposed by the 'responsible businesses' initiative, which gave rise to the most expensive popular initiative campaign in Switzerland's history.

Taiwan

Fifteen years after the last amendment in 2005, Taiwan's Legislative Yuan established a Committee on Constitutional Amendments in October. As of the end of 2020, there were 38 bills introduced, covering issues ranging from lowering of voting age, lowering the amendment thresholds, to reforms of the Central Government.

Thailand

In Thailand, the 2020 Constitutional reform was demanded by the massive youth movement. However, the government skillfully captured the momentum and turned the reform into a mere fix on electoral rules which would favor its prospect in the next election.

The Gambia

The Gambia's return to democracy after twenty-two years of authoritarian rule under former dictator Yahya Jammeh marked a turning point. In December 2016, Yahya Jammeh was finally voted out of office, and coalition opposition leader, Adama Barrow, voted in. On 19 January 2017, Barrow was sworn in as President of the Republic of The Gambia. This historic development presented a new blueprint for the transition from an authoritarian regime to a democratic dispensation. In 2020, The Gambia witnessed the stalling of the constitutional replacement project.

Turkey

In Turkey, the most recent constitutional reforms were adopted in 2017. These reforms denoted transition to presidentialism. Presidential decrees had been the primary legal tools for implementing the new government system. In 2020 Turkish Constitutional Court reviewed presidential decrees for the first time and established the limits of the decree authority.

Ukraine

In 2020, no new constitutional amendments were initiated in Ukraine. Instead, the ruling majority have continued with the constitutional changes that were instigated before: (1) they continued with the approval process of the constitutional amendments initiated by in 2018-2019; (2) they attempted increasing control over judiciary and over Constitutional Court.

United Kingdom

The United Kingdom's formal departure from the European Union was the most significant constitutional event in decades. UK membership officially ceased on 31 January 2020, and the transition period ended on 31 December 2020. A Trade and Cooperation Agreement was reached between the EU and UK on 24 December 2020.

United States

The confirmation of Amy Coney Barrett to the U.S. Supreme Court created a conservative supermajority on the Supreme Court for the first time in decades. This suggests new judicial limits on substantive due process and substantive conceptions of equality at a time when popular demands for equal citizenship are increasing.

Venezuela

In 2020, the Constituent Assembly established by the Maduro regime in 2017 came to an end, following the controversial elections of the National Assembly (legislature) on December 6, 2020. The Constituent Assembly did not modify the 1999 Constitution or even proposed a reform. Thus, the 1999 Constitution remains in force.

Vietnam

Although there was no formal constitutional reform in Vietnam in 2020, key constitutional actors have introduced a form of "soft" emergency powers vested in the Prime Minister. We argue that this represents an instance of constitutional mutation via consent.

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