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Table of Contents

Introduction

Year Two for the IRCR

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Welcome to the second edition of *The International Review of Constitutional Reform*! Last year, the IRCR became the first global scholarly resource to report on all forms of constitutional revision around the world.

This year, the project continues as it began: as an effort to explain and contextualize events in constitutional reform over the previous year in a given jurisdiction. We define constitutional reform 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 jurisdiction reports follow the same format:

1. "Introduction," which offers a brief overview of the year in constitutional reform;
2. "Proposed, Failed, and Successful Constitutional Reforms," which examines proposed constitutional reforms and explains the reasons for the failure or success;
3. "The Scope of Reforms and Constitutional Control," which evaluates the proposed reforms and explains whether they were the subject of constitutional review;
4. "Looking Ahead," which identifies the big questions that await the jurisdiction in the context of constitutional reform in the year or years ahead; and
5. "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. At the very end of the IRCR, we provide 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 review of the previous year.

The IRCR is a joint iniative of the *Constitutional Studies Program* at the University of Texas at Austin in partnership with the *International Forum on the Future of Constitutionalism*. As Co-Editors for this new resource, we have worked closely with a magnificent team of Associate Editors: Giulia Andrade, Elisa Boaventura, Bruno Cunha, Matheus Depieri, and Júlia Frade. We thank each of them for their inestimable contributions to this project. We also thank Trish Do and Nivedita Jhunjhunwala at the University of Texas at Austin for their invaluable assistance.

The IRCR aspires to cover the globe. We hope to continue to expand 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.

Happy reading!

Perspectives & Trends

The Rebirth of Constitutional Dynamics in the Post-Pandemic Era

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The reports in the inaugural 2020 edition of the International Review of Constitutional Reform (IRCR) revealed a clear trend in constitutional law around the globe: faced with the COVID-19 outbreak, governments focused their constitutional reform energies on the health, social, and economic challenges presented by the pandemic.

One year later, the general landscape of constitutional reform appears to have changed. In 2021, vaccines were progressively made available to the population and the scientific efforts to monitor, treat, and control COVID-19 outbreaks gave the global population hope to move on. In that context, insofar as the public health crisis seemed to ease and as the restrictions were progressively lifted, constitutional debates started to diversify and to re-flourish. Many countries, then, following a very difficult time facing the pandemic, returned to having more and more diverse debates, amendments, and changes to their constitutions. This can be seen, perhaps, as the first step towards the rebirth of constitutional debates in the post-pandemic era.

In that regard, as we can see in the 2021 IRCR, constitutional discussions about key issues barely seen in the 2020 IRC—for instance sustainable development, human rights, social rights, Indigenous rights—were brought back and put on the agenda in many countries. Moreover, the 2021 IRCR shows growth in structural and procedural changes in the electoral system, executive power, referendum rules, and the composition of parliaments, subjects that were avoided by many countries during the pandemic due to their complexity, even when understood as necessary by the population and political agents.

However, several countries showed concerning trends related to constitutional dismemberment and abusive constitutionalism. Some reports from the 2021 IRCR, for instance, described attempts or actual changes—not always in accordance with local constitutions or basic principles of international law—in electoral systems, judicial appointments, the composition of parliaments, amendment procedures, judicial review and reform, as well as fundamental and human rights. In some more extreme political contexts, countries have even reported serious constitutional violations that directly harmed basic principles such as the independence and separation of powers and individual freedoms of citizens. This will certainly demand further international attention.

It is not clear whether the post-pandemic era will be a time of constitutional rebirth and flourishment, centered on important social developments towards democracy, equality and human rights, or whether governments will keep using the pandemic and the unusual social challenges in order to move forward with illiberal agendas.

As Justice Luis Roberto Barroso warned in one of his opinions at the Federal Supreme Court of Brazil in 2021 (STF - ADPF 622), democratic setbacks in today's world no longer stem from *coups d'état*, using armies and weapons. On the contrary, the greatest threats to democracy and constitutionalism are a result of specific normative changes, ostensibly valid from a formal point of view. But when they are taken as a whole, they quite clearly progressively erode the protection of rights and the democratic regime.

That is why it is now more important than ever that the actors in our global civil society—scholars, students, lawyers, judges, and civil society in general—commit themselves to studying, monitoring, and demanding that their representatives safeguard the ideals of constitutionalism, democracy, and human rights.

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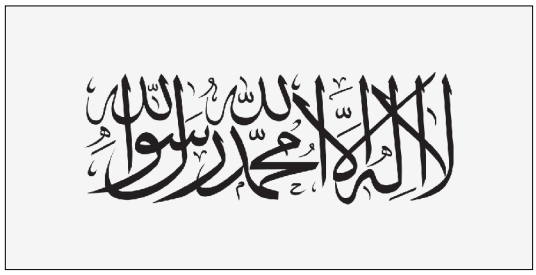
We would like to thank the *Constitutional Studies Program* at the University of Texas at Austin, the *International Forum on the Future of Constitutionalism*, and notably Professor Richard Albert and Justice Luís Roberto Barroso for the invitation to participate as Associate Editors of the 2021 IRCR and for always guiding and giving opportunities for young scholars to participate in the events and great academic projects they organize.

2021 Jurisdiction Reports

Afghanistan



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I. INTRODUCTION

This report on Afghanistan will likely differ from many of the others in this global catalogue of constitutional reform because of how constitutionalism operates in Afghanistan under the Taliban. In August 2021, the Taliban toppled the west-backed Ashraf Ghani government and took over the country's reins.[1] Since they returned to power, the Taliban has worked to 'dismember' the system put in place by the 2004 Constitution. If this was any other country or government, they might have drafted a new constitution or used widespread amendment packages.[2] However, this has not been the case in Afghanistan. The Taliban has ruled by decrees, laws, and unwritten codes as they did in the 1990s. It has barely stepped into the territory of formal constitutionalism. None of the constitutional reforms that the Taliban has implemented in Afghanistan have occurred under the name 'amendment.' In the few months after the Taliban came to power, Afghanistan has operated under an unwritten constitution enforced by fear and intimidation.

Therefore, at the primary level, this report analyzes the unwritten constitution that the Taliban has put in place. At the secondary level are the constitutional reforms which the Taliban has effected, as they pertain to 1) the governmental and political system; 2) the legal system; and 3) the human rights system. By placing the secondary-level reforms into these three categories, we will better understand the entire range of constitutional reforms that have taken place (or not) under the Taliban in Afghanistan.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Even when the Taliban was in exile, it had expressed its opposition to the 2004 Constitution. The Taliban had called the 2004 Constitution a western import and the biggest obstacle to peace in Afghanistan.[3] Thus, many had good reason to suppose that one of the first things the Taliban government would do when they came to power was to suspend or replace the 2004 Constitution.[4]

At the outset, it seemed that this was what they intended to do. In the weeks after the Taliban came to power, the Minister of Justice, Mawlavi Abdul Hakim Sharaee, stated that they would temporarily govern under the provisions of the 1964 Constitution that are 'not in conflict with Sharia law.'[5] A spokesman for the Taliban also stated that they planned to form a commission to draft a new constitution.[6] Shortly after that, different members of the Taliban government began to follow a different script. When the foreign minister, Amir Khan Muttaqi, for instance, met with Andreas Van Brandt, the ambassador of the European Union to Afghanistan, he stated that they would respect the 2004 Constitution.[7] Another high-level judicial officer of the Taliban regime, Sayed Abu Bakr Mottaqi, mentioned that Afghanistan's 2004 Constitution was still in force, but that its presidential and parliamentary provisions had been suspended.[8] Perhaps putting a final stamp on the *de jure* operation of the 2004 Constitution is the fact that the Ministry of Justice's website still has the 2004 Constitution up on its website, which it labels as the 'Enforced Constitution Of Afghanistan.'[9] This is unlikely to be an oversight because, as Shamshad Pasarlay points out, "the Taliban have made some fundamental changes to the Justice Ministry's website including removing the biography of the former Minister of Justice and replacing it with the Taliban Justice Minister as well as replacing Afghanistan's tricolor flag with that of the Taliban's own ensign." Though the 2004 Constitution is *technically* still in force, the remainder of this report will show how most of its provisions have been rendered ineffective. In reality, Afghanistan is

1 Ahmad Seir, Raheem Faiez, Tameem Akhgar, and Jon Gambrell, 'Taliban Sweep Into Afghan Capital After Government Collapses' (*AP News,* 16 August 2021) <https://apnews.com/article/afghanistan-taliban-kabul-bagram-e1ed33fe-0c665ee67ba132c51b8e32a5> accessed 8 May 2022.

2 See Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP, 2019) 84-92.

3 Trtworld And Agencies, 'Taliban Demands New Constitution for Afghanistan at Moscow Talks' (*TRT World*, 5 February 2020) <https://www.trtworld.com/asia/taliban-demands-new-constitution-for-afghanistan-at-moscow-talks-23896/> accessed 8 May 2022.

4 Haroun Rahimi, 'Afghanistan's Laws And Legal Institutions Under The Taliban' (*Melbourne Asia Review,* 6 June 2022) <https://melbourneasiareview.edu.au/afghanistans-laws-and-legal-institutions-under-the-taliban/> accessed 8 June 2022.

5 AFP, 'Taliban To 'Temporarily' Adopt 1964 Monarchy Constitution' (*The Hindu* 18 November 2021) <https://www.thehindu.com/news/international/taliban-to-temporarily-adopt-monarchy-constitution-with-caveats/article36713113.ece> accessed 8 May 2022.

6 Ayaz Gul, 'Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now' (*VOA News*, 28 September 2021. <https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html> accessed 8 May 2022.

7 Shamshad Pasarlay, 'Dead or Alive?: The Taliban and the Conundrum of Afghanistan's 2004 Constitution' (*Blog of the International Journal of Constitutional Law*, 23 March 2022) <http://www.iconnectblog.com/2022/03/dead-or-alive-the-taliban-and-the-conundrum-of-afghanistans-2004-constitution/> accessed 8 May 2022.

8 ibid.

9 ibid.

operating under an unwritten constitution made up of decrees by fiat, laws, and informal codes.[10]

Unlike Afghanistan's constitutional regime, the way government and politics actually work in Afghanistan is much clearer. In September 2021, only a few days after regaining power, the Taliban dissolved the election commission that had supervised elections during the previous regime.[11] It then announced an interim government similar to the one they had established when they were previously in power.[12] This interim government was staffed by men that foreign governments and international organizations identified as terrorists.[13] It did not employ any women or officials from the previous regime, and it included very few members from ethnic minority communities in Afghanistan.[14] Mohammad Hassan Akhund, who had occupied several senior positions within the Taliban during its exile, was announced as the prime minister.[15] The Taliban's co-founder, Mullah Abdul Ghani Baradar, another Taliban veteran, was installed as Akhund's deputy prime minister.[16] Sirajuddin Haqqani, the head of the Haqqani Network, a militant group, was designated as the interior minister.[17] Mullah Mohammed Omar, the son of the Taliban's first leader, was appointed the defense minister.[18]

Yet this is merely a shadow government. The Taliban's leadership council exercises real authority. An all-powerful religious cleric ('Amir'), Mawlawi Hibatullah Akhundzada, occupies the top position in this council.[19] The Amir is the *de facto* head of state and has ultimate authority over all religious, political, and judicial matters.[20] It is worth noting that there are no formal rules for deciding how the Amir is appointed nor how long he holds power. The Taliban leadership council handles the country's political, religious, social, and military affairs.[21] It oversees various commissions and supervisory bodies through which the Taliban administers its shadow government.[22] These commissions, in turn, focus on the economy, education, health, the military, and outreach.[23] The interim shadow government described above ultimately answers to the Taliban's leadership council.[24] The Taliban has remained silent on whether they will hold elections in the future.[25] The Taliban has thus completely reorganized the system of governance under the 2004 Constitution, which consisted of an elected presidency and a bicameral legislature.[26]

After a few months of judicial stalemate, the Taliban established their own Supreme Court along the same lines as the regime they had previously established and maintained in exile.[27] Supreme Court judges serve at the whim of the Amir, who has the power to appoint and remove them. Currently, the Office of the Chief Justice of the Supreme Court and the Office of the Minister of Law and Justice are both administered by the same individual: Abdul Hakim Ishaqzai. This speaks to how the Taliban sees judges as agents of the ruler rather than an independent branch.[28] This setup marks another significant departure from the 2004 Constitution. Though the previous Supreme Court of Afghanistan suffered from its own independence and neutrality issues,[29] it was designed as an independent institution whose judges were appointed by the President with the advice and consent of the lower house of the legislature.[30]

Another reform of the Taliban government was its overhaul of the legal system. Several senior Taliban leaders declared that Afghanistan would be governed by Sharia law.[31] Sharia, which signifies 'the way' in Arabic, is a body of religious law drawn from the Quran and inspired by what the Prophet Muhammad said and did. Different schools of Islam have markedly different interpretations of Sharia. The Taliban has decreed that Hanafi jurisprudence (one of the four schools of Islamic jurisprudence) be the supreme law of the land with which all extant and future state law must comply.[32] To this end, the ministry of justice instituted a committee to review all existing laws drafted during the previous regime and assess their compatibility with the Taliban's version of Sharia.[33] This committee is also vested with the power to remove statutes they find repugnant to Islamic dictates or to the Hanafi school of jurisprudence.[34] This is a drastic departure from the regimes in place under the 2004 Constitution. The 2004 Constitution required that state law not contravene the basic tenets of Islam.[35] Recourse to Hanafi law was made but only when existing statutes provided no guidance for the case under consideration.[36] However, such recourse could take place only within limits set by the 2004 Constitution and in a way that facilitated justice.[37] Additionally, the 2004 Constitution required Shia jurisprudence to be applied in cases dealing with Shia Muslims.[38]

Finally, as far as human rights are concerned, the 2004 Constitution mandated domestic adherence to "the United Nations Charter, international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights."[39] Further, the Supreme Court was given

10 ibid.
11 'No Need: The Taliban Dissolves Afghanistan Election Commission' (*Al Jazeera*, 25 December 2021) <https://www.aljazeera.com/news/2021/12/25/taliban-dissolves-afghanistan-election-commission> accessed 8 May 2022.
12 Ikramuddin Kamil, 'What the Taliban's Constitution Means for Afghanistan' (*Fair Observer*, 28 January 2022) <https://www.fairobserver.com/region/central_south_asia/ikramuddin-kamil-afghanistan-constitution-taliban-news-afghan-world-news-43794/> accessed May 8, 2022.
13 Lindsay Maizland, 'The Taliban in Afghanistan' (*Council on Foreign Relations*, 15 September 2021) <https://www.cfr.org/backgrounder/taliban-afghanistan#chapter-title-0-5> accessed 8 May 2022.
14 ibid.
15 ibid.
16 ibid.
17 ibid.
18 ibid.
19 ibid.
20 ibid.
21 ibid.
22 ibid.
23 ibid.
24 ibid.
25 'Who Will Run The Taliban Government' (International Crisis Group, 9 September 2021) <https://www.crisisgroup.org/asia/south-asia/afghanistan/who-will-run-taliban-government> accessed 8 May 2022.
26 Constitution of Afghanistan 2004, Article 60-109.
27 Haroun Rahimi, 'The Taliban, The Afghan State, and The Rule of Law' (Al Jazeera, 1 September 2021) <https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law> accessed 8 May 2022.
28 ibid.
29 See Sayed Ziafatullah Saeedi, "How Afghanistan's Judiciary Lost Its Independence" (*The Diplomat*, 18 June 2019) <https://thediplomat.com/2019/06/how-afghanistans-judiciary-lost-its-independence/> accessed 8 May 2022.
30 Constitution 2004 (n 25) Article 116-117.
31 Lexi Lonas, 'Taliban Commander Rules Out Democracy In Afghanistan: 'It Is Sharia Law And That Is It' (*The Hill*, 19 August 2021) <https://thehill.com/policy/international/568551-taliban-commander-rules-out-democracy-in-afghanistan-it-is-sharia-law> accessed 8 May 2022.
32 Shamshad Pasarlay, 'Afghanistan's Unwritten Constitution under the Taliban' (*Blog of the International Journal of Constitutional Law*, 17 May 2022) <http://www.iconnectblog.com/2022/05/afghanistans-unwritten-constitution-under-the-taliban/#more-11897> accessed 8 May 2022.
33 ibid.
34 ibid.
35 Constitution 2004 (n 26) Article 3.
36 ibid Article 130.
37 ibid.
38 ibid Article 131.
39 ibid Article 7.

the power to check laws for consonance with international human rights legislation. Over the years, Afghanistan has signed onto most major international human rights treaties.[40] The 2004 Constitution also contained provisions for an Independent Human Rights Commission.[41]

When the Taliban came to power, they promised to govern less severely than previously.[42] They claimed that 'international laws and instruments which are not in conflict with the principles of Sharia' will be respected.[43] What exactly the 'principles of Sharia' are, depends on one's interpretation of Sharia law. The Taliban's interpretation of Sharia is certainly not liberal or reformist. The ideology that informs the Taliban's understanding of Sharia will be examined in the next section of this report. However, at a macro level, the Taliban has abolished constitutional bodies such as the Independent Human Rights Commission.[44] Furthermore, it has shut down the Women's Affairs Ministry and replaced it with a Ministry of Vice and Virtue, a religious police that oversees the enforcement of moral codes.[45]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The previous section described how the 2004 Constitution is technically still in operation but that the Taliban's unwritten constitution has rendered its provisions ineffective. The Taliban has re-conceived the country's political structures, transformed the legal system, and as will be discussed in this section, dismantled its human rights regime. The Taliban views the 2004 Constitution as illegitimate. According to the Taliban, a legitimate Islamic constitution is one that is drafted by a constitutional assembly of Islamic scholars.[46] This is because, in their view, it is 'the sovereignty of God' that provides the foundation for a constitution and not the sovereignty of 'the people.'[47] Why is the Taliban then claiming that the 2004 Constitution is still operative?

One possible answer is that, as Shamshad Pasarlay claims, the Taliban does not want to dignify the 2004 Constitution by formally revoking or suspending it.[48] He contends that they may be simply waiting to draft a replacement Constitution whose ratification will automatically rescind the 2004 Constitution.[49] Though this explanation is certainly plausible, we nonetheless believe that there might be another angle at play. The Taliban's claim that the 2004 Constitution is still in operation may be an attempt to garner legitimacy before an international community that does not regard their current practices or their history as legitimate. The 2004 Constitution was arguably a highly liberal constitution for the Islamic world.[50] It even had a fair degree of international legitimacy, for that matter.[51] Now that the Taliban is seeking recognition from international actors, it has a vested interest in shedding its more radical reputation and shaping the discourse around it into a more moderate and balanced one. This approach to foreign affairs has been evident in many other statements of the Taliban as well.[52] Stating that the 2004 Constitution is still operative, at any rate, is not strategically opposed to this goal. Moreover, the foreign minister claimed that the 2004 Constitution was still in effect while talking with the EU Ambassador, thus giving comfort to our hypothesis. It was perhaps also with a view to international optics that the Taliban initially considered returning to the 1964 Constitution, which, before 2004, was Afghanistan's most liberal constitution.[53]

Another question is when the Taliban will draft its own constitution. It is difficult to ascertain when and easy to imagine a scenario in which they never put their own constitution in writing. Not putting anything in stone allows the Taliban to remain flexible in its policies. This could also help them as they seek to navigate how best to attain both domestic legitimacy and legitimacy from other governments who have concerns with the Taliban ways of governance. This strategic indeterminacy also enables the Taliban to spin the narrative that any action of theirs is a temporary remedy until they can find a permanent solution, which has been a routine pretext since they came to power. For example, the Taliban asked Afghan women to stay home from work because soldiers were 'not trained' to respect them.[54] One final explanation is that keeping things flexible allows the Taliban to prevent internal divisions over policy differences.[55]

Considering the Taliban believes that Sharia is all that is needed to run a country,[56] it makes operating without a written constitution even more of an actual possibility. The structure of the Taliban's government even favors such a rule. The Taliban government is highly centralized and resembles other full-blown autocracies.[57] Any decentralization of power takes place within the framework of Taliban leadership, which is a highly closed group.[58] There are no formal constitutional controls, and major constitutional issues are handled directly by Taliban leaders.[59] Taliban courts consist of handpicked judges aligned with the

40 'Ratification Status of Afghanistan' (*United Nations Treaty Body Database*) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN> accessed 8 May 2022.
41 Constitution 2004 (n 26) Article 58.
42 Jennifer Brick Murtazashvili, 'The Collapse of Afghanistan' (2022) 33(1) Journal of Democracy 40, 51.
43 Gul (n 5).
44 Mohammad Yunus Yawar, 'Taliban Dissolve Afghanistan's Human Rights Commission, Other Key Bodies' (*Reuters*, 17 May 2022) <https://www.reuters.com/world/asia-pacific/taliban-dissolve-afghanistans-human-rights-commission-other-key-bodies-2022-05-16/> accessed 8 May 2022.
45 Daniel Victor, 'What is Sharia Law, and What Does it Mean for Afghan Women Under Taliban,' (*The New York Times*, 19 September 2021) <https://www.nytimes.com/article/shariah-law-afghanistan-women.html?> accessed 8 May 2022.
46 Pasarlay (n 7).
47 ibid.
48 ibid.
49 ibid.
50 Barnett Rubin, 'Crafting a Constitution for Afghanistan' (2004) 15(3) Journal of Democracy 5.
51 ibid.
52 Max Fisher, 'How Will the Taliban Govern? A History of Rebel Rule Offers Clues' (*The New York Times*, 2 September 2021) <https://www.nytimes.com/2021/09/02/world/asia/taliban-govern-rebel-history.html> accessed 8 May 2022.
53 J. Alexander Thier, 'Making of a Constitution in Afghanistan' (2006) 51 New York Law School Law Review 558, 561-565.
54 Rob Picheta and Zahid Mahmood, 'Taliban Tell Afghan Women To Stay Home From Work Because Soldiers Are 'Not Trained' To Respect Them' (*CNN*, 25 August 2021) <https://edition.cnn.com/2021/08/25/asia/taliban-women-workplaces-afghanistan-intl/index.html> accessed 8 May 2022.
55 Clark B. Lombardi and Andrew F. March, *Afghan Taliban Views On Legitimate Islamic Governance: Certainties, Ambiguities, And Areas For Compromise* (United States Institute For Peace, 2022) 3-4.
56 Pasarlay (n 7).
57 Frud Bezhan, 'Taliban Constitution Offers Glimpse Into Militant Group's Vision For Afghanistan' (RFERL, 26 April 2020) <https://www.rferl.org/a/taliban-constitution-offers-glimpse-into-militant-group-s-vision-for-afghanistan/30577298.html> accessed 8 May 2022.
58 ibid.
59 Ashley Jackson and Florian Weigand, *Rebel Rule of Law* (Humanitarian Policy Group, 2020) 4-5.

group's ideology.[60] In those rare instances where judges do not side with the regime, the Taliban ignores the judges' decisions or, even worse, retaliates against them.[61] In fact, when they came to power, the Taliban fired all judges, prosecutors, and court officials appointed during the previous government and replaced them with Taliban appointees.[62] The Taliban has also taken control of the independent bar association and has declared that only Taliban-approved lawyers can work in the courts.[63] Rather than acting as a check on arbitrary government, the legal apparatus in Afghanistan consequently aids the Taliban in implementing its constitutional vision. Ruling by decree, the Taliban government goes unchecked by elections or other constitutional controls and is thus able to rule by fear and intimidation.

The advantages of keeping things vague and flexible are perhaps why the Taliban, in discussing their legal and human rights system, keeps making statements like they will operate 'according to Sharia' or 'within the bounds of Sharia.' Such statements do not mean much without knowing how the Taliban interprets Sharia. Scholars have frequently contended that Sharia is broad enough to accommodate both reform and progressive values of constitutionalism.[64] Nevertheless, there is little evidence to suggest that the Taliban is receptive to such interpretations of Sharia. If anything, it could be argued that the Taliban's version of Sharia is more extreme than any other in the world.[65] Admittedly, the Taliban has been a little more moderate this time.[66] For instance, some of its laws have extended women's rights pertaining to marriage, divorce, and property.[67] The Taliban has even ordered its government ministries and the Supreme Court to enforce these decrees.[68]

Nevertheless, they have significantly rolled back all progress that the previous regime made in terms of basic human rights. In addition to the structural changes that government departments and ministries have undergone, within days of assuming power, the Taliban asked female journalists, judges, bank officials, and other professionals to stop reporting to work.[69] Outside Kabul, women have been prohibited from leaving their houses without a male relative escorting them.[70] Furthermore, they have prevented women from entering universities and have shut down some women's clinics and schools.[71] The Taliban has also reinforced the mandate that women wear headscarves at all times.[72] In addition to women, the Taliban has also targeted human rights defenders, journalists, health care workers, and communities of religious and ethnic minorities.[73] They have even resumed public punishments, including amputations and executions, without following due process or restraint and certainly without observing the high evidentiary standards required by Islamic law.[74] Such an interpretation of Sharia is the most extreme in any part of the Muslim world.[75]

There are four possible explanations for the Taliban's draconian interpretation of Sharia and in particular the Hanafi jurisprudence. The first is because the Taliban believes that harsh punishments control the population more effectively.[76] Haroun Rahimi, a law professor at The American University of Afghanistan, has supported this view, stating that since the Taliban does not have a strong state apparatus to control the population, violence and public forms of punishment become a control mechanism.[77] The second reason is that the Taliban rejects anything it views as even remotely western.[78] Since the Taliban believes that progressive values have western roots, they seek to implement the most extreme, regressive versions of Islam possible.[79] The third reason that the Taliban is eager to implement its firebrand version of Islam in a rather public manner is to advertise its victory over the west.[80] The fourth and final reason is that the Taliban is taking a leaf from the notebook of other extremist states by using religion to legitimize its authoritarian actions, remain in power, and forward its agenda.[81]

IV. LOOKING AHEAD

The future of Afghanistan's constitution under the Taliban is uncertain, as the Taliban is highly unpredictable. Perhaps, the most important development to pay attention to is whether the Taliban codifies its constitutional vision in writing. It will also be worth noting whether the Taliban will change their political, governmental, and legal system. As this report has shown, they are operating in a manner very similar to their previous stint in power. Perhaps, the rest of the world will also be keeping a close eye on the human rights situation in Afghanistan. The Taliban certainly has some interest in achieving international legitimacy, having sanctions removed, and resuming foreign aid (especially in light of the food crisis and economic instability that besets Afghanistan at the moment). However, it is highly unlikely that the Taliban will change its ways significantly in response to international pressure. If the Taliban has made one thing clear, it is that they do not want to be told what to do by the West.[82] The Taliban has not hesitated

60 Rahimi (n 27).
61 ibid.
62 'Amnesty International Report 2021/22: The State of the World's Human Rights' (*Amnesty International*, 2022) <https://www.amnesty.org/en/location/asia-and-the-pacific/south-asia/afghanistan/report-afghanistan/> accessed 8 May 2022.
63 Ron Synovitz, 'Judge, Jury, And Executioner: Taliban Brings Afghanistan's Justice System Under Its Thumb' (*RFE/RL*, 1 October 2021) <https://gandhara.rferl.org/a/taliban-afghanistan-justice-system/31588972.html> accessed 8 May 2022.
64 See Noah Feldman, 'Does Sharia Mean the Rule of Law' (*The New York Times*, 16 March 2008) <https://www.nytimes.com/2008/03/16/news/16iht-16sharia.11119704.html?> accessed 8 May 2022. See also Kali Robinson, 'Understanding Sharia: The Intersection of Islam and the Law,' (*Council on Foreign Relations*, 17 November 2021) <www.cfr.org/backgrounder/understanding-sharia-intersection-islam-and-law/> accessed 8 May 2022.
65 Ron Synovitz, 'Taliban 'Tribal Version': Shari'a Is Not The Same Everywhere' (RFE/RL, 2 October 2021) <https://gandhara.rferl.org/a/taliban-sharia-law-afghanistan/31488108.html> accessed 8 May 2022.
66 Murtazashvili (n 42) 51.
67 'Taliban's Supreme Leader Issues Decree on Women's Rights' (TOL News, 3 December 2021) <https://tolonews.com/afghanistan-175725> accessed 8 May 2022.
68 ibid.
69 Victor (n 45).
70 ibid.
71 ibid.
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74 'Public Displays of Corpses Signal Return of Hard-Line Afghan Taliban' (*VOA News*, 27 September 2021) <https://www.voanews.com/a/public-displays-of-corpses-signal-return-of-hard-line-afghan-taliban-/6248297.html> accessed 8 May 2022.
75 ibid.
76 Synovitz (n 65).
77 Rahimi (n 27).
78 Robinson (n 64)
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80 Synovitz (n 65).
81 David Smock, *Islam and Democracy: Special Report 93*, (United States Institute of Peace, 2002) 3.
82 Mary Ellen Cagnassola, 'Taliban Official Warns Other Nations That 'No One Will Tell Us What Our Laws Should Be' *(Newsweek*, 23 September 2021) <https://www.newsweek.com/taliban-official-warns-other-nations-that-no-one-will-tell-us-what-our-laws-should-1632077> accessed 8 May 2022.

to allow thousands of people to die of starvation.[83] On the contrary, it is possible that the Taliban will respond to the threats from the international community by simply doubling down on their actions. In conclusion, we can only hope to see constitutional reforms that result in some moderation from the Taliban.

V. FURTHER READING

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Argentina

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I. INTRODUCTION

Argentina has not had a report on previous years, therefore, it is appropriate to make a brief description of its constitutional history. This description will be made in point II. In point III, the last constitutional reform that took place in 1994 and the most important rulings of the Supreme Court of Justice regarding the control of constitutionality will be discussed. The challenges of an upcoming constitutional reform will be discussed in Point V.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

REFORM OF 1860

The Argentine Republic sanctioned its Constitution in 1853. In 1859, the State of Buenos Aires lost the battle of Cepeda and the "Pact of San José de Flores" was signed between the Argentine Confederation and the State of Buenos Aires, which was then incorporated into the Confederation. This forced the reform of that constitution. The original Constitution of 1853 included a clause that prevented its reform for ten years. The events annulled that prohibition and the political will for national unity was stronger. The Constitution was reformed with the suggestions introduced by the Province of Buenos Aires in an ad hoc convention convened in 1860.

The reform had a more federal imprint with a strengthening of local provincial powers over the federal one. Each province could dictate its own constitution without the need for the National Congress to review it, the city of Buenos Aires would no longer be the capital by imposition of the Constitution, but it would be the Congress that would establish the federal capital city by law. In addition, customs taxes would be national for five years (1865).

THE REFORM OF 1866

Then the Constitution was reformed in 1866 and import and export duties were consolidated into the National Treasury.

THE REFORM OF 1898

The 1898 reform only dealt with the number of ministers in the Executive Branch and issues of proportion for the House of Representatives.

THE REFORM OF 1949

A broad reform, incorporating social rights, took place in 1949 under the government of Juan Peron, the so-called "Justicialista Constitution". There was a discussion within Congress at the time of sanctioning the law that enables the reform because it was understood that only two thirds of the members present were needed and not two thirds of the total of Congress. The opposition denounced the political illegitimacy of the reform.

The reform also included other innovations, such as *"habeas corpus"*, the social function of property was made explicit and the direct presidential election and re-election, the national property of natural resources were consecrated. The reform enabled each province to amend its Constitution without the need to put into operation the planned reform mechanisms, enabling the provincial Legislature itself to exercise the provincial constituent power. This Constitution was repealed by the military government in 1956.

THE REFORM OF 1957

The military government of General Pedro E. Aramburu called a constitutional convention. Peronism was outlawed and the Unión Cívica Radical had divided into two political parties, one denouncing the illegitimacy of the call and the other endorsing it. In 1957, a single article was added to the text of the 1853 Constitution (with the reforms of 1860, 1866 and 1898), which became Article 14 *bis* that incorporates minimum contents of social constitutionalism and an additional mention, in a similar vein, in the former Article 67 (11) (currently, Art. 75 (12)), on the sanction of the Labor and Social Security Code.

The Constituent Assembly was left without a quorum to continue in session, so with these two incorporations it exhausted its mission. In 1963 the Supreme Court of Justice of the Nation ruled in the case "Soria de Guerrero, Juana A. c. Bodegas y Viñedos Pulenta Hnos" and had the opportunity to issue a ruling in a case about the unconstitutionality of

the reform, rejecting the claim of the plaintiff invoking the doctrine of political questions. What is interesting about the case is the existence of a minority vote by Judge Boffi Boggero who admitted the possibility of reviewing the unconstitutionality of a constitutional reform.

REFORM OF 1972

In 1972 there was a reform made by the Military Government of Agustín Lanusse. This reform was in place until the coup d'Etat of 1976.

THE REFORM OF 1994

In 1994 the Constitution was reformed again. Raúl Alfonsín, President of the Nation between 1983 and 1989, and at that time leader of the Unión Cívica Radical and Carlos Menem, signed the so-called "Pact of Olivos" where a constitutional reform was agreed upon. One of its characteristics was the existence of the "Nucleus of Basic Coincidences", which had to be approved or rejected in full (art. 20). In other words, there was no possibility that the issues included therein would be dealt with broadly in the Constitutional Convention. These issues had already been closed from the National Congress with the approval of Law 24309, which was the one that enabled the reform and the conventional constituents only had the possibility of voting for the affirmative or rejection.

Among the reformed issues was the shortening of the presidential term, the direct election, the second ballot system, the Chief of Staff, the third Senator by Province, the Council of the Magistracy and the Trial Jury. There were also other issues that were enabled for treatment by the Constituent Assembly, such as the hierarchy of Human Rights Treaties, environmental protection or amparo action. The dogmatic part, between Arts. 1 to 35, was prevented from being modified by art. 7 of the cited legal body, so it was necessary to incorporate "new rights and guarantees" from arts. 38 through 43.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In 1994, with the reform of the National Constitution, article 99 was introduced, which in its fourth paragraph stipulates that judges can remain in office until they are 75 years of age. To remain in office, they must obtain a new appointment with the agreement of the Senate with the votes of two thirds of the members present, which may be repeated indefinitely. Otherwise, their mandate ends. Likewise, the Eleventh Transitory Provision also establishes that "the expiration of the appointments and the limited duration provided for in article 99, (4), will enter into force five years after the sanction of the amendment to the Constitution". Justice Carlos Santiago Fayt, member of the Court since 1983, due to his age and understanding that he was included in the situation contemplated in the aforementioned constitutional clause, promoted a declaratory action of unconstitutionality against the two provisions incorporated into the National Constitution: art. 99 (4), third paragraph and the eleventh transitory provision. The Court issued a ruling in 1999 upholding the claim and declaring the nullity of the reform introduced by the reforming constitutional convention of the year 1994 in art. 99, (4), third paragraph and in the eleventh transitory provision to art. 110 of the National Constitution.

To this effect, it argued that the challenged provision had not been authorized by Congress when it exercised the pre-constituent power with which the process of reforming the Constitution began. According to Fayt, the Convention was not empowered to modify art. 96 of the Supreme Law (currently it is art.110), a clause that consecrates the protection against the removal of judges by stating that they "will remain in office while their good behavior lasts." It also considered that in a situation that exceeded the framework given in the law that declared the need for the reform, there should be a body capable of applying the sanction that the legislator has provided for in the aforementioned legislation and that said body is nothing more than the Justice.

The Court considered that the reform introduced by the Convention is null and void since it substantially alters the powers authorized by law to the Convention, which has acted in an exorbitant manner, both on the question of the tenure of judges and on what makes the control of constitutionality in itself. The Judiciary is empowered to judge whether the act that specifically arises has been issued by a competent body, as well as emphasizing the relevance of the guarantee of tenure of magistrates as a fundamental element for any rule of law.

The Court established the doctrine of constitutionality control and emphatically stated that the case was also trying to clarify the question of the limitation to derived constituent power. This considering that the reform procedure (art.30 CN) is embodied in two stages: declaration of the need for reform (in Congress) and reform itself (Constituent Convention). With respect to the implicit powers enjoyed by the Constituent Convention, the Court held that they are auxiliary and subordinate.

But this criterion changed when the Supreme Court resolved the "Schiffrin" case in 2016, where by majority vote the precedent established in "Fayt" was explicitly changed.

The Court ruled that the Constitutional Convention had not exceeded its limits and therefore declared Article 99 (4), third paragraph of the National Constitution, was valid.

The arguments now exposed is that the reforming convention acts as a derived constituent power, with the purpose of modifying, or not, only those constitutional clauses that Congress declared eligible for amendment. The constitutional convention is free to determine whether to execute the reform and, where appropriate, is legally empowered to define the content of the constitutional provisions to be modified.

The Supreme Court also highlighted in "Schiffrin" that Law 24,309 (article 3, e), by enabling the 1994 reforming convention to update the powers of Congress and the Executive Power contained in the National Constitution, included within its powers, the reform of the various components of the appointment process of federal judges. This qualification sustained the necessary intervention of the Executive and Legislative Powers –when the magistrates reached the age of 75- therefore it was one of the possible modalities reserved for the constitutional convention. The application of the new emerging doctrine in "Schiffrin" proceedings leads to the conclusion that the 1994 constitutional convention did not exceed the limits of its competence by incorporating the clause of art. 99, Inc. 4th, third paragraph, of the National Constitution. This did not affect the principle of judicial independence either. And by

virtue of what has been said, it can be noted that while the age limit only modifies the lifetime nature of the position of a magistrate, it does not in any way violate the judges' non-removal protection.

IV. LOOKING AHEAD

There are issues not yet legislated by the National Congress that are constitutional mandates. Arts. 24 and 75 (12) established a law of jury trials. Some provinces have already legislated in this regard, but there is no national law yet. In the future, if the national law is enacted, controversies may arise between the national and provincial powers to design the jury trial model.

The right of art. 14 bis "to share in the profits of enterprises, with control over production and collaboration in management" has never been regulated.

Nor has the federal tax co-participation law been enacted. Given the confusing and inequitable federal distribution regime of taxes by the Federal State to the provinces, the 1994 reform established guidelines to sanction a new law. Art, 75 (2) states as follows: An agreement-law based on understandings between the Nation and the Provinces shall establish a tax-sharing deal, guaranteeing the automatic remittance of funds.

The distribution among the Nation, the Provinces, and the City of Buenos Aires, and among themselves, shall be carried out in direct relation to the jurisdictions, services, and functions of each one of them taking into account objective sharing criteria; it shall be based on principles of equality and solidarity giving priority to the achievement of a similar degree of development, of living standards and equal opportunities throughout the national territory.

The agreement-law shall originate in the Senate and shall be enacted with the absolute majority of all the members of each House; it shall be neither unilaterally amended nor regulated, and shall be approved by the Provinces.

The transitional provisions established as follows: A tax-sharing system shall be stated before the end of the year 1996 according to Section 75, (2). It never happened. The planned procedure is complex and the degree of consensus required that prima facie seems easier to reform the constitution itself than to achieve the sanction of the new co-participation law.

On the other hand, there are new institutions such as the Judicial Council or the Public Prosecutor's Office, whose regulations have been delegated to Congress. It has been the temptation of the incumbent governments, with circumstantial majorities in the National Congress, to modify the organic law of these institutes. A reform is desirable where some issues that have given rise to controversies are consolidated in the constitutional text.

For example, the number of members of the Judicial Council. The constitutional text states: The Judicial Council, ruled by a special law enacted by the absolute majority of all the members of each House, shall be in charge of the selection of the judges and of the administration of the Judicial Power.

The Council shall be periodically constituted so as to achieve the equilibrium among the representation of the popularly elected political bodies, judges of all instances, and attorneys with federal license". The number of members is not specified and the interpretation of the scope and content of the word "balance" and "judges of all instances" has been a source of conflict, leading the Supreme Court to declare the unconstitutionality of the laws that organized it. Thus, in 2013, the ruling "Rizzo" declared the unconstitutionality of Law 26,855 that reformed the composition of the Council (19 members without representation of the Court) and in December 2021 the Court ruled declaring the unconstitutionality of the integration set by Law 20,080 of 2006. (13 members without integration of the Supreme Court).

This led to the situation that the Court itself had to put into effect the text of Law 24,939 of 1998 (20 members including the Presidency of the President of the Supreme Court of Justice), which had been repealed by Law 26,080. The Bar Association ruling and summoned the rest of the sectors that make up the Council to appoint the representatives that were missing to complete the quota within 120 days. Currently, the Council of the Judiciary works with the integration provided for by Law 24939 of 1998, and a reform project is under discussion in the House of Representatives that already has half sanction in the National Senate.

The art. 120 rules "The Public Ministry is an independent body with functional autonomy and financial self-sufficiency, with the function of promoting the participation of justice for the defense of lawfulness and of the general interests of society, in coordination with the other authorities of the Republic." It is composed of an Attorney General of the Nation and a National Public Defender, and such other members as the law may establish. Its members enjoy functional immunities and undiminished remunerations.

Since the appointment and removal procedure is not established in the Constitution and has been left to the law, it has been a source of political and institutional conflict. Currently the position is vacant and there is a bill to reform the Organic Law of the Public Ministry.

It would also be desirable to establish a clearer process of constitutional reform. Art. 30 as it is drafted has raised doubts in its interpretation and application.

Section 30.- The Constitution may be totally or partially amended. The need for reform must be declared by Congress with the vote of at least two-thirds of the members; but it shall not be carried out except by a Constituent Assembly summoned to that effect.

The interpretation of at least two-thirds of its members vs. two-thirds of those present has been a dispute. In the reforms of 1860, 1866 and 1949 it was two thirds of those present while two thirds of the total was in 1898 and 1994. The question would seem to be resolved by a new interpretation that takes as a guideline what is established in art. 75 (22) when an international human rights treaty is to be elevated to constitutional status: "After their approval by Congress, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House in order to attain constitutional standing."

On the other hand, there is no amendment process that facilitates minor reforms.

There is also no supplementary regulation regarding the integration of the reforming Convention. It is established that it is a declaration and not a law. Therefore, this declaration does not necessarily follow the procedure for sanctioning laws provided for in the constitution itself. When Law 24309 was passed, which enabled the 1994 reform, the procedure did not follow that of the formation of laws, but rather the project was approved in one chamber and passed to the other, which

made additions to it, and instead of returning to the original chamber, it was approved by the Executive. This was observed by Deputy Polino. The Court ruled in his case, rejecting the action.

Finally, there are other issues such as the scope and content of the autonomy of the Autonomous City of Buenos Aires, which is not a province, but an "autonomous city". This autonomy is being built day by day according to the political struggles and, where appropriate, the rulings of the Court. In 2021, in the midst of the disputes over the COVID pandemic, the court in the ruling: "Government of the City of Buenos Aires c/ State National (National Executive Power) s/ declaratory action of unconstitutionality", CSJ 567/2021 confirmed the province status to litigate directly in the original instance in the Court, assimilating the treatment to a province and recognizing certain own competences in matters of health and education, in the dispute with the Federal Government.

Australia

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I. INTRODUCTION

To amend the *Australian Constitution* it is necessary to hold a referendum. Proposals to alter the constitutional text must be approved by absolute majorities of both houses of the national Parliament, and then endorsed by a national majority of voters *and* a majority of voters in a majority of States.[1] This is a high threshold that has been cleared only 8 times, out of 44 attempts, since Federation in 1901. The pace of constitutional change has, moreover, slowed in recent times. It is more than four decades since the *Constitution* was last amended and a referendum has not been held since 1999. The referendum record casts a shadow over Australian debates on constitutional reform. Many political elites remain skeptical that proposals for constitutional change are capable of winning public support at a referendum.

Against this background, it is not surprising that debate about constitutional reform progressed tentatively in Australia in 2021. The proposal for a constitutionally enshrined First Nations Voice was the most prominent issue and advocates continued to argue for a referendum in the near term. In a welcome development, a parliamentary committee considered ideas for revamping Australia's tired approach to constitutional review, and for updating its outmoded referendum laws. Looking ahead, there is scope for other constitutional reform issues – including the republic – to be revived in the coming years.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

FIRST NATIONS VOICE

Proposals for the constitutional recognition of Aboriginal and Torres Strait Islander peoples – also known as First Nations – have been debated in Australia for many years. At the last national referendum, in 1999, Australians rejected the insertion of a constitutional preamble that, among other things, would have acknowledged First Nations 'for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country'. In recent years a proposal for more substantive recognition has gained momentum. It would see the establishment in the *Constitution* of a body, or Voice, that would advise parliament on matters relating to Aboriginal and Torres Strait Islander peoples. The Voice proposal was one of three reforms, alongside treaty-making and truth-telling, put forward in the *Uluru Statement from the Heart*. The *Statement* was issued to the Australian people at the First Nations National Constitutional Convention in 2017. The convention followed a series of 13 regional dialogues in which a representative cross-section of the Indigenous community expressed their views on what constitutional change they wanted.[2]

The year 2021 saw some developments on the Voice proposal but no clarity on whether, or when, a referendum was likely to be held. In January 2021 a bipartisan 'co-design' process (involving both parliamentarians and Indigenous leadership) published an interim report which set out a range of detailed options for the establishment of local, regional, and national Voice bodies.[3] The co-design process was unable to consider constitutional entrenchment, as it was outside its terms of reference. In late 2021, the final report of the co-design process was published, and it recommended that the government progress its plans for the establishment, via statute, of local, regional, and national voice proposals. However, it also recommended that the government note the support for constitutional enshrinement of the Voice that was received during the public consultation process.[4] An analysis by the Indigenous Law Centre found that 90 per cent of public submissions expressed support for a constitutional (rather than statutory) Voice.[5]

As the year came to an end, the government stopped short of ruling out a referendum on constitutional recognition. Nonetheless, it seemed clear that its preference was for a statutory voice, or voices, at least in the short term. The opposition Labor Party continued to express its commitment to holding a referendum on a constitutionally enshrined Voice. The positions of the two major parties on Voice promised to be a significant point of distinction in the lead up to the federal election, due by May 2022.

CONSTITUTIONAL REVIEW

In June 2021, the House of Representatives Standing Committee on Social Policy and Legal Affairs initiated an inquiry into constitutional

1 *Australian Constitution*, section 128.

2 Megan Davis and George Williams, *Everything You Need to Know About the Uluru Statement from the Heart* (NewSouth Publishing, 2021).

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

4 National Indigenous Australians Agency, *Indigenous Voice Co-Design Process: Final Report to the Australian Government* (July 2021) recs 1, 6.

5 Gabrielle Appleby, Emma Buxton-Namisnyk, Dani Larkin, *Indigenous Voice Co-design Process: An Expert Analysis of the NIAA Public Consultations* (Indigenous Law Centre, June 2021).

reform and referendums in Australia. This was the first major inquiry into the process of constitutional review, and the conduct of referendums, in over a decade.

The Committee singled out for special attention the way constitutional reform is conducted in Australia. In its final report, published in December, it expressed concern about the absence of mechanisms for regular or systematic review of the *Constitution*.[6] It found that 'there is no established process for review, and no department or agency of the Australian Government [is] mandated to proactively consider or coordinate any general processes of constitutional review or consultation'.[7] The Committee called for a process that facilitates ongoing review of the *Constitution*, suggesting this was preferable to relying on *ad hoc* arrangements that tend only to arise when a specific proposal is being put forward for a referendum.

To fill this gap the Committee recommended that the Parliament establish a Joint Standing Committee on Constitutional Matters ('JSCCM') with 'a broad mandate to review the Constitution and consider constitutional matters'.[8] The JSCCM could initiate its own inquiries as well as receive references from the Parliament or a Minister, make recommendations on the holding of constitutional conventions, and exercise functions relating to the referendum process when a proposal is to be put to a vote. The Committee acknowledged other ideas – such as a permanent constitutional commission or a periodic constitutional convention – but favored a joint parliamentary committee on the basis that it is a proven mechanism that enables the 'buy-in' of parliamentarians, the people who are ultimately responsible for advancing specific proposals for constitutional amendment.

ARRANGEMENTS FOR THE CONDUCT OF CONSTITUTIONAL REFERENDUMS

The Committee also considered the adequacy of the *Referendum (Machinery Provisions) Act 1984* (Cth). This statute sets out the various rules that govern the conduct of constitutional referendums. The Committee took the firm view that Australia's referendum laws need updating. It rejected the view, advanced by the Department of Finance, that the *Referendum Act* is 'fit for purpose'. It instead found that 'certain provisions in the *Referendum Act* are outdated and not suitable for a referendum in contemporary Australia'.[9]

The Committee recommended that three changes be made as a matter of priority to ensure that Australia is ready for its next referendum. It said that the *Referendum Act* be amended to enable the distribution of the Yes/No pamphlet to all electors (not just to households) and via additional methods such as social media; the repeal of a provision that prevents the Commonwealth from spending money on referendum advocacy outside of the Yes/No pamphlet; and stronger referendum finance laws, including the banning of foreign donations over $100 and the introduction of donation disclosure requirements for campaign organisations.

The Committee acknowledged that other aspects of referendum process deserve attention but suggested that they are best handled in the lead up to specific referendums. The issues that the Committee placed in this category were: the form of the wording of the referendum question; the inclusion of neutral information in the Yes/No pamphlet; other neutral information and education activities; and the establishment of Yes/No committees.[10] The Committee further recommended that an Independent Expert Panel be established to provide advice to the JSCCM on these matters in the run up to a referendum. The Panel's membership would be appointed by the Prime Minister in consultation with other parliamentary party leaders, and would include constitutional law and public communication experts, representatives from the Australian Electoral Commission and/or other government agencies, and community representatives. The Panel's role would be advisory only. The JSCCM would consider its advice before handing it over to the Parliament along with its own views on how the referendum process should be handled.[11] Finally, the Committee suggested that there should be a comprehensive review of the *Referendum Act* to pick up issues not covered in sufficient detail by its inquiry. One area that it singled out for further attention was the need for stronger regulation of misinformation in referendum campaigns.[12]

The Committee's report was tabled late in the parliamentary term. It will be up to the next parliament, due to sit from mid-2022, to determine whether and how the Committee's recommendations are considered and implemented.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

FIRST NATIONS VOICE: MODEST, TRANSFORMATIVE OR BOTH?

The proposal for a First Nations Voice is best understood as a constitutional amendment rather than a dismemberment.[13] At the same time, as I indicated in my country report last year, the Voice proposal resists easy classification against Richard Albert's typology.[14] It is a modest reform with a far-reaching objective, namely, the recasting of the relationship between First Nations people and the state.

This point was elaborated upon in 2021 by Gabrielle Appleby, who explored the duality of the Voice idea as both modest and transformative.[15] Appleby noted the opinion of former Chief Justice of Australia, Murray Gleeson, that the Voice proposal is consistent with the supremacy of Parliament (it does not limit Parliament's law-making powers) and congruent with the existing position of Aboriginal and Torres Strait Islander peoples as subject to the so-called 'races power'.[16] For Gleeson, a proposal that the *Australian Constitution* be amended to allow Parliament to design a representative body to advise on

6 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (Parliament of Australia, December 2021).
7 Ibid [3.79].
8 Ibid [3.90].
9 Ibid [4.146].
10 Ibid [4.160].
11 Ibid [4.162].
12 Ibid [4.164].
13 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP, 2019) 76-78.
14 Paul Kildea, 'Australia' in Luis Roberto Barroso and Richard Albert (eds), *The International Review of Constitutional Reform* (2021) 16, 18.
15 Gabrielle Appleby, 'The First Nations Voice: A modest and congruent, yet radically transformative constitutional proposal', *AUSPUBLAW*, 11 June 2021 <https://www.auspublaw.org/blog/2021/06/the-first-nations-voice-a-modest-and-congruent-yet-radically-transformative-constitutional-proposal>.
16 Section 51(xxvi) of the *Australian Constitution* enables the national Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

matters relevant to First Nations people 'hardly seems revolutionary'.[17] Simultaneously, the Voice proposal is transformative: in Appleby's words it is 'a change that seeks to reconstruct the ultimate foundations of the Australian State in a way that acknowledges the existence of First Nations people and their sovereign status … in a structural way that gives expression to their right to self-determination'.[18]

This duality may prove significant in the way that the constitutional politics of this particular reform proposal plays out.[19] The transformative nature of the Voice proposal will appeal to those in the Australian community who feel that a foundational re-setting of the relationship between First Nations and the state is overdue. But any realistic appraisal of the prospects of the Voice must grapple with the fact that Australians have long proven resistant to constitutional change, and that a culture of amendment caution is dominant among political elites.[20] The more modest dimensions of the Voice proposal have the potential to appeal to those in the community who are more constitutionally conservative.

REVAMPING CONSTITUTIONAL REVIEW

While the proposal for a First Nations Voice dominates current discussions around constitutional reform, lingering in the background is the wider question of whether and how Australia should conduct a wider project of constitutional review. It is more than three decades since Australia's last broad-based constitutional review process, conducted by the Constitutional Commission (1988). During this time a variety of proposals for constitutional change have been floated, including the creation of a republic through the appointment of an Australian head of state, the extension of parliamentary terms, and the repeal of constitutional rules that disqualify dual citizens and others from running for parliament (see below under 'Looking Ahead'). But a general pessimism about the prospects of constitutional reform has led governments of all political leanings to eschew formal amendment and tolerate the status quo.

The 2021 decision of the House Standing Committee to inquire into constitutional review process was therefore welcome. First Nations Voice aside, the wider debate about constitutional reform is at a low point. The Committee's report promised a modest step towards reinvigorating discussion about the type of constitution that Australians want today, and the sorts of changes that might deliver it.

Ultimately, the Committee's proposal for a standing parliamentary committee on constitutional matters was not terribly ambitious. To give the Committee its due, the proposed JSSCM has promise. It could provide a much-needed focal point for regular inquiry into the adequacy of our constitutional arrangements. And the involvement of political representatives in constitutional discussions ensures some buy-in from those in power.

The Committee nonetheless missed an opportunity to endorse more innovative approaches to constitutional review. The idea of holding a constitutional convention run according to deliberative democracy principles is now well-established. The experience of Ireland and other countries demonstrates the potential of these mechanisms to promote public awareness of constitutional reform, ignite debate and generate sensible and trusted reform ideas. And, closer to home, Australians can look to the example of the Regional Dialogues and First Nations National Constitutional Convention, which led to the proclamation of the *Uluru Statement from the Heart*.[21]

The Committee, commendably, heard evidence from Irish officials and agreed that there are 'valuable lessons that could be learned' from both the Irish experience and the Uluru process.[22] However, it stopped short of recommending that a future government initiate such a process for the purposes of advancing constitutional review. A stronger endorsement would have helped to spotlight both the existence of such forums and the contribution they stand to make to Australia's flagging constitutional reform discourse.

MODERNIZING REFERENDUM RULES

Australia is not only out-of-practice when it comes to considering broad-based constitutional review. The rules that govern referendums have not been revisited for many years and, as the Committee concluded, are no longer 'fit for purpose' for a modern referendum. This is not merely a side issue; it is central to the manner in which Australia (or any nation) undertakes constitutional reform. Legal regulation of process matters ultimately shapes the fairness and deliberative quality of a constitutional referendum.

To this end the process recommendations of the Committee were welcome. The report strengthened a growing consensus on the need to free the national government from its current spending restrictions, and drew welcome attention to other, often overlooked, aspects of referendum finance. The recommendation that the official pamphlet should be capable of being distributed by additional methods underscores the position of earlier inquiries. The proposal for an Independent Referendum Panel reinforces the idea that an additional, neutral actor could improve our referendum process (much as it does in Ireland), even if the Committee envisaged it playing a purely advisory role.

At the same time, the Committee's recommendations for priority amendments to the *Referendum Act* did not go far enough. The Act suffers from other deficiencies that need to be addressed before Australia holds its next referendum.

For instance, the Committee made no specific recommendations on revisiting the content of the much-maligned official pamphlet. The pamphlet, first devised in 1912, presents arguments for and against the proposed amendment that are authorised by parliamentarians and are often overlong and misleading.[23] As Cheryl Saunders remarked almost 30 years ago, '[t]he primary purpose of the yes/no case is to sway votes, not to provide understanding'.[24] The Committee heard many creative suggestions, including the publication of a citizens' statement generated through a deliberative process, the inclusion of a neutral statement on the referendum proposal, and the use of images and graphs. It is

17 Murray Gleeson, *Recognition in Keeping with the Constitution: A Worthwhile Project* (Uphold & Recognise, 2019) 14.
18 Appleby (n 15).
19 Ibid.
20 Paul Kildea, 'How culture shapes Australia's referendum record', *AUSPUBLAW*, 11 June 2021 <https://collie-dinosaur-8jag.squarespace.com/blog/2021/06/how-culture-shapes-australias-referendum-record>.
21 Davis and Williams (n 2).
22 House of Representatives Standing Committee (n 6) [3.86].
23 Paul Kildea and George Williams, 'Reworking Australia's Referendum Machinery' (2010) 35(1) *Alternative Law Journal* 22.
24 Cheryl Saunders, 'The Australian Experience with Constitutional Review' (1994) 66(3) *Australian Quarterly* 49, 56.

regrettable that that Committee did not endorse some of these ideas. Any move to 'modernize' referendum process must address the pamphlet's deficiencies.

The Committee ultimately decided that decisions about pamphlet contents – along with other process matters like question-setting, and the establishment of umbrella Yes and No campaign groups – are best made by governments and Parliaments 'on a case-by-case basis at each referendum' on the advice of the independent Panel and the JSCCM.[25] The value of this approach is that it provides the government and Parliament with the flexibility to make process decisions that are sensitive to each specific referendum context. The downside is that it leaves important process matters to be determined on the eve of a referendum campaign when strategic and partisan considerations are likely to surface. If the Committee's 'flexible' approach to process decisions is to be workable, the *Referendum Act* first needs to be amended to set down basic ground rules to guide and delimit the discretion of decision makers. The allocation of public funding, the preparation of 'neutral' information and the drafting of questions would all benefit from a regulatory scheme of this kind.

IV. LOOKING AHEAD

The First Nations Voice proposal will likely remain at the center of Australian constitutional reform discussions for the time being. Looking ahead, there is potential for the Voice proposal to pave the way for much-needed consideration of other reform options. Should the Voice proceed to a referendum and be approved by the Australian public, political elites may start to let go of some of the extreme caution and defeatism that has characterized their attitude towards constitutional change in recent decades. A successful Voice referendum could help to bring about a constitutional thaw.

REPUBLIC

The proposal to establish an Australian republic will be a priority for many. More than 20 years after Australians rejected a republic model that provided for an appointed President, public disagreement on the issue persists. The Australian Republican Movement remains active in advocating for another push towards establishing an Australian head of state, perhaps with a model that would permit direct election. Polling suggests that support for a republic has declined in recent years, perhaps not surprising in the midst of a pandemic. One poll conducted in 2021 found support for a republic at only 34 per cent, the lowest in decades, and a high proportion of undecided respondents.[26] Nonetheless, there is a good chance that the push for a republic will be revived if the Voice proposal gains momentum, as it will be seen by some as another necessary step to modernizing Australia's constitution.

ELIGIBILITY TO SIT IN PARLIAMENT

Alongside the Voice and the republic, a third reform that would fit a 'modernization' theme is the amendment of section 44 of the *Australian Constitution*. This provision establishes rules on eligibility to sit in the national Parliament. It disqualifies a person from sitting in Parliament on several grounds, including holding foreign citizenship and being employed as a permanent public servant. The citizenship rule has proven especially problematic. In an ethnically diverse country, it renders millions of Australians ineligible to run for Parliament unless they have taken the often painful step of renouncing their foreign citizenship. Moreover, candidates and elected representatives sometimes hold citizenship to another country without being aware of it. The instability that this can cause was demonstrated in 2017, when 15 members of the national Parliament either resigned, or were ruled ineligible by a court, because of their foreign citizenship.

The following year, the Joint Standing Committee on Electoral Matters published a report on section 44.[27] It recommended that the Australian government prepare a proposed referendum question to either repeal section 44, or to amend it so as to empower Parliament to replace it with legislation. Years on, no action has been taken in response to the committee's recommendations.

As 2021 came to an end, the primary reform focus was on the First Nations Voice proposal. But the report of the House Standing Committee on constitutional review and continued (if low level) discussion about the republic and section 44, suggest that a wider and much-needed public debate on constitutional reform is on the horizon. Holding a referendum on the Voice may be the necessary first step towards that. The decision to hold that referendum will reside in the government and Parliament elected at the 2022 federal election.

V. FURTHER READING

Gabrielle Appleby, 'The First Nations Voice: A modest and congruent, yet radically transformative constitutional proposal', *AUSPUBLAW*, 11 June 2021 <https://www.auspublaw.org/blog/2021/06/the-first-nations-voice-a-modest-and-congruent-yet-radically-transformative-constitutional-proposal>.

Sean Brennan, 'The Wording is not the Problem', *Indigenous Constitutional Law Blog*, 6 July 2021 <https://www.indigconlaw.org/home/naidoc-week-2021-the-wording-is-not-the-problem>.

Megan Davis and George Williams, *Everything You Need to Know About the Uluru Statement from the Heart* (NewSouth Publishing, 2021).

House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (Parliament of Australia, December 2021).

Paul Kildea, 'How culture shapes Australia's referendum record', *AUSPUBLAW*, 11 June 2021 <https://collie-dinosaur-8jag.squarespace.com/blog/2021/06/how-culture-shapes-australias-referendum-record

25 House of Representatives Standing Committee (n 6) [4.160].

26 Jewel Topsfield, 'Support slumps for republic: poll', *The Age*, 26 January 2021, 8.

27 Joint Standing Committee on Electoral Matters, *Excluded: The Impact of Section 44 on Australian Democracy* (Parliament of Australia, May 2018).

Austria

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I. INTRODUCTION

The year 2021 has yet been another year largely dominated by COVID-19 and the legislative responses to combat the virus in Austria. Many of these measures – especially the lockdown imposed only for vaccinated people[1] or the planned general compulsory vaccination[2] – brought on interferences with fundamental rights and therefore discussions and in some cases proceedings before the Austrian Constitutional Court challenging their constitutionality. Nevertheless (just like in 2020), the measures taken only scarcely amended the Austrian Constitution and were mostly taken at the statutory law level or even as administrative ordinances. Besides these several other constitutional amendments were passed in 2021, although none of particular significance. The most interesting changes to the Austrian Constitution such as the Freedom of Information Act remain in the pipeline.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

A. SUCCESSFUL CONSTITUTIONAL REFORMS

Like the pandemic responses in the previous year, 2021 saw some COVID-19-related constitutional changes but altogether neither many numbers nor such of particular impact. The majority of those successful constitutional amendments were simply prolongations of existing rules concerning the decision-making of the government[3] and local governments (*Gemeinderat*)[4] by way of circular resolution or video conference[5] or special rules concerning accompanying measures in matters of public procurement.[6] Some parts of the COVID-19 act on administrative law (*Verwaltungsrechtliches COVID-19-Begleitgesetz*) were amended and since they had originally been passed as constitutional provisions these changes had to be passed at constitutional rank.[7]

Another group of amendments concerned clauses in statutory acts stipulating the Federation is competent to pass laws and administer them in the area of the specific act.[8] These so-called "*Kompetenzdeckungsklauseln*" are quite common in the Austrian legal landscape. The Austrian Constitution includes the main allocation of legislative and executive powers between the Federation and the states (*Länder*) in Articles 10 to 15.[9] These provisions lay down different variations of the distribution of those competences, assigning them either to the Federation or the *Länder* completely or separating the legislative and administrative competence in different degrees.[10] Furthermore, the Constitution provides for most matters falling within the Federation's executive competence to be executed by *Länder* authorities on behalf of the Federation. In general, competences are allocated according to certain matters or areas listed in the Constitution e.g. matters of trade are solely regulated and administered by the Federation. In case a new statutory act does not (solely) fall within the competence of the Federation, it is common to include a constitutional provision constituting such a competence for that specific area. In 2021 statutory acts in the area of renewable energy sources, green electricity, energy regulation, and alternative fuels were either passed or amended and included such provisions providing for the required competence.[11]

Another successful constitutional amendment saw several constitutional provisions lifted.[12] Yet the material impact of this amendment cannot be considered significant, as they were solely remnants of statutory acts which had expired already based on the second Federal Act on removing all obsolete legislation. Since this statutory law act could not lift constitutional law, the acts expired leaving a few constitutional provisions shattered in-between in force as meaningless leftovers – a situation which the amendment in 2021 remedied.

1 5. COVID-19-Schutzmaßnahmenverordnung, Federal Law Gazette II No. 465/2021.
2 Susanne Gstöttner, 'Das österreichische Impfpflichtgesetz Impfpflichtgesetz' (VerfBlog, 1 February 2022) <https://verfassungsblog.de/das-osterreichische-impfpflichtgesetz> accessed 15 June 2022.
3 See the amendment Art 151 para 65 AC affecting the period of validity of Art 69 para 3 AC; Federal Law Gazette I No. 2/2021; Federal Law Gazette I No.107/2021.
4 See the amendment Art 151 para 66 AC affecting the period of validity of Art 117 Abs 3 AC; Federal Law Gazette I No. 2/2021; Federal Law Gazette I No.107/2021.
5 See last year's report Susanne Gstöttner and Konrad Lachmayer, 'Report: Austria' in Luis Roberto Barroso and Richard Albert (eds), *The 2020 International Review of Constitutional Reform* (2021) 21-25.
6 Federal Law Gazette I No. 107/2021, Federal Law Gazette I No. 235/2021.
7 Federal Law Gazette I No. 2/2021; Federal Law Gazette I No. 107/2021.
8 Federal Law Gazette I No. 12/2021; Federal Law Gazette I No. 17/2021; Federal Law Gazette I No. 150/2021.
9 On the allocation of powers in the Austrian Constitution see Manfred Stelzer, *The Constitution of the Republic of Austria: A Contextual Analysis* (Hart Publishing 2011) 153ff.
10 Konrad Lachmayer, 'The Austrian Länder in a "glocal" network' in Sylvia Brunet and Arun Sagar (eds), *Fédéralisme, Dé-centralisation et Régionalisation de l'Europe, Tome I/II, Editions L'Epitoge-Lextenso, Collection «L'Unité du Droit» XVII* (Editions L'Epitoge-Lextenso 2017) 107-123.
11 See e.g. the Renewable Energy Extension Act (*Erneuerbaren-AusbauGesetz*), Federal Law Gazette I No. 150/2021 or the Eco-Electricity Act (Ökostromgesetz *2012*), Federal Law Gazette I No. 75/2011 as amended by Federal Law Gazette I No. 150/2021.
12 Federal Law Gazette I No. 107/2021.

Other successfully constitutional amendments related to constitutional provisions in statutory laws e.g. backing legislation that would otherwise possibly conflict with existing constitutional law like centralized competences to administer certain parts of a law by the government or the chancellor[13] or provisions relating to an independent control commission established by the State Security and Intelligence Act within the Federal Ministry of the Interior as.[14]

Although some of these constitutional amendments touched upon important issues of the Austrian Constitution fabric such as the distribution of competences between the Federation and the *Länder*, altogether none of them can be considered particularly significant in terms of their substance or ramifications.

B. PROPOSED AND FAILED CONSTITUTIONAL REFORMS

FURTHER ATTEMPTS TO INTRODUCE A FREEDOM OF INFORMATION ACT

An important issue still on the table in 2021 was one of the evergreens of proposed constitutional reforms in Austria: The Freedom of Information Act. As mentioned in last year's report, the government had agreed on a legislative proposal on the issue.[15] Before that, two legislative proposals by members of the opposition [16] called for an amendment of the Constitution in favor of a right to freedom of information but have since been adjourned in the constitutional committee to the National Council.[17] At the heart of these proposals is Article 20 para. 3 Austrian Constitution, which enshrines the principle of "*Amtsverschwiegenheit*" (official secrecy). Public authorities are compelled to maintain secrecy about everything known to them in their official capacity unless the law provides otherwise. The obligation of keeping secrecy applies when it is necessary in the interest of maintaining public peace, order, and security, national defense, foreign relations, in the economic interest of a corporation under public law or for the preparation of a decision, or in the predominant interest of the parties.

Since 2014,[18] there have been attempts to pass a Freedom of Information Act abolishing the secrecy approach in favor of implementing a right to the freedom of information in the Austrian Constitution. At the beginning of 2021, the endeavors to pass such an act seemingly got fresh wind in the sails with the proposal of the government. Under the overall heading of "transparency," this proposal aims beyond abolishing the principle of official secrecy and proposes further changes to ensure transparent state conduct. It calls for an amendment of the Constitution requiring all legislative, administrative as well as judicial organs to publish any information of public interest in a way accessible to anyone. In addition, everyone shall have a right of access to information limited only in cases secrecy is required on the basis of an enumerated list of reasons in the public interest e.g. national security, or due to compelling reasons of integration and foreign policy.[19] Despite the advance at the beginning of the year, the efforts seem to have come to a halt yet again.[20]

AN INDEPENDENT FEDERAL PUBLIC PROSECUTOR?

At the beginning of 2021, the government raised another issue, which had been discussed and called for[21] previously: The establishment of an independent Federal Public Prosecutor. In February, the conservative party communicated that it would support the implementation of such an office. The proposed new solution would alter the existing structure of the judiciary significantly as the Office of the Public Prosecutor would head this department independently, no longer being subject to the instructions of the minister of justice. However, towards the end of 2021, the ministry of justice presented the first ideas on the restructuring but was yet to draw up a proposal since they said this was "the biggest reform of Public Prosecution since the second world war".[22]

POPULAR PETITION ON CLIMATE PROTECTION

The popular petition on climate protection[23] advocating among other measures for the implementation of a constitutional right to climate protection mentioned in last year's report has since been discussed by parliament and led to the adoption of a resolution by the National Council including over 50 demands to the government to take measures to achieve climate neutrality, calling for eco-social tax reform and a transformation of the energy system.[24] Most of the measures won't require an amendment to the Constitution, however, the resolution calls for a study on the possibilities of enshrining a constitutional right to climate protection for all citizens as well as the constitutional establishment of a scientific climate advisory board monitoring the adherence to the CO2 budget.

13 See Section 8 para 2 of the COVID-19 act on administrative law as amended by Federal Law Gazette I No. 2/2021 or Section 102 of the Renewable Energy Extension Act (FN 11).

14 See Section 17a of the State Security and Intelligence Act as amended by Federal Law Gazette I No. 148/2021.

15 Gstöttner and Lachmayer 2020 (FN 5)

16 IA 61/A 27th legislative period; IA 453/A 27th legislative period; IA is short for *Initiativantrag* and refers to bills by at least five members of the National Council.

17 See the parliamentary communication No. 1293, 25 November 2020 <www.parlament.gv.at/PAKT/PR/JAHR_2020/PK1293/#XXVII_A_00061> accessed 15 June 2022.

18 19/ME 25th legislative period; ME stands for *Ministerialantrag*, a bill coming from the Federal Government drafted by the competent ministry; see for a discussion of the issue of freedom of information vs official secrecy Maria Bertel, 'Informationsfreiheit statt Amtsgeheimnis?' (2014) 22 Journal für Rechtspolitik 203.

19 Besides this, the draft proposes a "cooling-off" period of three years for all members of the ACC after holding certain political offices as well as the possibility for ACC judges to publish separate opinions.

20 Cathrin Kahlweit, ‚Politisches Patt', *Süddeutsche Zeitung* (2 May 2022) <https://sueddeutsche.de/politik/oesterreich-informationsfreiheitsgesetz-pressefreiheit-edtstadler-1.5574612> accessed 15 June 2022.

21 See the motion urging the government to take action on that matter (444/A(E) 27th legislative period).

22 Sebastian Fellner, Der Bundesstaatsanwalt lässt weiter auf sich warten, *derstandard.at* (20 April 2022) <https://derstandard.at/story/2000135030531> accessed 14 June 2022.

23 348 d.B. 27th legislative period; d.B. is short for "der Beilagen" and means the supplements to the protocols of the National Council.

24 697 d.B. 27th legislative period.

FURTHER TOPICS

Many of the reforms proposed – either through legislative initiatives or by passing a resolution calling for the government to draft such a bill– have not been decided yet either because deliberations have not been taken up yet or because the topic has been adjourned.

The opposition called for an amendment of Article 7 para 1 of the Austrian Constitution to guarantee equal treatment of people over the age of 60.[25] Several proposed changes concerned the Austrian Ombudsman Board and called for an extension of its auditing competences to include privatized legal entities and companies fulfilling functions of public interest[26] as well as revisions of the rules regarding the appointment of its members in order to provide for a transparent procedure independent of party politics.[27] In reaction to the climate legislation taken by parliament, one party called for implementing an element of direct democracy to veto such legislation.[28] In particular, they proposed an amendment of the constitution allowing for a mandatory referendum on passed bills if 100.000 signatures were collected. Moreover, the far-right party proposed the enactment of a Political Islam Prohibition Act.[29] Furthermore, an amendment of the constitution allowing for regional Courts of Auditors in certain cities was suggested (*Stadtrechnungshöfe*).[30] Another proposed amendment pressed for the creation of a constitutional backing for the competence of the *Länder* to dedicate plots of land for "social housing".[31]

Looking at the course many constitutional amendments being proposed in the previous year of 2020[32] took, shows the characteristic way of most proposed amendments in Austria. For example, the proposals concerning the competence of the ACC to take interim measures[33], new rules on the independence of the judges of the ACC[34], the expansion of the possibilities to raise objections in the legislative process by the Federal Council[35] , or the call for new competences of the Austrian Ombudsman Board regarding public entities carrying out decentralized tasks[36] mentioned last year have not been formally decided on. While many of them cannot officially be considered as failed, deliberations have either not even been taken up in the relevant committee to the National Council or they keep getting adjourned. Therefore, most of them will not be dealt with within the current legislative period due to the lacking political support of the government meaning they "expire" when it will end in 2024 at the latest. But while some of these topics keep reappearing in new proposals repeatedly with no greater chance of success, some notions were picked up by legislation proposed by the government.[37] Therefore, as the example of the Freedom of Information Act shows, which was first proposed six years ago and several times since,[38] issues continuously raised as possible amendments might gain momentum eventually.

25 IA 2279/A 27th legislative period.
26 IA 1625/A 27th legislative period; IA 1327/A 27th legislative period.
27 IA 1329/A 27th legislative period.
28 1771/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.
29 1681/A(E) 27th legislative period.
30 1841/A(E) 27th legislative period.
31 IA 1997/A 27th legislative period.
32 See Gstöttner and Lachmayer 2020 (FN 5).
33 444/A(E) 27th legislative period.
34 IA 353/A 27th legislative period.
35 51 d.B. 27th legislative period.
36 IA 360/A 27th legislative period.
37 Like the call for the establishment of an independent Federal Public Prosecutor.
38 19/ME 25th legislative period; IA 6/A 25th legislative period; 3/A(E) 26th legislative period.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

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.[39] 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 required 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 2021 constitute amendments to the constitutions rather than dismemberments.[40]

LEGISLATIVE OVERSIGHT

The constitutional amendments of 2021 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 Art 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. Some of the proposed changes have been assigned to different committees like the one on the protection of the environment or the Austrian Ombudsman Board as they were concerned with specific matters more apt to be dealt with in those groups.

The committees will assess the proposed amendment and potentially propose 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 committee 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. A lot of the currently pending proposals for constitutional amendments will most likely share this fate.

Another form of oversight for proposed constitutional amendments during the legislative process comes through the review process initiated for all proposals drafted by the government. In the course of this step, interest groups and organizations as well as the general public can give statements on the proposed new law. In regard to amendments

39 Harald Eberhard and Konrad Lachmayer, 'Constitutional Reform 2008 in Austria' (2008) ICL Journal 112, 116.
40 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 76-94.

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* is not legally required but has been observed as part of a decade-long state practice.[41] This procedure was applied to the government's proposal of a Freedom of Information Act and the parliament received 175 statements – including those from the ACC and the Austrian Administrative Court, the Association of Austrian judges, the data protection authority, several regional governments, universities, several ministries, the Parliamentary Administration, many NGOs, and private persons.[42]

Adhering to this extensive procedure, therefore, allows for broad involvement and discussion with the public but innately decelerates the legislative process. Some of the constitutional amendments proposed by the governing parties were taken to the parliament not as government proposals but by individual MEPs of the governing parties as an *Initiativantrag*, a bill proposed by at least five members of the National Council, without following the reviewing process and passing through parliament more quickly.

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 the 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 pending proceeding. Other than that, it will only decide upon the constitutionality of law following a motion by another Court, an individual, or a national federal government (Art 140 Austrian Constitution). However, none of the constitutional amendments of 2021 – 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 in particular the ACC. The only exception is the possibility to clarify whether an act of legislature falls within the competence of the Federation or the *Länder* upon application by the national or federal state governments prior to its implementation (Art 138 Austrian Constitution).

The Austrian Constitutional Court as one of the three supreme courts in Austria can be attributed to the role of the guardian of the Austrian Constitution.[43] Its Constitutional mandate is to exclusively review the constitutionality of legislative and administrative acts. In this sense, it plays a clear counter-majoritarian role.[44] However, some decisions indicate that the ACC has taken on a more activist role at times, advancing rights regarding somewhat controversial topics like same-sex marriage[45] and third gender[46]. While the ACC has overall become more activist in the last 50 years,[47] it has taken on a more restrained approach again in recent years while still not shying away from guarding human rights and taking on a representative or even enlightened role when necessary.[48] 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.[49] According to this case law, 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. Nevertheless, constitutional reforms passed without a referendum held – including the ones passed in 2021 – remain under the scrutiny of the ACC in light of the fundamental principles of the Austrian Constitution.

IV. LOOKING AHEAD

The next year will show how and if any of the further reaching amendments of the constitution especially concerning the Freedom of Information Act as well as an independent Office of Public Prosecutor manifest. Despite the overall communicated political willingness to instigate changes, the realization could be halted yet again by concerns coming from many different sides especially the regional authorities of the *Länder*. It remains to be seen if the existing proposals on the table for the Freedom of Information Act can and will be amended taking into consideration some of the criticism voiced and enable a satisfactory solution capable of winning a (constitutional) majority in parliament. Aside from that, the chances of the proposed restructuring of the judiciary in favor of an independent Public Prosecutor seeing the light of day depends on the efforts to draw up a legislative proposal not losing impetus and will have to be judged based on the still outstanding draft. Then again, other issues are set to dominate the course of the coming year including the ongoing battle against the global pandemic with numbers on the rise again at the beginning of summer 2022. Not to forget that in autumn the election of the Federal President will take place. Although this is not expected

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

42 See for the statements on the parliament's website <https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00095/index.shtml#tab-Stellungnahmen> accessed 14 June 2022.

43 Konrad Lachmayer, 'The Austrian Constitutional Court' in András Jakab, Arthur Dyevre and Guilio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 75, 86f; 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.

44 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.

45 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.

46 VfSlg 20.258/2018.

47 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.

48 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 2021) 75-94.

49 In the relevant case (VfSlg 16.327/2001) the legislator exempted a certain area from the ACCs scrutiny by plainly stating that all laws in force at a certain time regarding a certain issue are to be "considered not unconstitutional". 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 would deprive the Austrian people of their constituent power.

to have any ramifications on the constitution, it may tie up political resources even if the current officeholder running for office again indicates a less intense campaigning phase.

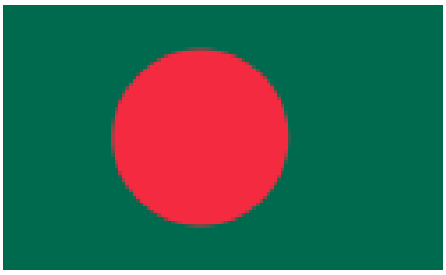
V. FURTHER READING

Harald Eberhard, 'The Austrian Constitutional Court after 100 Years: Remodelling the Model?' (2021) 76 Zeitschrift für Öffentliches Recht, 395

Anna Gamper, 'Dangerous or Endangered Constitutional Courts? A View from among and within the Branches of Power' (2021) 76 Zeitschrift für Öffentliches Recht 331

Karl Stöger, 'Austria: Legal Response to Covid-19' in King J and OLM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (OUP 2021)

Bangladesh



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I. INTRODUCTION

The people of Bangladesh, in the constituent assembly, adopted the current constitution in 1972 based on four fundamental principles - nationalism, democracy, socialism, and secularism.[1] It provides for a unitary state[2] with a parliamentary form of government[3] and establishes a supreme court for Bangladesh[4] as the highest court of the country with all types of jurisdictions including constitutional matters[5].

In the year 2021, Bangladesh celebrated the golden jubilee of its independence albeit on a limited scale due to the Covid 19 pandemic and it demonstrated extraordinary resilience in dealing with a global pandemic. Japan based Nikkei International's Covid Recovery Index placed Bangladesh in 5th position out of 121 countries.[6] Despite economic resilience, the legal system suffered during the pandemic. Thus, there was very little constitutional development from the judiciary. Because for almost the first half of the year, the courts ran on an 'urgent mode' primarily granting bails and hearing on pertinent issues. In the latter part, some important interpretations of the constitution of Bangladesh were delivered by the Supreme Court of Bangladesh which involved fundamental rights and extra-territorial application of a constitutional provision relating to vacation of seat of the parliament. The constitutional court has adopted a combination of counter-majoritarian, representative, and enlightened approach in their constitutional adjudication.[7]

On the political front, there were not too many reform proposals let alone initiatives. The opposition, civil society demanded a separate law for the formation of election commission- a demand that remained unfulfilled for last fifty years. The later part of the year witnessed a wide participation of parliamentarians, impacted simultaneously by civil society, in the making of the law. On the other hand, one important project of the Ministry of Law identified the discriminatory provisions in the *corpus juris* of Bangladesh for pursuing reform in accordance with the SDG 2030.

Although 2021 has been largely overshadowed by the global COVID-19 crisis, the state and history of the Bangladesh Constitution has been the subject of lively discussion in academia. A comprehensive list of the important published works has been attached at the end of the chapter.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. ELECTION COMMISSION REFORM

The Constitution of Bangladesh of 1972 provides the President with the authority to appoint the Chief Election Commissioner, and the other Elections Commissioners subject to the provisions of any law made in that behalf. But for 50 long years, this law was not enacted by the Parliament. Therefore, the President had exercised subjective prerogative to appoint these important constitutional positions in the absence of a law. For a long 50 years, no parliament or political party ever took the initiative to enact a law to streamline the appointment of the persons in charge of this major constitutional institution.

From 2011 onwards, the then President in consultation with the major political parties started constituting a search committee for the appointment in the leadership roles of the National Election Commission. This was an informal arrangement of the President of the country. There were demands in the civil society and among the political parties to streamline the process through a comprehensive law. With the upcoming completion of the tenure of the National Election Commission and the national election due in 2 years, 53 eminent citizens of Bangladesh demanded a law for the appointment the Chief Election Commissioner, and the other Commissioners.[8] Finally in the year 2021, the government took the initiative to place a bill in parliament as regards to the appointment of the Chief Election Commissioner and the other Commissioners.

The proposed bill prescribed the constitution of a search committee headed by a Judge of the Appellate Division to suggest names for the position of Chief Election Commissioner and the other Commissioners.

1 Constitution of Bangladesh 1972, Art. 8(1).
2 Ibid, Art. 1.
3 Ibid, Part IV, Chapter II.
4 Ibid, Art. 94.
5 Ibid, Arts. 101, 102, 103.
6 'Bangladesh best in dealing with Covid in South Asia: Nikkei index' *The Business Standard* (Dhaka, 6 May 2022) <https://www.tbsnews.net/coronavirus-chronicle/covid-19-bangladesh/bangladesh-best-dealing-covid-south-asia-nikkei-index> accessed 07 June 2022
7 For an overview of these three approaches, see Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67(1) American Journal of Comparative Law 109–143.
8 '53 eminent citizens demand law for appointing CEC, ECs' *The New Age* (Dhaka, 25 September 2021) <https://www.newagebd.net/article/150093/53-eminent-citizens-demand-law-for-appointing-cec-ecs> accessed 07 June 2022.

The other members included a Judge of the High Court Division of the Supreme Court nominated by the Chief Justice, the Auditor General and Controller of Bangladesh, the Chairman of the Bangladesh Public Service Commission, and two prominent citizens nominated by the President, one of whom will be a woman. After fifty years of wait, finally a transparent procedure prescribing a process for selecting the Chief Election Commissioner and other Commissioners removed a cloud from the political ecosystem in January 2022.

The enactment of this legislation has continued the constitution-making project in line with the then existing constitutional scheme by simply advancing the meaning of the constitution as it was then understood. Richard Albert considers constitutional changes in four distinct lenses based on their respective purposes: corrective, elaborative, reformative, and restorative.[9] The enactment of the above law has evidently the impact of an elaborative constitutional change.

2. LEGISLATIVE RESEARCH AND REFORM FOR PROMOTING AND ENFORCING NON-DISCRIMINATORY LAWS AND POLICIES

The Ministry of Law, Justice, and Parliamentary Affairs, Government of Bangladesh undertook an initiative to identify all the discriminatory provisions in the *corpus juris* of Bangladesh. It checked the incompatibility of the existing laws with the constitutional and human rights norms of equality and non-discrimination and aimed at underscoring some clear, specific, and tangible recommendations to address the said incompatibility.

The researchers assessed the provisions of law against the constitutional standard for discrimination as mentioned in Articles 19, 27, 28 and 29 of the Constitution of Bangladesh. In addition, they actively considered the international human rights law developments emanating from the comments of the United Nations Human Rights Treaty Bodies to expand the grounds of discrimination. While reviewing the laws, the researchers applied the following three scrutiny methods recognized by American constitutional law: 'strict scrutiny', 'mid-level scrutiny' and 'rational basis scrutiny'. Such scrutiny methods facilitated to find out different forms of discrimination, namely, 'facial discrimination' (evident on the face of the law), 'discrimination by design' (discovered in the objective of the law influenced by patriarchal philosophy) and 'discrimination by application' (discriminatory application of an apparently non-discriminatory law). Moreover, the researchers actively considered the 17 Sustainable Development Goals (SDGs) and 169 targets within the scheme adopted by Bangladesh. The researchers not only identified the discriminatory and inconsistent provisions in the laws but also suggested concrete recommendation to revise/reform/repeal in appropriate cases. In 2021, the researchers submitted their reports, and the law ministry is considering bringing necessary reforms to the existing laws.

Under the same project, the Ministry of Law, Justice, and Parliamentary Affairs has published a book titled 'Legislative Desk Book' (October 2021). The key objective of this Desk Book is to ensure clarity and uniformity in the drafting of legislation while complying with the constitutional principles, rules of law and statutory interpretation. The book offers a fundamental guideline and authoritative text for the legislative drafting and contains sources of useful information and best practices regarding legislative language, style, form, and process. The Desk Book while referring to the constitutional provision underscores the significant role of parliamentary standing committees in examining the Draft Bills and other legislative proposals in order to make them compatible with the constitutional and human rights norms and principles. The Book also emphasized on the importance of public participation and consultation before enacting an Act of parliament.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Despite the pandemic related stagnation in the judiciary and the legislature, there has been some minor reforms in constitutional understanding. Firstly, a supreme court judgment indicated possibility of collaborative constitutionalism by three organs of the state. Secondly, a number of judgments added contents to the understanding of fundamental rights provisions in the constitution. Thirdly, and perhaps the major reform, was done by the Supreme Court when they considered that even conviction by foreign courts can disqualify a member of parliament to hold seat in the parliament. Interestingly, none of these reforms contravened the eternity clause in the constitution, rather substantiated the existing provisions in the constitution being compliant with the eternity clause in the constitution.[10] In evaluation, it seems that the Supreme Court of Bangladesh has been all-representative, counter-majoritarian, and enlightened in performing its role as a constitutional adjudicator in a democracy.[11] This heading will show three such instances to substantiate the hypotheses.

1. RESTATEMENT OF SEPARATION OF POWERS DOCTRINE

The Supreme Court of Bangladesh has lately provided a restatement to the doctrine of separation of powers under the garb of Bangladesh constitution. In *Bangladesh Bank v People's Leasing and Financial Services Ltd. and Ors.*,[12] the court noted the struggle it had to undergo to identify the persons liable for paying damages to the shareholders who suffered loss due to the mishap in dealing with the company. The company bench of the High Court Division of the Supreme Court found that without the active collaboration between the institutions of the executive organ of the state, e.g., Anti-Corruption Commission and Bangladesh Security & Exchange Commission, and the judiciary, capturing the culprits and granting damages to the persons suffering from the liquidation of the company would not be possible. Thus, the company bench took the role of a 'constitutional court' and decided that "at times, there may be exigencies to work collaboratively for the greater interest of the nation ignoring the trifling procedural technicalities."[13]

The court relied on historical incidents intertwined with the foundation of Bangladesh led by the father of the nation. It reasoned that

9 Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford University Press 2019) 80.

10 Constitution of Bangladesh 1972, Art. 7B.

11 Luís Roberto Barroso (n 7).

12 *Bangladesh Bank v People's Leasing and Financial Services Ltd. and Ors.* (2021) 21 ALR 207.

13 Ibid, para 11.

"When the issue before the state-functionaries is regarding solution of a national crisis or development of the country, it is expected from the dignitaries of all the levels to reduce their respective paper works/procedures or field protocols as minimum as possible to contribute their maximum efforts towards building up the *'Sonar Bangla'* for which the three millions martyrs of our sacred land have scarified their souls and nearly quarter million women of this great soil have lost their chastity, simply for honouring the call of the Father of the Nation for independence and emancipation of the people of this country."[14] Such an approach to the separation of power doctrine under the Bangladesh constitution is an innovative development on the part of the judiciary to move forward to collaborative constitutionalism by two organs of the state towards good governance in the commercial sector. By doing so, the Supreme Court of Bangladesh has stepped into an enlightened journey necessary for progressing the civilization. This case took a new path by calling for a collaboration among executive and the judiciary.

2. DEVELOPMENT OF THE CONTENTS OF FUNDAMENTAL RIGHTS

The Supreme Court of Bangladesh takes a combination of enlightened and counter-majoritarian approach in dealing with disputes related to fundamental rights. While it remains vigilant in standing up against executive interventions, it also necessarily innovates and adopts enlightened method of interpretation to give better protection against curtailment of fundamental rights. This part of the report discusses two judicial decisions where the Supreme Court of Bangladesh, in performing its counter-majoritarian role, took an enlightened route to interpret fundamental rights.

Anti-Corruption Commission seized the passport of a Bangladeshi citizen studying abroad in connection with his alleged affiliation in a corruption case. The Supreme Court of Bangladesh observed that[15] the provision of Freedom of Movement in Bangladesh constitution is unique and distinguished from its counterparts in the Indian and Pakistan constitutions. The Bangladesh constitution has expressly granted its citizens right to leave and enter the country which the Indian and Pakistan constitutions have not done while enumerating their citizen's fundamental rights. The court noted that such right to leave and enter the country is not absolute, rather subject to reasonable restriction. Thus, no authority can without any ground seize a fellow citizen's passport for an indefinite amount time.

Disputes on seizure of passport is nothing new in Bangladesh.[16] Through this *Ahsan Habib Case,*[17] the court has clarified its position that the authorities may have lawful authority to seize someone's passport restricting citizen's right to leave and enter the country but that cannot continue for an indefinite period without communicating the reasons for doing so and taking leave of the court.[18]

In another case, *Md. Zahed Ali and Ors. v Bangladesh and Ors.*[19], the Supreme Court of Bangladesh considered land grabbing of poor peasants by using government apparatus a violation of fundamental rights. Earlier the *corpus juris* of Bangladesh provided both civil and criminal remedy in case of land grabbing or dispossession of property in legal terms. For the first time, the Supreme Court observed that such dispossession, grabbing of land using government apparatus negatively impacts poor citizens' right to equality, equal protection of law, right to life and liberty, freedom of profession, and right to property. The court declared such actions unconstitutional.[20]

3. DISQUALIFYING A MEMBER OF PARLIAMENT TO HOLD HIS SEAT BASED ON A FOREIGN JUDGMENT

A member of the Parliament of Bangladesh was convicted by a criminal court in Kuwait on 28 January 2021. In consequence, the Bangladesh Parliament Secretariat, issued a gazette notification, under Rule 178(4) of the Rules of Procedure of Parliament, declaring that he is no longer a member of the parliament of Bangladesh.[21] The gazette notification was issued on a ground of disqualification prescribed in the Article 66 read with Article 67 of the Constitution. According to Article 67 read with Article 66, a member of parliament shall vacate his seat if he has been convicted of a criminal offence involving moral turpitude sentenced to imprisonment for a term of not less than two years.

When this entire proceeding was challenged before the High Court Division of the Supreme Court of Bangladesh, the moot question was whether the judgement of a court of foreign jurisdiction can cause the disqualification of a member of parliament to hold his seat in the parliament.[22] The court reasoned as follows:

> The judgment of a foreign country on account of commission of "criminal offence" will equally be applicable while disqualifying a "member of parliament" within the meaning of Article 102(2)(d) of our Constitution. And obviously upon such disqualification the seat of a member of parliament will vacate under Article 67(1)(a)(d) of the Constitution as the judgment of a foreign country cannot be discredited for anyone's personal gain and if it is so done the majesty of our national Parliament vis-a-vis fairness of our judiciary would rather be belittled in the international arena.[23]

While the judgment can be appreciated on the grounds of showing respect towards foreign courts, implications from this case give rise to the unwanted situations where foreign courts can undermine the sovereignty of the parliament of a country. A careful evaluation of the entire proceeding shows that after the conviction of the member of the parliament, it was the parliament secretariat which issues the gazette notification announcing the vacation of the seat of the parliament. The Supreme Court of Bangladesh only upheld the decision of the Parliament who are the representative of the people of the republic. If a member of the parliament is convicted due to his involvement with human trafficking, and the parliament declares the vacation of his seat, it reflects fulfilment of a social demand. However, when such decision is challenged in the court,

14 Ibid.
15 *Md. Ahsan Habib v Government of the People's Republic of Bangladesh and Ors* (2021) LEX/BDHC/0003/2021 (hereinafter, 'Ahsan Habib Case').
16 *Hussain Muhammad Ershad v Bangladesh* (2001) 21 BLD (AD) 70.
17 *Ahsan Habib Case* (n 15).
18 Ibid, para 86.
19 *Md. Zahed Ali and Ors. v Bangladesh and Ors* (2021) LEX/BDHC/0013/2021 (hereinafter, 'Zahed Ali Case').
20 Ibid, para 36.
21 Extraordinary Gazette No. 11.00.0000.863.09.001.19-30 issued by Bangladesh Parliament Secretariat.
22 *Nurun Nahar Begum v Bangladesh* 74 DLR (2022) 1.
23 Ibid, para 19.

the court performed the representative role in reinforcing the decision by taking into consideration the judgment of a foreign court. It can thus be said that the court at the same time performed both representative role, and an enlightened role by introducing a new jurisprudence that a seat may be vacated even if a parliamentarian is convicted abroad despite considerations about possible national interest concerns.

IV. LOOKING AHEAD

1. IMPACT OF ELECTORAL REFORMS

There is an apparent dissatisfaction about the electoral ecosystem in Bangladesh among all the stakeholders including the ruling party, the other political parties, and the civil society. The ruling party questions the credibility, seriousness of the other political parties about their conscious democratic participation, while the other parties question the fairness of the system. The newly enacted legislation on appointment of the Chief Election Commissioner, and the other Election Commissioners has ushered a new hope after fifty long years. Only time can say whether such electoral reform can bring a transformative change in the political ecosystem.

2. ANTI-DISCRIMINATION PROJECT

After the completion of the research project on identification of discriminatory provisions in the *corpus juris* of Bangladesh, by the first half of 2022, the law ministry has put forward a bill in the parliament on Anti-discrimination law. The draft law reflets the mandate and spirit of the constitutional principles of equality and non-discrimination. While presenting the statement of purposes of the bill before the parliament, the law minister referred the core international human rights treaties including ICCPR, ICESCR, ICERD that prohibit discrimination and provide administrative and judicial measures to prevent discrimination. The proposed law while encompassing both direct and indirect discrimination provides an exhaustive list of discriminatory acts which particularly affect the marginalized and downtrodden sections of the society. Although the civil society has been making some uproars about some of the provisions and the structure of the bill, the fate of the bill remains to be seen given the fact that in its neighboring jurisdiction India, a similar law has been waiting to be passed for almost half a decade.

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Bolivia

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I. INTRODUCTION

The year 2021 was marked by the intention to reform the justice system, mainly due to its lack of independence. In this sense, various reform proposals have emerged, both popular and from the Executive, although none have been consolidated for the moment. The most relevant issue this year was related to the indefinite re-election and the ruling of the highest human rights court in the region. In 2017, Bolivia's Constitutional Court revoked the existing constitutional limit on reelection, arguing that it violated the human rights of then-President Evo Morales. In August 2021, the Inter-American Court of Human Rights issued an advisory opinion requested by Colombia, which concluded that barring unlimited presidential reelection did not violate human rights but rather ensured plurality and prevented the perpetuation of power in the hands of one person. Therefore, the predominant "restorative" reform proposal in 2021 was to restore the limits on re-election established in the 2009 Bolivian Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2021, two constitutional reforms were proposed in Bolivia. The first was related to the large-scale modification of the judicial system. The second was a restorative constitutional reform in order to reinstate the limit on the terms of office of the President and Vice President of the State.

The reform of the judicial system was initially proposed by the Ministry of Justice at the end of 2020 and remained in force until February 2021. That Ministry formed a constitutional advisory group made up of prominent lawyers in the country. After a few months and due to political pressure from the political party in power, that group suspended its functions. When the Ministry of Justice withdrew its proposal for reform, a group of constitutional lawyers drew up a new one. This proposal had the following reform objectives. 1) Reform the Constitution to return economic, financial, and administrative autonomy to the judicial system. 2) Establish in the Constitution a minimum budget allocation that should not be less than 3% of the entire State budget. 3) Establish a new system for the selection and appointment of magistrates and judges, which is based on a public, transparent verification and with citizen intervention of the suitability and capacity of the judges. This proposal consists of a citizen initiative that continues today. It is not yet possible to determine whether it will succeed or fail.

The second proposal had the objective of annulling a constitutional sentence (2017) that overruled a constitutional norm and declared the "human right" to indefinite reelection. The proposal was presented before the Constitutional Court of Bolivia by a group of constitutional lawyers. Before the Constitutional Court issues its decision, the Inter-American Court of Human Rights (IACtHR) issued the Advisory Opinion (AO) 28/21 which analyzed the figure of indefinite reelection in presidential systems.[1] The Inter-American Court concluded that the authorization of indefinite presidential reelection is contrary to the principles of representative democracy and, therefore, to the obligations established in the American Convention on Human Rights. Even though this last decision allowed the Bolivian Constitutional Court to approve the request for a restorative constitutional reform, it nevertheless denied it. A more in-depth analysis will be made in the next subtitle.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. THE PROPOSAL FOR CONSTITUTIONAL REFORM OF THE JUDICIAL SYSTEM

Bolivia has been in the midst of a judicial system crisis for several years. The different international organizations warned about the use of the judicial system for political purposes, high corruption, and lack of legitimacy of the judicial authorities, including the Constitutional Court of Bolivia, among others.[2] For example, Human Rights Watch in its reports "Justice as a weapon"[3] and "Justice as Revenge"[4] identified several cases that it called judicial persecution against political opponents. After the post-electoral conflicts of 2019, which began as a result of indications of electoral fraud[5], an Interdisciplinary Group of Independent Experts (IGIE Bolivia) was installed. This group, sponsored by the

1 Advisory Opinion N° 28 (IACtHR, 7 June 2021)
2 UN HRC, Visita al Estado Plurinacional de Bolivia: Informe del Relator Especial sobre la independencia de los magistrados y abogados, Diego García-Saván (A/HRC/50/36/Add.1), mayo 2022.
3 Human Rights Watch, *Justice as a Weapon: Political Persecution in Bolivia,* 2020.< Justice as a Weapon: Political Persecution in Bolivia | HRW>
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5 OAS :: FINAL REPORT - Analysis of Electoral Integrity - General Elections in the Plurinational State of Bolivia; See as well: Wilson Aguilar, "Informe de UE coincide con OEA y ratifica irregularidades en comicios". *Los Tiempos.* (Bolivia, 21 december 2019) <Informe de UE coincide con OEA y ratifica irregularidades en comicios | Los Tiempos>

Inter-American Commission on Human Rights, identified several factors that contributed to political interference in justice. Among them is the fact that the majority of judges and prosecutors currently hold temporary positions, combined with the lack of independence of the institutions in charge of appointing these officials to their positions. Another aspect is related to the low budget allocated to the sector, which is currently less than 0.5% of the general consolidated state budget. Naturally, the reasons are broader and more complex, since previous governments dedicated themselves to systematically undermining the independence of the judiciary and the prosecutor's office. However, improving the judicial system implies reforming several aspects of the Constitution.

In November 2020, the Minister of Justice organized an advisory committee composed of prominent lawyers in the country to reform the justice system. One of the objectives was to reform the election by popular vote of the highest judicial authorities due to the politicization in the pre-selection of candidates. Unfortunately, this proposal did not receive the support of the incumbent government and was canceled in February 2021. That same year, a group of constitutionalists organized a proposal for constitutional reform. This proposal, as mentioned in the previous subheading, presents elements that concentrate on the recommendations of the IGIE Bolivia and those required to reform the judicial system substantially.

According to article 411 of the Constitution, it is possible to propose a reform by popular initiative, if 20% of the signatures of the eligible voters are obtained. This proposal remains in force until the present, since it is being disseminated in order to obtain sufficient signatures. If this proposal succeeds, it will have to be submitted to a popular referendum for approval.

2. PROPOSAL FOR RESTORATIVE REFORM ON INDEFINITE PRESIDENTIAL RE-ELECTION

This restorative reform proposal originated in an atypical constitutional reform carried out in 2017 by the Constitutional Court through a ruling. However, due to the fact that the IACtHR issued AO 28, it was confirmed that it actually consisted of a constitutional dismemberment.

The Bolivian Constitution (2009) allows the re-election of the President for only two consecutive terms.[6] In 2016, the Government called a Constitutional Referendum in which the Bolivian people were consulted if they agreed and approved the Partial Reform Law of the Constitution in its article 168, introducing the second continuous re-election of the President and Vice President. On February 21, 2016, the aforementioned constitutional referendum was carried out, with the participation of 84.45% of the eligible electorate. 5,490,919 votes were cast, of which 51.30% (2,682,517 votes) of the citizens democratically decided that reelection should be maintained only once, expressly rejecting the possibility that the positions of President and Vice President could be re-elected for two consecutive terms. In accordance with this electoral result, the citizens chose to maintain the political system of government established in the 2009 Constitution, which guarantees the principle of periodicity and alternation in the exercise of political power, the principle of separation of functions, the system of checks and balances, and the system of horizontal and vertical controls to the exercise of power.

Later, in 2017, the incumbent political party filed an abstract unconstitutionality action. This constitutional resource allows the Constitutional Court to analyze whether a legal norm is compatible with the Constitution. In this case, atypically, it was requested that the provisions of the Constitution itself be invalidated, alleging that indefinite reelection was incompatible with the American Convention on Human Rights, which is part of the constitutionality block.[7] In November of that year, the Constitutional Court determined that since Article 23 of the American Convention on Human Rights (ACHR) did not establish limits to the right to be elected based on the number of terms in office, then, the limits to indefinite reelection were inconsistent with that treaty[8]. Although the Constitutional Court does not have the power to analyze the constitutionality of the Constitution itself, the court argued that it was carrying out a "control of conventionality" of a national norm. In this way, it declared the existence of the human right to indefinite reelection and overruled article 168 of the Constitution. In fact, it repealed a constitutional norm, which means that it carried out a constitutional reform through jurisprudence. This ruling is No. 084/2017.

That decision was highly criticized by constitutional experts. Although the Constitutional Court has a counter-majority role in the constitutional control of the norms, however, the object of analysis is the infra-constitutional norms and the control parameter is the Constitution.[9] In that sense, the Constitutional Court lacks the powers to overrule the Constitution. On the other hand, conventional fraud was also evidenced. Indeed, the Inter-American Court had already mentioned in the Castañeda Gutman case that limitations on political rights, such as being elected, can be subject to limitations, as long as they are legal, reasonable and proportional.[10]

Thus, the Inter-American Court determined that the grounds established in number 2 of article 23 of the ACHR are not exhaustive. This was considered when establishing that: "it is not possible to apply to the electoral system that is established in a State only the limitations of paragraph 2 of article 23 of the American Convention".[11]

According to this reasoning, the Inter-American Court itself, in the Judgment of the Castañeda Gutman vs. Mexico case, has already admitted a regulation of political rights, which is not established in article 23.2 of the ACHR, after carrying out the test of conditions and requirements to regulate and restrict rights in the ACHR according to its own case law. This contradicts the Constitutional Court's argument that the American Convention does not limit the right to be elected beyond those grounds established in Article 23.2 of the ACHR.

Notwithstanding the foregoing, Constitutional Judgment No. 084/2017 is theoretically definitive. The Plurinational Constitutional Court of Bolivia is the entity that – in theory- ensures the supremacy of the Constitution, exercises control of constitutionality, and safeguards the respect and validity of constitutional rights and guarantees.[12] Likewise, its rulings are of binding nature and of mandatory compliance, and against them, there is no further ordinary appeal.[13]

6 Article168 of the Political Constitution of the Plurinational State of Bolivia.

7 Article 410. II. of the Political Constitution of the Plurinational State of Bolivia.
8 Constitutional Court of Bolivia, Judgment N° 084/2017.
9 Article 202.1 of the Political Constitution of the Plurinational State of Bolivia
10 IACtHR, *Case Castañeda Gutman*, párr. 153 and 161.
11 Ídem.
12 Article 196 of the Political Constitution of the Plurinational State of Bolivia.
13 Article 203 of the Political Constitution of the Plurinational State of Bolivia.

Two years later, Colombia requested the Inter-American Court to rule on the compatibility of the figure of indefinite reelection in presidential systems with the ACHR. It is worth clarifying that the Inter-American Court has two functions: contentious and advisory. The contentious function allows the Court to hear cases against the States party to the ACHR for human rights violations. Through the advisory function, the Court responds to queries made by the OAS Member States or its organs regarding: a) the compatibility of internal norms with the Convention; and b) the interpretation of the Convention or other treaties concerning the protection of human rights in the American States.[14] Colombia requested that the Court rule on this figure because it was an issue of inter-American public order, it was related to the democratic systems of the region and some countries were interpreting the American Convention to allow indefinite reelection. Although the Court does not analyze specific cases within its advisory function but does so abstractly, it is no less true that three countries with fragile democracies had allowed indefinite reelection in the recent past: Nicaragua, Venezuela, and Bolivia. For this reason, it was important that the Court delivers its opinion in order to prevent the perpetuation of power and democracy erosion.

On June 7, 2021, the IACtHR issued the AO 28/21. In this decision, the Court established that international human rights treaties do not recognize the existence of an autonomous right to be reelected to the office of the Presidency. Nor was it found that there is a sufficient state practice at the regional level regarding the alleged human right to indefinite presidential reelection. Likewise, given the absence of support in international and national law, it ruled out that its recognition is a general principle of law. Thus, it concluded that "indefinite presidential reelection" does not constitute an autonomous right protected by the American Convention or by the *corpus iuris* of international human rights law. After analyzing article 23 of the ACHR and the principles of representative democracy, it established that the mere fact that restrictions on indefinite presidential reelection are not explicitly included in article 23.2 does not imply that these are contrary to the ACHR. In this regard, it analyzed whether the prohibition of indefinite re-election, being a limitation of the right to be elected, was compatible with the American Convention. Like any restriction of rights, to be valid it must be provided for by law in a formal and material sense, pursue a legitimate purpose and meet the requirements of suitability, necessity, and proportionality. If the restriction is in a norm of legal rank, it meets the first requirement.

Regarding the legitimate purpose, the IACtHR considered that the prohibition of indefinite presidential reelection has a purpose in accordance with Article 32 of the Convention since it seeks to guarantee representative democracy, serving as a safeguard of the essential elements of democracy established in Article 3 of the Inter-American Democratic Charter. It established that the prohibition of indefinite presidential reelection seeks to prevent a person from perpetuating himself in power and, in this way, to ensure political pluralism, alternation in power, as well as to protect the system of checks and balances that guarantee the separation of powers. Since representative democracy is one of the principles on which the inter-American system is founded, the measures taken to guarantee it have a legitimate purpose in accordance with the Convention.

14 Article 64 of the American Convention on Human Rights.

Regarding whether the restriction is suitable to achieve its purpose. The Court warned that taking into account the concentration of powers that the figure of the President has in a presidential system, the restriction of the possibility of indefinite reelection is an appropriate measure to ensure that a person does not remain in power and that, in this way, the constitutive principles of representative democracy are not affected. Regarding whether the restriction is necessary, the IACtHR warned that it does not find other equally suitable measures to ensure that a person does not remain in power and that in this way the separation of powers, the plural regime of parties and political organizations are not affected, as well as alternation in the exercise of power.

Regarding the proportionality of the restriction. The Inter-American Court pointed out that this was proportional to the goals sought and the sacrifice that this restriction implies is minor and justified to ensure that a person does not remain in power and, with this, prevent representative democracy from being degraded. Therefore, it concluded that the prohibition of indefinite reelection is compatible with the American Convention, the American Declaration, and the Inter-American Democratic Charter.

Finally, after a systematic reading of the American Convention, including its preamble, the OAS Charter, and the Inter-American Democratic Charter, the IACtHR determined that it was necessary to conclude that enabling indefinite presidential reelection is contrary to the principles of representative democracy and, therefore, to the obligations established in the American Convention and the American Declaration of the Rights and Duties of Man.

As can be seen, the Inter-American Court not only did not validate the decision of the Constitutional Court of Bolivia, but also refuted it in its entirety. In fact, the Inter-American Court operated – indirectly – as a controlling court for the constitutional reform carried out by the Constitutional Court of Bolivia, when it issued judgment No. 084/2017. The conclusions of that international court allow us to assert that Judgment No. 084/2017 is actually a constitutional dismemberment. According to Prof. Richard Albert, a constitutional dismemberment, *inter alia*, do violence to the existing constitution by reworking a fundamental right or destroying and rebuilding a central structural pillar of the constitution[15]. In the present case, the Constitutional Court of Bolivia created the human right to indefinite reelection and destroyed a safeguard of representative democracy that guaranteed the separation of powers, the system of checks and balances, alternation, and that prevented perpetuation in power. Due to the publication of AO 28/21, a group of constitutional lawyers filed a writ for the annulment of judgment 84/2017. The basis for this request was that there are exceptional situations that allow the constitutional courts of the region to annul their own sentences. Especially when there were errors in issuing them or that may seriously undermine constitutional principles. In addition, the Inter-American Court indicated that the control of conventionality that the States must carry out also applies to Advisory Opinions. This implies that the Constitutional Court of Bolivia evaluates whether Judgment 84/2017 is in accordance with OC 28/17. This request can be considered a proposal for restorative reform since it seeks to return the improperly redefined constitution to its previous meaning.[16]

15 Richard Albert, *Constitutional Amendments: making, breaking, and changing Constitutions,* (OUP, 2019), p. 78.

16 Richard Albert, *Constitutional Amendments: making, breaking, and changing Constitutions,* (OUP, 2019), p. 81.

In September 2021, the Constitutional Court of Bolivia denied the writ for annulment and kept in force the constitutional dismemberment that judgment No. 84/2017. Constitutional Order 0003/2021-RQ indicated that the group of jurists that requested the annulment of the indefinite re-election judgment "did not have active legitimacy" to file the annulment, because they were not authorities empowered to do so. As a result, this decision maintains the damage to democratic principles and violates international obligations and standards. Therefore, the proposal for restorative constitutional reform was unsuccessful.

IV. LOOKING AHEAD

The main challenge in the near future is the structural reform of the justice system according to the recommendations of international human rights organizations and civil society. The popular initiative of the group of constitutional lawyers that points in this direction is still in force. Similarly, the Ministry of Justice proposes a justice summit to gather recommendations in order to solve the problems of corruption and judicial delay. The greatest controversy is related to the election of judicial authorities by popular vote. The magistrates of the highest courts of the State are elected by popular vote by universal suffrage. This selection system is reserved for the election of the magistrates of the Supreme Court of Justice, the Agro-environmental Court, the Judicial Council, and the Plurinational Constitutional Court. The articles. 182, 188, 194 and 198 of the Constitution, provide the basic rules for the selection and election of the magistrates of the aforementioned courts.

The first experience using this system was carried out in 2011, which received various criticisms that can be summed up in a lack of transparency and access to information on the background of the candidates and eligibility criteria, the preselection body was a political body with a majority of the ruling party, lack of suitability of those selected and lack of legitimacy of the same by the majority of invalid votes in contrast to a minimum of votes in favor of each candidate.[17] In 2017, the judicial elections of the highest courts in the country were held again by popular vote. In December of that year, the Electoral Body held the judicial elections with certain modifications in the regulations, however, the essence of the selection process and its deficiencies remained untouched. As in the 2011 judicial elections, in the 2017 elections, the majority vote was for the "null" or "blank" option, resulting in minimal selection and approval by voters of the new judicial authorities. This detracts from the legitimacy and confidence of the Bolivian judicial system. Indeed, of the 6,438,801 million voters qualified to vote, more than 5.4 million voted: registering citizen participation of 84.2% at the national level. However, the invalid vote, at the national level, reached 50.93% support. The valid vote reached 34.12% and the blank vote 14.93%.[18]

To solve these deficiencies, a partial reform of the Constitution must necessarily be carried out. In this sense, the success of the reform will depend on the political will and the accompaniment of organized civil society to prevent it from becoming a constitutional dismemberment as was the indefinite reelection at the time.

17 Due Process of Law Foundation, Orias Ramiro: *Elecciones judiciales en Bolivia: un balance crítico*, en Aportes DPLF: Selección de miembros de Altas Cortes e independencia judicial, N°17, 5 de diciembre de 2012. P. 16.

18 Electoral Plurinational Body, *Separata de Información Pública N°4: Conozca los resultados oficiales de las Elecciones Judiciales 2017,* diciembre 2017.

V. FURTHER READING

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Bosnia and Herzegovina

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I. INTRODUCTION

2021 for Bosnia and Herzegovina (BiH) was widely seen as a window of opportunity for reforms, as there were no elections. However, it turned out to be one of the most turbulent years since the end of the war in 1995. Political crises caused by the incrimination of genocide denial had a negative impact on constitutional and electoral reform efforts. Indeed, throughout the year, political elites, parallel to the activities of the BiH Parliament, conducted negotiations about constitutional and electoral reform, under the pressure of EU and U.S. administrations. These negotiations aimed at finally implementing the judgments of the European Court of Human Rights (ECtHR), by removing ethnic discrimination from the electoral legislation as well as strengthening the integrity of elections. Other topics also emerged like reforming the House of Peoples, the Upper House of the Parliament of the Federation of Bosnia and Herzegovina (FBiH), one of two State Entities. Republika Srpska (RS), the other Entity, had undertaken steps toward unilateral withdrawal of transferred responsibilities from the State level, back to the Entity level. Those, responsibilities in the fields of judiciary, defense, and indirect taxation had been transferred to the State level by agreement. RS authorities claimed that the original transfer of responsibilities had not been constitutional since no amendments to the BiH Constitution had been introduced. Furthermore, RS National Assembly (RSNA) adopted a Declaration on constitutional principles, by which it instructed the government of RS to prepare a new text of the RS Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

At the end of 2021 there were six proposals for constitutional amendments in the procedure before BiH Parliamentary Assembly (BiH PA). Two of them aim at changing the provision that prohibits diminishing compensation for persons holding the office in the institutions of BiH during an officeholder's tenure. The other four proposals, each by three ethnic political parties and one by a multi-ethnic party, are aimed at implementing the ECtHR judgments in cases Sejdić-Finci,[1] Zornić,[2] Šlaku,[3] Pilav[4] and Pudarić.[5] In these cases, ECtHR found the ethnic conditions in the election of the BiH Presidency members as well as of members of the BiH PA House of Peoples discriminatory and contrary to the European Convention on Human Rights (ECHR). According to the ECtHR "time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the rights 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 of citizens"[6].

Constitutional amendments proposed by the three ethnic parties have been in the procedure since 2012, while one by a multiethnic party was introduced in September 2021. All three proposals agree upon expanding the number of delegates to the BiH House of Peoples to include delegates from those who declared themselves as "Others" (i.e., not to belong to one of the three main groups). The proposals differ in their solution for removing discrimination in the election to the Presidency BiH: while the Party of Democratic Action (Stranka demokratske akcije) and the Alliance of Independent Social Democrats (Savez nezavisnih socijal demokrata) simply want to eliminate the ethnic prefix of single BiH Presidency members, the Croatian Democratic Union of BiH (Hrvatska demokratska zajednica BiH) proposes the indirect election of the three members of BiH Presidency by the BiH PA. By contrast, the interethnic "Our Party" (Naša stranka) proposes to eliminate the BiH PA House of Peoples altogether as well as to substitute the collective BiH Presidency by a single President and Vice-President. The Constitutional and Legal Affairs Committee of the BiH PA House of Representatives concluded that amendments by "Our Party" are in the line with the Constitution and legal system of BiH. Eventually, the BiH PA House of Representatives did not adopt, in the first reading, the proposal of "Our Party".

In March 2021, BiH PA established the Inter-Agency Working Group on Election Law Reform (IAWG), with a mission to propose amendments to the Election Law BiH. These amendments should have strengthened the integrity of elections, in line with the recommendation of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and Council of Europe Group of States against Corruption

1 ECtHR Grand Chamber *Sejdić and Finci v. Bosnia and Herzegovina* App nos. 27996/06 and 34836/06 (ECtHR, 23 December 2009).
2 ECtHR *Zornić v. Bosnia and Herzegovina* App no 3681/06 (ECtHR, 15 July 2014).
3 ECtHR Šlaku *v. Bosnia and Herzegovina* App no 56666/12 (ECtHR, 26 May 2016).
4 ECtHR *Pilav v. Bosnia and Herzegovina* App no 41939/07 (ECtHR, 9 June 2016).
5 ECtHR *Pudarić v. Bosnia and Herzegovina* App no 55799/18 (ECtHR, 8 December 2020).
6 ECtHR *Zornić v. Bosnia and Herzegovina* App no 3681/06 (ECtHR, 15 July 2014), para 43.

(GRECO), as well as eliminate existing discrimination. U.S. Embassy, EU delegation, OSCE Mission in BiH, and non-governmental sector have supported the activities of the IAWG. IAWG held eight meetings and eventually failed to propose any amendments to the BiH Election Law or BiH Constitution, as it concluded that amendments were not possible without limited amendments to the BiH Constitution in light of ECtHR judgments. This result could have been predicted based on the experience of a similar parliamentary working group: like the one on implementing the ECtHR judgment in the case Sejdić-Finci. For two years (2010-2012), it could not reach a minimum consensus to propose amendments to the BiH Constitution.

Parallel to the activities of the IAWG, under the pressure of the EU and U.S. administrations and with the participation of the representatives of the European Commission for Democracy through Law (Venice Commission), ODIHR, and other experts, negotiations between leaders of the three main ethnic political parties were held through the year. Those negotiations should have created consensus on limited constitutional changes, aimed at eliminating ethnic discrimination electing members of the BiH Presidency and BiH PA House of Peoples as well as changes to the election law with the aim of ensuring greater transparency and accountability[7]. Additionally, political leaders were negotiating reforms of the FBiH Parliament House of Peoples and other institutional reforms in FBiH.

Regarding the BiH Presidency, proposals by the international community and political party leaders can be summarized as follows: 1) transplantation of the U.S. Electoral College to the election of the BiH Presidency members, 2) keeping BiH Presidency composed out of three members, but adding to their ethnic prefix "and Others" (e.g. "Croat and Others", "Serb and Others", and "Bosniak and Others" members of the Presidency), 3) adding a fourth member to BiH Presidency who would by directly elected on the territory of whole BiH as representative of "Others", 4) indirect election of the BiH Presidency members, 5) direct election of BiH Presidency members with the elimination of their ethnic prefix, 6) direct election of one BiH Presidency member and indirect election of two BiH Presidency members with the elimination of ethnic prefix, 7) combination of some of these proposals. Regarding the BiH PA House of Peoples, proposals are either to reduce its competencies so it would not be any more equal with the BiH PA House of Representatives (Lower House) or to expand its composition, so it would include representatives of "Others" (which is already the case in the Entities' Houses of Peoples, since 2002). However, by May 2022, no consensus was reached among political leaders on amendments to the BiH Constitution or Election Law.

In parallel, to backroom negotiations with party leaders, a Citizens' Assembly (CA) was launched by the EU Delegation, as an innovative model of deliberative democracy. In 2021 it adopted several recommendations, including those on the election and constitutional reform. By contrast with the above proposals by the international community and BiH political parties, the CA, composed of 57 randomly selected citizens, came up with very different proposals for amendments to the BiH Constitution. These include[8]:

- Elimination of discrimination from the BiH Constitution and Election Law, to allow everyone to elect and be elected to all positions at all levels of authority, as well as measures to empower women's participation.
- In relation to the Presidency, the indirect election of four Presidency members from amongst members of the BiH PA House of Representatives, with rotation so that each shall act as a President for one year.
- Abolition of the BiH PA House of Peoples.

Although BiH PA has received CA's recommendations, it never discussed these. The abolition of the BiH PA House of Peoples is revolutionary: never has this been discussed or taken seriously by domestic politicians or the international community. Indirect election of the BiH Presidency is in line with perilously package of constitutional amendments (so-called "April package" from 2006, which had combined it with a single president and two vice-presidents, without ethnic prefixes). It remains to be seen whether these proposals will be taken up at all and, in case, by whom. It seems that even EU Delegation, who sponsored this experiment in participatory democracy, was too busy with "old style" elite negotiations for really believing in the innovative thrust of the recommendations or using them for putting pressure on politicians.

During the year, RS authorities started to unilaterally regulate matters that more than 15 years ago had been transferred to the State level as additional responsibility. The BiH Constitution provides that the State shall assume responsibility for such matters as are agreed by Entities (Article III/5). Since 1995, such agreements on the transfer of responsibility to the State level had been concluded between the two Entities regarding the judiciary, defense, and indirect taxation. Being unsatisfied with the BiH Constitutional Court (CC) decision on the incompatibility of certain provisions of the RS Law on Forests with the BiH Constitution[9], the RSNA adopted "Conclusions" in December 2021, unilaterally withdrawing from agreements on the transfer of responsibilities. It even set unilateral steps in order to carry out those competences in future at Entity level, adopting a Draft Law on RS High Judicial and Prosecutorial Council (HJPC), thus preparing the creation of a parallel institution to the one at State level - BiH HJPC. Previously, BiH CC emphasized that once responsibility is transferred; it becomes the exclusive responsibility of the State[10] and cannot be transferred back to the Entities[11]. The High Representative of the International Community (HP) also stated that the possibility of withdrawing unilaterally from a transfer agreement previously passed by the democratic consent of both Entity legislatures is legally questionable[12]. For HP, RSNA actions "directly threaten to undo more than 25 years of

7 Interview with Matthew Palmer, the U.S. special envoy in Bosnia-Herzegovina for election reform (28 September 2021). Available at <https://ba.voanews.com/a/matthew-palmer-pred-put-u-sarajevo-kada-moraju-bh-politi%C4%8Dki-lideri-su-sposobni-napraviti-kompromis/6248751.html>.

8 Citizens Assembly Recommendations are available at <https://www.skupstinagradjana.ba/images/Recommendations_for_citizens_report_v6_1.pdf>.

9 BiH CC Decision on Admissibility and Merits in case no. U-4/21. Available at <https://www.ustavnisud.ba/uploads/odluke/_en/U-4-21-1280725.pdf>.

10 BiH CC Decision on Admissibility and Merits in case no. U-14/04. Available at <https://www.ustavnisud.ba/uploads/odluke/_en/U-14-04-51358.pdf>.

11 BiH CC Decision on Admissibility and Merits in case no. U-11/08. Available at <https://www.ustavnisud.ba/uploads/odluke/_en/U-11-08-235707.pdf>. The so-called, April package of the constitutional reform from 2006, contained a provision according to which responsibilities could have been transferred back only with the consent of both Entities and the State.

12 Office of High Representative. *OHR: Transfer of Competency Agreement Withdrawal Legally Questionable*, dated 5 August 2007. Available at <http://www.ohr.int/ohr-transfer-of-competency-agreement-withdrawal-legally-questionable/>.

progress in building up BiH as a State firmly on the path towards European Union (EU) integration"[13]. In order to justify the constitutionality of its actions, RSNA stated that the transfer of responsibilities had not been constitutional as no amendments to the BiH Constitution had been introduced for completing the transfer of powers. Contrary to these RSNA claims, however, the BiH Constitution does not request such an amendment, but foresees the transfer agreement as a less complex way to transfer responsibilities without amending the text of the Constitution (Article III/5) but foresees the transfer agreement as a less complex way to transfer responsibilities without amending the text of the Constitution (Article III/5) that lists only ten exclusive responsibilities of the central government. Furthermore, the assumption that constitutional changes would be almost impossible politically (despite an easy amendment procedure) turned out to be true since only one amendment has been adopted since 1995[14]. Eventually, in May 2022 BiH CC quashed several provisions of RSNA "Conclusions" of December 2021 and Declaration on constitutional principles adopted by RSNA, finding them contrary to the BiH Constitution[15].

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The scope of any reform is conditioned by an international obligation of BiH as well as BiH CC decision on the election of President and Vice-Presidents of the Entities. In Decision no. U-14/12 (March 2015) the BiH CC found the provision of Entities' constitutions reserving those offices to members of the three constituent people contrary to the prohibition of discrimination, due to the exclusion of national minorities, "citizens", and "Others". The BiH CC did not quash the aforementioned provisions, nor expressly ordered parliaments to harmonize the aforementioned provisions with BiH Constitution, justifying it by the fact that no political agreement on the implementation of the ECtHR Sejdić-Finci case law has been reached. Nevertheless, this BiH CC judgment constitutes an obligation to eliminate discrimination and amend the Entities' constitutions.

When it comes to the international obligations of BiH that determine the scope of necessary constitutional reform, we hereby refer to the Opinion of the European Commission on BiH's application for membership in the EU, from May 2019. The European Commission has identified 14 key priorities, including six which necessitate constitutional reform:

1. Ensure legal certainty on the distribution of responsibilities across levels of government.
2. Introduce a substitution clause to allow the State upon accession to temporarily exercise competences of other levels of government to prevent and remedy breaches of EU law.
3. Guarantee the independence of the judiciary, including its self-governance institution (HJPC).
4. Reform the Constitutional Court, including addressing the issue of international judges, and ensure enforcement of its decisions.
5. Guarantee legal certainty, including by establishing a judicial body entrusted with ensuring the consistent interpretation of the law throughout BiH.
6. Ensure equality and non-discrimination of citizens, notably by addressing the Sejdić-Finci ECtHR case law.

1) The European Commission points out that due to the transfer of responsibilities from Entities to the State following the Entity agreements and by other constitutional means (all of which do not assume adoption of constitutional amendments), political disputes between the State and its Entities often arise, such as questioning the existence of State responsibilities or threats to unilaterally return responsibilities to the Entity level.

Furthermore, within the constitutional law of BiH, a new type of responsibility division has been developed through the common competencies, i.e., its two subtypes: parallel (which can be identified in the areas of demining, education, electoral system, privatization, old foreign currency savings, and language use) and concurrent that is activated when the Entities cannot achieve constitutional goals and fulfill their constitutional obligations. These are the result of both the BiH CC case law (which introduced the concept of "framework legislation" in its decision no. U 5/98-III) and the legislation adopted by BiH PA.

In order to definitely clarify the constitutional situation of transferred responsibilities, and consequently to ensure effective implementation of the EU law, constitutional amendments need to be adopted to ensure legal certainty regarding the division of responsibilities between the State and the Entities.

2) Although in complex states, lower levels of government may be responsible for implementing EU law, only the State is responsible for violations before the EU Court of Justice. To ensure full compliance with the obligations arising from EU membership, BiH should have a "replacement clause" which would allow for powers of substitution temporarily replacing the Entities by the State in the exercise of certain responsibility, all to prevent and eliminate violations of EU law.

3) Amendments to the BiH Constitution should include State judiciary as *materia constitutionis*. Institutions created by State legislation and transfer agreements such as the Court of BiH, the Prosecutor's Office of BiH, and the BiH HJPC need to be *expressis verbis* mentioned in the BiH Constitution. Already in 2012, the Venice Commission had pointed this out[16], recommending BiH HJPC should be given an explicit constitutional basis for its role as a guarantor of the independence of the judiciary at all levels in BiH (in fact, there are four subsystems: State, Entities and Brcko-District).

4) Reform of the BiH Constitutional Court is not possible without intervention in the BiH Constitution. The BiH Constitution does not provide for the possibility or constitutional basis enactment of a constitutional law, an organic law or an ordinary law that would regulate any issue concerning the BiH CC. In the words of the BiH CC: "The Constitution of BiH does not explicitly provide those issues related to the functioning of the Constitutional Court will be regulated by

13 Office of High Representative. *61st Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations,* dated 11 May 2022. Available at <http://www.ohr.int/61st-report-of-the-high-representative-for-implementation-of-the-peace-agreement-on-bosnia-and-herzegovina-to-the-secretary-general-of-the-united-nations/>.

14 Amendment I to the BiH Constitution which recognized Brcko-District (31 March 2009) after international arbitration.

15 BiH CC Decision on Admissibility and Merits in case no. U-2/22.

16 European Commission for Democracy through Law (Venice Commission), *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, Venice (15-16 June 2012).

special laws"[17]. An express exception is legislative intervention by the BiH PA to regulate a different way of appointments of international judges. However, it is obvious that this is not sufficient to change the composition by abolishing international judges at all as required for the future by European Commission; for this, it is necessary to amend the BiH Constitution.

5) Although the European Commission recognizes the existence of "harmonization panels" which, through guidelines, aim to harmonize case law among the highest courts in the State and the Entities as well as Brcko-District, it insists on the future establishment of a national judicial body with similar functions to a Supreme Court (final authority). In 2007, when discussing disharmonized case-law in war crimes trials, BiH CC pointed out that different case-law "is probably the result of lack of a court at the level of Bosnia and Herzegovina, which would harmonize the case-law of all courts in Bosnia and Herzegovina and contribute to the full expansion of the rule of law in Bosnia and Herzegovina"[18]. However, given the request for the constitutionalization of the State judiciary (see above), the BiH Supreme Court should also be established by the Constitution at the State level, which, according to the Venice Commission, will guarantee the uniformity of BiH legal order, unity, coherence of its four judicial and prosecutorial systems. In its Opinion, the Venice Commission stated in 2012: "(The Supreme Court's) creation is considered important both from the perspective of the judicial bodies themselves for which it would provide useful guidelines on how to proceed with the interpretation and application of certain legal provisions, as well as from the perspective of BiH citizens for whom it would provide legal certainty, foreseeability, and uniformity in the interpretation and application of the law in the country"[19].

6) Necessary constitutional amendments for the implementation of the ECtHR Sejdić-Finci case law have already been discussed above.

In the 2021 Report on BiH, focusing on the implementation of 14 key priorities in the Opinion on application for EU membership, the European Commission has concluded that no progress or limited one has been made in implementing these (or other) reforms.

IV. LOOKING AHEAD

The year 2022 is again a year of general election in Bosnia and Herzegovina. Thus, not much is expected to happen in the field of constitutional and electoral reform, as the use of divisive rhetoric is expected to increase again. The scope of constitutional reform remains conditioned by judgments of the ECtHR as well as by the Opinion of the European Commission. Constitutional amendments remain a condition sine qua non for progress in EU integration. Increased interest of the U.S. administration in the Western Balkans could be an essential part of the international support and pressure necessary for making such amendments, as history teaches us. On the other hand, in 2022 there could be ECtHR decision in Begić[20] case, which might reshape the power-sharing mechanism within the BiH PA. Applicant, who is a member of the BiH PA House of Representatives complains under Articles 10 and 14 of the ECHR, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the ECHR that, as a result of power-sharing arrangements established by the BiH Constitution, his vote as a Member of the BiH PA House of Representatives carries disproportionately less weight than the vote of a Delegate to the BiH PA House of Peoples, although the latter category is not directly elected. In the applicant's opinion, this is not compatible with the concept of "effective political democracy" to which the Preamble to the ECHR refers.

V. FURTHER READING

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17 BiH CC Decision on Admissibility and Merits in case no. U-6/06. Available at < https://www.ustavnisud.ba/uploads/odluke/_en/U-6-06-162192.pdf>, para. 24.

18 BiH CC Decision on Admissibility and Merits in case no. AP-1785/06. Available at <https://www.ustavnisud.ba/uploads/odluke/_en/AP-1785-06-114785.pdf>, para. 90.

19 European Commission for Democracy through Law (Venice Commission), *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, Venice (15-16 June 2012), para. 64.

20 ECtHR *Begić v. Bosnia and Herzegovina* App no 34891/21.

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I. INTRODUCTION

Constitutional reform in Brazil is both formally and informally intense, and more particularly so when Brazil's general elections are approaching. Especially for a Constitution that features several restrictive fiscal and budgetary clauses, changing the constitution and such clauses is a typical avenue for electoral purposes. Most constitutional amendments of 2021 aimed at changing fiscal, budgetary, or electoral rules, some of which only could be done one year prior to the elections because of the principle of electoral annuality (Art. 16 of the Constitution). Most importantly, Brazil is enduring the most severe democratic backlash since the transition to democracy in 1985, and President Jair Bolsonaro, who is running for re-election, is likely to be defeated by former President Lula da Silva in the 2022 presidential elections according to current polls. As a would-be autocrat seeing the prospects of his re-election dwindle, adopting a very populist agenda also through constitutional change turns out to be a major resource to reverse this course. With most congresspeople also aiming to be re-elected, the incentives for approving such a populist agenda are higher still. Moreover, COVID-19 also led to some constitutional changes to alter the rite of deliberation in Congress as committees that should be "in person" were suspended, thereby affecting the pace and scope of some constitutional changes.

Re-election has historically fostered incentives for changing legislation to strengthen the incumbent's grip on power, but the Bolsonaro's years have experienced a shift in the way the relationship between the executive and the legislative powers behave. The more President Bolsonaro has lost popularity and political clout, the more Congress has seen an opportunity to put forward its own agenda by a weak government. The usual autocratization movements elsewhere normally follow a pattern of the executive branch co-opting or controlling Congress by several means, but, in Brazil, Congress advanced its control over the federal budget as the federal government has proven unable to provide coordination, so pork-barrel politics and a lack of national agenda have become widespread.

The so-called "coalition presidentialism", which is based on the governmental capacity of coordination of political coalition amid a highly fragmented party system, has been severely disrupted, and Congress has growingly become more of a central player in defining how budgetary grants will be distributed among the members of both Houses. This has led to a significant shift in how legislation is passed in Congress, with incentives that usually originate from Congress itself, so changes that foster incentives for congresspeople to remain in power and political leaderships to keep control over their parties have gained momentum. On the other hand, this fact has not barred President Bolsonaro from at least attempting to advance his autocratic agenda, such as modifying the long successful electronic voting system. Nevertheless, also as a sign that his clout is not that strong, some of his autocratic agenda had no immediate success.

2021 is also the year when the Supreme Court was called upon more often to defend the Constitution from attacks on its democratic principles, and also the year when its challenging relationship with - and immersion in - the political environment has become even more visible. It has also issued some leading cases in matters of constitutional rights, such as racism and the right to be forgotten. The Supreme Court - and the Superior Electoral Court - have been the main targets of President Bolsonaro as such a mutualistic relationship between the executive and legislative branches could be dismantled because of their visible unconstitutionalities, and because, as a typical would-be autocrat facing potential defeat, attacking the judiciary is an expected strategy. Yet, the Court has so far refrained from entering such a turbulent territory as it may catalyze even greater attacks on the Court when it is most needed to defend the electoral process itself. Therefore, the Court has been moving in murky waters to preserve its constitutional role but, at the same time, saw itself engulfed by its own political calculations.

This report discusses some constitutional amendments that were introduced in 2021 as well as some landmark decisions made by the Brazilian Supreme Court that have affected Brazilian constitutionalism in one way or another. Constitutional reform is a very dynamic process in Brazil, not only because the Brazilian Constitution is very detail-oriented and specific, but also because changing the Constitution has historically been – except for some core clauses – not a big deal, but just a bit more challenging political avenue. In any case, the pace accelerated in 2021 given the context of a significant shift in the country's "coalition presidentialism", the 2022 general elections (and the odds that former President Lula da Silva will win), the COVID-19 pandemic, and the strategic calculations of a Supreme Court in the face of a would-be autocrat and a growingly clientelistic Congress.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

This section starts with a brief explanation of some peculiarities of the Brazilian constitutional system, which has a broad list of actors that are legitimized to propose constitutional amendments and reforms. Article 60 of the Brazilian Constitution states that constitutional amendments may be proposed by (i) one third of the members of each chamber of Congress, (ii) the President of the Republic, or (iii) more than half of the State's Assemblies.

The first two are the most common ways of proposition, and the broad legitimization indicates that the number of constitutional amendments currently discussed by Congress is enormous. A simple search on the Lower Chamber's website points to 969 active proposals in that very chamber (13 of them were proposed in 2021). The Senate's website indicates 354 active amendment proposals (26 of them proposed in 2021).

The enormous number of propositions, the large list of subjects that they refer to, and the inexistent direct correlation between a proposal and its failure or success led the authors of this report to avoid presenting or discussing at any length all the amendments proposed in 2021. We strongly believe that analyzing the ways in which the Brazilian Constitution changed through the legislative process in 2021 is rather a matter of identifying what was effectively voted by Congress that year.

We, then, focused mainly on what was *approved* by Congress as it is logically the best way to understand what changed within the Constitution. Discussing rejected proposals of constitutional amendments in Brazil is unnecessary and unworthy, not only because there are multiple proposals rejected each year (with different levels of importance to the society), but also because the Constitution does not enjoin that the legitimized actors present the same subject again in the future (it only forbids a new proposition in the same year in which the amendment was rejected).

This is why we opted to discuss only three subjects: (a) the constitutional amendments that were approved in 2021; (b) an amendment that was *rejected* in 2021, whose subject was the attempt to substantially alter the method of vote in national elections, since its influence in the Brazilian political landscape in 2022 is undeniable; and (c) some important decisions issued by the Brazilian Supreme Court, whose work is currently highly important in shaping, interpreting, and (for many) altering the Constitution.

II.1 MODIFYING THE CONSTITUTION THROUGH CONGRESS – CONSTITUTIONAL AMENDMENTS OF 2021

As can be seen on the Presidency's website, of the end of 2021, the Brazilian Constitutional already had 114 *ordinary* amendments plus other 6 *revisional* constitutional amendments (a special type of modification that was adopted by Congress in 1994 to fulfill the determination of Article 3rd of the Temporary Constitutional Provisions Act of the Brazilian Constitution).

So, the Brazilian Constitution had an average of almost 3,5 constitutional amendments in its 33 years of life between 1988 and 2021. It is possible to say that 2021 was then a year of increased constitutional deliberation in Congress, since 6 (six) amendments were approved (109 to 114). It comes as no surprise, because 2021 preceded the general elections that will take place in October 2022, and there are several constitutional subjects whose modification needs to be in place several months before the election. That is the case of budgetary matters (whose importance to the incumbent, especially in an electoral year demands no further explanation), any modification of the rules governing the election, etc.

The first Constitutional Amendment of 2021 (CA #109) is part of a set of constitutional amendments drafted by the Minister of Economy to control the growth of permanent mandatory expenses regarding fiscal and social security budget of the Union, states, and municipalities. The idea was to limit expenses on public policies and services by establishing a criterion for the Union based on the relation between primary mandatory expenditure and total primary expenditure, and a different criterion for the states, the Federal District and municipalities based on the current expenditures and revenues to control public spending. Its main goal is to reduce it by revoking a few provisions of the Temporary Constitutional Provisions Act and adding transitory rules on the reduction of tax benefits; it partially separated the financial surplus from public funds, and it suspended conditionalities for spending on residual emergency aid to face the social and economic consequences of COVID-19 pandemic. This amendment was, on the one hand, necessary in view of the need to modify the constitutional budget system to accommodate pandemic and, on the other hand, it was an opportunity to limit spending on public policies and somehow mitigate the enforcement of social rights. These measures have the potential to cause the dismantling of public policies that are structuring to Brazilian society.

The second Constitutional Amendment of 2021 (CA #110) is a minor one: it deals with the validity of administrative acts issued by the State of Tocantins from January 1st, 1989, to December 31st, 1994, by adding a new article (18-A) to the Temporary Constitutional Provisions Act. Though odd, this fairly ordinary legal matter may be considered a constitutional subject in Brazil precisely because the State of Tocantins was created by the Federal Constitution of 1988 (art. 13 of the Temporary Constitutional Provisions Act), and some aspects of its legal order are still disciplined directly by the Constitution.

The third Constitutional Amendment of 2021 (CA #111) deals with various electoral issues: the regulation of procedures for local referenda (art. 1st); the all-important discipline of the political parties (involving methods of distribution of their share of the federal budget, the legal responsibility in case of fusion of parties, etc.); and the new date specified to the inauguration of Presidents and Governors from 2027 on.

The fourth Constitutional Amendment of 2021 (CA #112) deals with the distribution of some federal taxes, with a minimal increase of the share destined to the municipalities.

The fifth and the sixth Constitutional Amendments of 2021 (CA #113 and 114) deal with a subject that was one of the most important to the incumbents entering the electoral year: the constitutional regime of *precatórios*, which are court-ordered payments that all levels of government in Brazil must comply with. The Federal Constitution has a detailed discipline of this subject, and these amendments completely overhauled it, introducing profound changes to the system, enabling the federal and local governments to find ample budgetary room for increased spendings with eyes on the 2022 election.

II.2 A MODIFICATION THAT FAILED – HOW THE BOLSONARO ADMINISTRATION LOST A DEFINING BATTLE ABOUT THE ELECTIONS

Among the rejected amendments, the most vital one certainly was PEC (which stands for *Proposta de Emenda à Constituição*, or Constitutional Amendment Proposal) #135/2019. For more than 20 years, elections are electronic in Brazil, and it was a great achievement that provided the country with a safer way to vote and a quicker method of counting votes. It was no small achievement in a country with plenty of allegations of fraud, coercion, and manipulation throughout its history.

PEC #135 intended to alter the all-digital cabin booth that is utilized in Brazil since de 1990s. It proposed a printable receipt that could be "verified" by the voter to assure the correctness of the vote, which should be disposed in a safe ballot box that would allow an audit in case of necessity.

The Constitution requires the approval by two votes of three fifths in each chamber of Congress for an amendment to be enacted (article 60, § 2nd), but PEC #135 failed to pass the first vote in the lower chamber (229 votes in favor, 218 against, and one abstention). It was a blow to President Bolsonaro's most ardent will to challenge the country's electoral system, and a renewed theme to his constant attacks on the Electoral Courts and the electoral system, repeating his unproven claims of persistent fraud. It is one of the most commonly themes of his discourse – as is now routine for autocrats –, because discrediting the electoral system is a powerful weapon that allows him to mobilize his core base, and eventually challenge the electoral results if he does not win reelection.

II.3 MODIFYING THE CONSTITUTION THOUGH THE JUDICIARY – BRAZILIAN SUPREME COURT CASES THAT DEFINED AND CHANGED THE INTERPRETATION OF THE BRAZILIAN CONSTITUTION

1 – THE JUDGEMENT THAT VALIDATED A JOINT ACT OF THE CHAMBER OF DEPUTIES AND THE FEDERAL SENATE THAT CHANGED THE CONSTITUTIONAL REGIME OF PROVISIONAL MEASURES

The Brazilian Supreme Court upheld a joint normative act of the Chamber of Deputies and the Federal Senate (Joint Act n. 01/2020) that changed the constitutional regime of provisional measures (Brazilian Constitution, art. 62) due to the new coronavirus pandemic (Brazilian Supreme Court, ADI 6751/DF, ADPF 661/DF and ADPF 663/DF, Justice Alexandre de Moraes, judgment held on 3rd September 2021).

The Brazilian Supreme Court authorized the waiver of analysis of provisional measures by a mixed commission of Deputies and Senators, which can be analyzed directly by the plenary of each Legislative House. It also authorized the shortening of the constitutional period for analyzing provisional measures, according to the remote deliberation system of the Chamber of Deputies and the Federal Senate.

According to the Brazilian Supreme Court, the development of technological solutions for non-face-to-face interaction between parliamentarians allowed the observance of health recommendations and required adaptations in relation to the regular functioning of the Legislative Power, especially due to the technical difficulty in extending remote deliberation to the scope of the legislative committees.

However, one may ask: would it be possible to change the constitutional rite of provisional measures by a joint act of the House of Representatives and the Federal Senate, with the approval of the Supreme Court, instead of changing the Brazilian Constitution? The answer is not complex: wherever there is a constitutional provision determining the rite, the answer is negative. So, the exigence of a joint commission to discuss and make a report before voting the provisional measure and the deadline to convert it into a statute/law are constitutional provisions (art. 62, § 3º, § 9º), that is, they are part of the rite defined by the Brazilian Constitution. It means that it is not constitutional to change the provisional measures rite neither by a decision of the Supreme Court nor by a joint act of the House of Representatives and the Federal Senate. The one possibility to do it is by means of an amendment to the Constitution.

2 - THE INCOMPATIBILITY OF THE RIGHT TO BE FORGOTTEN WITH THE BRAZILIAN CONSTITUTION

The Brazilian Supreme Court ruled that the contemporary idea of a right to be forgotten was incompatible with the Constitution (Brazilian Supreme Court, RE1010606/RJ, Justice Dias Toffoli, judgment held on 2nd February 2021).

The right to be forgotten is generally understood as the right that a person has not to allow that a fact or an event, even if true, that occurred at a certain point in the past in his or her life, to be exposed to the public, causing him or her suffering or inconvenience. Hence the idea that this person has a right to be forgotten, the right not to be disturbed by past events.

A paradigmatic case of right to be forgotten is the "Lebach Case", judged by the German Constitutional Court. In this case, the German Constitutional Court ruled that the constitutional protection of the personality does not allow the press to exploit, for an unlimited time, the person who has committed a crime and his private life.

In Brazil, on the other hand, the issue had a different outcome when judged by the Brazilian Supreme Court. According to the Brazilian Supreme Court, the constitutional protection of privacy, intimacy, and honor (Brazilian Constitution, art. 5, X) does not encompass the right to be forgotten and gives way to rights such as free speech and freedom of the press. This means that the power to prevent, due to the passage of time, the dissemination of truthful facts or data lawfully obtained and published in printed or digital media must be understood as unconstitutional. Any excesses or abuses in the exercise of freedom of speech and information must be analyzed on a case-by-case basis, based on constitutional parameters - especially those relating to the protection of honor, image, privacy, and personality in general - and specific legal provisions in the criminal and civil spheres.

3 – THE RACIAL SLUR CRIME IS AN IMPRESCRIPTIBLE CRIME

The Brazilian Supreme Court ruled that the crime of racial slur must be understood as a species of the racism genre, and, therefore, it is imprescriptible, since the Brazilian Constitution defines the crime of

racism as imprescriptible (Brazilian Constitution, art. 5º, XLII). Thus, racism being a genre, racial injury is a form of specific manifestation of racism, being also encompassed by the constitutional imposition of imprescriptibility (Brazilian Supreme Court, HC 154248/DF, Justice Edson Fachin, judgment held on 28th October 2022).

The Brazilian Constitution defined racism as an imprescriptible crime. And racism was criminally defined by a specific act – Act 7.716/1989, art. 20. In turn, the crime of racial slur was criminally defined by the Penal Code (art. 140, § 3) and so far, was understood as a crime separate from the crime of racism. But, since the judgment of the Brazilian Supreme Court, the crime of racial injury came to be included as a species of racism, and no longer as a crime separate from the crime of racism, being understood as a species of the racism genre and equally imprescriptible.

IV. LOOKING AHEAD

The future of Brazilian constitutionalism and its democracy hinges on the outcome of the presidential elections. All the big questions that will come up in the following years are directly connected to such an outcome.

If Bolsonaro is not re-elected, as all the polls so far indicate, the major discussions that will affect Brazilian constitutionalism will possibly focus on how to revert some of the institutional and social regressions that took place in the last years in the country. The focus will possibly be on overhauling mechanisms that have raised caps on social spending through rigid fiscal rules, which have since led to a significant slump in social spending in key areas such as health, education, protection of minorities, and environment, especially when the country is most in need of them. On the other hand, some changes in institutional design aimed at protecting the country's democracy may gain some ground. Although such changes may face resistance in Congress, there is a consensus that the Bolsonaro's years have shown several fragilities of the 1988 Constitution that need to be addressed more carefully. Among them are, for example, the protection and independence of mechanisms and institutions of accountability and the revamp in the relationship between civilians and the military (thereby limiting further their interference in political life). Most importantly, though, may be the reconfiguration of the system of government since "coalition presidentialism" was seriously thrown into disorder with the rise of unaccountable mechanism of co-optation by political leaderships, such as secret budgetary grants, and the lack of central coordination, thereby encouraging parochial political interests instead of promoting a national agenda. The future of constitutional reform in Brazil hinges largely thus on the capacity of the executive to regain its capacity of rescuing the system of government from dissolution and reestablish central coordination with proper incentives for providing the country with a national agenda.

On the other hand, if President Bolsonaro is re-elected, constitutional reform may turn into a sort of abused concept to strengthen his grip on power and advance his autocratic strategy. What may come out of such a context also depends on how Congress and the Supreme Court will behave during his second term, but, as the first term has already proven, discontinuation of key public policies and systematic attacks on democratic institutions tend to weaken even further the checks on the executive power. If this movement accelerates in a second term – a typical turning point for autocratization movements – constitutional reform may mean the radical overhaul of Brazilian constitutionalism. This is the reason why 2022 will be the most relevant elections in Brazil since the transition to democracy: it will define the resilience of Brazilian democratic institutions and the strength of its constitutionalism.

V. FURTHER READING

Richard Albert, Carlos Bernal, and Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019)

Barry Ames, *Routledge Handbook of Brazilian Politics* (Routledge 2019).

Juliano Zaiden Benvindo, *The Rule of Law in Brazil: The Legal Construction of Inequality*, (Hart Publishing, 2022)

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Canada

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I. INTRODUCTION

In the field of constitutional reforms, 2021 has been a year of considerable developments in Canada, especially when compared to previous years and even decades. Indeed, in Canada, formal constitutional amendments are quite rare, due in large part to the high degree of rigidity of the amendment formula, outlined in Part V of the *Constitution Act, 1982*.[1] The latter contains five different amending 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 as well as of the federal Parliament.[2] Others require the consent of at least seven provinces, which tally at least 50% of the Canadian population (the 7/50 procedure),[3] while some necessitate the support only of the province(s) directly affected by an amendment, both in addition to Parliament.[4]

The last two amending procedures are unilateral ones. They allow the federal[5] and the provincial[6] parliaments to amend, autonomously and entirely on their own, various elements of the Constitution that only concern them. These include minor changes to federal institutions (the government, the Senate or the House of Commons) for the federal parliament and modifications of "provincial constitutions" in the case of provinces.

The high degree of consent required to multilaterally amend the Constitution partly explains the failure to realise major formal constitutional reforms since 1982. Instead, constitutional change occurs in more informal, indirect and incremental ways, mostly through unilateral action by members of the federation or through intergovernmental agreements[7]. But even in this regard, 2021 marked a shift. Indeed, there have been three different initiatives to formally amend the Constitution: one in Quebec, to unilaterally amend the *Constitution Act, 1867*; another in Saskatchewan, which should lead to a bilateral amendment (along with federal institutions) of the *Saskatchewan Act* of 1905 (an official part of the Canadian Constitution); and finally, one by Alberta, initiating a multilateral process to repeal section 36(2) of the *Constitution Act, 1867*, which constitutionalises fiscal equalization.

That being said, in consistency with previous trends of constitutional reforms in Canada, there have also been considerable developments regarding the evolution of the Canadian Constitution that do not require constitutional amendments. This report surveys all these events.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

I. NEW CONSTITUTIONAL INITIATIVES

The first major constitutional reform development of 2021 in Canada occurred in May, when the Quebec government tabled its Bill 96.[8] This provincial legislation is intended first and foremost as a reform to strengthen the Quebec *Charter of the French Language*, which obviously affects an important constitutional issue in Canada: the status of official languages. But the bill also introduced a formal amendment to the Canadian Constitution. Indeed, section 159 reads as follows:

> 159. The Constitution Act, 1867 (30 & 31 Victoria, c. 3 (U.K.); 1982, c. 11 (U.K.)) is amended by inserting the following after section 90:
>
> "FUNDAMENTAL CHARACTERISTICS OF QUEBEC
>
> 90Q.1. Quebecers form a nation.
>
> 90Q.2. French shall be the only official language of Quebec. It is also the common language of the Quebec nation."

The *Constitution Act, 1867*[9] is, along with the *Constitution Act, 1982*, a major part of the Canadian Constitution. The two new articles, 90Q.1 and 90Q.2, would be included in Part V of the *Constitution Act, 1867*, which relates to "Provincial Constitutions." Bill 96 thus proposes to unilaterally amend this part of the *Canadian* Constitution which – rather oddly – contains certain provincial constitutions.[10]

1 *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
2 *Ibid.*, s 41.
3 *Ibid.*, s 38.
4 *Ibid.*, s 43.
5 *Ibid.*, s 44.
6 *Ibid.*, s 45.
7 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 revision constitutionnelle dans tous ses états* (Montreal & Brussels, Éditions Yvon Blais & Anthemis, 2020) 427.
8 Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess, 42nd Leg, Quebec, 2021.
9 *The Constitution Act, 1867*, 30 & 31 Vict, c 3.
10 Part V of the *Constitutional Act, 1867*, only contains parts of the constitution of the four provinces that initially formed the Canadian federation in 1867. On

Following the Bill's introduction, some political commentators denounced what they claimed was an unconstitutional attempt by the Quebec government to amend the Constitution of Canada. In response to this criticism, the Canadian House of Commons adopted a motion stating that it agrees "that section 45 of the Constitution Act, 1982, grants Quebec and the provinces exclusive jurisdiction to amend their respective constitutions and acknowledge the will of Quebec to enshrine in its constitution that Quebeckers form a nation, that French is the only official language of Quebec and that it is also the common language of the Quebec nation[11]."

At the end of 2021, Bill 96 was at the committee stage at the National Assembly of Quebec. The Bill was finally passed on May 24 and assented to on June 1, 2022.

Another constitutional initiative happened later in 2021, when the province of Alberta held a referendum to ask its people whether they wanted to abolish Canada's equalization system, to which the province is a major contributor. The question on the ballot was: "Should Section 36(2) of the Constitution Act, 1982 — Parliament and the Government of Canada's commitment to the principle of making equalization payments — be removed from the Constitution?" The referendum was held on October 18, and a majority of 61.7% of the population of the province voted for the removal of Section 36(2). Such constitutional amendment, to be formally adopted, would require the support of the federal parliament and of at least seven provinces in which there is at least 50% of the Canadian population. While the referendum was consultative, in that it had no binding legal effect, popular support for the measure could trigger a duty to negotiate by other members of the federation[12].

Exactly a month later, on November 18, the Albertan government formally initiated – as all provinces can[13] – a multilateral constitutional amendment seeking to implement the results of the referendum. Constitutional reforms are initiated by parliamentary motions in Canada. The schedule of the motion proposed by the Albertan government is the following:

AMENDMENT TO THE CONSTITUTION OF CANADA

1. The Constitution Act, 1982 is amended by repealing section 36(2) thereof.

2. This Amendment may be cited as the Constitution Amendment, [year of proclamation].[14]

Before the vote, the province's premier, Jason Kenney, asked members of the Legislature "to be democrats first and foremost, to listen to the people of Alberta, to take our marching orders from the hundreds of thousands of Albertans who went out to polling stations to direct us to fight for a fair deal on this referendum." He added: "In so doing, the government of Alberta will be empowered to immediately seek negotiations with the government of Canada, yes, on the principle of equalization but more deeply on the broader issue of Alberta's unfair treatment in the Canadian federation."[15] The motion was adopted by a vote of 33 to 6. Now that Alberta has initiated that multilateral constitutional amendment, the federal parliament and the nine other provinces have three years to adopt motions, for or against it, before the attempted reform expires.[16]

Finally, another Canadian province initiated a multilateral (bilateral) constitutional reform late in the year. On November 29, 2021, the Saskatchewan Legislature adopted a motion to amend the *Saskatchewan Act* of 1905. The text of the proposed amendment is the following:

AMENDMENT TO THE CONSTITUTION OF CANADA

1. Section 24 of the *Saskatchewan Act* is repealed.

2. The repeal of section 24 is deemed to have been made on August 29th, 1966, and is retroactive to that date.

Citation

3. This amendment may be cited as the *Constitution Amendment, [year of proclamation] (Saskatchewan Act)*.[17]

This initiative is far more limited than Alberta's, in that it only relates to Saskatchewan. Therefore, it requires the support of the province's Legislature and of both houses of the federal parliament. Somewhat technical and complicated, the proposal concerns a tax exemption granted to a railroad company, the Canadian Pacific Railway, even before the province was created. The exemption was somehow "constitutionalized" when the province joined the federation in 1905. The proposed amendment is also quite interesting because it is an attempt to retroactively amend the Constitution. This, of course, raises several unanswered questions about the feasibility of such an undertaking. After receiving the support of the Saskatchewan Legislative Assembly and of both houses of the federal parliament, the amendment was formally proclaimed on May 9, 2022[18].

II. FAILED (OR ABANDONED) ATTEMPT

In last year's report, we discussed an attempted constitutional reform which would have altered electoral rules in Quebec. Electoral reforms have been proposed at different times in Canada, both for federal

this topic, see Hubert Cauchon and Patrick Taillon, "La constitution formelle des États fédéral et fédérés 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) 273.

11 Canada, House of Commons, *Vote No. 146 – Opposition Motion (Amendment to section 45 of the Constitution and Quebec, a French-speaking nation)*, 2nd Sess, 43rd Leg, June 16, 2021.

12 On that topic, see Catherine Mathieu, "L'initiative constitutionnelle comme élément déclencheur de la réforme du fédéralisme canadien," in Dave Guénette, Patrick Taillon and Marc Verdussen (eds), *La révision constitutionnelle dans tous ses états* (Montreal & Brussels, Éditions Yvon Blais & Anthemis, 2020) 245; Dave Guénette, "Le référendum constitutionnel dans les sociétés fragmentées – L'expérience canadienne, son ambigüité et ses conséquences," in Patrick Taillon and Amélie Binette (eds.), *La démocratie référendaire dans les États plurinationaux* (Quebec, Presses de l'Université Laval, 2018) 181.

13 *Constitution Act, 1982*, s 46.

14 Alberta, Legislative Assembly, *Hansard*, 2nd Sess, 30th Leg, November 18, 2021, 6295.

15 *Ibid*., 6301.

16 *Constitution Act, 1982*, s 39(2).

17 Saskatchewan, Legislative Assembly, *Hansard*, 2nd Sess, 29th Leg, November 29, 2021, 1384.

18 *Constitution Amendment, 2022 (Saskatchewan Act)*, Canada Gazette, Part II, SI/2022-25, May 9, 2022.

elections and in many provinces. These reforms have all failed or been abandoned. In that regard, the latest attempt in Quebec is no different. On September 25, 2019, the Quebec government tabled Bill 39, *An Act to establish a new electoral system*. After much speculation, including on the possibility of holding a referendum on the new voting system, the government announced in December 2021 that it was dropping its electoral reform.[19] Therefore, there will be no new voting system in Quebec for future elections.

III. ONGOING DEVELOPMENTS FROM PREVIOUS YEARS

Last year's report last also covered several possible and informal constitutional reforms. Those were informal because they were not amending the text of the Constitution, while they still touched on fundamental constitutional issues. One of them was the possibility of linguistic reforms in Quebec and for the federal order of government. The province of Quebec did act in that regard, tabling Bill 96 – *An Act respecting French, the official and common language of Québec*. The latter not only proposes to amend the Canadian Constitution as mentioned above, it also reinforces the *Charter of the French Language*, which has quasi-constitutional status in the province. At the federal level, in November 2021, the government tabled Bill C-13 – *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts*[20], acting on its promise to adopt new legislation on this topic. This Act also has quasi-constitutional status, this time, across the country.

Another issue discussed last year related to senatorial elections in Alberta. Those elections took place on the same date as the referendum on the equalization formula, on October 18, 2021. As Elections Alberta states on its website, the "senate election process is used in Alberta to allow electors to vote for the persons who they would like to potentially represent them in the Senate of Canada."[21] The word "potentially" is fundamental, since the federal government has no legal obligation to nominate "elected" senators, although it did five times in the past.[22] During those elections, several candidates campaigned and the public was able to vote for their favourite candidates[23]. It now remains to be seen whether any of these newly elected candidates will actually be appointed by the federal executive.

19 See Guillaume Bourgault-Côté, "Legault abandonne la réforme du mode de scrutin," *L'Actualité*, December 17, 2021, Online: lactualite.com/politique/legault-abandonne-la-reforme-du-mode-de-scrutin/; Julien Verville, "Un débat collectif et démocratique qui n'aura pas lieu," *La Presse*, December 28, 2021, Online: www.lapresse.ca/debats/opinions/2021-12-28/mode-de-scrutin/un-debat-collectif-et-democratique-qui-n-aura-pas-lieu.php.

20 C-13, *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts*, 1st Sess, 44th Parl, Canada, 2021.

21 Elections Alberta, "Senate Election," Online: www.elections.ab.ca/elections/run-as-a-senate-candidate/.

22 *Ibid*.

23 Elections Alberta, "Senate Election Results by Municipality," Online: officialresults.elections.ab.ca/orResultsPGESenate67S.cfm?EventId=67S.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

I. THE 2021 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."[24]

In our view, the initiatives by Quebec and Saskatchewan discussed in part II can be qualified as amendments. The proposed constitutional amendment in Bill 96 is consistent with the recognition by the House of Commons in 2006 that Quebec forms a nation.[25] Moreover, the new addition, namely that French is the only official language of Quebec was already provided for in the Quebec *Charter of the French Language*.[26] In other words, it does not create any rupture with the past. While the use of the nothwithstanding clause – which suspends parts of both the Canadian Charter and of the Québec Charter – could be described by some as a rupture with past constitutional practices, precedents in the regard still keep us from defining it as a dismemberment. As for the Saskatchewan bilateral amendment concerning the tax exemption for Canadian Pacific Railway, it is relatively minor and only affects the relationship between the Saskatchewan legal order and a private company. This said, the retroactive nature of the amendment is rather startling, and is certainly an innovation.

By contrast, the result of Alberta's proposed change could be seen as a dismemberment. Indeed, equalization reflects a concern to reduce inequities among provinces and can be seen as an instrument of federal solidarity. The objective of the equalization program, introduced in 1957, is to provide the provinces that benefit from it with the funding they need to ensure their own autonomous development and to enable them to offer a level of public services comparable to that of the wealthier provinces, at comparable taxation rates.[27] Repealing the equalization program would jeopardize this commitment to provide Canadians with a similar degree of service across Canada, as well as changing the balance of power between the provinces and the federal government. As a result, were the federal Parliament and other provinces to support the Alberta initiative to abolish s. 36(2) of the *Constitution Act, 1982*, this could be considered as breaking up with the pre-existing constitution. This support is, however, highly unlikely.

24 Richard Albert, *Constitutional Amendments – Making, Breaking, and Changing Constitution* (Oxford, Oxford University Press, 2019) 85.

25 On November 27, 2006, the House of Commons passed the following motion: "That this House recognize that the Québécois form a nation within a united Canada". Canada, House of Commons, *Vote No. 72,* 1st Sess, 39th Parl, November 27, 2006.

26 *Charter of the French Language*, CQLR c C-11, s 1.

27 Marc-André Turcotte, *Le pouvoir fédéral de dépenser ou comment faire indirectement ce qu'on ne peut faire directement* (Montréal, Éditions Yvon Blais, 2015) 3.

II. 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. For instance, judges could be asked which procedure should apply to a given amendment.[28]

The control can also be *ex-post*, if the validity of an amendment is challenged once it has already occurred.[29] 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 an ordinary statute is, in fact, a unilateral constitutional amendment subject to a formal amendment procedure.[30] While courts may review the 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.[31] 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.[32]

Of the three formal constitutional initiatives we have identified in Part II, none have (yet) been challenged before the courts, although legal action against Québec's Bill-96 have been announced. However, in 2021, two decisions were rendered with respect to previous informal constitutional reforms.

First, the Superior Court of Quebec, in April 2021, ruled that Québec's *Act respecting the laicity of the State* (Bill 21) is consistent with the Constitution, despite the fact that it bans the wearing of religious symbols by some public employees.[33] Indeed, since the bill employs the notwithstanding clause, it has been "shielded" from the application of the most relevant sections of both the Québec and Canadian Charter, like freedom of religion or equality rights. That being said, the Court exempted English-language school boards from the application of the statute, which was held to violate section 23 of the *Canadian Charter of Rights and Freedoms*. Several parties have appealed the judgment, which is now before the Quebec Court of Appeal.

In April 2021, that same Quebec Court of Appeal ruled[34] in favor of the constitutionality of the *Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*.[35] The statute provides that the "Québec people has the inalienable right to freely decide the political regime and legal status of Québec"[36] 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".[37] The Court of Appeal, in doing so, confirmed a previous ruling of the Superior Court of Quebec.[38]

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. The obvious ones, of course, are those relating to the three formal initiatives to amend the Constitution of Canada discussed in Part II.

First, Bill 96 in Quebec is likely to be legally challenged on the grounds that the constitutional changes it implements are inconsistent with Part V of the *Constitution Act, 1982*. It can also be expected that the changes to the *Charter of the French Language* will be challenged on the basis of the Canadian Charter and that the preventive use of the notwithstanding clause will be examined.

The same could be said with regards to the possible amendment of the *Saskatchewan Act* of 1905, a part of the Canadian Constitution. Here again, legal challenges could arise, especially coming from the Canadian Pacific Railway. The amendment's retroactivity will surely be at issue.

The outcome of the Alberta referendum on equalization and its constitutional initiative are much less certain. So far, there has been no real indication that any other government is interested in moving forward with the amendment, or even negotiating arrangements regarding it. The three-year time frame provides an interesting framework for possible talks. This said, the constitutional ground does not seem to be very fertile at the moment, despite the constitutional duty to negotiate. Albertans are scheduled to have a general election in the Fall of 2022. The electoral campaign could be an opportunity for political actors to call for constitutional talks regarding the equalization formula.

On the informal side of constitutional developments, in last year's report, we briefly discussed the *Act Respecting First Nations, Inuit and Métis Children, Youth and families*[39], adopted by the federal parliament. Quebec had requested an advisory opinion from its Court of Appeal regarding the constitutionality of this new federal statute.[40] In February 2022, the Court of Appeal upheld the validity of the federal law, with two exceptions[41]. Some parties have already expressed their intention to appeal the opinion to the Supreme Court of Canada.[42]

In addition to its Bill 96, which would amend the Constitution of Canada to include the recognition that Quebecers form a nation and that French is the only official language of Quebec, it appears that the Quebec government is currently working on writing a formal

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

29 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).

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

31 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.

32 See *ibid*, 69-70.

33 *Hak* v *Procureur général du Québec*, 2021 QCCS 1466.

34 *Henderson* v *Procureur général du Québec*, 2021 QCCA 565.

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

36 *Ibid*, s 2.

37 *Ibid*, s 4.

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

39 *An Act Respecting First Nations, Inuit and Métis Children, Youth and families*, SC 2019, c 24.

40 See Order in Council No. 1288-2019.

41 *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des* Métis, 2022 QCCA 185, para 571.

42 Supreme Court of Canada, No. 40061, Online: www.scc-csc.ca/case-dossier/info/dock-regi-fra.aspx?cas=40061.

constitution for the province, a genuine "Constitution of Quebec."[43] This project of a Quebec Constitution dates back several decades.[44] We will have to wait and see what developments come out of that process.

Finally, the 40th anniversary of constitutional Patriation of 1982 was the chosen occasion to initiate two legal challenges regarding constitutional reform in Canada. First, in recent years, senator Serge Joyal and law professor François Larocque have initiated legal challenges to force Canadian authorities to adopt an official French version of Canada's constitutional laws.[45] Their action is based on section 55 of the *Constitution Act, 1982*, which requires such translation to be adopted by means of a constitutional amendment. This constitutional obligation has never materialised. Second, law professor Daniel Turp, and others, undertook to seek a declaratory judgment that the main legal instruments by which the 1982 constitutional Patriation was carried out are actually void.[46] The effect of this action would be to reverse Patriation. The courts will have to rule on these claims over the next few years.

V. FURTHER READING

Hubert Cauchon and Patrick Taillon, "La constitution formelle des États fédéral et fédérés 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) 273.

Maxime St-Hilaire, Patrick F. Baud and Elena S. Drouin, "The Constitution of Canada as Supreme Law: A New Definition," (2019) 28 *Constitutional Forum* 7.

43 Denis Lessard, "Jolin-Barrette planche sur une 'Constitution du Québec'," *La Presse*, February 26, 2022, Online: www.lapresse.ca/actualites/analyse/2022-02-26/jolin-barrette-planche-sur-une-constitution-du-quebec.php.

44 Daniel Turp, *La constitution québécoise* (Montreal, JFD Éditions, 2013).

45 Marco Bélair-Cirino, "Une Constitution canadienne partiellement bilingue," *Le Devoir*, September 24, 2019, Online: www.ledevoir.com/politique/canada/563235/mot-cle-serge-joyal-et-la-constitution.

46 Daniel Turp, "Le rapatriement inconstitutionnel de 1982," *Le Journal de Québec*, April 19, 2022, Online: www.journaldequebec.com/2022/04/19/le-rapatriement-inconstitutionnel-de-1982.

Cape Verde

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I. INTRODUCTION

There were no major changes in 2021 to the Cape Verde Constitution (BL) (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 second in this global review of constitutional reform – presents 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 an outlook on constitutional reform for the next year (IV).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. FORMAL CONSTITUTIONAL REFORMS

1.1 CONSTITUTIONAL REFORM BY PARLIAMENT AS THE REFORMING POWER

As stressed in the 2020 Report,[1] under the concentration model, which characterizes the Cape Verdean constitutional amendment legal regime, proposals are made by a parliamentary faction or a single Member of Parliament (MP) through a constitutional amendment bill. This bill covers a myriad of amendments to different articles of the Constitution and are subsequently discussed alongside other constitutional amendment bills proposed by their pairs. For this reason, in Cape Verde formal constitutional amendment procedure can remain dormant for years, the last one being carried out in 2010. Nevertheless, time is not entirely idle because, in general, it allows for the emergence of informal proposals and discussions on possible amendments to the Constitution in political and academic circles. Some of those were discussed in the Cape Verdean public sphere in 2021. Thus, while there was no formal constitutional amendment in that year, political actors proposed and discussed some ideas regarding constitutional amendment that can be picked up in the years ahead.

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

Another manner in which the BL can be reformed is through the intervention of the courts, especially of the CCCV, because in Cape Verde judicial organs 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. This can be the case if these norms 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, of 21 April*, written by AJ Pina-Delgado, para. 2.11.4).[2] Despite the fact that no non-enumerated right was recognized by the CCCV in 2021, this judicial organ, understood that despite age not being mentioned by Article 24 (Equality Principle) of the BL, insofar as this provision didn't provide a closed list of non-discrimination grounds, it was also a basis of non-discrimination (*Judgement 60/2021, of 6 December*, written by AJ Pina-Delgado, para. 5.1.3).[3] Because it was a factor that could leave the individual in a vulnerable position and subjected to institutional, societal and individual biases.

2. 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 between these 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, of 10 February*, written by AJ Pina-Delgado).[4] But, in 2021, the CCCV

1 *The International Review of Constitutional Reform [IRCR] 2020*, L.R. Barroso and R. Albert (eds.) (Program of Constitutional Studies at the University of Texas at Austin 2021), 60.

2 Published at the *Official Journal* [*Boletim Oficial- OJ*], I-S, no. 35, 10.05.2016, 1225-1251.

3 *OJ*, I-S, no. 5, 17.01.2022, 130-140.

4 *OJ*, I-S, no 25, 03-03.2020, 633-652.

didn't recognize constitutional customs or conventions that changed other rules of the BL. 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 2021, some requests or allegations made in the framework of constitutional adjudication would amount to a constitutional change if accepted by the CCCV. Namely, that this judicial organ could scrutinize legislative omissions as requested by the Ombudsman concerning the lack of a professional career regime for public servants without tenure. But the CCCV declined the invitation on grounds that the BL did not recognize a power of review of legislative omissions (*Ruling 48/2021, of 4 November*, written by AJ Pina-Delgado).[5] Or that the legislator could not enact an internal norm that mentions an international organization if its constitutive instrument was not ratified and published in the official journal, but the CCCV dismissed the argument on grounds that such limitation on legislative powers could not be inferred from the BL (*Judgment 39/2021, of 30 August, Alex Saab v. SC, Per Curiam Decision*, para. 6).[6] And, finally, that an international treaty could be applied even if it was not ratified or signed by the country in cases of provisional application or estoppel, which the CCCV rejected stressing that in order for international treaties to be incorporated it was necessary for them to be duly ratified by national competent authorities after following the procedure established by the BL and after being published in the country's official journal (*Idem*, para. 12).

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

A. Making the native tongue official

As reported last year, in 2020, UCID (*União Cabo-Verdiana Independente e Democrática*), a political party, and other public personalities defended a constitutional amendment to make the CV native language called *Kriolo* (Creole) an official language alongside Portuguese.[7] In 2021, one of the most influential Cape Verdean linguists, former politician and former Minister of Culture, Mr. Manuel Veiga, proposed an amendment to Article 9 which currently reads: "1. The official language shall be Portuguese. 2. The State shall promote conditions for making the Cape Verdean mother language official in pair with the Portuguese language. 3. It shall be the duty of all national citizens to know the official languages, and shall have the right to use them". According to the amendment proposal, paragraph one would be changed to include the expression "Cape Verdean, known as Cape Verdean Creole", and the segment of paragraph two, "(...) for making the Cape Verdean mother language official on pair with the Portuguese language" would be replaced by the expression "for the effective and progressive construction of the formal and informal parity between the two official languages of the Republic".[8] The consolidated version which would result from the insertion in the "proper places, by way of substitutions, deletions or necessary additions", as prescribed by Article 289 of the BL, would read: "1. The official languages shall be Portuguese and Cape Verdean, known as Cape Verdean Creole. 2. The State shall promote conditions for the effective and progressive construction of the formal and informal parity between the two official languages of the Republic. 3. It shall be the duty of all national citizens to know the official languages and shall have the right to use them".

1.2. CHANGES TO THE POLITICAL AND ELECTORAL SYSTEM

A. Adoption of a Presidential System of Government or a Semi-Presidential System with a Strong Presidency

In 2021, the adoption of a new system of government was presented and discussed in the context of the presidential elections campaign in op-eds and by a candidate. The first one was framed in a rather classical manner to assure that the Head of State rules the country effectively,[9] but the last one was formulated on more radical grounds based on what the presidential candidate Dr. Gilson Alves – a self-assumed defender of strong-men rule that he associates with governance efficacy and international respect, and Putin admirer – called "absolute power" of the President as the embodiment of the will of the people. To guarantee that the National Assembly – the organ that holds constitutional reform powers – would follow his lead, he openly said that, in case of resistance, he would constrain Parliament to execute his will by using his status as commander-in-chief of the armed forces or by dissolving that organ, even outside the constitutional framework, if necessary.[10]

B. Acceptance of Dual-Nationals Candidacies for PR

Another important proposal was put forward by a businessman, Mr. Marcos Rodrigues, a prospective presidential candidate, that complained that under Article 110 of the Constitution, dual-nationals, like himself, were not allowed to be proposed as presidential candidates in reason of the impossibility of fulfilling the requirement of "not having another nationality". Thus, he proposed the requirement to be repealed because in a diasporic nation like Cape Verde that depended heavily on emigrants' contributions, it made no sense to forbid them to be candidates in presidential elections.[11] Other political actors showed some overture to discuss the matter and eventually support the change, namely the then PR, Mr. Jorge Carlos Fonseca, and the Majority Whip, Mr. João Gomes.[12]

But the fact was that no action was immediately taken and Mr. Rodrigues could not run. Another dual-national, Mr. Péricles Tavares, tried to present a candidacy, but the President of the CCCV, CJ Pinto Semedo, on grounds that the Constitution "unequivocally" considers a

5 *OJ*, I-S, no. 5, 17.01.2022, 84-86.
6 *OJ*, I-S, no. 100, 15.10.2021, 2508-2570.
7 *IRCR 2020*, 61.
8 https://expressodasilhas.cv/cultura/2021/07/08/reedicao-da-obra-o-caboverdiano-em-45-licoes-apresentada-na-praia/75604
9 Carlos Carvalho, 'Presidencialismo ou Magistratura de Influência', *Expresso das Ilhas*, n. 736, 07 de outubro de 2021, 14.
10 https://expressodasilhas.cv/politica/2021/09/25/gilson-alves-se-a-constituicao-nao-representa-a-vontade-do-povo-deixa-de-servir-o-seu-objectivo/76742.
11 https://inforpress.cv/empresario-cabo-verdiano-e-residente-na-diaspora-requer-revisao-do-artigo-110o-da-constituicao-da-republica/
12 https://www.voaportugues.com/a/cabo-verde-empres%C3%A1rio-com-dupla-nacionalidade-quer-direito-de-concorrer-%C3%A0s-presidenciais/5742158.html

Cape Verdean citizen who holds another nationality as being ineligible to that post. As a result, although "one may discuss if the ineligibility of the dual-national is still justified", "while a constitutional reform that alters the meaning of the provision that sustains it is not operated, one cannot help applying it when conducting a scrutiny on the admissibility of presidential candidacies" (*Decision of 23 August 2021*, available in Portuguese at https://www.tribunalconstitucional.cv/index.php/decisoes/, last accessed 2 July 2022). As the decision was not challenged – at least on those grounds –through an appeal to the full court, it became final and definitive on that matter.

C. Possibility of submission of candidacies in parliamentary elections by groups of citizens

A proposal to amend Article 106, which defines the conditions for the presentation of candidacies in democratic elections, limiting them to political parties or coalition of political parties in the case of legislative elections, was put forward by one of the parliamentary factions – UCID – last year, as reported,[13] was presented again by a back-bencher of the main political party, MPD (*Movimento para a Democracia*), and a possible candidate to its leadership, Mr. Orlando Dias, in a speech delivered at the National Assembly.[14] It was also supported by a former MP, Mr. Milton Paiva, that defended the necessity of adopting a mixed system that would add to the current available closed party lists fixed by the Constitution and by Electoral Legislation, the possibility of having uninominal lists and lists of groups of citizens.[15]

D. Reduction in the number of Members of Parliament and Limitation of terms of office of MPs

The reduction in the number of MPs, which is a recurrent theme in constitutional reform discussions in Cape Verde,[16] was again raised. Namely by an extra-parliamentary political party – the *Partido Popular* (PP)[17] – and by the MPD back-bencher and party leader hopeful, Mr. Dias.[18] They both considered that the current maximum of seventy-two MPs established by Article 141(1) is excessive in a developing country with a population of 500.000 inhabitants. While the latter's proposal seems to lead to a small adjustment of the number of MPs, the former explicitly proposed a two-step process of cutting them initially to thirty-six and subsequently to twenty. The same party proposed the introduction of a limit of two consecutive terms for MPs and other holders of public office and the possibility of impeaching them if they abuse power.

E. Possibility of creating a parliamentary group with three MPs

As it did last year, UCID, through the mouth of its then leader, Mr. António Monteiro, keeps insisting on a matter dear to the party: the reduction of the number of MPs necessary to constitute a parliamentary group from the five established by Article 149(1) of the Constitution to three.[19] The proposal managed to extract a commitment from Mr. Correia e Silva, the Prime Minister and leader of the main political party, MPD, to support an amendment of the Constitution in that sense.[20]

F. Adjustment of Constitutional Deadlines for Cabinet Formation

Mr. Humberto Cardoso, an influential political analyst, former MP, and editor of one of the two main local newspapers, defended that to avoid an excessive hiatus between the legislative elections and the legitimation of a new cabinet through the approval of a motion of confidence in Parliament, it was necessary to reform the Constitution to clarify and adjust the deadlines that mark the pace of the transfer of power process.[21]

1.3. CHANGES RELATED TO THE JUDICIAL SYSTEM

A. Extension of the Deadline to Request a Preventive Review of Constitutionality of a Norm

The then PR, Mr. Fonseca, complained that the eight days deadline established by Article 278(3) of the BL to refer a case to the CCCV to review the constitutionality of a legal norm included in a bill sent to him for promulgation purposes was manifestly inadequate in situations he simultaneously receives more than "dozens of legal diplomas (...)", some of them "highly complex" as, for example, was the case of the Criminal Code and the Criminal Procedure Code Amendment Acts. For these reasons, he suggested that the Constitution be reformed in order to extend that deadline to "ten or twelve days" or alternatively to only count the working days.[22]

B. Creation of an External Judicial Inspectorate Service

The Minister of Justice, Ms. Joana Rosa, admitted – without much enthusiasm apparently – that a solution to strengthen the Judicial Inspectorate Service and to avoid the impression of corporatism and what she saw as a certain lack of will shown by judges in evaluating their colleagues, was to outsource it by using "external" services rather than one exclusively composed by judges, but that this would require an amendment to Article 224 of the BL which establishes that the inspectors be "recruited among judges".[23]

2. EVALUATION AND EFFECTS OF THE PROPOSED REFORMS

Most of the proposed reforms of the BL, despite the discussions that can be held on their necessity and merits and their political feasibility,

13 *IRCR 2020*, 62.
14 https://www.voaportugues.com/a/cabo-verde-grupos-de-cidad%C3%A3os-devem-ser-autorizados-a-concorrer-nas-legislativas-diz-o-deputado-orlando--dias-/5988025.html
15 Ibid.
16 *IRCR 2020*, 62.
17 https://expressodasilhas.cv/politica/2021/04/10/legislativas-2021-pp-propoe-reducao-do-numero-de-deputados-no-parlamento/74266
18 https://www.voaportugues.com/a/cabo-verde-grupos-de-cidad%C3%A3os-devem-ser-autorizados-a-concorrer-nas-legislativas-diz-o-deputado-orlando-dias-/5988025.html.
19 https://expressodasilhas.cv/politica/2021/04/10/as-maiorias-absolutas-tem-segregado-os-cidadaos-em-funcao-da-sua-cor-politica/74237
20 https://www.anacao.cv/noticia/2021/06/14/pm-assume-diminuicao-do-numero-de-deputados-exigidos-nas-bancadas-parlamentares/.
21 https://expressodasilhas.cv/opiniao/2021/06/21/pluralismo-reforca-estabilidade/75299.
22 https://expressodasilhas.cv/politica/2021/01/11/pr-sugere-alargamento-do-prazo-para-fiscalizacao-preventiva-da-constitucionalidade-dos-diplomas/72900
23 https://expressodasilhas.cv/pais/2021/10/30/temos-um-bom-futuro-para-a-justica-os-cabo-verdianos-podem-confiar/77272.

would fall under the constitutional reform power of Parliament and would not raise much debate.

Others would be more consequential. This is the case of A) the officialization of the creole language, that would duly acknowledge one of the main features of the Cape Verdean identity and traditional factor of differentiation from the former colonial power, Portugal; B) The authorization of dual-nationals to be proposed as presidential candidates, for its proponents and defenders would reinforce the attachment between the Cape Verdean diaspora and their fatherland, but it also raises questions for allowing persons with double-allegiances to be elected as the country's highest magistrate, which is considered by Article 125 of BL as the guarantor of the "unity of the Nation and of the State" and as an external representative of the Republic of Cape Verde, and C) The possibility of group of citizens to present candidacies to legislative elections would increase the possibilities of participation in the elections of people non-affiliated in political parties, but it is not absolutely clear if it is well suited to a system that, more than anything, values political stability in the framework of periodic competitive elections and stable majorities, rather than extensive political representation of minority ideas. The reduction of the number of MPs would be necessary for purposes of rationalization and to strengthen the quality of Parliament itself insofar as it would depend on a more rigorous selection of MPs. However, in an Archipelago country with a large diaspora, such reform would require meticulous reflection and reasonableness of the political actors involved to avoid the instrumentalization of the process for electoral purposes and the unbalancing of the system of political representation.

Two of the above-mentioned proposals could prove to be more controversial: the creation of an External Judicial Inspectorate Service and the change of the system of government. As regards to the first, depending on the manner that an External Judicial Inspectorate Service with disciplinary powers over judges is designed it could be incompatible with the separation and interdependence of the branches of the State and with the independence of courts, both protected by the limits to constitutional reform clause (Article 290, paragraph 1, d) and f)). Seeming that reforms in the Judicial Inspectorate are necessary for the above-mentioned reasons, it would be more prudent to permit the integration of persons that are not career judges, namely law professors or lay citizens, into the system rather to fully "externalize" it.

Regarding the second proposal, it is true that discussions on the best system of government for Cape Verde are recurrent in the local political debate and scholarship, but since independence, the country always had a model based on the distribution of power between the Cabinet, the National Assembly and the President of the Republic. The Constitutional Order established in 1992 prescribes for a semi-presidential system of government with a Parliamentary inclination, which some authors classify as "Moderated Parliamentarism". Traditionally, the reasons to defend a classical Presidential model were related to a structural incongruity between a President that is elected directly by the people and is the Head of State and the lack of teeth to, at least, be an effective umpire of the political system as prescribed by the BL and to non-acceptance of Prime Ministers as legitimate representatives of the State in Africa, a continent dominated by powerful Presidents of the Republic.[24] But the idea of having a strong president or a president with absolute powers would clearly amount to a dismemberment of the BL,[25] because it would paradigmatically alter the identity of the Constitution of Cape Verde and of the political community that traditionally diluted executive power between different organs and mistrusted one man-rule.

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

The CCCV, which according to the design of the constitutional system, plays a countermajoritarian role and a role of protection of the values enshrined in the BL, had the opportunity to discuss a challenge to a constitutional norm in 2021. When Mr. Alex Saab, an appellee in a high-profile concrete review of constitutionality case,[26] argued that an interpretation of the Supreme Court (SC) according to which a person could be extradited if the requesting state provides for assurances that it would not apply a life sentence in the case of a guilty verdict, would be contrary to the BL. But, the CCCV ruled that the norm that used to protect foreigners from being extradited in cases of possible application of life imprisonment was repealed in 2010 by an amendment to the Constitution (*Judgment 39/2021, of 30 August*, *Alex Saab v. SC*, *Per Curiam Decision*, para. 3.2.10 B).[27] Therefore, this means there was not a real constitutional question arising from the interpretation of the SC that could trigger the competence of the CCCV. And also that in order for that matter to be discussed it was necessary to challenge the norm of the amendment bill that repealed that protection,[28] which the appellant did not do (*Idem*).

In another segment of the same judgment (para. 9.8), the CCCV dismissed an allegation that there was a constitutional problem with a legal norm of the International Cooperation on Judicial Criminal Matters Act that permitted the extradition of a foreign person even if reciprocity assurance is not made by the requesting state on grounds of violation of the equality principle. The CCCV understood that the distinction between a national and a foreigner for extradition purposes resulted directly from the BL, because its text only prohibits the extradition of nationals. Thus, challenging the legal norm would amount to challenging the BL itself. And that, in such a case, the CCCV could not second-guess the wisdom of the framers of 1992 in establishing the distinctions they deemed to be justified. And neither could the legislator who assumes reform powers under the Constitution because the National Assembly has the legitimacy to change the BL to insert certain distinctions between national and foreigners as far as it does not violate the material limits established by Article 290 and insofar as it respects "the identity of the Constitution and the values it endorses", in doing so. In the concrete case, it reasoned that the establishment of

24 See David Hopffer Almada, *A questão presidencial em Cabo Verde – Uma questão de regime*, Praia, Authors Edition, 2002, 8-12.

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

26 See the *Global Review of Constitutional Law 2020*, Richard Albert; David Landau; Pietro Faraguna & Simon Drugba (eds.), (I Connect-Clough Center) 55.

27 *OJ*, I-S, no. 100, 15.10.2021, 2508-2570.

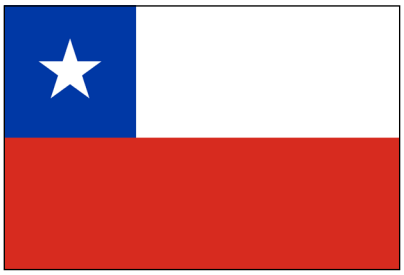
28 According to the procedural rules applied to such cases, the absence of an explicit challenge to a norm prevents the CCVV from ruling on its constitutionality, because, as established by the Article 62(2) of the Constitutional Court Act, "The Court may only declare the unconstitutionality or illegality of rules whose scrutiny has been requested (...)".

different constitutional regimes for nationals and foreigners in cases that involve safeguards against compulsory detachment of a person of the national territory through extradition or deportation – since they are rights of belonging – was justified.

IV. LOOKING AHEAD

Local political actors foresee that the formal procedure for constitutional reform will be triggered in 2022, but if that happens is not certain that it will bear fruit in reason of the qualified majority of two-thirds of MP that any constitutional amendment bill requires to be approved. Neither of the three parties represented in Parliament has the necessary majority. Therefore, any reform has to be negotiated by the main party, center-right, MPD, and center-left, *Partido Africano da Independência de Cabo Verde* (PAICV), the two traditional rival parties that only once agreed to reform the BL. On the other hand, it is always possible that the CCCV recognizes the incorporation of treaty or statutory rights into the Constitution or recognizes constitutional changes operated by constitutional custom.

Chile



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I. INTRODUCTION

Constitutional reform was still a dominant issue in Chile during 2021. In fact, we could say that Chile lived amidst a constitutional moment all throughout 2021. The period covered by the present report can be described as the installation stage of the ongoing constitutional process: when the defining points and first decisions of the Constitutional Convention of Chile took place. The elections that defined its composition were held in May, and the installation was on July 4th. Then the Convention, that had nine (extendable for up to twelve) months to propose a new constitutional text, made the very first definitions of procedural rules and institutional design. At the same time, the ordinary legislative discussion continued. So, in addition to the Constitutional Convention and its own process, the sanitary conditions due to the COVID-19 pandemic prompted several constitutional reforms for a second year in a row.

If we look closely, we can see that even though 2021 was not as prolific in terms of constitutional reform bills introduced as 2020, it came a close second. Furthermore, if we compare the number of constitutional reform bills that were introduced into Congress from 2010 onwards, we see an abrupt change in the quantity. Between 2010 and 2017, the average number of constitutional amendment bills presented was approximately 49. With 2010 at the lowest with only 35 bills and 2015 at the highest with 54 bills, whereas, in 2018, they started increasing significantly. The highest numbers fall between 2020 and 2021, with 145 and 116 bills, respectively.[1]

We think that this important increase could be mainly explained by two factors: on the one hand, the constitutional process and the ongoing COVID-19 Pandemic rendered reforming the Constitution a necessity. And, on the other hand, a sort of "constitutionalization" of the political discourse where many contested issues took the form of constitutional reform bills. An example of the latter is the constitutional amendment presented to make presidential candidates who are (at the same time) congressmen obliged to waive their parliamentary expenses in the six months prior to such an election. This occurred when one of the main candidates for the 2021 presidential elections was in that position. As this shows, a political discussion about the rightness or wrongness of being a candidate while also having to fulfill a representation duty turned into a constitutional reform that eventually failed.

From this point on, through the article, we propose an extensive revision of various constitutional amendments that took place in 2021 and present an analysis of the meaning and consequences of the constitutional change in Chile and some particularly notorious constitutional reforms.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In this section, we will revise successful and unsuccessful constitutional reforms. Successful constitutional reforms will also be categorized into two groups: those related to the COVID-19 pandemic and those related to the constitutional crisis and ongoing process.[2]

1. SUCCESSFUL CONSTITUTIONAL REFORMS

1.1. SUCCESSFUL CONSTITUTIONAL REFORMS RELATED TO THE COVID-19 PANDEMIC

i. The online parliament operation

The main constitutional reform that was meant to adapt rules and procedures to the sanitary context, was the extension of the authorization for the online functioning of Congress. As in other countries[3], this was first discussed and approved in 2020, when the legislature was allowed for a one-year period to use technological devices (remote voting and videoconferencing) instead of mandatory physical presence to vote and participate in the discussions. As the time limit of the constitutional authorization was coming to an end and the sanitary conditions were not improving, a one-year extension was proposed and later approved (bill Nº 14.022-06, later Law Nº 21.318).

1 Prepared by the authors based on data available on the Senate's webpage. Available at: https://www.senado.cl/appsenado/templates/tramitacion/index.php. Last accessed on June 3rd, 2022.

2 In particular, and due to its implications and the broadness of the topic, the constitutional crisis and ongoing reform process will be divided into further sections as depicted below.

3 Waismel-Manor, Israel, Ittai Bar-Siman-Tov, Olivier Rozenberg, Asaf Levanon, Cyril Benoît, and Gal Ifergane, 'Should I Stay (Open) or Should I Close? World Legislatures during the First Wave of Covid-19' (2022) Political Studies <https://journals.sagepub.com/doi/10.1177/00323217221090615> accessed 13 June 2022.

This reform was successful and found extensive support across the political spectrum. This bill specifically amended the Transitional Disposition N° 32 and, from then on, Congress had a two-year period to have online sessions when specific circumstances related to health hazards were present.

1.2. SUCCESSFUL CONSTITUTIONAL REFORMS RELATED TO THE CONSTITUTIONAL CRISIS AND ONGOING PROCESS

The ongoing constitutional crisis is mirrored by a political crisis, both of which were channeled through the institutional process of the Constitutional Convention (we will go over this in the next section). Therefore, we have found it to be appropriate to combine the following constitutional reform bills under the same section.

1.2.1 ON THE MATTER OF THE CONSTITUTIONAL CRISIS

i. Third withdrawal of pension funds

In 2020 and 2021, there were a set of constitutional amendments presented that via transitional dispositions allowed people to make a financial withdrawal from their pension saving funds. In 2021 the third and fourth "ten percent of pension funds withdrawal" bills were presented.

The third "withdrawal" was successful (bills Nº 14054-06 and others, further known as Act Nº 21.330) and it motivated a requirement of unconstitutionality filed by the Executive on procedural and substantive grounds. We will go over this in section III. The fourth withdrawal bill was unsuccessful, and we will revise it below.

1.2.2 ON THE MATTER OF THE CONSTITUTIONAL REPLACEMENT PROCESS

i. Two-day election process

Also due to the pandemic, the Executive introduced a bill (Nº 14062-07, 14.063-07 and 14.064-07, later Act Nº 21.317) seeking the constitutional authorization to carry out the elections of the constitutional convention representatives and local government authorities during the whole weekend (a two-day process). In Chile, elections are usually only carried out on one day (Sunday). In general terms, it not only stated that the election would be on the 15th and 16th of May, which was meant to avoid agglomerations of people and thus make voting spaces a safe environment for all. At the same time, the goal was to maintain acceptable participation levels which could've been discouraged because of the sanitary concerns.

This reform also gave new regulatory attributions to the Election Commission of Chile (known as "Electoral Service of Chile" or "Servel" by its abbreviation in Spanish), an autonomous constitutional institution or guarantor institution[4] that oversees everything related to elections processes. This was especially meaningful in terms of establishing the procedure of opening, closing, and sealing the ballot boxes. It also regulated and allowed the presence of candidate's delegates in polling places. Both regulations exemplify how the main concern was to maintain the enduring credibility of Chilean elections. This bill was widely supported and swiftly passed by Congress and later on, the elections took place in an orderly manner with no issues of concern regarding credibility or legitimacy being raised.

ii. Constitutional representatives' resignation

Conversely, we have a set of constitutional reforms presented to install and improve some of the problems the Constitutional Convention encountered. As an example of both, we have the constitutional reform that sought to install the possibility of resignation for constitutional representatives, and the disposition of replacement mechanisms in the case of independent candidates having been elected in an independent electoral pact (bill Nº 14.592-07 and 14.589-07, Law Nº 21.432). This bill was presented notoriously in 2021 and successfully passed by Congress in early 2022.

2. FAILED CONSTITUTIONAL REFORMS

i. Fourth ten percent withdrawal of pension funds

Although the first withdrawal of pension funds could've been linked to measures intended to face and mitigate the economic effects of the pandemic[5], the following presentation of bills, in the same manner, made clear the intention underlying them. Fundamentally, they were meant to undermine the social security system, which is currently administered by private entities regulated by law (an issue that's become politically contested), by defunding it. These bills were extremely popular constitutional amendments because they provided direct payments to citizens (of their own money, funds earmarked for a specific purpose: retirement pension).

As a matter of fact, this fourth bill (Nº 14287-07, 14293-07, 14301-07, and others) was presented shortly after the passing of the "third withdrawal" bill. Finally, this bill was ultimately unsuccessful, being rejected by the upper chamber in a very close vote. The substantive and economic regards, which will be addressed later on, managed to stop (at least for the time being) these amendments.

Along the same lines, amid the constitutional discussion and after three previous successful withdrawal of funds bills, and the current discussion of a fourth withdrawal, a group of congressmen presented bills related to the matter. For example, there were bills presented to allow the full withdrawal of the pension funds (bill N° 14730-07 and 14859-07), amongst others that intended to subside the pension funds of those who were left with virtually no funds for their pension (bill N° 14263-07).

ii. Related to the Constitutional Convention.

There were constitutional reform bills that were presented to have an impact on the elections of representatives and the installation of the

4 Tarunabh Khaitan, "Guarantor Institutions" (2021) 16 Asian Journal of Comparative Law 40

5 Hernán Gomez, 'Chile', in Luis Roberto Barroso and Richard Albert (eds), 'The 2020 International Review of Constitutional Reform' (ISBN 978-1-7374527-0-6, Published by the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2021)

Constitutional Convention that were ultimately unsuccessful. Not because they were properly rejected by Congress but because they never moved forward in the law-making process, making them virtually unsuccessful, having lost opportunity.

First, an example of this is the amendment that sought to allow voting abroad for the election of the convention representatives (bill N° 14028-07). Currently, voting abroad is only permitted in national elections (such as the President's election or a national referendum).

Second, in the spirit of decentralizing the constitutional discussion—a strong topic that afterward impregnated the constitutional discussion—an amendment was presented to establish that the Region of Biobío would be the official site of the Constitutional Convention, instead of the Metropolitan Region where the capital is. Both constitutional reforms were ultimately unsuccessful.

iii. To allow independent candidates to form lists in regular elections.

This was a critical reform that sought to lower the standards for the presentation of independent candidacies and allow them to form electoral pacts, making them almost –if not– equal to political parties' candidacies.

In March, shortly after passing the bill that did precisely this and decreased the requirements to present independent candidatures and allowed independents to form electoral pacts for the constitutional representatives' election, an amendment that intended to apply such rules to the parliament's elections was introduced (bill N° 14071). This was mostly prompted by the institutional crisis that did not spare political parties and intended a grave danger to the representative democracy[6].

As we know, political parties are the necessary vehicle that in a complex and numerous societies allows to channel different societal and ideological views and are, because of this, fundamental to democracy[7]. The main argument for this amendment was that there is a significant disconnection between the traditional political parties and "the people". For this, it was argued that social and political movements should be allowed in the political arena on a more flexible note, as to give the election more legitimacy. All of this, without submitting these movements or electoral pacts to the regulatory norms that traditionally affect political parties (in terms of funding or transparency rules, just to give a few examples).

This bill was submitted to a vote in the Senate's Commission of Government, after seeing firsthand the results of such design in the past election of conventional representatives. In this vote, the bill was rejected, and after that, it was never put to vote on the Senate's floor.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The reforms that have been enunciated cannot be analyzed without taking into consideration the context in which they were discussed and approved.

As we have noted, in 2021 the 155 members of the Constitutional Convention were elected (on May 15th and 16th) and the Convention began to function (July 4th). The constitutional reforms to the constituent process were to adapt the approved rules to the circumstances of the moment. But it was not in Congress, but in the Convention, where the most critical constitutional changes for the country were discussed.

During the first months of the Convention's work, the main discussion was the procedure to be followed to approve a new constitution. By October, five different sets of procedural rules were approved. From the very beginning, some highly divisive issues were present such as the concept of "plurinationality" and other constitutional norms related to indigenous peoples, freedom of speech, and distrust in political parties, among others. Then, in the last months of the year, an intense period of public hearings and citizen participation began, activating civil society as never before in Chile. In January 2022, the Convention started the writing process of the new constitution through a rigid process where each article, paragraph, and many amendments were discussed and voted not only in committees but also in plenary sessions[8]. It was during these months when polarization increased significatively as many very contested issues were discussed; even several topics that are not commonly included in a constitution (e.g., abortion, public funding of private schools, land restitution, sex education, promotion of sports, etc.). For this particular nature, considering the nomenclature given by Professor Richard Albert, the constitutional process in its procedural rules' discussion and especially in its substantive discussion constitutes a constitutional dismemberment. It breaks with the Chilean constitutional historic tradition, and because of its constituent nature it dissembles elemental parts of it[9].

However, this doesn't mean that the constitutional reforms discussed in Congress have not been relevant or have gone unnoticed. Perhaps one of the most intense constitutional debates of the last decade, along with the new constitution process, have been the constitutional reforms that included in the transitional provisions of the Constitution an authorization to withdraw between 10% and the whole pension savings that were aforementioned.

This debate combines economic aspects (because of the higher inflation generated by these measures[10]), social security matters (because it emptied the retirement savings accounts of the poorest), and constitutional issues (related to formal and substantive topics). Among the formal constitutional issues were i) the discussion on whether it

6 Juan Pablo Luna and David Altman, 'Uprooted but Stable: Chilean Parties and the Concept of Party System Institutionalization' (2011) Latin American Politics and Society, 53(2), 1-28 <https://www.cambridge.org/core/journals/latin-american-politics-and-society/article/abs/uprooted-but-stable-chilean-parties-and-the-concept-of-party-system-institutionalization/D9B14650C62637C9BE7D200F06818FA9> accessed 13 June 2022

7 Tarunabh Khaitan (2020), 'Political Parties in Constitutional Theory', Current Legal Problems, Vol. 73: p. 95, <https://academic.oup.com/clp/article-abstract/73/1/89/6028887> accessed 13 June 2022

8 Between the first session (07.04.2021) and the 103 session (05.14.2022) the plenary has called to 4511 votes. See further in Aldo Mascareño and others, 'La ley de los grandes números' (Nota de Investigación C22, May 2022) <https://c22cep-chile.cl/publicaciones/la-ley-de-los-grandes-numeros/> accessed 14 June 2022

9 Richard Albert, Constitutional Amendments: making, breaking and changing constitutions (Oxford University Press, 2019) 76 – 92

10 As it was continuously warned by the Chilean Central Bank on presentations in Congress. Mario Marcel 'Proyectos de reforma para permitir nuevos retiros anticipados de fondos previsionales' (18 August 2021) <https://www.camara.cl/verDoc.aspx?prmID=234922&prmTipo=DOCUMENTO_COMISION> accessed 14 June 2022.

is possible to incorporate the authorization of withdrawals in a transitional provision; ii) the majority required to approve it (by 2/3 or 3/5 of the members of congress); and iii) whether legislators have attributions to introduce a bill regarding social security regulation in a system with reduced parliamentary initiative[11]. Among the substantive debates were i) whether the pension withdrawals of pension savings before retirement age were against the right to social security and ii) whether the authorization to the withdrawal of a number of life annuities[12] was a regulatory taking. As stated in the previous version of this report, the Constitutional Court upheld -with the tied-break vote of its President- a claim against the "second withdrawal", declaring that the constitutional reform was unconstitutional. It argued that the bill was, in its nature, a legal provision and not a constitutional one. As such, it had not respected the legislative process because it had invaded one of the topics where the Executive has sole initiative. It also added that the withdrawals affected the right to social security virtually emptying it of content. Along with the above, the Court confirmed its power to control constitutional reforms, both formally and substantively.

This highly contested precedent was the main reasoning behind the second claim of unconstitutionality filed by the President against the third withdrawal (April 2021). But, despite the fact that the bill was very similar to the previous one, the claim was surprisingly rejected. Two justices who were previously in the majority changed their vote and decided to declare the claim inadmissible without even considering it on its merits. In an unprecedented performance, one of those ministers declared to the press before the beginning of the hearing that "the central point is what has to be done to solve the people's problems"[13]. If the sentence of 2021 that declared the constitutional reform unconstitutional was intensely debated by the public opinion, this one as well, but now because of the change of mind without a clear explanation.

The issue of unconstitutional constitutional reforms does not end here. At the end of 2021 a set of claims to declare not applicable said constitutional reform (the Chilean action for concrete judicial review) was initiated in the Constitutional Court. In 2021 it was discussed whether the inapplicability of a "constitutional precept" could be requested taking into consideration that the Constitution only authorizes the inapplicability of "legal precepts". The Court in March 2022, by a one-vote majority, accepted five of the seven actions arguing that the constitutional norm had a "legal nature" and that it actually constituted a "regulatory taking". The details of this case will be analyzed in the 2022 report[14].

As can be seen, the Constitutional Court has fully entered into the control of constitutional reforms in both procedural and substantive aspects, playing a counter-majoritarian role, as Professor Barroso has described[15]. Although the Chilean Constitution, since 1980, (and then ratified in 2005) explicitly allows the judicial review of constitutional reforms, the scope of this control has always been an issue of debate. In these rulings, the Constitutional Court has ratified a broad control, form, and substance. The latter, however, is problematic because in Chile we do not have unamendable constitutional clauses. It remains uncertain whether these rulings will continue to be good law in the future. We also do not know if Congress will insist on passing legislation using the transitional articles of the constitution as means of bypassing the ordinary legislative process procedural rules. In 2022, a group of members of the lower House introduced a bill doing the same but it was rejected.

Furthermore, we can state that the successful withdrawals of funds bills managed the super majoritarian quorums needed to pass the bills in the context of a diminished legitimacy Constitution and the difficult sanitary context that prompted expenditure. In addition to this, as a consequence of presenting and forcing the Executive's will in a matter that's of its sole initiative, it diminished this institution. For the latter, this too can be categorized as a dismemberment type of amendment.

The other constitutional reform bills mentioned in section II, such as the two-day election process or the authorization for online functioning of the legislature are of a different nature. In this regard, they were mainly "elaborative" in the sense that they "continued the constitution-making project in line with the current design of the constitution"[16] to adjust to the complex new scenario.

IV. LOOKING AHEAD

The most significant constitutional milestone in Chile since the return of democracy in 1990 will be September 4, 2022. That day, the referendum to approve or reject the new constitution to be proposed by the Constitutional Convention will take place.

The Chilean Constitution, approved in 1980 and subsequently transformed and amended more than sixty times since 1989, had been under severe criticism by the left for almost a decade. However, it was not until the political crisis of October 2019 that the parties from the right accepted the whole replacement of the Constitution as a means to channel and offer a political solution to a problem that had become violent. The "*Acuerdo por la Paz y la Nueva Constitución*" (Agreement for Peace and the New Constitution) of November 15 was a political agreement where the broad spectrum of political parties, with the exception of the Communist Party and some groups of the leftist "Frente Amplio", began to draw the new constitution-making process. This process' "dual aversion", as Sergio Verdugo and Marcela Prieto stated, has been to avoid the Bolivarian experience of constitution making process and to replace

11 On presidential prerogatives Eduardo Aleman and Patricio Navia, 'Institutions and the Legislative Success of strong presidents. An analysis of Government bills in Chile' (2009) The Journal of Legislative Studies, 15(4), 401-419, <https://www.tandfonline.com/doi/full/10.1080/13572330903302471> accessed 14 June 2022.

12 In Chile, the social security system regarding retirement pension funds is administered by private entities regulated by law and can take up to four forms. The main two are (i) a programmed withdrawal at the retirement age (where you maintain the property over your funds) and (ii) a number of life annuities (where you transfer property of your funds), and the other two are a combination of both.

13 Juan Pablo Andrews, 'Ministro Aróstica argumenta rechazo del TC a requerimiento del gobierno por retiro del 10%: "Carece de fundamentos completos"' *La Tercera* (Santiago, 27 April 2021) <https://www.latercera.com/politica/noticia/ministro-arostica-argumenta-rechazo-del-tc-a-requerimiento-del-gobierno-por-retiro-del-10-carece-de-fundamentos-completos/EQQFE5M6FNARPDP4ALVGZ4KTZY/> accessed 14 June 2022

14 One of us, Sebastián Soto, must disclose that he was in the legal team that represented the State in these cases. The State was defeated in up to five of the seven cases before the Constitutional Court. The final decisions before ordinary courts are still pending.

15 Luis Roberto Barroso, 'Countermajoritarian, representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 The American Journal of Comparative Law 109, 125

16 Richard Albert, Constitutional Amendments: making, breaking and changing constitutions (Oxford University Press, 2019) 76 – 92

the symbolic legacy of Pinochet[17]. The former objective inspired the rules of the constitution-making process. The latter motivated the underlying idea to write a new constitution that would be a "house for all", in the famous words of Professor Patricio Zapata[18], which is a new constitution that generates consensus. In the same manner, even President Boric, shortly after being elected in December 2021, said "we do not want a partisan Convention, only in the service of our government"[19].

The twelve months of working of the Convention will be completed on July 4, 2022. This report was written when most of the new constitutional norms were already approved but there is still time left for the transitional provisions and formal corrections before the final draft. The draft of the new constitution that will be submitted to referendum has important differences with the current constitution: i) although it maintains the presidential system, it modifies rooted rules of the Chilean presidentialism (replacement of the 200-year-old Senate by a new Chamber of Regions with much less competences, reduction of presidential power, allows immediate presidential reelection, among others); ii) it defines Chilean democracy as "paritary" which means that Congress and many other collegiate and even uninominal bodies must be integrated at least by 50% of women; iii) it moves from a unitary state to a regional one, creating areas of political and fiscal autonomy; iv) it creates a "Judiciary Council" which concentrates the powers of appointment, evaluation and discipline of the whole Judiciary that will be comprised of judges and non-judges appointed; today these competences are more fragmented in the courts of appeals and the Supreme Court; v) significantly reduces the powers of the Constitutional Court; v) increases the number of recognized rights from 49 to 132[20]; vii) establishes a large number of principles, some traditional to constitutionalism (e.g. social state or fiscal sustainability) and others not common (e.g. eleven principles related with the health system or seven principles for the protection of the environment); viii) incorporates the "rights of nature", recognizes the "sentience" of animals, and declares them as "subjects of special protection"; ix) recognizes indigenous peoples, declares Chile as a plurinational state, and establishes various special rules more favorable to them, among others.

All these provisions, and many others, have generated intense discussion and increased polarization. By now it has become clear that the new constitution, which was supposed to be the "house for all", will not be so, at least not in the short term. Furthermore, polls show that the approval will not reach the 78% it had in the 2020 referendum that initiated the process and it could even happen, although unlikely, that the rejection of the new constitution could prevail.

If the approval triumphs by a small margin, a process of constitutional consolidation will begin. Probably the new constitution will require reforms to transform the new divisive text into a constitution that unified Chileans. If the rejection triumphs, the Convention will have failed, and a new political agreement will probably be necessary to overcome the still unsolved constitutional challenge.

V. FURTHER READING

Sebastián Soto, 'La hora de la Re-Constitución' (1st edition, Ediciones UC, 2021)

Magdalena Ortega, 'Constitución Solidaria: Ideas para una nueva Constitución y el proceso constituyente' (Ediciones IdeaPaís, 2021)

Marcela Prieto and Sergio Verdugo, 'How Political Narratives Affect the Self-Enforcing Nature of Interim Constitutions' (2021) 13, pages 265–293, Hague Journal on the Rule of Law <https://link.springer.com/article/10.1007/s40803-021-00161-7> accessed 18 June 2022

Gabriel Negretto, 'Deepening Democracy? Promises and challenges of Chile's Road to a New Constitution' (2021) 13(2-3), Hague Journal on the Rule of Law, <https://link.springer.com/article/10.1007/s40803-021-00158-2 accessed 18 June 2022> accessed 18 June 2022

17 Sergio Verdugo and Marcela Prieto, 'The dual aversion of Chile's constitution-making process', International Journal of Constitutional Law, Volume 19, Issue 1, January 2021, Pages 149–168, https://doi.org/10.1093/icon/moab011

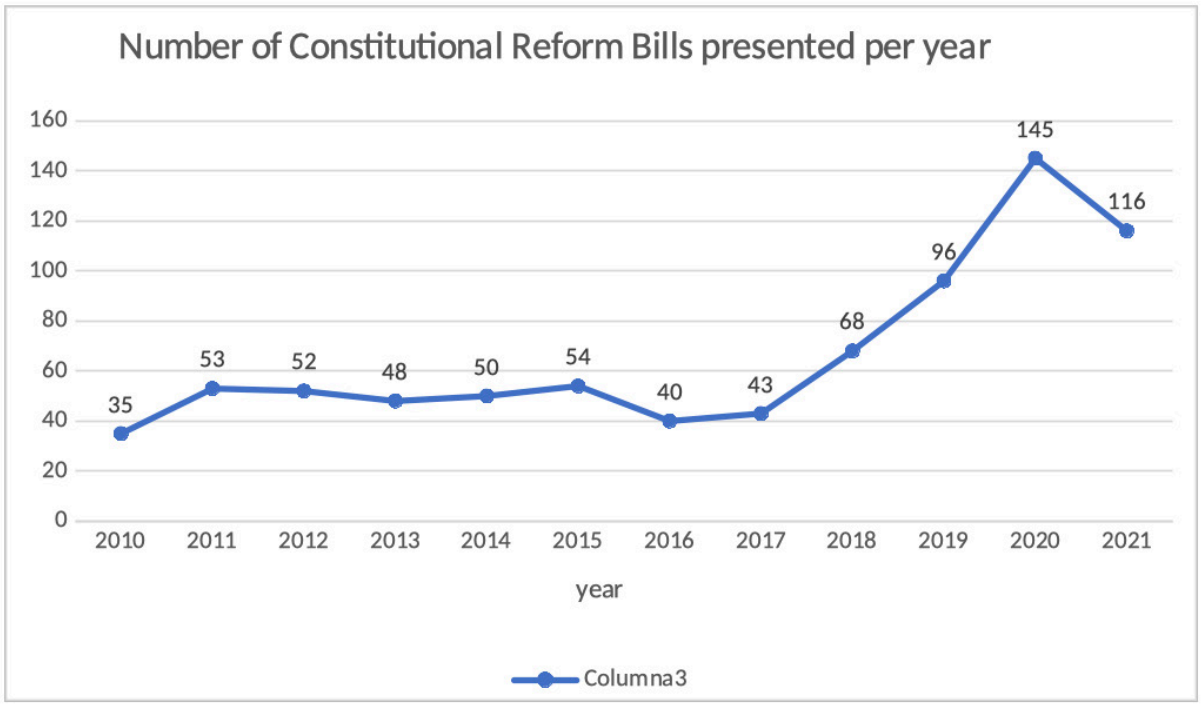
18 Patricio Zapata (2015) 'La casa de todos', Ediciones UC, Santiago, 2015.

19 Alberto Gonzalez, 'Gabriel Boric: "No queremos una Convención partisana, al servicio de nuestro Gobierno"' (21 December, 2021) <https://www.biobiochile.cl/especial/una-constitucion-para-chile/noticias/2021/12/21/gabriel-boric-no-queremos-una-constitucion-partisana-al-servicio-de-nuestro-gobierno.shtml> accessed on 14 June 2022

20 Nicolás Vergara, Consuelo Saavedra and Matías del Río in interview with Rodrigo Delaveau on *Radio Duna*, Ex Alternate Justice of the Constitutional Court of Chile, Faculty of Law, P Universidad Católica de Chile (17 May 2022) <https://www.duna.cl/programa/hablemos-en-off/2022/05/17/rodrigo-delaveau-sobre-los-499-articulos-de-la-constitucion-mas-relevante-seria-el-tema-de-los-derechos-reconocidos-vamos-a-pasar-el-record-mundial-tenemos-46-y-vamos-para-los-132/> accessed on 14 June 2022

VI. ANNEX

TABLE Nº 1.



Source: Prepared by the authors for this purpose with the data available on the Senate's webpage at <https://www.senado.cl/appsenado/templates/tramitacion/index.php>. Last accessed on 3 June 2022.

Colombia

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I. INTRODUCTION

Seeing as 2021 was the second year of the COVID-19 pandemic, many of the restrictions on fundamental rights that were adopted to compensate for the deficit of medical structures in Colombia were progressively eliminated. However, Congress maintained a virtual session scheme that allowed it to advance with the legislative and constitutional change agenda. This form of virtual session has impoverished the already scarce deliberation within parliament. This deliberative deficit is rife throughout all the functions of Congress: when it comes to the approval of laws, when it approves constitutional reforms and when it carries out the occasional and weak political control of the government.

In this context, the role of constitutional judges is to intervene to recover deliberation and guarantee that laws and constitutional reforms approved by Parliament majority do not violate constitutional norms, democratic procedures, and the essential principles of the Constitution. It can be said that the lower the degree of deliberation within Parliament, the greater the intervention of the Constitutional Court.

The intervention of the Constitutional Court to control the constitutional reforms nonetheless requires a citizen lawsuit to be ensued. The Constitutional Court can only act if the petition on the compliance of constitutionality formulated by citizens is strictly done within the year following the issuance of the constitutional reform. As it is well known in comparative public law, the control of the Court falls both on the procedures and to prevent the essential principles of the Constitution from being replaced. The latter is carried out by means of a constitutional replacement test.

This report will discuss the content of the only two constitutional reforms approved during the year 2021. In addition, the report will focus on the control of constitutionality of one of the abusive constitutional changes that sought to establish life imprisonment for people who committed has committed rape and violence against boys and girls. The Constitutional Court, in Judgment C-294/21, considered that this reform was contrary to human dignity. It was an abusive constitutional change because its unconstitutionality was fully known and warned before its approval.

Finally, we will refer to perspectives on constitutional reform. It is important to keep in mind that elections for the Congress and President of the Republic will be held in 2022. This reduces legislative activity because it is replaced by political campaigning. At the time of preparing the report, the new distribution of Congress is already of public knowledge. This is the most plural and divided integration since the 1991 Constitution. This allows us to assume that the constitutional reforms will require the negotiation of various parties that won seats in parliament. The expectation is that this plural distribution contributes to increasing the effective rigidity of the Constitution and reduces unconstitutional changes.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

During 2021 (in the 2020-2021 legislature), out of 40 legislative acts bills to reform the Constitution, 38 were archived by the Congress. Most of these bills were about the constitutional regime of public servants (form of election, period, requirements for access to the position, and salary). These bills also included: electoral reform, category of Special District to Villavicencio and Puerto Colombia cities, participation in political affairs, autonomy of *el Instituto Nacional de Medicina Legal y Ciencias Forenses*, life imprisonment for femicide and for those who commit crimes against public property, fight against corruption, and elimination of the Special Jurisdiction for Peace.[1]

Before the end of 2021 (in the 2021-2022 legislature), 25 legislative acts bills were proposed. All proposals were archived by the Congress. Many of these bills referred to issues such as: the granting of District category for the city of Aracataca, the justice reform, the Congress reform; functions of political control, salary of congressmen, age to access the position, number of congress members, the bioethics and biolaw, the jurisdiction of the National Attorney General, the military criminal jurisdiction, and the recognition of country-people as subjects of rights.[2]

In consequence, in 2021, Congress approved two constitutional reforms. The Legislative Act 01 of July 14th and the Legislative Act 02 of August 25th.

Firstly, Legislative Act 01 of July 14th, 2021, was issued, which begun its process in 2020, added the Article 356 of the Constitution, establishing that the city of *Medellín* is organized as a Special District of Science,

1 Congress of the Republic of Colombia, legislative acts bills 2020-2021, available at: http://leyes.senado.gov.co/proyectos/index.php/proyectos-de-acto-legislativo/cuatrenio-2018-2022/2020-2021?limit=10&start=20

2 Congress of the Republic of Colombia, legislative acts bills 2020-2021, available at: http://leyes.senado.gov.co/proyectos/index.php/proyectos-de-acto-legislativo/cuatrenio-2018-2022/2021-2022

Technology, and Innovation, and determining that its political, administrative, and fiscal regime will be the one provided for in the Constitution and the law for other categories of districts unless the legislator regulates the matter in a special way. Likewise, this constitutional reform added the Article 328 of the Constitution, indicating that every municipality of the *Valle de Aburrá* Metropolitan Area, if deemed necessary, could access benefits of the Special District of Science, Technology, and Innovation of *Medellín*, as per the law that regulates it.

The statement of reasons for the legislative act bill pointed out that *Medellín* has been consolidating as an epicenter of science, technology, and innovation in the national and Latin American contexts. In this way, the administrations of the city paired with academy, business and social sectors have traced a route that has allowed the capital of *Antioquia* to position itself as a benchmark in the development of artificial intelligence, internet, new technologies, science, and innovation.[3]

On this point, Article 286 of the Constitution emphasizes and regulates the figure of territorial decentralization and the districts as territorial entities, which play a determining role in regional growth and development. This is a clause that was asleep. However, during 2021 it had a reactivation because several municipalities tried (unsuccessfully) to adopt the form of districts (i.e. Villavicencio, Puerto Colombia and Aracataca).

Secondly, there is the Legislative Act 02 of August 25th, 2021, which created 16 Special Transitory Districts for Peace in the House of Representatives for the periods 2022-2026 and 2026-2030. With this legislative act, point 2.3.6 of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, signed between the Government of Colombia and the FARC-EP (hereinafter FA) was fulfilled by the Congress. In the statement of reasons for the project, it was argued that this constitutional reform was an affirmative action for the inhabitants of the territories that had suffered the effects of war and the state abandonment more severely. The aim is to ensure eight-year popular representation in the House of Representatives.[4]

Article 1 prescribes that the members of the transitory districts for peace will be elected one for each district, the seat will be assigned by the Congress to the candidate with the highest number of votes, and the lists must be drawn up considering the principle of gender equality. The National Decree 1207 of 2021 regulates this election. According to Professor Nohlen, the electoral district "is an area in which the votes cast by people with the right to vote constitute the basis for distribution of seats for the candidates, regardless of the votes cast in another electoral zone"[5]. The territorial division into districts is preferably used for parliamentary and congressional elections.[6] The Colombian Constitutional Court, in judgment SU-150/2021, highlighted that the Special Transitory Districts for Peace

> "is a transitional measure, of representation, of comprehensive reparation and a guarantee of non-recurrence for victims, which must operate in accordance with a special regulation. Although, our constitutional system has not been oblivious to the creation and development of special districts for peace,[7] the great difference with other special districts is that these, for the first time, focus on victims and on the importance to give them a voice that represents them, and that can watch over their interests in the body that par excellence represents the people, seeking, among others, that they participate in the implementation process of the Agreement, established in this document in an initial term period of 10 years, but whose goal is especially the three presidential terms following the signing of the FA (...)"[8].

Now, the regulation on this matter (the Special Transitory Districts for Peace in the House of Representatives for victims of the Colombian Armed Conflict) began in 2017 with the legislative act bill 017 of 2017 (Chamber) and 05 of 2017 (Senate), in the context of the Special Legislative Procedure for Peace (Legislative Act 01 of 2016). On that occasion, the Board of Directors of the Senate declared the project not approved because it considered that the absolute majority necessary for its approval was constituted by 52 votes in favor and not the 50 that the project obtained.

However, the Colombian Constitutional Court (Sentence SU-150/2021)[9] resolved a *tutela* action filed by a senator against the Board of Directors of the Senate. The court protected the fundamental right to due process in the legislative process and the rights to comprehensive reparation, equality, and political participation of victims of the armed conflict. Consequently, it considered the legislative act approved, and ordered its publication by the President.

The Constitutional Court pointed out that the plenary session of the Senate approved the legislative act with the required majority. It argued that the seats that could not be replaced should be discounted, given that although at the time of the events the Senate was made up of 102 senators, three of them had been suspended from their investiture by sanctioning that they were not susceptible to replacement (figure known as the empty chair). Therefore, the composition of the Senate changed, and majorities were to be calculated on a total of 99 senators. Consequently, the 50 affirmative votes that the legislative act bill obtained constituted a sufficient majority for its approval.[10]

This legislative act constitutes the last constitutional reform for the implementation process of the FA. The reform contributed to consolidating one of the objectives of the 1991 Constituent Assembly when creating the Constitution: that peace be a primary objective within the political organization.[11]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The most significant reform was the Legislative Act 01 of 2020, modified by Article 34 of the Constitution[12], establishing the reviewable life

3 Congress of the Republic of Colombia. Gazette 577, Friday, July 31st, 2020, p. 15
4 Congress of the Republic of Colombia, Gazette no. 384 of May 24, 2017, report of the paper for the first debate legislative act bill number 05 of 2017 Senate.
5 Dieter Nohlen. *Sistemas electorales del mundo*, Madrid, Centro de Estudios Constitucionales, 1981, p. 106.
6 Jean Marie Cotteret and Claude Emeri. *Los sistemas electorales*, Barcelona, Oikos-Tau *Ediciones*, 1937, p. 36.
7 Transitory Article 12 of the 1991 Constitution sought that guerrilla groups linked to a peace process and committed to laying down arms could have representation in the Congress of the Republic, generating guarantees of political participation. For this reason, powers were granted to the Government for making Special Districts for Peace. (...)
8 Colombian Constitutional Court. Judgment SU-150/2021.
9 Colombian Constitutional Court. Judgment SU-150/2021.
10 Colombian Constitutional Court. Judgment SU-150/2021.
11 National Constituent Assembly of 1991. Constituents Germán Rojas Niño and Angelino Garzón, March 21, 1991, Gazette n. º25, 57.
12 Article 34. "Exile and confiscation penalties are prohibited. However, by court

imprisonment sentence for children and adolescents' rapists (NNA). The Legislative Act 01 of 2020 abolished the prohibition of life sentences in Colombia. It corresponds to an amendment as it is a legislative act, which is a Constitutional reform mechanism under the Congress' jurisdiction as its capacity of a derivative constituent power[13], and it seeks to strengthen the penalties of those who commit crimes against children and adolescents' life and integrity. This amendment identifies the derivative constituent power, legitimized to implement life imprisonment for those who commit the crimes mentioned before. The demand for unconstitutionality considers that it transgresses formal and material aspects of the Constitution. Procedural defects were invoked in the preparation of the legislative act, as well as the excess of Congress's powers.

Sentence C-294 of 2021 studied the lawsuit filed against the Legislative Act 01 of 2020. The plaintiffs alleged that the procedural defect ignored the democratic principle. The Plenary Chamber considered that there was an irregularity in the decision to flatly reject the challenge made to the congressmen, since the Congressman's Ethics and Statute Commission did not hear or resolve the request as the law requires. However, this irregularity does not affect the validity of processing the Constitutional Reform project.

For the plaintiffs, the derived constituent exceeded its competence since it replaced an axial axis of the Political Chart. Indeed, Article 34 of the Constitution included the sentence of life imprisonment with the possibility of being reviewed by the Commission of Crimes against children and adolescents' life and sexual integrity. Regarding the *constitutional replacement test*, the plaintiffs argued that there was an excess of the Congress´s competence as a derived constituent, violating the Social State an excess Congresses' competence as a derived constituent, violating the Social State of law clause and human dignity, ignoring the resocialization policy the government should have for those who pay custodial sentences.

Additionally, life sentences do not resocialize and violate human dignity. Moreover, studies realized that a person returning from prison becomes more introverted, affecting an individual's morale and resocialization, in addition to prisons' overcrowding, health, and food system conditions which prisoners endure. Due to the foregoing, the plaintiffs affirmed that this Legislative Act replaced the Social State of Law model and the duty to protect human rights. The Prison Group (plaintiffs) concluded that this Constitutional Reform excludes any encouragement or incentive to return to life in society, and the review of the sentence 25 years later is an excessive term responding to irreparable damage.

After analyzing the charges filed against Article 34, the Court found that in Colombia, there is no life imprisonment sentence. Therefore, accepting this type of sentence in the Constitutional Legal System constitutes a setback in terms of humanization of penalties in criminal policy, and the guarantee of resocialization of convicted persons. The Court also concluded that the Congress transgressed its power to reform by including the reviewable life imprisonment sentence in Article 34 of the Constitution since it affected a defining axis of the Chart, such as the social and democratic state of law founded on human dignity that replaced the Constitution. Thus, the unconstitutionality of the Legislative Act was finally declared.

Sentence C-327 of 2021 studied three lawsuits filed against the same legislative act. In this case, the Court stated that there is *res judicata* and *absolute res judicata*, because the debate on the constitutionality of this norm was exhausted.

Sentence C-294 of 2021 establishes the reviewable life imprisonment sentence enshrined in the above-mentioned legislative act. It is a mechanism seeking to protect the rights of children and adolescents (NNA) victims of homicide and rape. The reform was based on the content of Article 44 of the Constitution when considering the child's best interests, preserving him/her from abuse to guarantee physical, psychological, intellectual, and moral development, and the correct evolution of his/her personality. Moreover, this reform was looking to protect the vulnerability of children, a duty of special protection[14]. Although children and adolescents' helplessness and vulnerability merit a criminal policy to protect them, the Court considered that the sentence of life imprisonment should be reviewed after 25 years and disregarded human dignity as a bastion of the Social State of Law.

Thus, the reviewable life imprisonment sentence is not an ideal measure to combat violent and sexual crimes against children and adolescents, but it could be a greater risk according to the Court.

A. THE ESSENTIAL PILLARS OF THE CONSTITUTION

This reform created serious questions about the constitutional replacement doctrine. Indeed, the essential pillars of the Constitution are indeterminate concepts, refined by Constitutional Jurisprudence. It understands that unconstitutionality cannot be limited to a single article. The transversal nature of the essential principles not only limits the Congress's power to reform but also encompasses a series of constitutional articles that generate sub-principles scattered throughout the Constitution. Therefore, each replacement trial must be made in a particular way, and although Congress can amend the Constitution, this fact does not allow to replace, repeal, and suppress the Constitution[15].

B. THE CONSTITUTIONAL REPLACEMENT DOCTRINE

Constitutional Jurisprudence has indicated that despite the fact that the Constitution does not contain stony or immovable clauses, it has "axial and identity principles that, if were to be reformulated, would affect and would turn the identity of the Constitution into a different text."[16]

The reform of the Constitution is a fact that although enshrined in Article 374 of the Constitution has not been fully delimited. Therefore, the Court's jurisprudence mentions reform when it refers to the

ruling, ownership of property acquired through illicit enrichment shall be declared extinguished, to the detriment of the Public Treasury or with serious deterioration of social morality. Exceptionally, when a child or adolescent is the victim of intentional homicide, carnal access that implies violence or made unable to resist or unable to resist, a penalty of life imprisonment may be imposed. Any sentence of life imprisonment will have automatic control before the hierarchical superior. In any case, the penalty must be reviewed within a period of not less than twenty-five (25) years, to assess the resocialization of the convicted person. || TRANSITORY PARAGRAPH. The National Government will have one (1) year from the date of the legislative act promulgation to file to the Congress the bill that regulates life imprisonment."

13 "The Political Constitution may be amended by Congress, by a Constituent Assembly, or by the people through a referendum."

14 Colombian Constitutional Court. Judgment C-318/2003.

15 Colombian Constitutional Court. Judgment C-630/2017.

16 Colombian Constitutional Court. Judgment C-579/2013.

immediate modification of Constitutional texts. Mutation refers to a transformation in the configuration of political power *without* it being recorded in the Constitutional text. The destruction, "(...) occurs when the existing Constitution is suppressed, and this suppression comes with the constituent power on which the Chart was based[17]." When the Constitution is abolished, legal continuity is broken, and the constituent power adopts a new Constitution.

Therefore, substitution consists of replacing the Constitution – or one of its defining axes – with a different constitutional model in the way of the reform's power.

C. THE TRIAL OF SUBSTITUTION AGAINST THE CLAUSE OF THE SOCIAL STATE OF LAW BASED ON HUMAN DIGNITY AS THE DEFINING AXIS OF THE CONSTITUTION OF 1991

The Colombian Constitution is conceived on a series of principles and rights inscribed in the on it part. Therefore, Article 1 of the Political Constitution of 1991 recognizes Colombia as a Social State of Law founded on respect for human dignity, seeking to perpetrate social justice and human dignity through the subjection of the authorities, to the principles, rights, and social duties of Constitutional order. The model of Social and Democratic State of Law is an essential and identity axis of the Political Chart. The Court has recognized the model as a pivotal to ensure the enjoyment and exercise of fundamental rights in the Constitution[18].

The role of the Constitutional Court is to preserve the axial axes of the Constitution of 1991, and specifically, the Social State of Law founded on human dignity. Therefore, the other public powers, including Congress, cannot make any provision that violates human dignity without distinction.

Based on this aspect, the principle of forms instrumentality alludes to may be a procedural defect in the process of formation of the legislative act. The Constitutional judge must verify that it is a necessary requirement for the fulfillment of the democratic principle, or the principle of democratic deliberation, generating a procedural defect and the validity of the legislative act[19].

In the case of Legislative Act 01, of 2021, the importance of the Ethics Commissions of Congress is confirmed as an internal control and surveillance body for its proper functioning, and transparency in the process of political deliberation. Thus, political or parliamentary interests needed in the political scenario and the private interests generating a conflict of interest ought to be distinguished[20].

The control of constitutionality in Colombia responds to a power against the majority that materializes because of a lack of legislative precision. We are witnessing a deep crisis of the principle of representation, and the scenario of Colombian constitutionalism responds to a transforming course of events where judges intervene to materialize Constitutions. This fact responds to the *machine room of Latin American transformative*[21] constitutionalism, where citizens have claimed their rights through different judicial mechanisms such as "*tutela action*" or abstract control of constitutionality demanding from the public power the concession of the principles enshrined in the Constitution[22].

IV. LOOKING AHEAD

Like every year, it is interesting to analyze the intervention of the Constitutional Court regarding the constitutional reforms approved. One of the fundamental pillars of the Constitution is the autonomy of territorial entities. For this reason, constitutional changes that modify the category of municipalities to that of districts (i.e. Medellín) can call forth the Constitutional Court's intervention. The objective is not only a formal change of name, but that the districts assume greater powers, can provide specific services, and materialize local self-government. The Constitutional Court has been a guarantee of municipal autonomy in the context of the tension between the unitary State and decentralization. Now the court must give content to the category of districts so that the promise of autonomy occurs.

Likewise, the implementation of the peace agreement keeps some social disagreements alive. So, one could expect a claim of unconstitutionality against constitutional reform 02/2021, where 16 special districts of peace were created in the 1991 Constitution. In such a case, the Constitutional Court will grant it significant weight to peace because this is a foundational pillar of the Constitution. Furthermore, peace is a value, a principle, a right and a duty. This has been maintained by the Constitutional Court in Judgments C-579/2013[23], C-699/2016,[24] C-332/2017[25], C-630/2017[26], C-674/2017[27], C-027/2018[28], and C-020/2018[29].

It is also important to note that these spaces for the parliamentary representation of victims go beyond the scheme of representation of groups towards the representation of interests. The objective is that the public policies that are specified in the laws reflect differential approaches to the protection of victims of the armed conflict. These victims have been an insular or discreet minority now reaching Congress through targeted affirmative action. Although this is a temporary measure, the goal is for there to be a phenomenon of empowerment that allows victims to maintain representation after the year 2030. Even more importantly, it is necessary that the measures that are approved during the two periods in which the victims will have affirmative action in order to qualify the deliberation that occurs within parliament.

17 Colombian Constitutional Court. Judgment C-579/2013.
18 Colombian Constitutional Court. Judgment C-288/2012.
19 Colombian Constitutional Court. Judgment C-294/2021.
20 Colombian Constitutional Court. Judgment C-011/1997.

21 Jorge Ernesto Roa Roa. "La ciudadanía dentro de la sala de máquinas del constitucionalismo transformador latinoamericano". *Revista Derecho del Estado*, Universidad Externado de Colombia. nº 49, May-August, 2021 pp. 35-58. doi: https://doi-org.ez.urosario.edu.co/10.18601/01229893.n49.04
22 Jorge Ernesto Roa Roa. "La ciudadanía dentro de la sala de máquinas del constitucionalismo transformador latinoamericano". *Revista Derecho del Estado*, Universidad Externado de Colombia. nº 49, May-August, 2021 pp. 35-58. doi: https://doi-org.ez.urosario.edu.co/10.18601/01229893.n49.04
23 Colombian Constitutional Court. Judgment C-579/2013.
24 Colombian Constitutional Court. Judgment C-699/2016.
25 Colombian Constitutional Court. Judgment C-332/2017.
26 Colombian Constitutional Court. Judgment C-630/2017.
27 Colombian Constitutional Court. Judgment C-674/2017.
28 Colombian Constitutional Court. Judgment C-027/2018.
29 Colombian Constitutional Court. Judgment C-027/2018.

The Republic of Croatia

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I. INTRODUCTION

Citizen initiated constitutional referendums have been the highlight of the attempts to change the Croatian constitution in the past year. This method of amendment, known as the "constitutional citizens' initiative" in domestic parlance, is not entirely novel. Since its introduction in 2000, there were several attempts to amend the constitution through this procedure. It is only one such case that resulted in a referendum, the 2013 constitutional amendment introducing the definition of marriage into the Constitution.[1] Other initiatives failed either because of a lack of voters' support or because their content was declared unconstitutional. Nevertheless, in 2021 two new constitutional citizen initiatives were attempted. The first was related to the accession of the Republic of Croatia to the eurozone. The second emerged from the crisis caused by the coronavirus disease and aimed at scrutinizing the pandemic measures taken by the executive. In this report we will address both constitutional initiatives. In the first part of this Report, we will briefly present their most significant elements and show what results they have achieved thus far. The second part of this Report will discuss both citizens' initiatives in light of the judicial review of constitutional amendments in Croatian law. Finally, the third part of the Report will highlight the need for a more robust process of constitutional reform in Croatia.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

As noted earlier, the first attempted constitutional amendment was related to the accession of the Republic of Croatia to the Eurozone. This initiative was the result of citizens' scepticism towards the change of currency and fears concerning the impact this may have on their livelihood.[2] The organizers of the initiative, a group of right-wing political parties, currently a part of the opposition in the Parliament, collected signatures for the referendum in the autumn of 2021. Once held, the referendum would amend the Constitution so that it provides that the official currency of the Republic of Croatia is the Croatian Kuna (HRK) and that the decision to change the currency in the Republic of Croatia can only be made in a referendum. In order to hold the referendum, it was necessary to collect at least 10% valid signatures from the total number of voters within 15 days.[3] According to the Decision of the Ministry of Justice and Public Administration issued on October 24 2021, 10% of valid signatures out of the total number of voters on October 24 amounted to 368,867 signatures.[4] However, this initiative did not collect the required number of valid signatures and therefore no constitutional referendum was held.

The other attempt at constitutional reform happened against the backdrop of a prolonged controversy related to the coronavirus pandemic. On the one hand, the pandemic response triggered a substantial dissatisfaction in the citizenry, as the enforcement of the measures appeared to be at times arbitrary and selective. Secondly, the Government and the Civil Protection Headquarters as its specialized emergency institution adopted the measures without any significant oversight of the Parliament. The Constitutional Court appeared to be lenient and did not strike down the large majority of the measures adopted.[5] One of the parliamentary parties in the opposition argued that the referendum is the only remaining remedy. It thus organized two citizens' initiatives. One was directed at the Constitution and the other at the legislation empowering the Civil Protection Headquarters to direct the pandemic response, namely The Law on Protection of the Population Against Infectious Diseases.[6] The legislative initiative had three aims. First, it sought to provide the Croatian Parliament with exclusive jurisdiction to adopt all safety measures required to prevent the spread of infectious diseases that would restrict certain rights and freedoms

1 The Article 62 of the Croatian Constitution now includes the following provision: "Marriage is a union of a man and a woman". See the Constitution of the Republic of Croatia, Official Gazette 56/90, 135/97, 8/98 [consolidated text], 113/00, 124/00 [consolidated text], 28/01, 41/01 [consolidated text], 55/01 [correction], 76/10, 85/10 [consolidated text]) and the Amendment to the Constitution of the Republic of Croatia (ballot initiative), Official Gazette No. 5/2014, Decision of the Constitutional Court of the Republic of Croatia No. SuP-O-1/2014 (hereinafter, the Croatian Constitution).

2 Positive and negative effects of adopting euro in several European countries are explained in: Witold Gadomski, 'The Pros and Cons of the Eurozone' (*Obserwatorfinansowsky.pl*, 2019) <https://www.obserwatorfinansowy.pl/in-english/the-pros-and-cons-of-the-eurozone/> accessed 14 May 2022; 'Strategy for the Adoption of the Euro in the Republic of Croatia' (*Webpage of the Croatian National Bank*, 2018) <https://euro.hnb.hr/documents/2070751/2104255/e-strategy-for-the-adoption-of-the-euroin-Cro.pdf/9e02b33f-665a-46a9-a1b6-ac63f9af3c95> accessed 14 May 2022.

3 See the Croatian Constitution, Art. 87 and the Law on Referendum and other Means of Direct Participation in Administration of State Powers and Local and Regional Self-Government, Official Gazette 33/1996, 92/2001, 44/2006, 58/2006, 69/2007, 38/2009, 100/2016, 73/2017, Art. 8b.

4 Decision of the Ministry of Justice and Public Administration, Official Gazette 115/2021.

5 Decision of the Constitutional Court U-II-5571/2021, U-II-5744/2021, U-II-5784/2021, U-II-7007/2021 (2022) <https://sljeme.usud.hr/Usud/Praksaw.nsf/C12570D30061CE54C12587B300435CAB/%24FILE/U-II-5571-2021%20i%20dr.pdf> accessed 15 May 15 2022; Decision of the Constitutional Court U-II-5417/2021 and others (2022) <https://sljeme.usud.hr/Usud/Praksaw.nsf/C12570D30061CE54C-12587B30045035E/%24FILE/U-II-5417-2021%20i%20dr.pdf > accessed 15 May 2022.

6 Official Gazette 79/2007, 113/2008, 43/2009, 130/2017, 114/2018, 47/2020, 134/2020, 143/2021.

guaranteed by the Constitution. Secondly, the Parliament would be obligated to ratify all decisions already enacted by the Civil Protection Headquarters. Finally, the legislative initiative would repeal the mandatory Covid tests for public sector employees and officials, as well as rescind the Covid certificates made mandatory for the public sector.[7] By contrast, the constitutional citizens' initiative was apparently less ambitious and had as its aim the addition of two new words, "pandemic" and "epidemic" as two additional cases in which fundamental rights and freedoms may require exceptional restrictions, as regulated by Article 17, paragraph 1 of the Croatian Constitution.[8]

The collection of signatures for these two citizen initiatives lasted from 4 to 18 December 2021. According to the Decision of the Ministry of Justice and Public Administration issued on December 4, 2021, 10% of valid signatures out of the total number of voters on December 4 amounted to 368,446 signatures.[9] The procedure of verifying valid signatures was conducted by the Ministry of Justice and Administration. In the process, it was determined that a total of 372,635 valid signatures for the legislative referendum and a total of 370,310 valid signatures for the constitutional referendum were collected.[10] This meant that both initiatives have garnered sufficient support to move forward. However, Croatian Parliament, in accordance with Article 95 of The Constitutional Act on the Constitutional Court of the Republic of Croatia[11], sent a request to Constitutional Court to establish whether the questions of the both citizen initiatives were in accordance with the Constitution.[12] The Constitutional Court found that the questions of both citizens initiatives were unconstitutional, thus blocking both referendums.[13] While the full decision of the Court has yet to be released at the time of writing, the most salient points of the Court's interpretation have been made public. It is to these that we will now turn.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Two contextual elements are important to understand the Constitutional Court's decision to declare unconstitutional an amendment adding two words to an existing constitutional provision. One is immediate to the provision itself. Under Article 17, the Croatian Parliament may "curtail" some of the rights and freedoms protected by the Constitution in several scenarios: "during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster". Article 17 obligates the parliament to decide on such curtailments by a two-thirds majority. This rule departs from the "regular" rules of limiting fundamental rights, codified in the Article 16 of the Constitution. While such restrictions must in all cases be proportionate, limiting fundamental rights outside of states of emergency does not require a two-thirds majority. One of the problematic features of the Croatian Covid response was that the parliamentary majority acted as if coronavirus outbreak did not amount to a "natural disaster". The legislator adopted the relevant amendments to the legislation in accordance with Article 16, avoiding the requirement of a two-thirds majority. The Constitutional Court would later confirm the constitutionality of this choice, controversially finding that the parliament is completely free to avoid the two-thirds majority requirement.[14] The constitutional citizens' initiative of 2022 responded to this by the attempt to introduce "pandemic" and "epidemic" as two additional exceptional scenarios, alongside "natural disasters", in which a two-thirds majority is required. The underlying idea was that the amendment would force the parliament to turn to Article 17, especially with the legislative initiative backing it up. As outlined earlier, this legislative initiative would change the applicable law so that the Parliament is obligated to confirm each of the pandemic measures already enacted and to enact all such future measures directly.

The second contextual element relevant to this report is the Court's power to review the constitutionality of constitutional amendments. It was long held that the Constitution authorises the Court to only control the constitutionality of the procedure by which a constitutional amendment is adopted.[15] In fact, Jasna Omejec, who would later preside over the Court that "discovered" the broader power to strike down unconstitutional amendments, at one point argued that judicial review of a constitutional amendment's content was not "inherent to constitutional traditions" relevant to Croatia.[16] This reading interpreted the concept of substantively unconstitutional constitutional amendments as inimical to the Croatian constitutional order, almost as if it were a dismemberment of the Constitution.

In 2013, before the referendum on the definition of marriage was held, the Court published a document with an innocuous title: A communication on the citizen initiated constitutional referendum on the definition of marriage.[17] As the Parliament did not request the Court to decide on the constitutionality of a heteronormative definition of marriage but instead authorised the referendum with a two-thirds majority,[18] the Court's response was not in the form of a judicial review. Nevertheless, as a reminder that one should not judge a book by its covers, the Communication contained two surprises. One is the controversial finding that defining marriage as a "union of one man and one woman" was not contrary to the Constitution. The other is the ascription of the power to determine the constitutionality of all future constitutional amendments. Drawing from its power to oversee the legality and constitutionality of referendums

7 'Decision of the Organizational Committee of the Citizen Initiative "Dosta je stožerokracije" of November 25' (*Webpage of the Croatian Elections Commission*, 2021) <https://www.izbori.hr/site/UserDocsImages/2021/Referendumske inicijative/20211203133510.pdf>.

8 'Decision of the Organizational Committee of the Citizen Initiative "Odlučujmo Zajedno" of November 24' (*Webpage of the Croatian Elections Commission*, 2021) <https://www.izbori.hr/site/UserDocsImages/2021/Referendumske inicijative/20211203133503.pdf>.

9 Decision of the Ministry of Justice and Public Administration, Official Gazette 132/2021.

10 'Dovršen postupak provjere broja i vjerodostojnosti prikupljenih potpisa birača građanske inicijative „Odlučujmo zajedno"' (*Webpage of the Croatian ministry of justice and administration*, 2022) <https://mpu.gov.hr/vijesti/dovrsen-postupak-provjere-broja-i-vjerodostojnosti-prikupljenih-potpisa-biraca-gradjanske-inicijative-odlucujmo-zajedno/25994>.

11 The Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette 99/1999, 29/2002, 49/2002.

12 Decision on the Request for calling a referendum of the Citizen initiative "Odlučujmo zajedno!", Official Gazette 45/2022; Decision on the Request for calling a referendum of the citizen initiative "Dosta je stožerokracije", Official Gazette 45/2022.

13 'Press Release of the Constitutional Court of the Republic of Croatia of 16 May 2022' (2022) <https://www.usud.hr/sites/default/files/dokumenti/Priopcenje_za_javnost_sa_sjednice_Ustavnog_suda_RH_od_16._svibnja_2022.pdf> accessed 17 May 2022.

14 Decision of the Constitutional Court of Croatia in case no. U-I-1372/2020 and ors. of 14 September 2020, Official Gazette Nr. 105/2020-1971.

15 Đorđe Gardašević, 'Neustavni ustavni amandmani i Ustavni sud Republike Hrvatske', *Konstitucionalizacija demokratske politike* (Hrvatska akademija znanosti i umjetnosti 2014) 90.

16 Jasna Omejec, 'Kontrola ustavnosti ustavnih normi (ustavnih amandmana i ustavnih zakona)' (2010) 1 Godišnjak Akademije pravnih znanosti Hrvatske 1, 25.

17 SuS-1/2013 of 14 November 2013, Official Gazette 138/2013-2966 (hereinafter: The Communication).

18 For background on this sequence of events see Đorđe Gardašević, 'Constitutional Interpretations of Direct Democracy in Croatia' (2015) 7 Iustinianus Primus Law Review 1, 24–25.

generally, the Court noted that it would intervene in all those cases where it detects such "formal or substantive unconstitutionality of the referendum question or such a serious procedural fault that threaten to violate the structural features of the Croatian constitutional state, that is, Croatia's constitutional identity".[19] While apparently restricted to constitutional amendments done through referendums, the Court's later case law would confirm that this power extends to all constitutional amendments.

Against the background of these two elements, the attempt to add two new words to the Constitution may have been politically urgent but apparently had little constitutional weight. Indeed, one could argue that an addition of "pandemic" and "epidemic" to a constitutional article does not really amount to an amendment. It does not change the powers of the legislative or the executive branches of power nor does it affect the scope of fundamental rights. Without the accompanying legislative initiative, a change in the constitutional text itself could not legally bind the Parliament to adhere to the exceptional preconditions for limiting rights guaranteed by the Constitution. Hence, the proposed change did not really clash with any explicit or implicit unamendable rule of the Constitution, nor could it dismember the Constitution in any way. Instead, it posed a different question. At issue was whether a symbolic legal effect of the amendment may be sufficient to declare it unconstitutional. This problem connects to a larger underlying issue, the role of the Croatian constitution. The idea that some constitutional amendments may be purely symbolic and as such unconstitutional suggests that the Constitution plays no role other than legally facilitating political processes already in place. An amendment that only symbolically defies these has no place in such a constitutional vision.

The Court addressed the issue in May of 2022, finding both the constitutional and the legislative citizens' initiatives unconstitutional. The Court found the legislative initiative unacceptable as it would obligate the Parliament to decide in a particular fashion. In doing so, the Court ruled, the initiative threatened to transfer powers to the legislature that are "inherent to the executive" in responding to an unforeseen outbreak.[20] While the Court apparently based this argument on a reading of the principle of separation of powers, the Court's response to the constitutional citizens' initiative was more innovative, and troublingly so. The Court found that adding two words to an existing constitutional provision was not unconstitutional in itself, because of the "neutral" legal impact of the amendment. However, the Court considered the referendum unconstitutional because it could not legally obligate the Parliament to adhere to Article 17 of the Constitution. Although this apparently means that the Court only reviewed the referendum, the Court concluded that the "constitutional amendment" in question was unconstitutional because it was "superfluous in relation to its purpose".[21]

While the Court originally rightly insisted that unconstitutionality is possible only in cases involving serious breaches of the constitutional framework, the new approach suggests that constitutional amendments may be unconstitutional because they are "superfluous". In this case, the Court located the redundancy of the amendment in the disparity between the referendum question and the explanation of the referendum's rationale provided by the organizers of the initiative. In simple terms, while the affirmative answer to the question could not legally obligate the Parliament to adopt pandemic measures with a two-thirds majority, the organizers claimed that such an obligation would arise if the referendum succeeded. As the referendum was incapable of producing this result in law, the Court found that the amendment contained in it is "superfluous" to its declared purpose. The possible political impact of the amendment, i.e., that it may force the legislature and the executive to publicly justify their refusal to adhere to Article 17 of the Constitution, was apparently not considered relevant.

The Court's reasoning contains a problematic vision of citizen's participation in referendums initiated by their vote. First, the argument that a citizens' initiative is unconstitutional because the voters were misinformed assumes that voters only had the information the organizers provided. Furthermore, it assumes that the voters have had to be aware of the intricacies of constitutional interpretation when they provided signatures for a referendum. Finally, the Court obviates the role of the referendum campaign. The campaign would allow both the supporters and the critics of the referendum to voice their vision of both the political and the legal dimensions of the constitutional amendment. The Court could have preliminarily warned that the referendum could not legally obligate the Parliament to change its interpretation of the Constitution. Indeed, a similar warning prefaced the referendum on marriage, when the Court noted that a heteronormative definition of marriage does not mean that specific *rights* pertaining to marriage may not be extended to same-sex couples.[22] In that case, the mere possibility that some or all voters may be expecting a different effect did not suffice to declare the amendment nor the referendum unconstitutional. In the case of the Covid-related constitutional amendment, however, the Court glosses over the political dimension of referendums, acting as if they were purely juridical instruments. The referendum in this guise becomes a tool for preventing a constitutional amendment and at the same time serves to extend the Court's role in reviewing the constitutionality of constitutional amendments well beyond the original ascription of this power.

The Court's reasoning is problematic because of two additional features. Firstly, the Court suggests that the constitutional amendment would not be superfluous if, instead of adding "pandemic" and "epidemic" to Article 17, it provided that the Parliament "must" rather than "may" curtail fundamental rights. Again, in an effort to extend the constitutional language to erase any political traces of a referendum, the Court uses an example of an amendment that is neither feasible nor constitutional. Limitations to fundamental rights are political and must be amenable to challenge and change. The Constitution cannot provide that the Parliament "must" restrict fundamental rights because it is incapable of defining all such situations in the abstract and any attempt to do so would restrict the space for democratic processes. Hence, if the organizers suggested such an amendment, it would most definitely be considered unconstitutional. This leaves the constitutional amendment between a rock and a hard place. If it has a legal impact, it will be unconstitutional. If it lacks a legal impact, it will be unconstitutional. Any shades in between apparently do not exist.

Secondly, the Court takes the opportunity to criticise the organizers of the referendum, noting that they have "misinterpreted" Article 17 when they suggested that an addition of two words would force the Parliament to do anything in particular. In doing so, the Court argues that only its own interpretation of the constitutional provision reflects

19 The Communication, para 5.
20 Press Release, p 4-5.
21 Press Release, p 3.
22 The Communication, para 12.

a correct meaning of the Constitution, and that the Parliament must retain the power to ignore the procedure for exceptional limitation of fundamental rights. By insisting on its earlier finding in this manner, the Court insulates the meaning of the Constitution from political contestation, leaving an essential element of the constitutional framework at the mercy of political parties that dominate the legislature.

Much hinges on whether the Court's new interpretative turn will remain restricted to referendums or expand to constitutional amendments generally. Even if it this reasoning applies only to forms of direct democracy, its fuzzy nature lends itself to declaring all referendums unconstitutional. The "redundancy" and "necessity" of constitutional amendments are quintessential political issues. Without any identifiable negative legal impact on the constitutional framework, it may prove difficult if not impossible to restrain their reach. It is in any case certain that this interpretation enables an unpredictable restriction of any future bottom-up attempt at amending the Croatian constitution, thus cementing the role of political majorities in the Parliament.

In the past, the Constitutional Court has played a largely counter-majoritarian role. Its main output were decisions that tempered the overreach of majorities. Nevertheless, the Court has engaged in several episodes of a more ambitious nature. In some cases, the Court acted as if it represented the voters supporting a referendum,[23] while in others it attempted to educate the public and the authorities on the importance of fundamental rights enshrined in the Constitution.[24] The recent decision of the Court apparently departs from all three roles. First, it affirms the will of the governing majority in the Parliament without any significant scrutiny. Secondly, it fails to provide sufficient weight to the will the voters expressed in supporting the citizens' initiative. Finally, by continuing to adhere to its troubling interpretation of the procedures for restricting fundamental rights as elective, the Court departs from the emphasis it had earlier placed on value-based constitutional interpretation.

There is no way of knowing with certainty how the Court would respond to the citizen-initiated referendum on the Euro. As its organizers failed to gain sufficient support among the voters, if only by a slight margin, the Parliament never asked for the Court's interpretation of the amendment's constitutionality. However, some scholars have argued that the referendum would be unconstitutional because Croatia had already acceded to the Union and the voters had decided on the Euro once they accepted EU membership in the accession referendum of 2012. Against this background, any new referendum on the topic was "belated".[25] The Court would likely adopt these responses. It is probable that it would identify the proposed amendment as an encroachment into the exclusive power of the executive and the legislature to decide on Croatia's international relations. It would also likely find that the amendment runs contrary to Croatia's obligations as a member of the Union. The idea that participatory and deliberative structures should be strengthened even if the suggested referendum itself might be unacceptable would likely fall to the wayside, overtaken by a powerful contrast between constitutionality and unconstitutionality that apparently removes all nuances of political action.

23 See, for instance, the decision of the Constitutional Court U-VIIR-1158/2015, Official Gazette 46/2015-919, para 64.

24 For example, in U-VIIR-4640/2014, Official Gazette 104/2014-2021, paras 10, 10.1 and 13.

25 Dražen Ciglenečki and Jagoda Marić, 'Ništa od izjašnjavanja o uvođenju eura: "Inicijativa desnice nema pravnu podlogu, sve je već riješeno ranijim referendumom"' (*Novi list*, 2021).

IV. LOOKING AHEAD

Croatia's constitution was never bound to a clear constitutive or foundational moment. Existing in the shadow of the Homeland War, the Constitution was from its inception more of an instrument of political expediency than a barrier to arbitrary power. While the War itself ended decades ago, it continues to be a foundational political theme in Croatia, with different events from its course consistently commemorated throughout each year. By contrast, there is no celebration of the Constitution's enactment. Indeed, last year marked thirty years since the original constitution came into force but, aside from several mostly academic events, it is only a range of controversies concerning the Constitution's enforcement that "celebrated" the occasion. The War continues to exist as an ongoing constitutional moment within which the entirety of the constitutional order is trapped.[26] The Constitution maintains an ambivalent role, declared at the same time an autonomous structure of law, an instrument of the nationalist Croatian project and a tool of elite manipulation.

At this point, it is becoming apparent that Croatia must revisit its constitution in a more robust deliberative and participatory process that would involve the electorate. Constitutional reforms have thus far remained piecemeal and have substantially responded to the problems identified by political parties in power. One significant attempt at a reform was fostered by one of the former presidents of the Republic, Josipović, but the draft of this new constitution never reached the broader public once Josipović lost the elections for his second term. With the only outlet for participatory constitutional politics being citizens' initiatives that are almost always thwarted by the Constitutional Court, citizen-initiated referendums have enabled minority right-wing parties to argue that the existing constitutional order is defunct, essentially being entirely divorced from the electorate. The current president of the Republic has even suggested that the Constitutional Court should be abolished.[27] It is thus of some urgency that "the people" stop being an abstraction locked in the Homeland War and that the Constitution be renewed. Sadly, it is doubtful that this is possible in the current (and ongoing) political climate, furthering a lasting deadlock of constitutional meaning.

V. FURTHER READING

Đorđe Gardašević, '"Business as unusual": pandemic concentration of executive powers in Croatia', Pravni zapisi, Vol. 12, No. 1/2021: 91-122.

Đorđe Gardašević, 'Popular Initiatives, Populism and the Croatian Constitutional Court' in Fruzsina Gárdos-Orosz, Zoltán Szente (eds.), Populist Challenges to Constitutional Interpretation in Europe and Beyond (Routledge 2021): 109-125.

Matija Miloš, 'Reimagining Direct Democracy as an Intersection of Different Forms of Representation' Pravni zapisi, Vol. 11, No. 1/2020: 69-92.

26 Dejan Jović, *Rat i mit. Politika identiteta u suvremenoj Hrvatskoj* (Fraktura 2017).

27 'PROTUUDAR NA USTAVNI SUD: Nakon izjave Predsjednika, Most pokreće referendumsku inicijativu zZa ukidanje Ustavnog suda' (*Nacional.hr*, 2022) <https://www.nacional.hr/protuudar-na-ustavni-sud-nakon-izjave-predsjednika-most-pokrece-referendumsku-inicijativu-za-ukidanje-ustavnog-suda/> accessed 25 May 2022.

Cuba

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I. INTRODUCTION

The year 2021 was characterized in Cuba by the implementation of a profound procedural reform, derived from the constitutional reform of 2019. The recognition of several constitutional rights related to access to justice by citizens, due process and legal responsibility of state officials led to the adoption of new procedural acts and an act on the organization of the judicial system. These covered criminal, civil, family, commercial, administrative, labor, and economic Law, as well as the organization and operation of courts. Another important procedural act is the one that protects constitutional rights, which was adopted in early 2022.

On the other hand, a group of activists tried to carry out peaceful demonstrations in several Cuban cities in November 2021. To do so, they requested authorizations from the local authorities of several municipalities in the country, which were denied. Both the citizens' request and the authorities' response were based on constitutional precepts. The former based their request on the constitutional right to peaceful demonstration, while the authorities refused to hold the march, arguing that it violated the preservation of public order.

I will reflect on these aspects in this report. First, I will explain the general characteristics of the procedural reform and the legislation adopted as part of it. Then, I will refer to the act that implements the process of protection of constitutional rights, because although it is a legislation of 2022, it is linked to the procedural reform. Thirdly, I will refer to the attempted peaceful demonstration that was attempted in November 2021. Finally, I will present some ideas about the next laws that will be adopted in Cuba to complement the Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. THE PROCEDURAL REFORM OF 2021

As I explained in the preceding section, the main legal event that occurred in Cuba in 2021 was the procedural reform. Note that this did not mean a modification of the constitutional text approved in 2019, but rather focused on protecting, at least formally, several constitutional rights. For example, article 94 of the Constitution recognizes the right to due process in the judicial and administrative spheres, and article 95 of the Constitution establishes special guarantees of due process in terms of criminal proceedings. Another right recognized in the Constitution that required legal protection from procedural law was established in article 98 of this normative provision. Said article establishes the patrimonial responsibility of the administration, indicating that any person who suffers damage or harm unduly caused by directors, officials, and employees of the state due to the exercise of the functions of their positions, has the right to claim and obtain the corresponding reparation or compensation in the manner established by act.[1]

In addition, article 99 of the Constitution establishes that the person whose rights enshrined in the Constitution are violated and, as a consequence, suffers damage or harm by state bodies, their directors, officials or employees, due to the undue action or omission of their functions, as well as by individuals or by non-state entities, has the right to claim before the courts the restitution of rights and obtain, in accordance with the law, the corresponding reparation or compensation. The article itself states that a special act must define those rights protected by this guarantee, and the preferential, expeditious and concentrated procedure for its fulfillment.[2] Finally, I must mention that in the tenth transitory provision of the Cuban Constitution, the Governing Council of the People's Supreme Court is entrusted, within eighteen months of the entry into force of the Constitution, to present to the National Assembly of People's Power (NAPP) the draft of the new Act of the Popular Courts, and the proposals for modifications that correspond to the Act of Criminal Procedure and the Law of Civil, Administrative, Labor and Economic Procedure.[3]

The procedural reform was based on the adoption of procedural acts for the criminal and administrative spheres, as well as a Code of Procedures that regulates civil, family, commercial, labor, social security matters and the execution of judicial decisions issued in related processes with these subjects. In the case of Act No. 143, Criminal Procedure Act, it regulates novel aspects for the Cuban context. For example, an article is included that refers to the constitution as a

1 See Andry Matilla, 'La responsabilidad patrimonial del Estado: una primera lectura general del artículo 98 del texto constitucional cubano de 2019', [2020] <https://www.researchgate.net/publication/344442675_La_responsabilidad_patrimonial_del_Estado_una_primera_lectura_general_del_artIculo_98_del_texto_constitucional_cubano_de_2019> accessed 11 June 2022.

2 See Martha Prieto, 'Algunas consideraciones sobre el artículo 99 constitucional y el proceso garantista de los derechos' [2022] <https://revista.unjc.cu/index.php/derecho/article/view/109/181> accessed 11 June 2022.

3 <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2019-ex5_0.pdf> accessed 12 June 2022.

formal source for the regulation of the criminal process (article 1), the criminal process is defined (article 2.1), and it is specifically established that no one can be subjected to forced disappearance, torture or cruel, inhuman or degrading treatment or punishment (article 4.1). In addition, access to criminal justice is recognized for people who have been victims or harmed by a crime (article 138). In the criminal procedural act, they are defined as the natural or legal person who, as a result of a crime, has suffered physical, mental, moral or patrimonial damage (article 139).[4]

This new criminal procedural legislation regulates four types of basic procedures. The first of these is the ordinary procedure, with which criminal proceedings filed for crimes with a sanction of more than three years of imprisonment or a fine of more than one thousand quotas, whose perpetrator is known and has been captured (article 167.1). In addition, a procedure is included for crimes whose maximum penalty is up to three years of imprisonment or fines of up to one thousand quotas or both (articles 394-400), and another called Abbreviated Attestation for the processing of crimes punishable by up to one year of imprisonment freedom or a fine of three hundred quotas or both, provided that the act is flagrant, the intervention of the accused is evident or he has confessed, and the characteristics and circumstances so advise (articles 401-406). Finally, it is worth mentioning the procedure for the imposition of therapeutic measures, which constitute post-criminal security measures, regulated in articles 678 to 699 of Act No. 143. To these procedures are added others of a special type, related to the requirement of criminal responsibility to the main figures of the state, the government, and the Communist Party of Cuba (CPC), the judges and prosecutors, as well as for the cases in which the Chamber of Crimes against State Security of the People's Supreme Court claims the knowledge of the causes for crimes against state security and terrorism (articles 658-677).

For its part, Act No. 142, Administrative Process Act, also establishes some novel issues. In the article 4.1 is established that the administrative procedural rules are interpreted in such a way that they favor the effective judicial protection of the rights and legitimate interests of the people and the pronouncements on the merits of the claims made. In this sense, this act complements the content of articles 92, 98 and 99 of the 2019 Constitution. In addition, the administrative responsibility of bodies that are part of the public administration and of others that, even if they are not, may be recognized incur administrative responsibility, as is the case of the NAPP or the presidency of the republic (articles 7 and 8). Another novel aspect is that claims against administrative omissions are recognized, which allows citizens to act against omissions by the public administration or other defendant entities (articles 49 and 50). Finally, it highlights the supplementary character that is granted in this act to the Code of Processes and the Act of Courts of Justice.[5]

In the case of Act No. 141, Code of Procedures, the recognition of several formal sources for the processing and decision of cases submitted to the courts of civil jurisdiction stands out, including the Constitution, international treaties in force and the general principles of Law and others established in the code itself (article 4.1). Another important aspect is that the courts are empowered to take into account, in addition, the judicial resolutions issued in the matters of the matters regulated by the Code of Processes, containing reiterated criteria issued by the rooms of the People's Supreme Court, those that do not have binding force, but can be invoked by the parties in support of their claims (article 4.2). This element is very important, because in Cuba jurisprudence is not recognized as a formal source of Law. However, in this code the courts are empowered to consider those criteria of the chambers of the country's highest body of justice, which are alleged by the parties in a judicial process. Instead, article 5 of this code establishes as a rule of interpretation that the norms contained therein are interpreted in accordance with the provisions of the Constitution, depending on whether effective judicial protection and due process guarantees prevail. Thus, articles 92, 94, 95, 98 and 99 of the Constitution are complemented. In this sense, rules are established to resolve potential conflicts of attributions between the judicial and administrative authorities (articles 37-40).[6]

On the other hand, Act No. 140, Act of Courts of Justice, establishes the organization of the Cuban judicial structure. The recognition that the judicial function implies an exercise of authority and, in turn, the provision of a public service (article 4.1) stands out. The consideration of the judicial function as a public service is in accordance with the rights recognized in articles 92, 98 and 99 of the Constitution. In addition, it is indicated that the courts recognize the alternative methods of conflict resolution and use conciliatory formulas to resolve the matters that are attributed to them, according to their nature, in accordance with the constitution and the normative provisions established for that purpose. This precept is related to the right recognized in article 93 of the Constitution, relative to the fact that people can resolve their controversies using alternative methods of conflict resolution, in accordance with the constitution and the legal norms established for such purposes. In accordance with articles 454.2 and 609.1 subsection b) of the Code of Procedures, the agreements derived from the alternative methods of conflict resolution are comparable before the courts and are executed in the same way as the judicial resolutions, and said agreements are part of voluntary jurisdiction.[7]

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

Finally, an important novelty recognized in Act No. 140 is the creation of a Constitutional Rights Amparo Chamber within the People's Supreme Court. This may be chaired by the President or a Vice President of the People's Supreme Court and also made up of the presidents of the other courtrooms of that body, when the nature of the matter requires it, due to its complexity or the matter on which it falls (article 35.1 section c) and article 35. 3).

4 See Act of Criminal Procedure, Act No. 143/2021 <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o140.pdf> accessed 12 June 2022.

5 See Act of Administrative Process, Act No. 142/2021 <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-0139.pdf> accessed 12 June 2022.

6 See Code of Procedures, Act No. 141/2021 <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o138.pdf> accessed 13 June 2022.

7 See Act of Courts of Justice, Act No. 140 <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o138.pdf> accessed 13 June 2022.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. SOME CLARIFICATIONS ON THE CONTROL OF CONSTITUTIONALITY IN CUBA

Before analyzing some changes that occurred in terms of reform and constitutional control in Cuba in the year 2021, it is necessary to point out some issues in this matter. The Cuban Constitution establishes that the control of the constitutionality of the laws and other regulations is a faculty of the NAPP. Article 108, paragraph e) of the Constitution indicates that this body is responsible for exercising constitutional control over laws, decree-laws, presidential decrees, decrees, and other general dispositions, in accordance with the procedure established by law. This means that control of constitutionality is political in Cuba. In this manner, the possibility of the courts exercising the control of the constitutionality of laws and other normative provisions is excluded. In turn, this means that the laws passed by the NAPP go into effect with a vote of constitutionality. In a context such as Cuba, this has repercussions on the government relying on the NAPP to approve laws related to its interests, as happened with the procedural reform carried out in 2021.

On the other hand, the Cuban Constitution has an intangibility clause established in its article 288. This stipulates that in no case can be reform the pronouncements on the irrevocability of the socialist system established in article 4, and the prohibition to negotiate under the circumstances provided for in subparagraph a) of article 16, both of the constitution itself. Thus, unmodifiable norms are codified, so the Cuban Constitution does not admit a total reform, that is, it only allows partial reforms. In accordance with article 226 of the Constitution, this normative provision can only be reformed by the NAPP through an agreement adopted, in nominal vote, by a majority of not less than two thirds of the total number of its members. In the article 227 of the Constitution is established the subjects that have the initiative to reform the Constitution, highlighting that 50,000 citizens can promote a constitutional reform.

In addition, a special procedure is established if the reform refers to certain issues. In the article 228 of the Constitution is indicated that when the reform refers to the composition and functions of the NAPP or the Council of State, to the powers or term of office of the President of the Republic, to the rights, duties and guarantees enshrined in the constitution also requires ratification by the favorable vote of the majority of voters in a referendum called for such purposes.

This reform procedure excludes the possibility of reforming the Constitution through constitutional amendments. In such a way, the reform of Cuban Constitution is based in the integrative model. This is a method of codifying constitutional amendments in which amendments are incorporated directly into the master text of the original constitution. Changes to the original text are clearly noted, and the end result is an internal remodeling that manages to preserve the external form of the original constitution.[8]

8 See Richard Albert, *Constitutional Amendments. Making, Breaking, and Changing Constitutions* (OUP 2019) 236-238.

2. THE ACT FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS

On the other hand, and as I mentioned earlier, in accordance with the guidelines of the Act of Courts of Justice, was created a Constitutional Rights Amparo Chamber. In May 2022, the NAPP approved the Act on the Protection of Constitutional Rights, which regulates the procedure for the defense of the rights recognized in the Constitution before the aforementioned courtroom. Although this law has not yet been published in the official Cuban gazette, the preliminary draft presented by the President of the Governing Council of the People's Supreme Court before the NAPP was approved by this body without substantial changes.[9]

This law regulates the preferential, expeditious and concentrated procedure for its fulfillment for the defense of constitutional rights. Consequently, all the rights recognized in the Constitution, which do not have a means of defense in judicial proceedings on other matters (civil, family, administrative, labor, and social security, commercial and criminal) and which have been or are being violated from the entry into force of the Constitution.

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

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

Another important matter is that the declaration of unconstitutionality of acts and other legal norms, being an exclusive power of the NAPP, cannot be the object of the constitutional process. In this sense, the courts are expressly excluded from the control of the constitutionality of the acts. This derives in the existence of an exclusive political control in the matter concentrated in the NAPP. Thus, this body will

9 <https://www.tsp.gob.cu/sites/default/files/documentos/Ley%20de%20amparo%20constitucional%20%281%29%20%281%29.pdf>; See Wennys Díaz, 'Un nuevo hito: Ley del Proceso de Amparo de los Derechos Constitucionales' (*Granma*, 15 May 2022) <https://www.granma.cu/cuba/2022-05-15/aprueban-ley-que-resguarda-los-derechos-constitucionales> accessed 15 June 2022.

be judge and party in the analysis of the constitutionality of the acts it issues, so it is very possible that the draft that I have commented on will be approved, despite the shortcomings indicated. This approval may not be challenged by citizens in court.

In addition, the commented draft establishes that judicial decisions adopted in other matters cannot be claimed in the constitutional jurisdiction, since, for this, there are the corresponding resources and review procedures, in which violations of constitutional guarantees that occur during these processes. This pronouncement is contrary to one of the essential characteristics of due process in the constitutional sphere. I am referring to the opposition of the constitutional jurisdiction to material res judicata (*res iudicata*), since it can review the constitutionality of a judicial decision. In other words, in the event that a person is not satisfied with the judicial pronouncement in the face of what they consider to be a violation of their constitutional rights, they should have access to the constitutional jurisdiction.[10]

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

IV. LOOKING AHEAD

Looking to the future, there are several questions regarding the legislative implementation of the 2019 Constitution. But in this report I will expose two of them. The first is strictly legal and the second political. First, it will be important to appreciate how the legislative schedule will be implemented during the remainder of the current NAPP term. This is important because it is linked to the legal-formal protection of constitutional rights and other contents recognized in the Constitution. Second, it is possible that these changes are not linked to a liberalization of the exercise of constitutional rights, that is, they are not expected to be opposable as to the state. Therefore, all this legislative development will be linked to the strengthening of the prevailing authoritarian political regime in Cuba.

Although in article 1 of the 2019 Constitution Cuba is recognized as a socialist rule of law, the position of the authorities has been based on a positivist conception of Law. This means that the implementation of the legislative schedule has focused on developing constitutional content, but this has not ensured a broader exercise of constitutional rights and their democratization. On the contrary, the content of the acts adopted, including those approved as part of the procedural reform, do not allow the rights recognized in the Constitution to be exercised by citizens who oppose the government. The political logic on which the rule of law is being built in Cuba does not respond to a liberal conception of Law, which is why it does not allow citizens to oppose their rights against the state. For this reason, although the legal guidelines are formally established in this regard, they do not respond to the typical liberal conception of the rule of law. This will only exist for those who exercise their rights in line with the interests of the state, which reinforces the authoritarian nature of the Cuban political regime, and turns the Law into a mechanism for the preservation of this regime.

V. FURTHER READINGS

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Roberto Veiga González, "La Constitución cubana de 2019: ¿una República sin ciudadanos?", 2021, 4 (36), Revista Foro Cubano de Divulgación <https://revistas.usergioarboleda.edu.co/index.php/fc_divul/article/view/2069/1518> accessed 20 June 2022.

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

Cyprus

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I. INTRODUCTION

Cypriot constitutional law is admittedly atypical; it is an example of constitutional experimentation that has failed, yet surprisingly remains in force for decades.[1] This state of affairs has evolved as a response to dramatic political events that had, and continue to have, severe constitutional and structural implications.[2] Six decades after the collapse of 1963,[3] the extraordinary solution of the law of necessity[4] remains still in force and is the pillar of the constitutional order. Therefore, the exceptional became, in effect, the norm.

More specifically, the Constitution of the Republic of Cyprus came into force in 1960, after the island gained its independence from the UK.[5] A unitary State was formed that was designed to operate through the Greek and the Turkish communities and on the basis of the organizing principle of bi-communalism. That principle was to have application in all constitutional aspects, in conjunction with the application of a notion of checks and balances, as well as the strong presence of the principle of separation of powers. In effect, the two communities were to function as detached political entities and guarantors of their respective communal interest, while at the same time coming together at the decision-making level. The constitutionally dense concept of 'people' was omitted from the Constitution of 1960 and the declaration of the manner of expression of popular sovereignty was avoided. Instead, the organizational and functional axis was the Greek and Turkish communities.

Moreover, the composition of organs and the ability to exercise their constitutionally entrusted competences depended on the presence and participation of both communities. Following the collapse and failure of the system in December 1963, with the withdrawal of Turkish officials from State organs, the compliance with the Constitution as regards the functioning of all those organs with the inclusion of the Courts, became practically and legally impossible.

It is important to clarify that the Constitution consisted of 199 articles and three annexes, with the core of the preceding system being perpetual. The eternal clause of article 182 of the Constitution created permanency for the established system. It declared the non-amendable nature of 48 out of the 199 articles (as found in Annex III and with only article 23 relating to human rights and specifically the right to property). The eternal clause, therefore, primarily aimed at preserving the principle of bi-communalism. The perpetuation of the system was also guaranteed by three foreign powers (UK, Greece, Turkey), whereas the amendment procedure required a separate two third majority at the legislature and long communal lines. Resorting to the people was constitutionally, politically, and de facto excluded, thus when the Turkish Cypriot officials and elected representatives withdrew from the operation of the State, the Republic found itself in the eye of a perfect constitutional storm: a rigid constitutional setting depending on the participation of both communities, with one of those leaving the structure and with no room for resorting back to the people or amending the constitutional provisions. Constitutional paralysis was a fact, and the consequence were dire.

The Courts faced a real and existential constitutional dilemma with severe consequences for the maintenance of the functioning of the State. Cypriot constitutional law found itself at the point where constitutional theory, application and pragmatism become entangled in a quest to keep the State alive. This is an unenviable position and the solution adopted by the Supreme Court was the introduction of the law of necessity as the pillar upon which the State still functions to this day.

For example, the establishment of the Supreme Constitutional Court (hereafter: SCC) with one member from each community and a foreign judge presiding, was intended to establish a centralized system of constitutional review on the basis of the Kelsenian Austrian constitutional review model. The SCC had exclusive constitutional jurisdiction that included both preventive and repressive review

1 Constantinos Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas, 2015).
2 Constantinos Kombos, *The Impact of EU law on Cypriot Public Law* (Sakkoulas, 2015) pp. 7-31.
3 On the Cypriot system see Achilles C. Emilianides, *Constitutional Law in Cyprus* (Kluwer 2019); Criton Tornaritis, *Cyprus and its Constitutional and Other Legal Problems* (2nd edn, 1980); George Pikis, *Constitutionalism, Human Rights, Separation of Powers, The Cyprus Precedent* (Martinus Nijhoff 2006); Polyvios Polyviou, *Cyprus: A Study in the Theory of Structure and Method of the Legal System of the Republic of Cyprus* (Chryssafinis and Polyviou 2015); Savvas Papasavvas, *La Justice Constitutionelle à Chypre* (Presses Universitaires d' Aix – Marseilles 1998).
4 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.
5 Polyvios Polyviou, *Cyprus on the Edge: A Study in Constitutional Survival* (Chryssafinis and Polyviou 2013).

manifested in various forms and through numerous procedures.[6] The SCC also had exclusive administrative law jurisdiction, with the High Court having the jurisdiction of an appellate court for civil and criminal cases, thus establishing two levels of jurisdiction and a separate constitutional review jurisdiction.

The system collapsed in 1963 with the resignation of the President of the SCC (Professor Forsthoff) and the subsequent withdrawal of all Turkish officials from their offices.[7] The same occurred in relation to the High Court, with the resignation of its foreign President, as well as with all lower courts with the withdrawal of the majority of judges originating from the Turkish community.

The solution applied was that of the law of necessity that was introduced through a combination of Law 33/64[8] and the decision of the newly established through that law Supreme Court (hereafter: the Court) that was to carry out all the powers of the SCC and the High Court.[9] In the landmark decision in *Ibrahim*[10] the Court ruled on its own existence and justified the adopted approach on the basis of the maxim *salus reipublicae suprema lex esto*. Accordingly, it was held that the collapse of the State is not an option for the benefit of complying with the Constitution in such exceptional circumstances. Therefore, the superiority of the Constitution and its invalidating effect (article 179) are in effect suspended in relation to laws attempting to save the State by providing functional alternatives to the constitutional provisions that became inoperative. That empowerment of the executive and the legislature was to be counterbalanced by the judicial control of such enactments on the basis of a complex proportionality test supplemented by the objective existence of *an extreme necessity that places the State at risk of its existence*. This is the applicable test and it is admittedly demanding.

Against this backdrop, it is difficult for the author to report on annual constitutional reform 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, without taking into account the preceding historical context. Formally, in 2021, no amendment of the Constitution of Cyprus was adopted, in contrast to the one amendment introduced in 2020 and the four amendments that were implemented in 2019, bringing the total number of constitutional amendments to sixteen (one amendment in 2022). Consequently, what happened in 2021 cannot be disassociated from the past where all the elements of constitutional reform could be relevant to the analysis. In effect, Cypriot constitutional law is an example of continuing constitutional reform.

As a corollary, the emphasis will be placed on the immediate future with an imminent constitutional reform that would restructure the judicial architecture and re-establish the SCC. This reform is being discussed at the time of writing and is before the legislature for a vote. It forms part of 2021, and its discussion took place in that chronological interval.

6 Constantinos Kombos, "Idiosyncratic Constitutional Review in Cyprus: (Re-) Design, Survival and Kelsen" *ICL Journal*, vol. 14, no. 4, 2020, pp. 473-496.
7 *Ibid.*
8 *Law 33/64, Administration of Justice (Miscellaneous Provisions) Law.*
9 Section 9 of *Law 33/64.*
10 *The Attorney-General of the Republic v Ibrahim* [1964] CLR 195. For analysis see Kombos (n 1) 151-72.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2021, the reform of the administration of justice was at the forefront of the discussion about constitutional law. This has been an ongoing attempt aimed at resolving delays in the handling of case load and which in 2021 reached a stage of maturity with specific proposals being tabled before Parliament for debate. This would represent the most significant constitutional reform since 1963 and will impact the constitutional and judicial organization and structure.

In specific, the main feature of the reforms seems to be the reestablishment of the SCC and of the maintenance of the Supreme Court, as well as the establishment of a new Court of Appeal with three divisions (civil, criminal, administrative). Nevertheless, the terminology used that refers to a SCC is not accurate since it does not reset the system back to its original version but rather aims to solidify the decentralized mode of review with the addition of a third-tier of jurisdiction in certain limited cases. The SCC will hear all cases under institutional procedures (articles 139, 140, 149 etc), as well as references on constitutionality by lower courts under conditions (article 144). It will also hear, after granting permission, cases relating to very significant constitutional matters in administrative proceedings or even in place of the lower court that has jurisdiction on such matters. The Supreme Court will hear after granting permission certain appeals in lieu of the Court of Appeal and it will have third-tier jurisdiction in exceptional cases. The Court of Appeal will examine all appeals and will have first instance and appellate jurisdiction over the issuing of orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. There will also be significant changes as regards the Supreme Judicial Council entrusted with disciplinary, appointment and promotion jurisdiction as regards judges. In its place, there will now be various such organs to ensure that there is crossline exercise of disciplinary powers that were so far exercised by the Supreme Court even against its own members.

Indisputably, the preceding reforms are going to transform the judicial architecture and the constitutional setting for the administration of justice. They will require constitutional amendments and there are questions as regards their efficacy, the procedure followed for the debate of the reforms, the impact on the law of necessity and the complication that will result.[11] The thirteen judges of the Supreme Court will have to choose whether they wish to move to the SCC or stay in the Supreme Court, with the allocation of competences and the changes in appointment and disciplinary judicial matters being highly contested.

The package is to be put to a vote on the day after this report has been submitted and, in any event, the outcome will form part of the report on constitutional reform for 2022. Nevertheless, given that such reforms were formulated and discussed in 2021, the attention will turn to them.

11 Constantinos Kombos, "Idiosyncratic Constitutional Review in Cyprus: (Re-)Design, Survival and Kelsen" *ICL Journal*, vol. 14, no. 4, 2020, pp. 473-496.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

There has been no judicial examination of the proposed reforms but instead an informal collegial decision by the Supreme Court, by majority, expressing doubts and opposition to the package.[12] Legal assessment is highly likely to take place after the reforms are implemented and in the context of concrete cases where the constitutionality of the new system will be challenged. It is noteworthy that in *Electoral Petition 1/2019*,[13] which was analyzed in the 2020 report, the Supreme Court for the first time introduced and adopted the basic structure doctrine, thus creating the jurisdictional space for examining the substantive constitutionality of constitutional amendments. At the same time, it must be noted that the Supreme Court has enormous power and exclusive jurisdiction as regards the assessment of the application of the law of necessity. The proposed reforms depend on the application of the law of necessity, via the procedure of article 182 of the Constitution, and could also be said that parts of them touch upon both the essence of the law of necessity and the independence of the judiciary.

The reforms are to be based on amalgam of amendments to Parts IX and X of the Constitution and on legislative enactments. The constitutional amendments relate to non-basic provisions, that is provisions outside the scope of the eternal clause of article 182 and Annex III. It is clarified that the Cypriot Constitution allows for preventive review of constitutionality via article 140, whereby laws adopted by the House of Representatives and before the President of the Republic promulgates them, can be referred to the Supreme Court by the President for assessment of their constitutionality. This implies that there is a disagreement between the executive and the legislature, which in the case of the reform to the administration of justice is not likely to exist, since the reform has been a political priority for the executive and its successful enactment is not to be questioned by the executive that proposed it. This means that the Supreme Court will not have the opportunity to examine the constitutionality of the said reforms, at least until those are implemented and a case arises under the new architecture. Therefore, the issue will go before the newly established SCC and after the judges of the current Supreme Court have exercised their choice of selecting which of the new two courts they will serve. This could prove an important point since the judges would have agreed to their placement and the whole system would already be in place, thus making returning to the previous structure highly difficult and sensitive.

Overall, and as explained in the previous section, the proposed reforms will be taking the system back[14] to the system that originally applied under the Constitution of 1960, but in the absence of Turkish Cypriots and foreign judges. This is bound to create questions as to the impact that will result on the law of necessity that is still the cornerstone of the constitutional order. The idea behind the law of necessity was that the High Court and the SCC were impossible to operate, hence the system was replaced with a centralized constitutional review system until the political question of Cyprus was to be resolved. The reforms discussed clearly challenge the reasoning supporting the law of necessity and represent a reaction to the existing problem of workload without taking into account the effect on the underlying rationale for the operation of judicial organs in the absence of Turkish Cypriots. There is clearly an impact on the theoretical supporting justification behind the law of necessity, especially since the existence of the State is not endangered by the workload problem and viable alternatives can exist, like the increase in the number of judges, the creation of judicial chambers, the splitting of the jurisdiction of the Supreme Court in constitutional and civil/criminal compositions. Put differently, the crucial importance of the law of necessity for the Cypriot legal order should not be underestimated and toyed with without taking into account the potential consequences.

Moreover, there are concerns about the impact on judicial independence especially as regards the appointments, promotions, and disciplinary powers of the current Supreme Court. At the moment, the Supreme Court has absolute power on such matters and the proposed reforms will include non-judicial members in the processes. This is perhaps the biggest stumbling block.

In general, the reforms could be construed as fundamentally altering the system in a way that is distanced from the model introduced on the basis of the law of necessity, which in turn was very different to the originally provided system in the Constitution of 1960. The question whether such reforms could amount to dismemberment cannot be answered in a definitive manner at this stage, because the final version of the tabled laws and amendments is still under discussion. Minor details could have important consequences. At the same time, the dismemberment discussion must take into consideration the specificity of the Cypriot context with the introduction of the law of necessity as the only available response to the constitutional dead-end and dilemma of 1963. That change, which did not take the form of a constitutional amendment, is distinguished from the dismemberment situation given the non-amendability and the real constitutional dilemma of the time. Nevertheless, the law of necessity transformed the constitutional law and setting by negating the invalidating effect of article 179 that provides for the primacy of the Constitution when a legislative provision is adopted for the purpose of solving the inability to comply with the Constitution because of the departure of one of the two communities. The currently under discussion alteration of the system affects both the original provisions via amendment and the subsequent approach of the law of necessity.

These are important constitutional issues that will become clearer once the reform is adopted and when their constitutionality is challenged.

12 On file with the author (in Greek).

13 *Supreme Court of Cyprus, Election Petition 1/2019, Michaelides et al. v Chief Returning Officer et al., Decision of 29 October 2020.*

14 To a considerable degree but not fully, as reference of constitutionality to the SCC under article 144 will now depend on the lower court considering the matter to be material for the determination of the case and also appropriate to be referred. This latter part did not exist in article 144 of the Constitution of 1960 where the discretion of the lower court was limited to the assessment of the material nature.

IV. LOOKING AHEAD

The year 2021 has been one of minimal activity as regards constitutional reform. It can be described as the calm before the storm that the long-awaited reform of the Cypriot administration of justice will bring. The Cypriot judges voiced their opposition regarding specific provisions of the draft proposals, such as the issue of identifying the competent court for the adjudication of cases that are pending before the Supreme Court and the participation of non-judges in the composition of the council with disciplinary powers as regards judges. 2022 is bound to be a turning point in Cypriot constitutional law.

V. FURTHER READING

Constantinos Kombos, *Cypriot Constitutional Law: Theory, Organization and Praxis* (Athens: Nomiki Vilviothiki, 2021) (in Greek)

Czech Republic

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I. INTRODUCTION

The Czech Republic has a polycentric constitution[1] that is a rather rigid one. Due to the political fragmentation, it is relatively rare that an amendment is passed. In 2021, we witnessed one of these rare occasions. Apart from it, few other proposals were either rejected by the Senate (the upper chamber of the Parliament) or whose procedure was discontinued in October 2021 due to general elections.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Even though the rules for amending the Czech constitution are at first glance relatively flexible (3/5 majority in both chambers of the Parliament),[2] it is not very easy to actually amend the Constitution as Czech governments are notoriously weak (the ruling coalition never had 3/5 majority in Chamber of Deputies) and Senate (the upper chamber of the Parliament) is often controlled by the opposition (there are 81 single-member districts and a third of the seats are re-elected every two years).[3] Therefore, there have been only a few amendments to the Czech Constitution since 1993, when the Czech Republic was established.[4]

In 2021, we witnessed one of these rare occasions. The Charter of Fundamental Freedoms (enacted in 1991 and adopted from Czechoslovakia and is now part of the polycentric constitution) has been amended to include the right to defend one's own life or the life of another person with a weapon in accordance with the law.

Two other proposals gained the approval of the Chamber of Deputies but were later rejected by the Senate. One proposed to introduce the sliding mandate (i.e., the option for the MP who will enter the government to be replaced by a substitute from the same party). The other proposed to extend the jurisdiction of the Supreme Audit Office to municipal and regional budgets and corporations owned or controlled by the state or local governance. This would affect mainly the ČEZ group, one of the biggest companies in the field of electricity generation in Central and Eastern Europe, controlled by the state that owns around 70% of the shares.

The legislative procedure of several other proposals was discontinued in October 2021 due to general elections. Each Chamber of Deputies elected every four years is considered to be separated from its predecessors; therefore, proposals not approved by the "old" chamber cannot be further discussed.

From October to December, there was only one new proposal that was not yet discussed in the session of the Chamber of Deputies. This proposal belongs to "evergreens" proposed in almost every term of the Chamber of Deputies. It seeks to introduce the nationwide general referendum, direct elections, and recall of town mayors and regional council presidents.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The only actual constitutional change (i.e., adding the right to use weapons in accordance with the law) is uneasy to classify as either amendment or dismemberment in Albert's typology.[5] It is definitely closer to the amendment. It did not change anything despite adding a new sentence to the constitution (and thus amending it). On the statutory level, Czechia already allows the possibility to own a gun and use it once certain conditions are met. Using a weapon to protect oneself or someone else could be a valid defense in Czech criminal law. The proposal did not intend to change any of those rules. And as Zuzana Vikarská rightly pointed out, even the complete ban on firearms on the statutory level would still be in accordance with the newly added provision of the Charter of Fundamental Rights and Freedoms.[6] The intention to protect the current level of statutory legislation from future developments on the EU level also wouldn't be fulfilled as EU law

1 This polycentric constitution contains the Constitution, i. e. constitutional act no. 1/1993 Coll. (hereinafter "the Constitution" or "Czech Constitution"), Charter of the Fundamental Rights and Freedoms (hereinafter "the Charter"), the constitutional act no. 110/1998 Coll, on the security of the Czech Republic and several other constitutional acts (most of them are just a formal assent of an international agreement changing the state border).

2 Article 39 section 4 of the Czech Constitution. The English translation of the Constitution can be found at https://www.constituteproject.org/. Translation of direct quotations from the Czech Constitution were taken from this source.

3 Article 16 section 2 of the Czech Constitution.

4 All amendments together with short annotations in English can be found in the Atlas of the Czech Constitutionalism http://czecon.law.muni.cz/content/en/

5 R Albert, *Constitutional Amendments*, OUP 2019, 76-94.

6 Z Vikarská, "Right to self-defence with a weapon in the Czech Republic: an unloaded gun?" (Constitutionnet, 30 September 2021) <https://constitutionnet.org/news/right-self-defence-weapon-czech-republic-unloaded-gun> accessed 15 June 2022

trumps all national law of member states, including their constitutions. That leads to the conclusion that Czechia has amended its constitution but didn't change anything.

The two proposals approved by the Chamber of Deputies and later rejected by the Senate were amendments as they proposed rather parametrical changes within the constitutional system. Similar can be said about other proposals discussed in the Chamber of Deputies.

The only proposal that gets closer to the dismemberment level is the recent idea to introduce nationwide general referenda and direct elections and recalls of town mayors and regional council presidents. Czechia is among few European countries that have no form of a nationwide referendum. Its introduction would change the balance between institutions. Similarly, the possibility of recalling an elected official would be a paradigmatic shift in the electoral system. However, these proposals were submitted by the SPD party (Svoboda a přímá demokracie - Liberty and Direct Democracy), which is often labelled as populist or even far-right[7] and most likely will not get the support of other parties.

The Czech Constitution has its explicit eternity clause that prohibits "any changes in the essential requirements for a democratic state governed by the rule of law".[8] Although there is no explicit provision concerning the role of the Constitutional Court in enforcing this eternity clause, the Court claims its authority to annul constitutional laws based on the general provision of article 83 of the Constitution.[9] However, the amendment of the Charter of Fundamental Rights and Freedoms described above was not reviewed by the Constitutional Court. Given that this particular amendment was intended to have only symbolical meaning, it is unlikely that there will be an opportunity for the Constitutional Court to review this amendment in the future.

Despite several decisions that might fall under countermajoritarian or enlighten role, the Court could be seen as playing a representative role in recent years. Court has mostly stayed away from the 'cultural wars', including, e.g., LGBT rights. The Court can be portrayed as a "guardian of fair political competition that simultaneously avoids dividing Czech society by advancing sensitive agendas"[10]. The *Grand Election Judgment II* published in 2021, [11]shows that the Court is not afraid to issue far-reaching judgments on a highly political topic.

IV. LOOKING AHEAD

It is implausible that proposals for a general referendum or direct elections and recall of mayors currently pending in the Chamber of Deputies will attract the support of major political parties within the Parliament. On the other hand, other issues might require constitutional changes.

The covid pandemic exposed that Czech emergency regulation was prepared with other situations (such as floods or windstorms) in mind and was inefficient in handling more robust problems affecting the whole territory for a considerable time. Therefore, it is advisable to revise this regulation.

Some of the proposals that did not manage to be debated in 2021 before the parliamentary elections, such as the constitutional law on electoral districts for the Senate elections, are likely to find their way back into Parliament. Also, the upcoming presidential elections in early 2023 can be expected to revive the debate on the role and position of the president in the constitutional system, which may result in proposals to modify the president's powers. In particular, the possibility of involving other constitutional bodies in appointing the Board of the Czech National Bank (currently, all members, including the Governor, are appointed exclusively by the President without consultation or intervention of any other body) had been discussed in the past.

V. FURTHER READING

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7 J Wondreys, 'The "refugee crisis" and the transformation of the far right and the political mainstream: the extreme case of the Czech Republic', (2021) 37:4 East European Politics 722.

8 Article 9 section 2 of the Czech Constitution.

9 "The Constitutional Court is the judicial body responsible for the protection of constitutionality".

10 H Smekal, J Benák & Ladislav Vyhnánek, "Through selective activism towards greater resilience: the Czech ConstitutionalCourt's interventions into high politics in the age of populism", (2022) 26 The International Journal of Human Rights 1230, 1239.

11 For further details see M Antoš and F Horák, "Proportionality Means Proportionality: Czech Constitutional Court, 2 February 2021, Pl. ÚS 44/17" (2021) 17 European Constitutional Law Review 538.

Ecuador

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I. INTRODUCTION

In 2021, Ecuadorian constitutionalism remained relatively more stable than in prior years. The Constitutional Court (hereafter the Court or CC) approved only one modification while rejecting other attempts. During this year, the CC ruled on four new cases. The first sought to call for a constitutional assembly to draft a new constitution. The second pointed at passing a twelve-reform package from which only one passed the constitutional control. The remaining two cases sought to amend the constitutional guarantees for compliance and penalties for breaching with decisions of indigenous justice.

Meanwhile, the National Assembly (hereafter NA or the Assembly) could not gather the required majority to pass any reform except one. The NA debated five reforms along 2021[1]. The first two sought to eliminate the Council for Citizen Participation and Social Control (CPCCS by its Spanish acronym). The third had to do with an attempt to shift decision-making power from the central government to the locals in Galapagos province. The fourth tried to expand the requisites to be appointed Prosecutor General and Comptroller General. The only approved amendment sought to consider the number of kilometers of rural roads as an additional criterion to distribute the state budget among local governments.

Among all these modification efforts we discuss the extent to which the attempt to draft a new constitution is categorized as a dismemberment and how the alleged elimination of the CPCCS might fall into either an amendment or dismemberment. In both cases the Court's ruling and the context of each case help to further illustrate the classificatory effort.

This Report unfolds as follows. First, we provide a preliminary review on how constitutional amendment procedures work according to the Ecuadorian constitution. The second section encompasses the amendment proposals submitted before the CC and discussed within the National Assembly in 2021. Part three discusses the scope of the attempt to draft a new constitution and the elimination of the CPCCS. The report concludes in Part IV with some upcoming events.

1 For additional detail, see the Report for 2020.

1. THE ECUADORIAN CONSTITUTIONAL AMENDMENT SYSTEM

The Ecuadorian constitution encompasses a three-track system of constitutional change, which differentiates constitutional amendment (*enmienda*), partial reform (*reforma parcial*) and constitutional replacement (*Asamblea constituyente*). These three mechanisms can be initiated by citizens, leveraging a number of signatures of the electoral registry in support of their proposal, a group of legislators, or the President.

The amendment is the less demanding procedure. It can be approved either by a simple majority in a popular referendum, or via two-thirds supermajority of the NA, without resorting to a referendum. When legislators initiate an amendment, this procedure will include two legislative debates within the NA. The scope of these proposals is limited. Amendment proposals cannot modify the fundamental structure of the constitution, cannot change the state's constitutive elements, cannot set restrictions on constitutional rights and their guarantees, and cannot modify any of the procedures for reforming the constitution.

Contrasting with the amendment procedure, partial reform can only be approved by popular referendum, after being passed by a two-thirds vote in two legislative debates of the NA. Partial reform proposals have fewer restrictions than amendments. They cannot set limitations on constitutional rights and guarantees and cannot modify the procedure for reforming the constitution.

Constitutional replacement is the more demanding procedure as it can only be carried out by a constituent assembly. Such a proposal should contain a provision on how to select the drafters and the resulting constitution shall be passed by a majority in a popular referendum.

Article 443 of the Constitution explicitly grants the CC the power to decide which of the three mechanisms is appropriate for each case. In its decision 4-18-RC/19, the CC stated that its judicial review power -regarding constitutional modification- extends across these three stages. 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. The Court will rule whether the recommended path is suitable for the attempted modification.

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 required to issue an opinion on the proposal's constitutionality, 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 proposal's content agrees with the constitution.

The third stage consists of an ex-post judicial review of constitutional amendments and reforms. Anybody can file an "accion publica de inconstitucionalidad" (writ for abstract constitutional review) within 30 days after the amendment or partial reform comes into force. In this stage, the Court can only assess whether the amendment or reform followed the procedural grounds established by the constitution and the law.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2021 several actors filed constitutional modification proposals before the Court, whereas other -previously adjudicated- proposals were discussed within the NA. The Court and the NA rejected or failed to find the majority to pass any proposals, except one, respectively. This section reports all cases ruled by the Court and discussed by the National Assembly in 2021. Although most of the issues discussed within the NA were described in detail in the 2020 Report, this piece covers additional facts that occurred this year.

1. CONSTITUENT ASSEMBLY WITH FULL POWERS

In 2021, the Court had to determine whether it was possible to call a constituent assembly with "full powers" to "transform the state's institutional structure and draft a new Constitution for the Republic". To fully understand the reasoning of the Court, in this case, it is worth remembering the Ecuadorian constituent process (2007-2008), in which the constituent assembly´s first act consisted of asserting its "full powers" vis a vis all political institutions. The constituent assembly then declared the legislative body as "suspended" thereby assuming all its lawmaking powers. In addition, the constituent assembly controlled the appointment of high public officials such as the attorney general, the comptroller general and Supreme and Constitutional Tribunal justices.

In case 5-20-RC, the Court ruled that a constituent assembly with "unlimited, extraordinary and unconditioned powers", as claimed by the proponents, was incompatible with certain constitutional limitations. The Court stated that any constitutional modification through a constituent assembly must comply with formal and substantive limitations established in the constitution and its jurisprudence. According to article 444 of the constitution, a constituent assembly can be called by referendum. If approved, the constituent assembly is limited solely to draft the text of a new constitution that will be enacted only if another referendum ratifies it.

The Court started its decision by pointing out that human rights limit political power. Hence, a constituent assembly cannot exercise its powers against these rights. Subsequently, the Court stated that the Constitution does not conceive the possibility of a constituent assembly with "constituted powers". Put it differently, the constituent assembly cannot legislate, execute laws nor judge. Concentration of powers in a single body, posited the CC, would encourage this organism to be judge and jury, and would prevent the action of the constituted organs.

Furthermore, the Court declared that convening a constituent assembly with full powers would be incompatible with the separation of powers principle and the main values of a constitutional democracy. Concentration of powers, ruled the Court, encourages authoritarianism and arbitrariness. The CC therefore concluded that convening a constituent assembly with "full powers" to reform the Constitution is not foreseen nor regulated by article 444 and rejected the proposal.

In its concurring opinion, Justice Corral distinguished two kinds of original constituent powers: "original foundational" and "original transformative" constituent powers. The latter is meant to completely change a constitution, whereas the former can only take place when a state is created. In both cases, the people have the power to create a new constitutional order that either replaces an old regime or an existing constitution. This kind of constitutional change can only be carried out by a constituent assembly, whose legitimacy ultimately relies on the people.

According to Justice Corral, while it is true that a constituent assembly cannot be omnicompetent and assume constituted powers, it is also true that this body exerts full original transformative powers to replace an existing constitution. Furthermore, Justice Corral held that the plenipotentiary character of a constituent assembly must be understood by the Court as a possibility to deepen a social pact in a new constitution that, according to the aforementioned article 444, must be ratified by referendum.

Limiting the people's possibility to call for a constituent assembly with full powers to reform the constitution, maintained Justice Corral, translates in reducing the people's sovereignty to exercise original transformative power. In all cases, any petition aiming at convening for a constituent assembly must be precisely justified by the proponents.

2. COMPLIANCE WITH DECISIONS OF THE INDIGENOUS JUSTICE

In 2008 the Ecuadorian constitutional system emphasized the notion of legal pluralism. This means that multiple legal systems coexist within one jurisdiction. In this sense, indigenous authorities are entitled to exert justice based on their ancestral traditions and within their geographical jurisdiction. According to article 171 of the constitution, the state shall guarantee public officers' compliance with such decisions.

In 2021 an indigenous representative filed two modification proposals before the Court. The plaintiff attempted to modify the second section of article 171 using the partial reform procedure in both cases. In the first case[2], the proponent intended to promote liability for noncompliance with decisions from the indigenous justice through i. public policy and ii. sanctions for noncompliers. The Court argued that attempting to promote compliance with such decisions through public

2 Case No. *6-20—RC/21* [2021] CCE

policy might constrain human rights. The institutional design provides other types of mechanisms to do so. These mechanisms include legal -i.e., laws, other regulations- and judicial -i.e., Amparo- guarantees.

In the second case[3] the petitioner sought to introduce an obligation of economic compensation favoring the indigenous communities on behalf of public or private agents that defy decisions from that jurisdiction. In that regard, the CC determined that a comprehensive reparation is far beyond economic compensation. Indeed, reparation attempts to restore the situation before rights' violation which includes other measures -e.g., restitution of the right, rehabilitation, guarantees of non-repetition, public apologies, provision of public services, and health care, among others. Therefore, constraining reparation to economic compensation might limit rights' application. In both cases, the CC concluded that the partial reform procedure is unsuitable for modifying article 171 of the constitution.

3. LABOR AND SOCIAL SECURITY RIGHTS

A group of citizens filed a petition aimed at altering twelve articles of the Constitution that regulate the right to work[4]. The main changes concerned: i. setting the prohibition of unjustified layoff, ii. transferring the power to fix the basic wage from the executive to the legislative branch, establishing employee's right to a net earning equivalent to fifteen percent of their employer's annual net earnings, iii. modifying the integration of the Ecuadorian Social Security Institute´s Directive Council, iv. introducing the state's obligation to contribute with at least forty percent of the pensions' budget, v. promoting indefinite labor contracts between privates, among other reforms.

In a questionable decision, the Court decided that most of the petitions were not suitable to be treated as amendments, because they constrained constitutional rights and modified the fundamental structure of the Constitution. Unlike other cases, the reasoning of the CC was not clear and straightforward. As an example, the Court held that limiting employers' right to dismiss employees would set unreasonable restrictions to their freedom of contract, protected by article 66.16 of the Constitution. Hence, the Court was reluctant to examine the benefits of such a modification for employees' rights.

The Court also maintained that transferring the power to fix the minimum wage from the executive to the legislative branch would neglect the original constituent intention of dialogic debate between employees and employers. Although article 328 of the Constitution establishes that "every year, the State shall establish and review the basic wage set by law", it is worth noting that this wage is fixed by the Ministry of Labor, which operates as a specialized presidential secretariat. According to the Labor Code, the minimum wage must be agreed upon by both parties -employees and employers- and ratified by the minister. Thus far, this has not been the case, as that wage has always been fixed unilaterally by the minister.

Also, the CC controversially held that paying public servants their compensations within fifteen days after being fired by the public administration altered the fundamental structure of the Constitution as it ignored several public administration constitutional principles, such as budgetary planning. The Court, without any strong argument, recognized budgetary planning as a principle that integrates the basic structure of the Constitution.

Only one of the twelve proposed constitutional changes received a favorable decision by the CC. This change sought to include stability, primacy of reality, workers rights' imprescriptibly, nondiscrimination and gender equality as guiding labor rights principles.

In its dissenting vote, Justice Salazar held that it is not the Court's responsibility to judge the appropriateness of constitutional changes. In her opinion, the majority of the Court did not sufficiently explain why some changes were not suitable to be treated as amendments. According to Justice Salazar viewpoint, the proposed amendments were not meant to restrict constitutional rights. She also held that the Court was unreasonably expanding the basic structure of the Constitution's scope.

4. GALAPAGOS ISLANDS' LOCAL GOVERNMENT

In 2020 a group of legislators proposed a group of amendments seeking to set a special government and establish Galapagos province as autonomous. In the second debate in early January, the NA discussed this amendment but failed to reach the required two-thirds majority (92 votes) to approve it.

5. THE CPCCS AND OTHER INSTITUTIONAL MODIFICATIONS

In 2020 the NA held the first debate of a series of reform attempts to either eliminate the CPCCS or transfer its appointment powers back to the National Assembly. In addition, the reform package included a transformation of the congress into a bicameral institution and new regulations for the Prosecutor General office. In 2021, these topics generated a heated and polemic debate within the NA. Although the reform initiative had widespread support, the main parties within the NA did not reach the 92 votes — a two-thirds majority — to pass such modification. Most of the experts pointed out that although the elimination of the CPCCS had some level of consensus, the introduction of other reforms hindered the legislative approval.

Afterwards, a group of citizens -who initially promoted the reform package- submitted the case back to the Constitutional Court. Their primary purpose was that the Court decide to follow the next steps of the procedure -i.e., calling a national referendum to approve the reforms. The CC opened the so-called decision-compliance-monitoring-procedure but decided to dismiss the case due to a lack of competency. In other words, if the NA decided not to pass the reforms package, the CC had no power to overturn such a decision.

3 Case No. *1-21-RC/21* [2021] CCE
4 Case No. *1-17-RC/21* [2021] CCE

6. THE COMPTROLLER AND THE PROSECUTOR GENERAL

In 2020, a group of legislators proposed a set of constitutional amendments aimed at incorporating additional requisites to appoint the Comptroller General and Prosecutor General. In early January 2021, after two debates within the NA legislators did not reach the minimum two-thirds majority vote, therefore the amendment was not approved.

7. SUBNATIONAL GOVERNMENTS' BUDGET ALLOCATION

In early January, within a second debate, the NA approved -with 116 votes in favor- an amendment that sought to consider the number of kilometers of rural roads as an additional criterion to distribute the state budget among sub-national governments. The amendment was enacted as part of the constitution in late January 2021.

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. a constitutional assembly vested with full powers and tasked to draft a new constitution; ii. elimination of the CPCCS - might be classified under these categories. Regarding the full powered constitutional assembly, we argue that it does not necessarily fall into a concrete category since it pretends to draft a new constitution. The attempts to eliminate the CPCCS and other minor concomitant reforms might fall into the dismemberment category, although this is not entirely clear.

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."* Amendment expresses constitutional continuity. Dismemberment alters the constitution's essential features, such as its institutional structure or its identity.

2. ATTEMPTING TO DRAFT A NEW CONSTITUTION

During 2021, amending, reforming and even drafting a new Constitution were constant electoral campaign proposals. Several legislative and presidential candidates proposed drafting a new constitution, whereas others advocated reinstating the one from 1998. Classifying these demagogic proposals as either amendments or dismemberments might be a futile exercise. In fact, as pointed out by Professor Roznai, these two constitutional reform concepts lack the explanatory power to "resolve the challenges posed by constituent power´s radical ability to disrupt constituted bodies". Besides, it is difficult to predict the direction that such abrupt constitutional change proposals might take.

3. ATTEMPT TO ELIMINATE THE CPCCS

The Ecuadorian 2008 Constitution envisions a state made up of five branches. Besides the three classics, the Constitution added an Electoral branch and a Transparency and Social Control branch (FTCS). The CPCCS is part of the FTCS. The CPCCS was originally intended to empower and engage citizens in public decision-making. Instead, it has become an instrumental actor in consolidating presidential control over regulatory agencies and the judiciary. Partial reform proposals discussed during 2020 and 2021 aimed at eliminating an organism that has barely fulfilled its constitutional objectives.

On the one hand, a group of reformers sought to eliminate the CPCCS whereas another group contemplated transferring its attributions to the other branches and public offices. In this context, it is unclear whether these modifications can be labelled as either constitutional amendment or dismemberment. The former option seemed to be a change that would have preserved separation of powers, judicial independence, accountability, and transparency and therefore it could be understood as an amendment - as long as it continues with the constitution-making project initiated in 2008. Yet, the total suppression of the CPCCS can be a dismemberment, if we think it might curtail a radical impulse that inspired the 2008 Constitution, namely, the involvement of citizens´ voices in public decision making.

In 2021, the debate over the modification took two different moments. At the beginning of January, the legislators held the second debate over the first modification proposal (case 8-19-RC/19). The reform package covered topics such as transferring attributions from the CPCCS to the National Assembly, the Ombudsman and the Comptroller General. Due to the complexity of the topics, the Assembly chose to hold a separate vote for each part of the reform however the legislators were not able to gather more than 87 — they needed 92 — affirmative votes. If passed, this type of reform could be classified as an amendment.

Later, in March the NA debated over the second proposal (case 4-19-RC/19). This proposal was an initiative of a group of citizens and had some popular support. That reform package sought to eliminate the CPCCS, reduce the number of legislators, turn the congress into a bicameral organism, separate the Prosecutor's general office from the judicial branch, among others. The initiative had 27 articles in total and legislators voted article by article but again they failed to reach the required majority to pass the reform. This kind of modification partially breaks with the core of the constitution therefore might be classified as form of dismemberment. Overall, what is clear is that the former NA did not have the political will to reach an agreement over the proposed reforms. The situation of the actual Assembly does not seem to be different.

IV. LOOKING AHEAD

This year has been somewhat stable in terms of attempts to modify the constitution. As discussed in this report, the CC rejected almost all attempts to modify the constitution while the former composition of the National Assembly was not able to reach the required two-thirds majority to pass any constitutional change, except one. Besides this, the future of potential constitutional reforms is still unpredictable. The National Assembly that took office in May 2021 and the new conformation of the Court that will initiate in February 2022 have not had the opportunity to rule or vote on any potential constitutional reform yet.

The Court has established a series of precedents that guide future proponents on the minimum standards that the modification proposals should meet in order to be approved. This should provide some level of certainty to the proponents although the new conformation of the court might -slightly- change such standards. The new court would reveal their preferences as long as they get cases on each constitutional control phase.

On the other hand, when analyzing legislative behavior experts characterize the actual NA as a convoluted body. The atomized composition of the legislative body -11 parties plus independent legislators- in addition to the constant rivalry across political parties precludes the possibility of reaching a two-thirds majority within the Assembly. In this sense, the amendment and partial reform seem to be hindered as modification mechanisms. This fact leaves the *status quo* as the most likely scenario as long as the political conditions remain constant.

Finally, due to the constitutional culture and the chronic institutional instability there is still the latent possibility of convening a Constituent Assembly to draft a new constitution.

V. FURTHER READING

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El Salvador

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I. INTRODUCTION

In May 1st of 2021, the Legislative Assembly decided to remove the Justices of the Constitutional Chamber, based, as they argued, on a competence given by the Constitution. Despite a last effort made by the removed Justices of the Constitutional Chamber, who issued a judgment declaring their removal unconstitutional, the Legislative Assembly appointed 5 new justices, who took office that same day.[1] Then, in September, the *new* Constitutional Chamber took a controversial decision, issuing a ruling in favor of presidential reelection. The thing is, presidential reelection is forbidden by the Constitution. The prohibition of reform the presidential term limits is an eternity clause (*cláusula pétrea*) established by Article 248 of the Constitution. I will argue in the corresponding section of this paper that that is a case of constitutional dismemberment. No constitutional reform was promoted in 2021.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Despite no constitutional reform took place in 2021, there was an interesting event carried out by the *new* Constitutional Chamber of the Supreme Court. The Case of *Pérdida de los derechos de ciudadanía* (loss of citizenship rights) 1-2021 was issued in September. Here are some arguments to understand the nature of the decision. Articles 174 and 182 attribution 7 of the Constitution confer on the Constitutional Chamber the competence to declare the loss of their political rights[2] to persons who "sign acts, proclamations or accession to promote or support the reelection or continuation of the President of the Republic, or use direct means to that purpose".[3] The 1-2021 Case began with a lawsuit filed by a citizen before the Constitutional Chamber in which he demanded the loss of political rights of a person who, being a pre-candidate for deputy for the ruling party of El Salvador, promoted the re-election of the current President of the Republic. The Salvadoran Constitution considers as an eternity clause, that is, that it cannot be reformed by the secondary constituent power, everything related to the alternation in the exercise of the Presidency of the Republic. The protection of this clause by the Constitution reaches such a point that, as a unique case in Latin America, whoever intends to alter it may lose their political rights.

The 1-2021 Case was rejected. Nonetheless, the *new* Constitutional Chamber took the opportunity to stablish a new interpretation about the presidential term limits in El Salvador. For the Salvadoran primary constituent power, the prohibition that the president could be reelected immediately and continuously was a fundamental decision. Another series of provisions confirm it. Article 152.1 of the Constitution maintains that a person who has held the presidency for more than six months, consecutive or not, during the immediately preceding period or within the last six months prior to the beginning of the presidential term, cannot be a candidate for President.[4]

Article 88 of the Constitution maintains that the alternation in the exercise of the presidency of the Republic is essential for the maintenance of the form of government and the political system, and that the violation of said norm forces the insurrection of the people. On the other hand, article 75.4 of the Constitution contemplates that the fact of promoting or encouraging presidential reelection is a cause of loss of political rights. Finally, the Constitutional Chamber of the Supreme Court had interpreted in its jurisprudence[5] that the prohibition of immediate presidential reelection covered not only leaving a presidential term in between, but two, since the prohibition includes the nomination as a candidate in the period immediately following the one in which it was exercised the presidency.

Apparently, and from a strictly normative point of view, all the avenues of access to presidential reelection were constitutionally closed. Nonetheless, in the 1-2021 Case, the new members of the Constitutional Chamber reinterpreted the previous criteria to change it completely. In their opinion, what article 152.1 of the Constitution actually prohibits is that whoever has already been president in a first period, and being in a second period, cannot run for a third period. Consequently, reelection is not prohibited for those who, being in a first term of the presidency,

1 José Ignacio Hernández G. 'The Mass Removal of Constitutional Judges in El Salvador: A New Case of Constitutional Authoritarian-Populism' (*I-CONnect*, 14 May 2021) <http://www.iconnectblog.com/2021/05/the-mass-removal-of-constitutional-judges-in-el-salvador-a-new-case-of-constitutional-authoritarian-populism/> accessed 20 May 2022.

2 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.

3 Article 75 ordinal 4th of the Constitution.

4 See Marcos Antonio Vela Ávalos 'La reelección presidencial indefinida: el caso de El Salvador' (*IberICONnect*, 9 December 2020) <https://www.ibericonnect.blog/2020/12/la-reeleccion-presidencial-indefinida-el-caso-de-el-salvador/> accessed 21 February 2022.

5 Inconstitucionalidad 163-2013 [2014].

decide to opt for a second term. If it seems confusing, that's because it is.[6]

I will try to graph it as follows: P is president at time tÐ, therefore, when the Constitution speaks of the "immediately preceding period", it refers to time t-Ð, that is, when P was not yet president. Hence, P can run for his reelection at time tÐ. Nevertheless, already being in tÐ, since P was president in tÐ, and that would be his "immediate previous term", he could no longer run for a third term at time tÐ.

The decision also appeals to the sovereignty of the people, who "will have among their range of options the person who at that time holds the presidency, and it is the people who decide whether to place their trust in him again or if they opt for a different option". The problem with the previous interpretation is that it contradicts what the primary constituent power shielded through an eternity clause and another series of constitutional norms, that is, the clear intention to prohibit consecutive presidential reelection.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. CONSTITUTIONAL DISMEMBERMENT.

The interpretation made by the Constitutional Chamber, by upsetting an eternity clause, undoubtedly generates a momentous constitutional change. The aforementioned change cannot be classified as a constitutional amendment, because obviously it has not been carried out through a legislative procedure that formally alters the text of the Constitution. Although it is an informal constitutional change, it is not a constitutional mutation either, because although the change has been made via judicial interpretation, it has altered the identity or basic structure of the Constitution.

This missing link between modifying the basic structure of the Constitution without having to replace it with a new one is what Richard Albert has called constitutional dismemberment. Constitutional dismemberment implies a profound change that can affect fundamental rights, the structure or the identity of the Constitution. In the Salvadoran case, the last judgment of the Constitutional Chamber changed the basic structure of the Constitution by modifying an eternity clause, something that would be reserved to the primary constituent power and not to the ordinary power of amendment or to the judges.

In any case, according to Albert, if legal continuity is to be maintained, a change of this magnitude would require approval similar to that required to ratify the Constitution, in accordance with the principles of reciprocity and symmetry.

This is one more case in Latin America of modification of presidential terms limits through the interpretation of the constitutional courts (it is added to the cases of Bolivia, Costa Rica, Honduras and Nicaragua). These cases invite us to question whether the eternity clauses actually shield certain precommitments of the people or are just colorful toys (to use Llevellyn's expression) in the constitutions that do not guarantee their unamendability.

2. JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS AND THE ROLE OF THE CONSTITUTIONAL CHAMBER IN EL SALVADOR.

Judicial review of constitutional amendments by the Constitutional Chamber has only been exercised in two occasions.[7] In El Salvador, the unconstitutionality action has a popular initiative, 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.[8]

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 substantive reasons[9], 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.[10] 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.

The Constitutional Chamber plays a counter-majoritarian 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.[11] 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.

6 Manuel Adrián Merino Menjívar 'When Judges Unbound Ulysses: The Case of Presidential Reelection in El Salvador' (*I-CONnect*, 9 September 2021) <http://www.iconnectblog.com/2021/09/when-judges-unbound-ulysses-the-case-of-presidential-reelection-in-el-salvador/> accessed 21 February 2022.

7 Inconstitucionalidades 7-2012 [2013] y 33-2015 [2017].

8 Articles 174 and 183 of the Constitution.

9 Regarding the substantive 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.

10 Inconstitucionalidad 52-2005 [2005].

11 Inconstitucionalidad 21-2020 Ac. [2020].

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 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.

V. FURTHER READING

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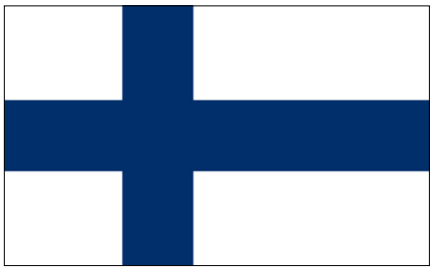
Finland



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I. INTRODUCTION

The year 2021 did not bring about any formal constitutional reforms or amendments to the Constitution of Finland (731/1999)[1] which can still be regarded as being a fairly modern Constitution. As the Constitution has also been subject to some partial amendments during its 22 years of existence, it continues to remain relevant and capable of addressing various ongoing societal and political developments.

However, the political-societal context in which the Constitution functions has been subject to significant transformations in recent years. The year 2021 was no exception. In particular, the COVID-19 pandemic with its various regulatory measures taken to limit its spread occupied the center stage on the Finnish scene of constitutionalism. To be sure, the constitutional dynamics of the COVID-19 pandemic were so dominant during 2021 that it overshadowed other constitutional discussions and debates.

Thus, the COVID-19 pandemic even brought about a number of such legislative proposals which did not only entail limitations to fundamental rights but also included temporal derogations from these rights for the purpose of limiting the spread of pandemic and ultimately protecting the health of the population and everyone's right to life. For instance, several legislative measures limiting such fundamental rights as freedom of movement (Section 9), the right to work, and the freedom to engage in commercial activity (Section 18) were enacted in 2021. Similarly, closing of schools, daycare, and sports facilities, as well as limitations on cultural services had a significant impact on fundamental cultural and educational rights, including the rights of the child and other vulnerable groups.

However, the pluralist system of constitutional review in Finland warrants notice in this context as it is constituted by a combination of *ex ante* review by the Constitutional Law Committee of Parliament and *ex post* review by courts. Hence, various legislative proposals enacted for the purpose of managing the COVID-19 pandemic and entailing limitations on or even derogations from fundamental rights were reviewed by the Constitutional Law Committee of Parliament which is the main authority of constitutional review and interpretation in Finland. According to Section 74 of the Constitution, the Constitutional Law Committee 'shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties'.

Apart from constitutional dynamics caused by the pandemic, there was some constitutional discussion around the rule of law, the political interference, and risks that the Constitution might face due to recent domestic and global developments. As with other Nordic countries, Finland has also witnessed the rise of populism, including neo-Nazi and anti-immigration movements, which may at worst even mutate into such authoritarianism and illiberal constitutional amendments that could eventually endanger the very foundations of the Finnish Constitution based on democracy, rule of law and the protection of human rights.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The procedure for constitutional enactment has remained the same since 1919 when the earlier Constitution Act of 1919 entered into force, entailing formal requirements for the procedure. The current section 73 of the Constitution provides as follows:

> "A proposal on the enactment, amendment or repeal of the Constitution or on the enactment of a limited derogation of the Constitution shall in the second reading be left in abeyance, by a majority of the votes cast, until the first parliamentary session following parliamentary elections. The proposal shall then, once the Committee has issued its report, be adopted without material alterations in one reading in a plenary session by a decision supported by at least two thirds of the votes cast.
> However, the proposal may be declared urgent by a decision that has been supported by at least five sixths of the votes cast. In this event, the proposal is not left in abeyance and it can be adopted by a decision supported by at least two thirds of the votes cast."

As stated in the first sentence, Section 73 is applicable for proposals on the enactment, amendment, and repeal of the Constitution. Moreover, Section 73 includes two procedures for constitutional enactment, the normal and the urgent procedures. The normal constitutional amendment procedure, according to the first subsection, requires leaving the bill in abeyance after an election. However, if the proposal

1 The unofficial English translation is available at: https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf

is declared urgent, the procedure is faster.[2] In addition to these formal requirements for the procedure itself, the Finnish Constitution does not set out any limitations on the amendments, such as substantial limitations or unamendable sections. According to the Constitutional Law Committee of Parliament, constitutional amendments should primarily be made in accordance with the procedure under subsection 1 of Section 73, whereas the urgent procedure can only be used if certain exceptional circumstances deemed absolutely vital so require.[3]

Section 73 also refers to the possibility of a limited derogation of the Constitution. Hence, it is necessary to mention the one Finnish peculiarity, the *institution of exceptive enactments*, which allows the adoption of legislation that conflicts with the Constitution without amending the text of the Constitution. However, the enactment of exceptive enactments has to be in accordance with the constitutional enactment procedure provided in Section 73 of the Constitution. Instead of describing these enactments with terms of amendment or dismemberment, domestic constitutional doctrine describes exceptive enactments as making a 'hole' in the Constitution and then filling this hole by the norms of exceptive enactments.[4]

The institution of exceptive enactments must not be confused with Section 23 of the Constitution that provides for the protection of fundamental rights in situations of emergency and allows the enactment of temporary derogations. Some of those legislative measures adopted due to the COVID-19 and entailing derogations from fundamental rights were enacted pursuant to Section 23 of the Constitution.

1. OVERVIEW OF PAST REFORMS AND AMENDMENTS OF THE FINNISH CONSTITUTION

The current Constitution of Finland entered into force on 1 March 2000, after a comprehensive reform that primarily sought to unify and modernize the earlier constitutional documents without encroaching the foundations of Finnish Constitution.[5] Thus, the Constitution of Finland includes several principles and solutions similar to the ones included in the earlier constitutional documents. Before the comprehensive reform, several partial reforms had taken place.[6] Perhaps most notable was the total reform of the domestic system for the protection of fundamental rights in 1995. The outcome of the reform was – and still is – a broad catalog of fundamental rights, with a range of economic, social, and cultural rights, in addition to the more traditional civil and political rights. Moreover, there are specific provisions on responsibility for the environment and environmental rights, as well as for access to documents and the right to good administration. Almost all rights are granted to everyone, an exception being made only with regard to the freedom of movement and certain electoral rights. This catalog of rights was included in the current Constitution almost in a way as it was enacted in 1995.

As of today, the Finnish Constitution is still quite a modern constitution with a concise and uniform style. Yet, there have continuously been debate and discussion over the need for further amendments and reforms. The gist of the debate has had to do with divided views on the role of the President in foreign affairs and, particularly, European Union (EU) affairs. In addition, the discussion has been about the need to say "a bit more" about the EU in the Constitution, for the widespread view was that the Constitution of 2000 failed to unlock these questions in a satisfactory way.

In 2012, the Constitution was subject to partial amendments that related to the question of mentioning Finland's EU membership in the Constitution, as well as to the procedure of the transfer of powers to the EU. The proposal is that EU membership should be explicitly mentioned in Section 1 of the Constitution. In addition, it is proposed that the Constitution should be supplemented by a provision providing that a "significant" transfer of state powers to the EU or international organizations would require the two-thirds majority of the given votes in Parliament. *E contrario*, transfers of powers failing to be significant would be decided by simple majority.[7] In 2018, Section 10 on the secrecy of confidential communications was also amended for the purpose of allowing the enactment of legislation on civilian and military intelligence.[8] The latter one included amendment to the Constitution, which was declared urgent and hence, adopted without abeyance in accordance with Section 73, subsection 2 of the Constitution.

2. THE MAJOR DEVELOPMENTS IN 2021

2.1. REGULATORY MEASURES AND THE COVID-19 PANDEMIC

The outbreak of the COVID-19 pandemic caused waves – not only on disease rates, but also on legislative proposals on restrictions aiming to limit the spread of pandemic. As with many other countries, also in Finland, these restrictions and regulatory measures included various limitations to, and even derogations from, fundamental and human rights enshrined in the Constitution and international human rights treaties binding upon Finland. Legality of these restrictions relied on different legal bases, including direct application of Section 23 of the Constitution and specific legislation concerning emergency powers. In addition to these restrictions by legislative enactments and governmental decrees, several regional and local authorities issued orders and regulations, as well as various soft law measures such as guidelines and recommendations, that further limited the full enjoyment of rights and liberties of the people.[9]

2 In the normal procedure, the electorate have a possibility to assess the amendment in parliamentary elections.

3 Constitutional Law Committee Report 4/2018.

4 Further discussed and demonstrated with an example of the use of exceptive enactments when Finland joined the EU: Tuomas Ojanen and Janne Salminen, 'European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism', in Anneli Albi, Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (The Hague: T.M.C. Asser Press 2019) 359, 362

5 Government Bill 1/1998, p.1

6 Tuomas Ojanen, 'Constitutional amendment in Finland', in Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Taylor and Francis, 2012)

7 Government Bill 60/2010. Further discussed in Ojanen and Salminen 2019 (Supra note 4).

8 Government Bill 198/2017. About amendments concerning secrecy of confidential communications for the purpose of allowing the enactment of civil and military intelligence legislation see the 2018 report on Finland: Milka Sormunen, Laura Kirvesniemi and Tuomas Ojanen, 'Finland', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *The I-CONnect Clough Center 2018 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2019) 98

9 See e.g., Martin Scheinin, 'Finland: Soft measures, respect for the rule of law, and plenty of good luck' (*Verfassungsblog*, 23 February 2021) <https://verfassungsblog.de/finland-soft-measures-respect-for-the-rule-of-law-and-plenty-of-good-luck/> accessed 30 June 2022

As the Finnish constitutional review relies on the abstract *ex ante* review conducted by the Constitutional Law Committee of Parliament,[10] the Committee assumed the major role supervising the constitutionality of the legislative proposals during the pandemic. For example, legislative proposal on temporarily restricting freedom of movement and close contacts (so called partial lockdown) was considered by the Committee to conflict with the Constitution so significantly as to inhibit its improvement that the bill ultimately fell down completely in Parliament.[11] The Committee considered that the proposal to prohibit movement in total was in this case contrary to the requirement of proportionality and not necessary within the meaning of Section 23 of the Constitution.

In addition, several other regulatory measures such as the vaccination of health care personnel, postponing the date of municipal elections and so called COVID-19 passport were also the subject of public debate and scholarly discussions. The Parliamentary Ombudsman[12] issued several cases concerning the pandemic. Complaints due to the pandemic concerned on, for example, vaccinations, mask mandates, quarantines, and COVID-certificates.[13]

2.2 THE EMERGENCY POWERS ACT

In Finland, a variety of precautionary measures have been made for the purpose of preparing for all possible crises. Part of this contingency for crises has been made through legislative measures. The powers of the authorities during emergencies are primarily laid down in the Emergency Powers Act (Act No 1552/2011) which seeks to secure the livelihood of the population and the national economy, to maintain legal order and fundamental and human rights, and to safeguard the territorial integrity and independence of Finland in emergency conditions.

The Emergency Powers Act defines in its Section 3 five different types of emergencies covering particularly serious crises. One of them is a widespread infectious disease, such as the COVID-19 pandemic. The Government, in cooperation with the President of the Republic, may declare a state of emergency when the criteria for a state of emergency are met. Due to the COVID-19, Finland was in a state of emergency two times; first from 16 March to 16 June 2020 and second from 1 March to 27 April 2021. Under emergency conditions, the authorities may exercise only those powers that are necessary for their purpose and proportionate to the objective pursued. The powers laid down in the Act may only be used in ways that are necessary in order to achieve the purpose of the Act and proportionate to the objective of their use. The powers may be exercised only if the authorities cannot control the situation by using regular powers.

When the state of emergency was over, the powers of the Emergency Powers Act no longer applied and the COVID-19 pandemic was managed by taking advantage of the powers of the legislation in place under normal conditions, including the Communicable Diseases Act (Act No 1227/2016) and the Border Guard Act (Act No 578/2005) which were also subject to some partial amendments in 2021 for the purpose of countering more efficiently the pandemic.

During 2021, some of the criticism presented by the Constitutional Law Committee of Parliament was aimed, more or less directly, at the enforcement and application of the Emergency Powers Act. Although the discussion emerged due to the pandemic, several flaws in the Emergency Power Act had already been identified before the crisis, such as the tension with the definition of the emergency conditions with Section 23 of the Constitution and the extent of the delegation of legislative powers from Parliament to the Government and Ministries and other authorities.[14]

In 2021, it became clear that the Emergency Powers Act is in need of a total revision. The emergency legislation also needs to respond better to new types of risks such as hybrid influence activities and situations of so-called instrumentalization in the field of migration and asylum.

2.3 THE DISCUSSION ON THE RULE OF LAW AND THE CONSTITUTIONAL UNAMENDABILITY

Traditionally, the topic of constitutional unamendability has attracted very little attention in Nordic constitutional scholarship. However, there has in recent years, including last year, been increasingly domestic discussion and debate of various threats to rule of law especially insofar as such a core element of the rule of law as the independence of the courts is concerned. It has been pointed out that the Constitution contains only weak safeguards for judicial independence, lacking, for example, explicit substantial limitations on constitutional amendments and amendment powers.

Therefore, there have been calls for constitutional amendments for the purpose of strengthening constitutional guarantees for the independence of the courts, as well as introducing explicit constitutional limits to amendment powers. This discussion has also triggered constitutional speculation of the existence of any implicit or supra-constitutional unamendability on the powers of constitutional amendments in Finland.[15]

2.4 THE REFORM OF THE HEALTHCARE AND SOCIAL SERVICES SYSTEM

The long running reform of the healthcare and social services system was finally finished in 2021. The main objective of the reform is to improve the availability and quality of basic public services throughout Finland.

Since the late 2000s, the reform has also been a continuous and pressing constitutional matter, for the domestic catalog of fundamental rights also includes the right to life and health and the right

10 About the role of the Committee see e.g., Ojanen and Salminen 2019 (Supra note 4), and the 2016 report on Finland: Laura Kirvesniemi, Milka Sormunen and Tuomas Ojanen, 'Developments in Finnish Constitutional Law: The Year 2016 in Review', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *The I-CONnect Clough Center 2016 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2017) 62

11 Government Bill 39/2021 and Constitutional Law Committee Opinion 12/2021

12 According to Section 109 of the Constitution of Finland, The Parliamentary ombudsman shall ensure that the courts of law, the other authorities and civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfil their obligations. In the performance of his or her duties, the Ombudsman monitors the implementation of basic rights and liberties and human rights.

13 See the Parliamentary Ombudsman's annual report of 2021, which is available online in Finnish: https://www.oikeusasiamies.fi/toimintakertomukset

14 In Finnish, see Johannes Heikkonen, Pauli Kataja, Juha Lavapuro, Janne Salminen and Mira Turpeinen, *'Valmiuslaki ja perusoikeudet poikkeusoloissa: Valtiosääntöoikeudellinen kokonaisarvio valmiuslain ja perustuslain 23 §:n suhteesta'*. Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja 64/2018.

15 Constitutional unamendability discussed in more detail in Tuomas Ojanen, 'Constitutional Unamendability in the Nordic Countries' (2019) 21 EurJL Reform 385

to adequate healthcare and social welfare services. The Constitution also obliges public authorities to promote the health of the population.

The responsibility for organizing these services will be transferred from municipalities to wellbeing services counties from 2023 when the last bills are scheduled to enter into force. Under the reform, a total of 21 self-governing wellbeing services counties were established in Finland.[16] In addition, the City of Helsinki will be responsible for organizing health, social and rescue services within its own area.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. CONSTITUTIONAL CONTROL

The primary authority of constitutional review and interpretation is the Constitutional Law Committee of Parliament, whose mandate under Section 74 of the Constitution is to 'issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties'. As other non-judicial actors are also charged with various tasks of *ex ante* constitutional review of legislative proposals, the overall Finnish system of constitutional review is institutionally pluralist, as well as is a peculiar mix of abstract *ex ante* and concrete *ex post* forms of constitutional review in a manner that is intriguingly linked with the issue of the division of powers between the democratically elected legislature and the judiciary.

Due to the role of the Constitutional Law Committee its reports and opinions were important for the developments in 2021. For example, in COVID-19 related issues, several opinions by the Committee included severe constitutional criticism against various legislative proposals with the outcome that these legislative proposals were changed for the purpose of achieving harmony with the Constitution and international human rights treaties binding upon Finland. Also, the reform of the healthcare and social services system was under the review of the committee, including major constitutional matters.

The constitutional control conducted by the Constitutional Law Committee is abstract and thus, the review of the Committee cannot cover all the possible situations that could emerge from applying the legislation. The *ex post* review conducted by the courts and the legality supervisors aims to plug the possible loopholes left in the abstract *ex ante* review of the Committee. The outbreak of the COVID-19 pandemic will eventually bring individual cases – including constitutional matters – in courts as well, but in 2021 the more relevant constitutional actors were the legality supervisors, especially the Parliamentary Ombudsman.

2. THE ROLE OF THE COURTS – LIMITED BUT NOT IRRELEVANT

As with other Nordic countries, Finland has no constitutional court, and courts still play a secondary role in the Finnish constitutional system. Prior to 2000, courts were also prohibited from reviewing the constitutionality of ordinary legislation. However, as the constitutional tendency has been towards rights-based constitutionalism since the late 1980s, the prohibition of judicial review was abolished in 2000 when the current Constitution entered into force. Section 106 of the Constitution now acknowledges judicial review, albeit with a half-way-house formulation, by providing on the primacy of the Constitution as follows:

> "If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution."

Section 106 of the Constitution acknowledges only a limited role for courts in reviewing the constitutionality of Acts of Parliament.[17] It is not intended to shift the task of securing the constitutionality of Acts of Parliament from the Constitutional Law Committee of Parliament to the judiciary. Instead, the primary mechanism for reviewing the constitutionality of legislation is in the future as in the past, the abstract *ex ante* review carried out by the Constitutional Law Committee. The *travaux préparatoires* of Section 106 are clear on this point,[18] and so is also the wording of Section 106 as it requires that the application of an Act must be in *evident* conflict with the Constitution. If the conflict is not evident, the Court is lacking tools of constitutional review and therefore, the judicial review is mainly focusing on plugging loopholes of the system of *ex ante* constitutional review. The application of Section 106 by courts remained initially quite rare but since the late 2000s there have been more cases involving application of Section 106 by courts. Those cases may suggest, at least tacitly and by implication, that there exists a need for effective *ex post* review of legislation by courts. As a consequence, there have also been increasingly calls for amending Section 106 of the Constitution by abolishing the requirement of an evident conflict.

In 2021, there were some notable cases including the application of Section 106 of the Constitution. All cases raised some wider debate on the issue on hand, such as the case 2021:140 of the Supreme Administrative Court. The case was about whether the obligatory membership of the student union provided in the Universities Act (558/2009) was in evident conflict with the freedom of association guaranteed in Section 13 of the Constitution. In this individual case, the Court considered that the application of the Section concerning obligatory membership was not in evident conflict as intended in Section 106 of the Constitution. However, the subject itself – the obligatory membership of the union and its relation to the Constitution – became part of the public and political discussion.

IV. LOOKING AHEAD

Due to the lack of comprehensive constitutional reforms or even partial ones, constitutional development in Finland during 2021 can be regarded as modest. Still, the pandemic and the rise of populism or authoritarianism have triggered some constitutional discussion and debate of the rule of law, fundamental rights and the status of the

16 Act implementing the reform of health, social and rescue services and the related legislation (Act No 616/2021) entered into force on 1 July 2021

17 For the background of Section 106, see Tuomas Ojanen 'From Constitutional Periphery toward the Center – Transformations of Judicial Review in Finland' (2009) 27 NJHR 194, 202-206.

18 See Government Bill 1/1998, p. 164. See also Constitutional Law Committee Report 10/1998, p. 31

Constitution and its relation to political power. These themes reflect European and global trends as well.

The need to prepare for crises and emergency situations has also amplified the discussion on the need for legislative changes, including constitutional amendments. In particular, the reform of the Emergency Powers Act is timely, not only due to the pandemic but also considering the recent changes in European and global political situation and security policy. Hence, the Emergency Powers Act is going to be comprehensively reformed in a long-term project, aiming for up-to-date and consistent legislation that would be in harmony with the Finnish Constitution. In addition to this comprehensive reform, the Emergency Powers Act and Border Guard Act are going through a rapid change with amendments that address the risks emerging from hybrid influence activities that exploit migration. These amendments aiming to strengthen border security have already been prepared in the beginning of 2022 as the global situation has expedited the need for amendments.

It is inevitable that the future developments will be more or less impacted by the international security situation. The comprehensive reform of the legislation concerning preparedness for crises and emergency situations is considered being strictly necessary and the scope of the reform will also necessitate careful constitutional review, as well as give rise to some wholly new constitutional questions and debates.

V. FURTHER READING

Martin Scheinin, 'The COVID-19 Emergency in Finland: Best Practice and Problems' (*Verfassungsblog*, 16 April 2020) <https://verfassungsblog.de/the-covid-19-emergency-in-finland-best-practice-and-problems/> accessed 30 June 2022

Martin Scheinin, 'Finland: Soft measures, respect for the rule of law, and plenty of good luck' (*Verfassungsblog*, 23 February 2021) <https://verfassungsblog.de/finland-soft-measures-respect-for-the-rule-of-law-and-plenty-of-good-luck/> accessed 30 June 2022

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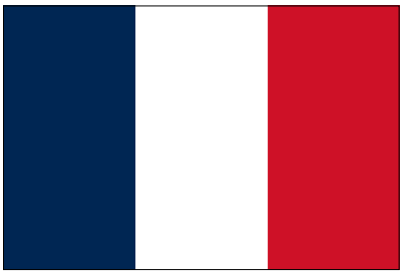

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I. INTRODUCTION

Although the year 2021 did not bring any fully fledged constitutional reform, a few new developments should be emphasized. Indeed, 2021 saw the *de facto* failure of the 2019 reform and of a smaller reform introduced in 2021. The first was not discussed by Parliament. The second was discussed and modified back and forth by the two chambers of Parliament, being dropped in the end. 2022 being a presidential election and a legislative elections year, the political will to fight for a constitutional reform was quite low. The oppositions would also have used the reforms and the discussions as platforms for the upcoming elections. It is however likely that a new reform, made of both old and new propositions, will be introduced after the legislative elections, depending on the elected majority. If Emmanuel Macron gets a majority, he will most likely go forth with what he laid down in his presidential program, but this will not happen before the end of 2022.

This does not mean, however, that no constitutional change took place entirely. Quite unexpectedly indeed, the Constitutional Council made a jurisprudential change by finally fleshing out the "rules or principles inherent to the constitutional identity of France". Although not a constitutional reform in the formal meaning, it is a change at the constitutional level worth mentioning.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

First of all, it should be noted that in continuity to what was written last year in this report[1], the constitutional reform introduced in 2019[2], which aimed at modifying the French institutions, seems to have definitively been dropped. It has not been discussed in Parliament in 2020, nor in 2021. The COVID-19 crisis has outshone it entirely, and then the presidential election made it politically impossible to discuss it. This does not mean that the reform is dropped for good. Parliament could decide to discuss it, or the Government could decide to put it on the order of the day of either one of the assemblies. It is, however, very unlikely, in the same way that it would be unlikely in the US for the unratified amendments to be eventually ratified by the States. It has not technically failed as much as it has been *de facto* dropped. The content of the various amendments will probably be kept for the next constitutional reform, though it has not even been formally announced.

The 2021 planned constitutional reform[3], also mentioned in last year report[4], aimed only at amending the first article of the Constitution, adding a new sentence related to climate change and environment. The amendment was adopted by the National Assembly, modified by the Senate, modified again by the national Assembly, and finally modified yet again by the Senate. None of the four versions are entirely identical and the differences could appear as purely semantics, but the two chambers of Parliament had very different ideas of what the new provision should entail, specifically when the Constitutional Council would use it against the legislator, that is Parliament itself. Considering the procedure of constitutional reform in France, it has not been rejected as such, and the discussion between the two chambers of Parliament could actually go on. However, the Government decided to drop the reform, so that it can be considered as having failed. Considering that the idea to include a similar provision already existed in the 2019 project, it is likely that the next revision will include, or try to include at least, a similar amendment.

It should also be noted that legal doctrine suggested some constitutional reform regarding the place of Corsica in the French Constitution[5]. Indeed, Corsica always had a specific place politically, but not so much constitutionally. In 1982, a process of decentralization was started. The idea was to give more powers to the various local administrations (cities, departments and regions) with no political control from the central administration. Although similar in some ways to devolution, this process is wholly different because it is only on a secondary legislation level, not on a primary legislation level. That is to say that decentralization aims at giving a power to enact regulations only, and not statutes. As of today, Corsica has a specific legislative statute, but not a constitutional one.

The proposed constitutional reform aims at giving Corsica a proper constitutional place, as well as a political and juridical recognition. The first point would be to give a constitutional recognition to the "Corsican people"[6]. The second point, that would not only benefit more than just

1 Eleonora Bottini, "France" [2020] IRCR 112.

2 Projet de loi constitutionnelle pour un renouveau de la vie démocratique, n° 2203, presented on August 29th 2019 <https://www.assemblee-nationale.fr/dyn/15/dossiers/renouveau_vie_democratique> accessed 19th May 2022.

3 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> accessed 19th May 2022.

4 Eleonora Bottini, "France" [2020] IRCR 113.

5 Wanda Mastor, *Rapport sur l'évolution institutionnelle de la Corse* (11th October 2021) <https://www.isula.corsica/attachment/2229377/> accessed 19th May 2022.

6 See Constitutional Council, 9th May 1991, Decision n° 91-290 DC, *Act on the stat-*

Corsica but is mainly a demand from the Corsican people, is the possibility to teach the Corsican language by immersion education, even in public schools. The last point really focuses on the juridical statute of the island, and three possibilities are put forth. The first one would follow the 2019 proposition and only add in the Constitution that Corsica is a specific collectivity, following the reform project of 2019. The second one would put in place a true devolution system, in which Corsica would have similar powers to the Parliament at least in some matters states by the Constitution and then detailed in an organic law. The third one would be giving Corsica a specific title in the Constitution, as it is the case for New Caledonia, with a possibility for a referendum of independence in years to come. This would let Corsica become a new, independent State. Except the part that was in the 2019 reform project, these constitute only propositions made by one scholar.

One last constitutional change, if not a constitutional reform per se, is worth mentioning here: the Constitutional Council's decision of the 15 October 2021 (2021-940 QPC, *Société Air France*). Rendered through the QPC procedure (Question Prioritaire de Constitutionnalité, an ex-post constitutional review of a legislative act), that decision is both a landmark case and a bit of a disappointment since it finally gives some content to the very broad category of "rules or principles inherent to the constitutional identity of France" created by the same Council in a decision rendered on the 27th July 2006[7]. The general (and historic) prohibition of any kind of delegation of general administrative power inherent to the exercise of public force now forms part of that category, in conditions we will investigate further on.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The content of the 2019 constitutional reform was explained in detail in last year's report, so there is no need to go back to it. However, the 2021 reform (1), the proposed reform on Corsica (2) and the first "principle that is inherent in France's constitutional identity" recognized by the Constitutional Council (3) must be explained further. None of these constitutional reforms raised any tension with unamendable rules in the Constitution[8]. They all constitute mainly amendments and not dismemberments, although a point could be made that some of the proposed reforms about Corsica are dismemberments. The Constitutional Council was only involved in the last point of interest, since the constitutional reform came from its own case law. Although its role and its place have not changed since last year, we will explain its specific position in this case.

1. ENVIRONMENT

The 2021 reform project is interesting in several ways. Some have been mentioned last year, and we will focus here on the scope of the reform and why it failed, which are both entangled. The general idea behind this revision was to specifically add a reference to climate change in the Constitution. In 2005, a specific Charter for the Environment was added to the preamble of the Constitution, to be used as reference by the Constitutional Council. It is mainly based on sustainable development rather than on climate change, and it was deemed necessary to add a specific provision about climate change.

However, that project failed because both chambers of Parliament did not agree on the specific wording of the provision, which has its importance since after the reform, the Constitutional Council could have used it against said Parliament. The National Assembly wanted, following the Government, the provision to use the verb "guarantee", to indicate that the Republic "guarantees environmental preservation and biological diversities". The Senate, however, proposed "preserves" or "acts", and wanted to also specifically limit the scope of the revision to what the 2005 Charter provided. The argument was that the wording suggested by the Government and the National Assembly was too restrictive on the Parliament. The Senate did not want to bind itself that much in law making, considering that its action would be too limited by the provision.

It is hard to really foresee what the Constitutional Council would have made of both the proposed wordings, but the fear of being too limited by the Constitution is what made the reform fail. If the Constitutional Council can usually be considered an enlightened court, it can sometimes be counter-majoritarian. The fear of the Council using that reform as a counter-majoritarian tool is then what led to the that reform's failure.

2. CORSICA

Symbols are important, especially so when dealing with cultural identities on a constitutional level. The existence of a Corsican people, although a sociological and anthropological reality[9], has always been concealed behind the whole of the French people. The idea of a complete unity of the French people, however, has already been challenged, first in 1998 with the recognition of the New Caledonian people in article 76 of the Constitution, then in 2003 in article 72-3 with the recognition of overseas populations. The 1991 justification for the unconstitutionality of a statute recognizing the Corsican people and the lack of a constitutional mention of Corsica altogether is then hard to justify. This is precisely the point of the proposed reform of article 72-3 of the Constitution: recognizing both the overseas populations *and* the Corsican people. Undoubtedly, such a change is largely cosmetic. It is, nonetheless, an important one when it comes to matter of principles. Such a change might appear as a dismemberment, if one is to follow the decision of the Constitutional Council of 1991[10]. Indeed, at least according to the Constitutional Council, the Constitution must be read as recognizing only the French people, this being a founding part of the French Republic.

The second part of the proposed reforms concerning Corsica is about teaching the Corsican language, and more largely other regional languages. Since the 1789 Revolution, France has been built on the unity of the language spoken by its people. People speaking regional languages do not have any specific rights to be addressed in said languages when

ute of the territorial unit of Corsica, in which the Council struck down a statute recognizing the existence of the "Corsican people" because the Constitution only recognizes the existence of the "French people".

7 Constitutional Council, 27th July 2006, decision n° 2006-540 DC, *Copyright and related rights in the information Society.*

8 On the unamendable rules in France, see last year report, Eleonora Bottini, "France" [2020] IRCR 115.

9 Liza Terrazzoni, *Les autres en Corse : pour une sociologie des relations interethniques* (Albiana, 2019).

10 Constitutional Council, 9th May 1991, Decision n° 91-290 DC, *Act on the statute of the territorial unit of Corsica.*

dealing with the administration, and every legal act of both the central State and the local administrations has to be written in French as per the *ordonnance de Villers-Cotterêts* of 1539. The idea behind the proposed reform is to enable public schools to teach regional languages by immersion education. It is obviously possible for private schools to do it, but it is prohibited for public schools to teach regional languages in such a way. This reform aims directly at overturning a recent decision of the Constitutional Council, in which it ruled that it was unconstitutional to allow a city to finance schools with immersion education[11].

Regarding Corsica, last but not least is the place of the island altogether in the Constitution. A first project is inside the 2019 reform project, and only aims at mentioning Corsica in the Constitution. However, the two other propositions, mentioned in II, would give a specific status to the island, either through a form of devolution or through a planned autonomy, not unlike New Caledonia. Such a reform could be seen as a dismemberment, since article 1 of the Constitution is centered on the unity of the State.

3. CONSTITUTIONAL IDENTITY

The 2021-940 QPC decision of the Constitutional Council mentioned earlier is worth exploring a bit further here. As indicated, it is a landmark case as it constitutes the first practical application of another landmark decision rendered on the 27th July 2006[12]. The 2006 decision regards the only possible situation where a constitutional review of a law ensuring the transposition into national law of European directives is possible, when the law only provides the necessary consequences of an unconditional and precise directive: the situation where the transposition law "runs counter a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto" (*i.e.*, through a constitutional reform). In any other case, supremacy of European law as well as article 88-1 of the French Constitution apply: European directives must be transposed into French law and, in the event of a difficulty with any piece of European law (for example, a conflict between the directive's content and the national Constitution), only the European Court of Justice is competent to give rulings on their interpretation and validity, or lack thereof (art. 267 TFEU).

The 2006 decision caused quite the commotion in both French and European law at the time. At the European level, that decision happened only a year after the TCE's failure (Treaty establishing a Constitution for Europe), in a time of great fragility of the European institutions. It started a trend amongst some of the most historical members of the EU to reaffirm their constitutional identity against European Law (followed by Spain on a European decision rendered on the 20th of November 2008, and then by Germany in a decision rendered on 30th June 2009[13]). At a more national level, that decision triggered a series of scholarly discussions as to what that notion encompassed. Different principles were suggested, including the French concept of separation of powers or public service, the free administration of local authorities and, most notably, the French concept of laïcité[14]. Even though litigants tried to use that newfound lever against transposition law more than once, no principle was ever sanctioned as being part of those rules or principles inherent to the constitutional identity of France.

It's a done thing now with the 2021 decision, and the principle it elevated as being inherent to the constitutional identity of France is one of the reasons why it is quite a disappointment. The decision was rendered in a very specific context, which is the obligation imposed on the company that transported a foreigner who is not a national of a member of the European Union and who has been denied entry in France to transport them back to their departure point (art. L. 231-4 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile).* That obligation was incorporated into French law as per the 2001/51/CE Directive of 28th June 2001 and article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, and it was challenged on the grounds of "running counter" the principle, inherent to the constitutional identity of France, that powers of general, administrative police cannot be delegated to private entities (such as, in that case, the private society Air France). More precisely, the society argued that, through that obligation to transport foreigners back to their departure point, they were also compelled to detain those foreigners against their will, transferring them the exercise of public force. That obligation to detain and transport unwilling passengers, as well as the costs involved and entirely supported by the company, was considered unconstitutional (as per article 12 of the *Déclaration des Droits de l'Homme et du Citoyen of 1789*) and a violation of that principle forbidding that delegation of general, administrative police powers.

That prohibition was indeed sanctioned as part of the principles inherent to the constitutional identity of France, thus making possible a constitutional review of the transposition law challenged by the company. Making it possible, however, does not mean that the law was found unconstitutional: the Constitutional Council, right after recognizing that the prohibition of delegation of general administrative police powers inherent to the use of public force does form part of the principles inherent to the constitutional identity of France, highlights that the obligation imposed on the air transportation company to transport the foreign who has not been granted entry into French territory only compels them to see to their transportation. Any sort of monitoring, restricting or use of force against those foreigners is carried out by the police authorities, not by the company, meaning. The law is, then, found constitutional and the litigants are dismissed.

That decision, as unique as it formally is, is not very original on a more substantial point of view. The prohibition of delegation of general administrative police powers was first formulated in an historic case of the Council of State of the 14th June 1937 (*Ville de Castelnaudary*) and then reiterated by the Constitutional Council[15]. The only novelty in this decision is the fact that that prohibition forms part of the principles inherent to the constitutional identity of France – a possibility that had never been imagined by the various authors who speculated on its content. That such a narrow prohibition was the first principle to be sanctioned as such was as much of a surprise as it was a disappointment to those who imagined a more substantial content to that notion[16].

11 Constitutional Council, 21st May 2021, Decision nº 2021-818 DC.

12 See above, note 7.

13 CJCE, 20th November 2008, case T-185/05, *Italian Republic v. Commission* and Federal Constitutional Court of Germany, 30th June 2009, 2 BvE 2/08 e.a.

14 See, for example, Michel Troper, "Identité Constitutionnelle", in Mathieu Bertrand (ed.), *1958-2008. Cinquantième anniversaire de la Constitution française* (Dalloz 2008).

15 See, for example Constitutional Council, 10th March 2011, decision nº 2011-625 DC, *Law on guidelines and programming for the performance of internal security* or 20th May 2021, decision nº 2021-625 DC.

16 See, for example, Sébastien Hourson, "L'identité par contraste, la légalité du contrat" [2022] Dr. Adm. 3.

Another source of disappointment is that the prohibition pointed out by the Constitutional Council is the "narrow version" of the prohibition put in place by *Ville de Castelnaudary*: it only regards the delegation of general administrative police powers and the exercise of public force, and not the delegation of special administrative police powers (here, the special administrative police of foreigners). The window the decision opens is then a very small one: it means that a law ensuring the transposition into French law of a directive that is unconditional and clear can only be reviewed on grounds of constitutionality if it delegates to private entities powers of general administrative police, including the exercise of public force – that is, traditional police activities. Any other sort of delegation of administrative police powers will not fall into that category, and will not allow for a constitutional review if put in place by a transposition law.

That decision is not nearly the bombshell the 2006 decision was, mostly because of how narrow it is and because it did not, ultimately, lead to any sort of sanction on the challenged law. It does work, however, as a reminder that that category of principles inherent to the constitutional identity of France exit and might be used against European law if necessary. It also makes for another example of the tendency of the Conseil constitutionnel to toy with his jurisdictional competences and with a rather constructive approach to the Constitution to create, shape and potentially reshape his own place in the constitutional framework[17]. We will not here engage in a full review of the role the Constitutional Council plays in the French institutional landscape, as this has already been done in the previous edition. We can still definitely connect that occasional tendency of the Council to come up with new notions, categories and regimes as his own way of play somewhat of an enlightened role, in the small margins offered by his constitutionally, culturally and politically constrained position.

IV. LOOKING AHEAD

2021 was not a very productive year in terms of constitutional reform for a reason, whether it is considered good or bad: 2022 is an electoral year. Politically, considering how tense the political and social climate already was at the beginning of the year and how it grew to become more tense through the months, it was rather hard to imagine how it could be possible to follow through with a full-fledged constitutional reform.

As we are writing these lines, President Emmanuel Macron has already been reelected against his main opponent, Marine Le Pen. As the first round of the legislative elections will be organized on the 12th June, that is to say three days before the deadline of this article, we cannot yet predict whether the newly reelected President will be able to re-engage another constitutional reform project according to his electoral manifesto. Its content, as far he gave details about it during the campaign, is mostly similar to the one he initiated back in 2018: reinforcing of the control powers of Parliament over the executive power, injecting a dose of proportional elections into the legislative elections (for now entirely based on a majoritarian system), reducing the number of deputies and senators, barring the possibility to hold multiples mandates through time, suppressing the Court of Justice of the Republic (the specific jurisdiction charged with investigating ministers) and including the status of Corsica into the constitutional text. The only "novelty" resides in the method he means to use, since he wishes to summon a cross-party commission to work on the new draft. That method is far from new since eight commissions have already been summoned to work on constitutional reform drafts, with only two being really cross-party and four leading to actual constitutional reforms.

Whether or not that constitutional reform will finally be put to the vote and, eventually, adopted highly depends on the results of the legislative elections. Considering the constitutional amendment procedure set up by article 89, President Emmanuel Macron will need the absolute majority in the National Assembly to be able to conduct the process as he imagined – otherwise, if he loses his majority during the next legislative election, he will have to make do with an adverse majority and an adverse Prime Minister (the political situation is called *cohabitation* and has not happened in France since 1997). He might have to make concessions or, depending on what Prime Minister he eventually names, to give up on his initial project. It could be, then, that the 2022 edition of this review might have a brand-new constitutional reform to write about.

With the number of unknown variables involved in the process and the complicated political atmosphere in France at the moment, we should expect 2022 to be an *interesting* year on a constitutional level – if not a peaceful year.

V. FURTHER READING

Wanda Mastor, *Rapport sur l'évolution institutionnelle de la Corse* (11th October 2021) <https://www.isula.corsica/attachment/2229377/> accessed 19th May 2022.

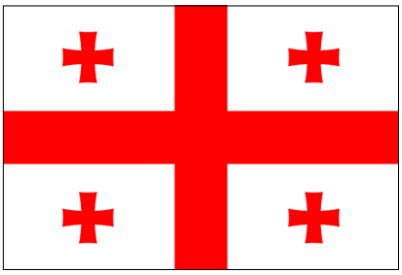
Nicolas Pauthe, "Modifier l'article 1er de la Constitution : une fausse bonne idée pour la cause environnementale ?" [2021] AJDA 2021.

Pierre-Antoine Tomasi, "L'identité constitutionnelle de la France, la force publique et le service public" [2021] RFDA 1087.

Romain Rambaud, "Observations sur le projet de réforme constitutionnelle 'pour un renouveau de la vie publique démocratique", orale presentation on the 21st November 2019, <https://hal.archives-ouvertes.fr/hal-02543985/document> accessed 19th May 2022.

17 See, on the matter of the role of the Constitutional Council, Eleonora Bottini, "France" [2020] IRCR 115.

Georgia



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I. INTRODUCTION

Constitutional amendments aren't unfamiliar to the Georgian reality. Almost every year politicians demand various changes to the Basic Law. Every such demand of course is shaped by a political context. The review at hand aims at analyzing the political configuration leading to the drafting of a constitutional amendment bill. The reader will learn about the genesis of political crisis and its escalation, as well as the way it's been managed by external actors. Furthermore, the paper deals with the content of the bill and its fate. The proposal alters 4 different topics in the Constitution. Therefore, I will evaluate each modification individually in order to determine whether it amends or dismembers the Constitution. The review also touches upon the possibilities of unconstitutional constitutional amendments and the role the Constitutional Court plays in Georgia. I will also discuss the concept of amendment culture and identify its type in Georgia and thereby, I'll try to explain the main reasons for frequent amendments. In the end, I will propose some ideas for further studies of the nature of constitutional amendments in Georgia.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

A constitutional amendment bill proposed in 2021 was aimed at soothing the political outcry afterwards the 2020 parliamentary elections. Immediately after the results of the elections were announced,[1] the opposition refused to hold the allocated seats, claiming that the elections have been rigged.[2] Their protest resulted in the demand that the Parliament terminated their mandate, but the legislative branch refused to do that.[3] Some Georgian constitutional scholars deemed this unconstitutional.[4] 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.[5] Two out of 7 opposition parties agreed to enter the Parliament.[6] 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.[7] The proper amendments to the Organic law of the Election Code have been registered in the Parliament in pursuit of the memorandum.[8] In addition, the ruling party Georgian Dream (hereinafter GD) started preparations for the constitutional amendment that would consider lowering the threshold of parliamentary elections from 5% to 3% and also decreasing the number of deputies for creation of a faction from 7 to 4.[9]

In the meantime, the confrontation between GD and other opposition parties escalated. On March 1, President of the European Council Charles Michel visited Georgia to meet with the parties in dispute.[10] The government and the opposition discussed the 6-point plan put forward by President Michel.[11] The plan contained many aspects, including the ambitious election reform and potential snap elections.[12] Later, President Michel, in cooperation with High Representative Borrell, mandated Christian Danielsson to engage as personal envoy, in EU-mediated political dialogue in Georgia.[13] Mr. Danielsson came to Georgia on March 12 and in the following days he met with the President, the ruling party and the opposition.[14] He also held a joint meeting with the parties.[15] 10 hours of negotiations ended with no concrete results.[16] Afterward, Mr. Danielsson returned Brussels to inform President Michel about the mission.[17]

1 The final summary protocol of the results of the Parliamentary elections of Georgia, <https://info.parliament.ge/file/1/BillReviewContent/265324?> accessed 31 March, 2022.
2 Giorgi Alaverdashvili, 'Georgia' in Luís Roberto Barroso and Richard Albert (eds), *The 2020 International Review of Constitutional Reform*, the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2020, 120.
3 ibid.
4 ibid.
5 ibid.
6 ibid.
7 ibid.
8 Georgian Young Lawyers' Association, Newsletter N18, 7-9, <https://tinyurl.com/3rmvyktv> accessed 5 April, 2022.
9 Georgian Dream Prepares to Initiate Constitutional Amendments to Decrease Parliamentary Election Threshold from 5% to 3% <https://tinyurl.com/3ffh2462> > accessed 5 April, 2022.
10 Georgian Young Lawyers' Association, Newsletter N18, 9, <https://tinyurl.com/3rmvyktv> accessed 5 April, 2022.
11 Radio Liberty has learned about 6 issues discussed at Orbeliani Palace, <https://www.radiotavisupleba.ge/a/31128235.html> accessed 5 April, 2022.
12 ibid.
13 President Michel mandates Christian Danielsson to engage as personal envoy, in EU-mediated political dialogue in Georgia <https://www.consilium.europa.eu/en/press/press-releases/2021/03/08/president-michel-mandates-christian-danielsson-to-engage-as-personal-envoy-in-eu-mediated-political-dialogue-in-georgia/> accessed 5 April, 2022.
14 Georgian Young Lawyers' Association, Newsletter N18, 11, <https://tinyurl.com/3rmvyktv> accessed 5 April, 2022.
15 ibid, 14.
16 The 10-hour negotiations ended in vain - the agreement was not reached again, <https://go.on.ge/254j> accessed 5 April, 2022.
17 Christian Danielson - Ultimately, the responsibility for resolving the crisis lies

On March 27, Mr. Danielsson came back to Georgia and on March 30, the second round of negotiations was held but it was in vain.[18] The proposal of the EU presented by Mr. Danielsson became available that day.[19] Later, on April 19, President Michel proposed another document.[20] Even though the proposal didn't reflect aspirations of all political parties, the parties compromised and signed the document.[21] The opposition parties that became parties to the document entered the Parliament and ended their boycott.[22] After the release of the chairman of one opposition party from prison, that party also decided to follow the lead of the fellow opposition parties.[23]

Based on President Michel's document, a constitutional amendment bill has been drafted and registered in the Parliament on June 29.[24] Nevertheless, on July 28, the ruling party withdrew from the agreement.[25] The bill contained 4 major issues. The first is lowering the parliamentary election threshold from 5% to 2% for the next two elections.[26] The second topic refers to the formation of parliamentary factions. According to the bill, in the parliaments elected in the next two elections, the members of a faction can't be less than four.[27] Currently, the minimum number of Members of Parliament required to form a faction is seven.[28] The third major issue that it addresses is the appointment of the Attorney General. The bill suggests that in the next two parliaments, the legislative branch elects an Attorney General with 3/5 of majority.[29] However, if it fails to do so on two attempts, then on the third try the Parliament votes with the simple majority.[30] In that case, the term of an Attorney General is one year.[31] The fourth important change concerns abolishing the election system designed for any extraordinary elections before 2024.[32] It's worth noting that GD entrenched this system into the Constitution in 2020.[33]

When modifying the Constitution, amendment rules provide for a deliberation floor.[34] It's mandatory to hold nation-wide public discussions about any amendment for a month.[35] The Parliament set up the commission of the public debates[36] and in a month it delivered final minutes of the hearings to the Parliament.[37] The legislative branch adopted the bill on the first hearing on September 7 of 2021.[38] The bill still needs to pass the second and the third hearings in order to become a part of the Constitution. The Legal Issues Committee asked the Bureau four times so far[39] to prolong the time for the second hearing,[40] which the Bureau did on all four occasions.[41] As GD withdrew from the agreement of April 19, its chairman declared that the adoption of an amendment could be postponed until 2023.[42] He also added, that passing the bill would show a goodwill of the ruling party and it would be a "small gift" to the opposition.[43] Currently, the adoption of the bill is pending.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The 2021 constitutional amendment bill contains 4 issues. In this section, I'll evaluate each of them to ascertain whether they're amendments or dismemberments. Then, I'll briefly discuss the possibilities of unconstitutional constitutional amendments and the role of the Constitutional Court. In the end, I'll touch upon the constitutional amendment culture in Georgia.

Before the assessment of each issues, I'll provide a brief overview of amendments and dismemberments. Professor Richard Albert offers us a content-based approach when distinguishing the two.[44] In his opinion, the fundamental difference between an amendment and

with Georgian political actors, which is important for the country's democratic consolidation and European aspirations, <https://tinyurl.com/4nmswpm5> accessed 5 April, 2022.

18 Georgian Young Lawyers' Association, Newsletter N18, 16, <https://tinyurl.com/3rmvyktv> accessed 5 April, 2022.

19 EU mediator Christian Danielsson publishes proposal made today to Georgian political parties, <https://tinyurl.com/5554z25b> accessed 5 April, 2022.

20 "A way ahead for Georgia" <https://www.eeas.europa.eu/sites/default/files/210418_mediation_way_ahead_for_publication_0.pdf> accessed 5 April, 2022.

21 Georgian Young Lawyers' Association, Newsletter N19, 5, <https://tinyurl.com/55wrcaeb> accessed 5 April, 2022.

22 The part of the opposition deputies entered the Parliament, <https://civil.ge/ka/archives/416446> accessed 5 April, 2022.

23 "United National Movement" enters the Parliament, <https://www.interpressnews.ge/ka/article/658450-ertiani-nacionaluri-mozraoba-parlamentshi-shedis> accessed 5 April, 2022.

24 A letter of the Members of the Parliament to the Head of the Organizational Department of the Parliament of Georgia, <https://info.parliament.ge/file/1/BillPackageContent/31727?> accessed 5 April, 2022.

25 "Dream" withdraws from Charles Michel agreement <https://netgazeti.ge/news/556482/> accessed 5 April, 2022.

26 The Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia, 2021, art 1 (1) <https://info.parliament.ge/file/1/BillReviewContent/277220?> accessed 5 April, 2022.

27 ibid.

28 Constitution of Georgia, art 41 (3).

29 The Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia, 2021, art 1 (1) <https://info.parliament.ge/file/1/BillReviewContent/277220?> accessed 5 April, 2022.

30 ibid.

31 ibid.

32 ibid, art 1 (2).

33 To learn about last year's constitutional amendment process see: Giorgi Alaverdashvili, 'Georgia' in Luís Roberto Barroso and Richard Albert (eds), *The 2020 International Review of Constitutional Reform,* the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2020, 117-120.

34 To learn more about deliberation floors, see: Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (Oxford University Press, 2019) 204.

35 Constitution of Georgia, art 77 (2).

36 The Resolution of the Parliament of Georgia on the establishment of a commission on the publishing the bill and conducting its public hearings, <https://info.parliament.ge/file/1/BillReviewContent/279086?> accessed 5 April, 2022.

37 Final minutes of the nation-wide public discussions of the Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia (N07–3/92, 29.06.2021), <https://info.parliament.ge/file/1/BillReviewContent/282167?> accessed 5 April, 2022.

38 Voting results of the first hearing of a constitutional amendment bill, <https://info.parliament.ge/file/1/BillReviewContent/282363?> accessed 5 April, 2022.

39 Last time I checked the website of the Parliament for this purpose was on May 18, 2022.

40 N2-12071/21 Letter of the Legal Issues Committee to the Bureau of the Parliament <https://info.parliament.ge/file/1/BillReviewContent/283109?> accessed 5 April, 2022. N 2-13935/21 Letter of the Legal Issues Committee to the Bureau of the Parliament <https://info.parliament.ge/file/1/BillReviewContent/284875?> accessed 5 April, 2022. N2-832/22 Letter of the Legal Issues Committee to the Bureau of the Parliament < https://info.parliament.ge/file/1/BillReviewContent/293538?> accessed 5 April, 2022. N2-5363/22 Letter of the Legal Issues Committee to the Bureau of the Parliament < https://info.parliament.ge/file/1/BillReviewContent/298825?> accessed 18 May, 2022.

41 N86/14 Decision of the Bureau <https://info.parliament.ge/file/1/BillReviewContent/283111?> accessed 5 April, 2022. N91/14 Decision of the Bureau <https://info.parliament.ge/file/1/BillReviewContent/284877?> accessed 5 April, 2022. N116/29 Decision of the Bureau <https://info.parliament.ge/file/1/BillReviewContent/293798?> accessed 5 April, 2022. N145/12 Decision of the Bureau <https://info.parliament.ge/file/1/BillReviewContent/298963?> accessed 18 May, 2022.

42 Irakli Kobakhidze - There will be no early elections until 2024, as for lowering the threshold, it depends on many things <https://tinyurl.com/2p88rhab> accessed 5 April, 2022.

43 Irakli Kobakhidze - If we adopt constitutional amendments, the clause on the proportional system, as well as the clause on the threshold, should be effective from 2024 <https://tinyurl.com/mrxs3z3r> accessed 5 April, 2022.

44 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (Oxford University Press, 2019) 78.

a dismemberment lies in their scope.[45] 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.[46] A constitutional amendment entails unbroken unity with the constitution being amended.[47] Constitutional continuity is a necessary feature of amendment.[48] Professor Albert distinguishes 4 purposes of amendments. They can either be corrective, elaborative, reformative or restorative.[49]

A constitutional dismemberment, in contrast, is incompatible with the existing framework of a constitution because it seeks to achieve a conflicting purpose.[50] Severing the link that keeps the constitution coherent with an amendment results in a constitutionally discontinuous change that pulls reformers outside of the present constitutional order and into a new world where the rules of old may have no legal or political validity.[51] A dismemberment is incompatible with the existing framework of the constitution and … seeks to unmake one of its constituent parts - its rights, structure, or identity.[52] Therefore, there can be three types of dismemberment.[53]

As mentioned, the constitutional bill in question introduces 4 different changes. One concerns the threshold in the next two parliamentary elections. According to the current regulation, parliamentary elections starting from 2024 are fully proportional and the threshold is 5%.[54] The bill introduces 2% threshold for the next two elections (2024 and 2028 parliamentary elections).[55] It doesn't affect the electoral system, it just lowers the threshold to gain parliamentary seats. It doesn't modify the structure of the Constitution. If the bill is adopted, the system will stay intact. Therefore, it falls under the category of a reformative amendment. It revises an existing rule in the constitution but without undermining the constitution's core principles.[56] The second change introduced by the bill alters the minimum number of deputies to create a parliamentary faction. Currently, at least 7 members are necessary to form a faction.[57] The proposed amendment aims at lowering that number to 4.[58] Again, the change is in line with the existing design. As a result, this part of the bill could be considered a reformative amendment. The third change concerns the appointment of the Attorney General. Now the Constitution states that the Attorney General is elected by a majority of the total number of the Members of Parliament (hereinafter MPs).[59] The bill raises the quorum to 3/5 of the total number of the MPs.[60] However, it also states that if the Parliament fails to elect the Attorney General twice with this higher majority, then on the third try it elects him by a majority of the total number of the MPs.[61] The term of the Attorney General elected by majority, according to the bill, shall be 1 year. The change doesn't introduce anything new into the Constitution. It just modifies the way of election of the Attorney General. Therefore, it can be understood as an amendment. Again, this is a reformative amendment. The fourth change abolishes the mixed electoral system designed purposely for the extraordinary elections before 2024.[62] In 2020, the amendment was passed that modified the distribution of seats for the 2020 parliamentary elections. It also stipulated that any extraordinary elections until 2024 must be conducted according to the procedures prescribed by the amendment. The abolition of this norm would lead to the use of a default rule, which entails fully proportional system.[63] As a result, the forth modification introduced by the bill alters the election system from mixed to fully proportional for the extraordinary elections that might take place before 2024. Changes to the electoral system could be classified as a dismemberment of a constitutional structure.[64] The constitutional bill proposed alters 4 different aspects in the Constitution. Three changes are pure amendments, whereas the fourth one is a dismemberment. It's curious how one bill can on the one hand amend and on the other hand dismember some of the parts of the constitution. This review doesn't provide a room for such studies. This issue could be put off for a discussion in some other article.

It's worth reiterating, that the change in question is just a bill. Although, the Parliament adopted it on the first hearing, the second and the third hearings are still pending. The Constitution of Georgia doesn't establish *ex ante* constitutional control. However, one can't challenge a constitutional change even if it's properly passed. The Constitutional Court of Georgia declared that it doesn't possess the competence to review. In the last year's review, I discussed the main arguments of the Court.[65] Since, there hasn't been any new cases this year in that respect, I won't discuss this topic any further.

Professor Luis Roberto Barroso argues, that the Supreme and Constitutional Courts play countermajoritarian, representative and/or enlightened role.[66] In Georgia, in different instances, the Constitutional Court can play either role just mentioned. I have demonstrated that in the review of constitutional amendments of 2020 with indication to specific cases.[67]

Since, the changes have been so frequent to the Constitution, I would like to elaborate on amendment culture in Georgia. Professors Tom Ginsburg and James Melton put forward the idea of amendment culture. According to them, it is "the set of shared attitudes about the desirability of amendment, independent of the substantive issue under

45 ibid, 79.
46 ibid.
47 ibid.
48 ibid.
49 ibid, 80.
50 Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale J. Int'l L., 1, 4.
51 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, (n 44) 79.
52 Albert, 'Constitutional Amendment and Dismemberment' (n 50)1, 5.
53 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, (n 44) 84-92.
54 Constitution of Georgia, art. 37.
55 The Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia, 2021, art 1 (1) <https://info.parliament.ge/file/1/BillReviewContent/277220?> accessed 5 April, 2022.
56 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, (n 44) 81.
57 Constitution of Georgia, art. 41 (3).
58 The Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia, 2021, art 1 (1) <https://info.parliament.ge/file/1/BillReviewContent/277220?> accessed 5 April, 2022.
59 Constitution of Georgia, art. 65 (2).
60 The Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia, 2021, art 1 (1) <https://info.parliament.ge/file/1/BillReviewContent/277220?> accessed 5 April, 2022.
61 The Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia, 2021, art 1 (1) <https://info.parliament.ge/file/1/BillReviewContent/277220?> accessed 5 April, 2022.
62 To learn more about this amendment, see: Alaverdashvili (n 2) 117-120.
63 Constitution of Georgia, art. 37 (6).
64 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, (n 44) 88.
65 Alaverdashvili (n 2) 119.
66 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.
67 Alaverdashvili (n 2), 120.

consideration and the degree of pressure for change."[68] Professor Albert elaborates on their work and offers us the types of culture. According to him, amendment culture can accelerate, redirect, or incapacitate formal amendment in a given jurisdiction.[69] One can witness acceleration culture in three cases, when (1) there is a dominant political party in a country with a younger and more frequently amended constitution commands an amendment supermajority that exceeds the amendment threshold, giving the party free rein to do as it wishes.[70] Another case (2) could be that polities with more frequently amended constitutions have faced a number of peculiar shocks, and lawmakers managed to reach agreement on those many occasions when an amendment was thought necessary to provide a needed fix.[71] Still another reason (3) could be that amendment culture in high-amendment countries recognizes amendment as a change vehicle that is not undermined by frequent resort to it.[72] In Georgia, historically, ruling parties have almost always enjoyed the constitutional majorities. From the adoption of the current Constitution[73] until now, in total, there have been 7 parliamentary elections, out of which in 5 the governing party enjoyed constitutional majority.[74] This could be the main reason why the Constitution has been modified 36 times in just 27 years of its existence. I have argued elsewhere that due to the dominance of a ruling party, the culture of acceleration has been established in Georgia.[75]

IV. LOOKING AHEAD

Constitutional bill seems to be forgotten by the major political parties. Because of the current foreign and domestic affairs, such as Russia's war against Ukraine and the political tension in Georgia, the focus has been shifted from the adoption of the Constitutional bill to ongoing issues. The Legal Issues Committee of the Parliament has continuously asked the Bureau to prolong the deadline for the second hearing. The Rules of Procedure of the Parliament allows the extension of a term for 2nd hearing if the chairperson of the leading committee provides reasons for that.[76] It's worth noting that there's no limit for the number of times of extending a term. The chairperson can apply to the Bureau as many times as he/she wants. I officially asked the Bureau and the Legal Issues Committee about the reasons for the postponement of the adoption of the bill and the supposed date of the renewal of the hearings. In the response from the Parliament 2 reasons were stated. The first was the adherence to the terms prescribed by the Rules of Procedure and the second was the comprehensive preparation for the bill for the second hearing.[77] However, the Parliament left unanswered my question about the renewal of the hearings. Neither did the letter include information about the current phase of preparation of the bill.

The Constitution of Georgia unlike the Constitution of Canada doesn't provide for an intra-generational ratification of a constitutional bill.[78] Amendment rules don't explicitly contain a deliberation ceiling. Therefore, it's unclear whether or not an inter-generational ratification could take place in Georgia. We know from the American constitutionalism that in case of silence of the constitution on when amendment proposals must be ratified, it could take years or even centuries for a bill to be included into the constitution.[79] I guess the big question for Georgian scholars to answer would be how long the Parliament can discuss a constitutional bill before its adoption. There are no academic papers regarding the subject. As mentioned above, the chairman of GD stated that the adoption of the bill could be postponed until 2023.[80] So, there is roughly one year to produce articles. This could be enough time for scholars to write average size papers on the topic.

V. FURTHER READING

1. Malkhaz Nakashidze, Sub-National Constitution and Constitutional Amendments in the Autonomous Republic of Adjara, in book "Avtandil Demetrashvili 80", Sulkhan-Saba Orbeliani University, Tbilisi, 2021.

68 Tom Ginsburg, James Melton, 'Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty' (2015) 13, 3 International Journal of Constitutional Law, 686, 699.

69 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, (n 44) 111.

70 ibid, 112.

71 ibid.

72 ibid.

73 The Constitution of Georgia came into force on August 24 1995.

74 In the parliamentary elections of the years of 1995, 1999, 2004, 2008 and 2016 the winner party always had the constitutional majority. In the periods of 2012-2016 and from 2020 until now no single party possessed a constitutional majority. History of elections in Georgia (1918-2016) <https://tinyurl.com/2vcdh36x> accessed 10 April, 2022. How many deputies would have had a particular party, if the 2016 elections had been conducted on fully proportional system, <http://go.on.ge/151q> accessed 10 April 2022. A final summary protocol of the results of the 31st of October 2020 Parliamentary elections of Georgia, <https://tinyurl.com/y8ktw968> accessed 10 April 2022.

75 Giorgi Alaverdashvili, Amendment Culture in Georgia. The paper is currently kept in my laptop.

76 Rules of Procedure of the Parliament of Georgia, art. 112 (1).

77 Letter N4645/2-7/22 from the Parliament of Georgia received on May 25th 2022.

78 To learn more about the Constitution of Canada and amendment procedure, see: Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, (n 44) 207-210.

79 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, (n 44) 205.

80 See part II of the review.

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 debate in Greece and elsewhere.[1] The year 2021 has been mostly viewed as "the year of salvation", where societies found strategies to combat the pandemic and people to get their normal lives back. The most important aspect of this long-term strategy is, beyond dispute, the authorization of vaccines to prevent Covid-19. The politics of vaccination as to whether it shall be mandatory and to what extent, dominated constitutional discussion in Greece, as the Parliament has passed several pieces of legislation towards that direction.

The intent of this report is to examine the different aspects of constitutional dialogue in Greece. Since the latest constitutional amendment was concluded in 2019 and its aftermath was discussed in the relevant report for the year 2020,[2] this report will mostly focus on legislation of significant constitutional relevance and its clash with fundamental rights. In particular, measures that limited certain fundamental rights will be examined and the position of the Courts towards this clash will be reviewed. 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 2021.

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. A significant number of measures to prevent the spreading of Covid-19 fall under the scope of article 44, para. 1 of the Constitution. Since February 2020, eleven 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.

However, this institutional pattern has changed in the year 2021. During the course of the year, only one act of legislative content was issued, related to the establishment of the vaccination certificate and its application. In all other events concerning measures for combating Covid-19 in all aspects of social life, the regular legislative procedure was adopted. This example indicates the gradual restoration of normality from an institutional and constitutional perspective and the country's efforts to attune the pandemic to the constitutional order in order to not be considered "extraordinary circumstances of an urgent and unforeseeable need" that article 44, para. 1 of Constitution demands for the activation of emergency law. In that sense it may be argued that during the pandemic crisis the Constitution was challenged to its limits but proved to be resilient to the pandemic shock.

With reference to 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 article 5, paras. 2 and 5 and article 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.

In particular, during the course of 2021, the discussion focused on 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 initially 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.

In that respect, Greece has introduced mandatory vaccination policy measures against Covid-19 on two different grounds: profession and age. The first ground refers to two professions: the Special Disaster Response Unit of the Hellenic Fire Service and all personnel in public and private health sector, medical, paramedical, nursing, administrative and supporting. In the first case, based on article 79, para. 13 of Law no. 4662/2020, the Chief of the Hellenic Fire Service ordered the

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 13 June 2022.

2 Vasileios G. Tzemos, Konstantinos Margaritis and Eleni Palioura, "Greece" in Richard Albert and Luis Roberto Barroso (Eds.), *The 2020 International Review of Constitutional Reform* (2021).

3 Article 4, para. 3, part. A, section iii, subsection b.

compulsory vaccination against Covid-19 to all members of the Special Disaster Response Unit until June 11, 2021. The legal consequence in case of non-compliance with the aforementioned order was the transfer to another unit of the Hellenic Fire Force.

In the second case, the Parliament included article 206 in Law no. 4820/2021 on compulsory vaccination. According to that provision, all personnel working in the public and private health sector must be vaccinated against Covid-19 for imperative reasons of the protection of public health. In that case, the legal consequences were far more crucial in case of non-compliance; for the public sector employees that fall under the scope of the provision, the special administrative measure of suspension of duties is imposed. During the period of suspension, no remuneration is provided, and the time of suspension is not counted as actual public service time. Similarly, in the private sector, the employer is obliged not to accept the employee's services and is released from the obligation to pay remuneration for the period of non-compliance with the aforementioned provision. Under the last case, a great number of employees were essentially left out of the labor market.

On the grounds of age, mandatory vaccination was introduced with article 24 of Law no. 4865/2021. Under this provision, for imperative reasons of the protection of public health, all people born until December 31, 1961, and residing in Greece are obliged to be vaccinated against Covid-19. An administrative fine of 100 euros was imposed for every month of non-compliance, except from January 2022 when the administrative fine was reduced to 50 euros. Subsequently, the twenty-ninth article of Law no. 4917/2022 provided the Minister of Health with the power to determine the suspension, the reinstatement, and the expiration of this measure, after taking into account the recent epidemiological data. Consequently, this mandatory vaccination measure was suspended from April 15, 2022, until September 30, 2022.

It is also worth mentioning the developments in the field of e-governance, e-education and church-state relations. More specifically, with regard to the latter, there has been no particular legislative or jurisprudential development in the last year concerning the pandemic regulations. In late 2021, the General Secretariat for Religious Affairs of the Hellenic Ministry of Education and Religious Affairs published a report on the incidents against places with religious content during the year 2020 and refers to the measures taken by the Greek government regarding places of religious worship during the pandemic. In this report, the position of the so-called "anti-vaccination movement" on the ground of religion is underlined, members of which present themselves as "true believers", as opposed to the formal position of religious communities that support state policies against the Covid-19 pandemic.

In addition, the regulations for e-governance that came to the Greek legal order during the pandemic have been further elaborated. In particular, the Joint Ministerial Decision of 18.11.2021 introduces the concept of digital certificate of a public document and the digital certificate of a private contract. There have also been developments in the field of e-justice, since, in addition to the electronic filing of lawsuits and applications before the courts, the electronic submission of documents by bailiffs through a specific application called "Electronic Performance System" will begin in 2022.

Regarding the field of personal data, the Hellenic Data Protection Authority issued two decisions on teleworking and distance learning. Initially, under Decision No. 32/2021, the Authority, in the context of informing individuals as well as data controllers and processors, issued Guidelines specifically for the processing of personal data used during remote work, regardless of the form and type of employment. More specifically, these Guidelines apply both in the private and public sector and its scope is to specify on one hand the risks, rules, guarantees and rights of the individuals and on the other, the obligations of public authorities and private bodies, as processors, in compliance with the institutional framework for the protection of personal data. Furthermore, under Decision No. 50/2021, the Authority examined the compliance of the Ministry of Education and Religious Affairs with the recommendations of its opinion No. 4/2020 on the compatibility of modern distance education in primary and secondary schools with the provisions of the legislation for the processing of personal data and found deficiencies. For example, the Ministry has carried out no detailed research on the legality of the processing purposes. Additionally, the information provided to the individuals was less than what is required by the General Data Protection Regulation (GDPR), while this information was not in an understandable and easily accessible form. Moreover, it is mentioned that the applied safety measures must be completed in a way that is available to every teacher, while it must be ensured that all teachers involved in the distance education process have received minimum information. The Ministry, therefore, violated, according to the Authority, its obligation under article 35 par. 9 of the GDPR; moreover, no proper evaluation of data transmission to non-EU countries has been carried out. For these violations, the Authority gave the Ministry a period of two months to comply with the relevant GDPR provisions.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Taking James Bryce's classification,[4] the Constitution of Greece is a rigid constitution and thus is amended under a specific procedure described in article 110. The same article includes an eternity clause, 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.

Regarding the amendment procedure, at first stage, at least 50 members of the Parliament shall propose the need for amendment which shall be voted by a supermajority of 3/5 of the total number of the Parliament's members. This resolution defines the specific provisions that need to be revised. After the Parliament's decision on the amendment of the Constitution, the next Parliament shall, in the course of its opening session, decide on the provisions to be revised by an absolute majority of the total number of its members.

Alternatively, if a proposal for revision of the Constitution receives the majority of the votes of the total number of members but not the 3/5 supermajority, the next Parliament may, in its opening session, decide on the provisions to be revised by a 3/5 supermajority of the total number of its members, instead of an absolute majority.

Therefore, for the completion of a constitutional amendment, a 3/5 majority and an absolute majority are needed, the former in the proposing Parliament and the latter in the revisionary Parliament or vice versa.

4 James Bryce, *Studies in History and Jurisprudence* (OUP 1901).

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.[5] 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 decentralized 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.

In that perspective, the Council of State reviewed the measures described in Part II. In particular, with reference to the staff serving at the Disaster Response Unit of the Hellenic Fire Service, the Court ruled that mandatory vaccination was constitutionally acceptable.[6] The structure of the judgment of the Court was based on the following elements. The measure was imposed on this specific category of the Fire Service personnel in order to ensure the uninterrupted operational functioning and the full availability of the Disaster Response Unit that have a specific mission and specific conditions of service. The measure is based on substantive law and provisions authorizing the Chief of the Hellenic Fire Service to promptly adopt, in circumstances of pandemic, an extra temporary condition of service for the good state of health of the members of the Unit, the vaccination against Covid-19. This decision rests upon genuine scientific evidence from official bodies in Greece, such as the National Vaccination Committee and internationally, according to which vaccination is the most effective way to control the spread of the disease, while the benefits of vaccines outweigh any side effects, which are, in any event, extremely rare. Finally, that measure did not violate the principles of equality and non-discrimination, since the difference in treatment on the ground of vaccination is based on an objective criterion, in particular because of the reduced frequency and intensity with which vaccinated persons fall ill and transmit the disease in comparison to unvaccinated persons.

Similarly, in the case concerning the personnel working in the public and private health sector, the Council of State ended up in the same result by following a quite similar rationale.[7] The measure is imposed on this specific professional group in the context of the constitutional obligation to demonstrate social solidarity, particularly with regard to medical and nursing staff because of their increased responsibility for safeguarding the health of patients. It is prescribed by law and is based on genuine scientific evidence accepted by the vast majority of the relevant scientific bodies in Greece and internationally, according to which vaccination is a key tool for the containment of the Covid-19 pandemic; moreover, according to existing scientific evidence, serious side effects of vaccination are extremely rare. Finally, the Court ruled that the suspension of work without remuneration is also constitutionally acceptable. It was also held, on one hand, that the obligation to vaccinate only medical, paramedical, nursing, and other staff in the health sector does not infringe the principle of equality in relation to other categories of workers and on the other hand, that the procedure provided for monitoring and checking compliance with the obligation to vaccinate against Covid-19 does not infringe the legislation on the protection of personal data. At the time of writing this report, the case concerning mandatory vaccination on the ground of age and the subsequent administrative fine of 100 euros in case of non-compliance is still pending before the Council of State.

Although the publication of the aforementioned decisions will definitely clarify the rationale of the Council of State, it is quite apparent that the Court applied the principle of proportionality. The legitimate aim of mandatory vaccination appears in both cases. In the first case the uninterrupted operational functioning and the full availability of the Disaster Response Unit, a unit with special characteristics and mission within the Fire Service and in the second case, the safeguarding of patients' health, who are exposed to the health service personnel and who are in principle in a fragile position. This last aim is highly interrelated with the principle of social solidarity. From that perspective, the main duty of the health workers is to provide the highest possible level of service. Hence, that implies that health workers themselves have taken all appropriate measures to limit any possibility of transmitting any infection, especially Covid-19 that is, according to all scientific data, highly transmissible.

Furthermore, the Court acknowledged the adequacy of mandatory vaccination in both cases and underlined its necessity, since vaccination is described by the Court as the most effective method to combat Covid-19. With reference to the final step, the proportionality *stricto sensu*,[8] the Court, by comparing the benefits and damage, concluded that the benefits of vaccines outweigh any side effects, which are extremely rare. In all proportionality steps, the Court based its logic on genuine scientific evidence from formal medical institutions in Greece and abroad.

Although Greece applies a decentralized 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.

5 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.

6 At the time of writing this report, the decision had not yet been published. However, under article 34, para. 8 of the Presidential Decree 18/1989, the President of the Council of State may publish a brief statement of the content of the decision taken.

7 Similarly to n 6.

8 The proportionality *stricto sensu* has been criticized in principle at Vasileios G. Tzemos, "The "Mature" Proportionality" in Vasileios G. Tzemos (ed.), *Public Law in "Puzzlement": Classical Matters and New Dilemmas* (Greek Public Law Association 2020) <http://www.dimosiodikaio.gr/docs/praktika_6syn.pdf> accessed 13 June 2022.

Under the three Weberian types,[9] the Council of State mostly plays a counter-majoritarian 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. This long-standing position of the Council of State perfectly completes the separation of powers principle, which is of fundamental value to every democratic society.

As a general comment, when courts embrace the representative role could, in some cases, underlie some form of "judicial populism", whilst the enlightened role may sometimes lead to a substantial replacement of the political institutions by the courts. This could potentially shift the balance deriving from the separation of powers principle, towards the judiciary.

IV. LOOKING AHEAD

During the year 2021, the pandemic measures have gradually mitigated with certain of them being totally abolished. With reference to the institutional process, what should be additionally underlined is that the legislative procedure has gradually returned to its ordinary form, abandoning the emergency law provisions.

In 2020, society came up against a new type of measures due to the unprecedented covid-19 pandemic. In that respect, the State was in the peculiar position to take measures with a view to protect public health, as a constitutional obligation deriving from article 5, paras. 2 and 5 and article 21, para. 3. In this context, in order to fulfil this obligation, the State must act quickly, proactively and effectively, in ways that sometimes inevitably affect the application of other fundamental rights.

Consequently, the Covid-19 pandemic challenged not only the resilience of the Constitution, but also the understanding of the principle of proportionality. The proportionality test has been put at the centre of discussion as to the adequacy and necessity of those measures, combined, in some cases, with proportionality *stricto sensu*. In Greece, the extremely strict measures adopted in 2020 would be considered totally unacceptable under normal circumstances, however declared as not violating constitutional provisions in the times of the pandemic.

Under those circumstances, the Council of State has established a corpus of decisions on the pandemic measures. The main approach adopted by the majority is a realistic, pragmatic interpretation of the Constitution, in line with genuine scientific data on Covid-19. In its pandemic case law, the Court had always taken into account the actual conditions and the temporary nature of certain measures, for example the limitation of freedom of assembly as guaranteed in article 11 of the Constitution or the freedom to practice one's religion, in article 13 of the Constitution.

Likewise, in the cases discussed above regarding mandatory vaccination, the Council of State acknowledged the necessity and proportionality *stricto sensu* by putting the role of the specific categories of workers where mandatory vaccination was applied in context. In that sense, the proportionality principle does not exist merely in the world of ideas but is materialized in the real world.[10] Moreover, the interrelation of mandatory vaccination with the social solidarity clause of the Constitution demonstrates, in the Court's case law, the systematic interpretation of the constitutional provisions in accordance with its spirit.

In conclusion, the pandemic measures have led to a new era of constitutional changes. During the pandemic outburst, the margin of State discretion, which must in principle constantly consider the principle of necessity, in order to take the most beneficial measures for society, has been pushed to its limits. That challenged the resilience of the Constitution in an unprecedented way. Through its case law, the Council of State tried to achieve a balance among the fundamental rights at stake, by proclaiming, under certain conditions, the protection of public health.

V. FURTHER READING

Tzemos, V. G. and Margaritis, K. (Eds.), *The Charter of Fundamental Rights of the European Union: The First Ten Years-New Challenges and Perspectives* (MDPI 2021).

Tzemos, V. G. "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 13 June 2022.

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(Ed.) *The Charter of Fundamental Rights of the European Union: A Commentary* (Nomiki Bibliothiki 2019).

9 Luis Roberto Barroso, "Countermajoritarian, Representative and Enlightened: the Roles of Constitutional Courts in Democracies" [2019] Am. J. Comp. Law 109.

10 Tzemos (n 1).

Guatemala

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I. INTRODUCTION

Guatemalan history shows that constitutional amendments are rare. The current reporting cycle follows this trend. The only successful amendments, which followed a failed attempt of self-coup in 1993, resulted in 37 amendments approved by Congress and a popular referendum to the 1985 Constitution. Another set of amendments was rejected by popular referendum in 1999 and since then, no proposal to amend the Constitution has moved forward.

The lack of more frequent amendments to the 37-year-old Constitution is partially explained by its formal rigidity which only considers two mechanisms to amend it. The first way is for two thirds of Congress to approve the amendments, which then must be ratified by popular referendum. The second mechanism is to call a constitutional assembly, something that was proposed for the last in Congress in 2012[1], but with no virtual support.

According to Guatemala's Constitution, 5,000 citizens can propose constitutional amendments to Congress. Then, the "proposal" needs approval by two thirds of members of Congress and ratification by popular referendum. This mechanism was tried at least three times in the last fifteen years. But since the Constitution only states that citizens can "propose" the amendments, Congress has limited itself to reading the proposals without proceeding to a serious discussion that would move the process forward.

Given the weak system of political parties, the lack of a dominant political party or ruler, political elites have little incentive to reform the Constitution. They seem comfortable playing with the prevailing rules of the game that favors a weak judiciary and accountability systems.

However, the Constitutional Court of Guatemala is a key player both in the legal and political arena. Its influence in the legal arena is explained by the fact that by constitutional design all proceedings of *amparo* and unconstitutionality of laws are subject to appeal, and the Constitutional Court has the jurisdiction to see of the appeal.

On the other hand, since 2009, all major political crisis ended in one way or another in the Constitutional Court and were decided there. The political elites accepted that role and the Court's influence has only grown in the past years. As will be discussed in this report, constitutional informal mutations can be explained by key rulings of the Constitutional Court that will have profound implications in the future.

1 Congreso de la República de Guatemala. 'Iniciativa de ley 4500' https://www.congreso.gob.gt/assets/uploads/info_legislativo/iniciativas/Registro4500.pdf

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2021, no constitutional amendments were discussed in Guatemalan Congress. Nor any new proposals to amend the Constitution were introduced. The year was marked for the selection process of the Constitutional Court justices.

By constitutional design, every five years, all members are appointed by five different entities. This results in volatile constitutional jurisprudence.

In the past few years, politicians, and some influential lawyers,[2] have complained about the sphere of competences of the Court. Even a special mission sent by the Organization of American States in 2020, requested by Guatemalan government to tackle an internal democratic crisis, showed concerned over the criteria over the competence of the Court[3].

This is important given the political and institutional context of Guatemala. First, the article 268 of the Guatemalan Constitution states that Constitutional Court has the essential function to defend the constitutional order and article 265 states that there is no area or matter which is not subject to the proceeding of *amparo*. Hence, the Constitutional Court has wide margins of discretion to decide which cases are subject to its competence.

This has created an incentive for the politicians to influence the selection process of justices for the Constitutional Court to increase their political power. The selection process lacks any technical or meritocratic approach and is highly politicized.

In April 2021, when the process ended, Congress refused to swear one judge renowned for her decisions regarding protection and guarantees of human rights and the fight against corruption. The Inter-American

2 Miguel Barrientos Castañeda. 'CEDECON se pronuncia por sentencia emitida por la CC' https://www.prensalibre.com/ahora/guatemala/politica/cedecon-se-pronuncia-por-sentencia-emitida-por-la-cc/

3 Organización de Estados Americanos. ´Misión Especial en Guatemala. Del 27 de noviembre al 2 de diciembre de 2020´. https://es.scribd.com/document/503761807/Informe-Mision-Especial-OEA-en-Guatemala

Commission on Human Rights[4], and the UN Special Rapporteur on the independence of judges and lawyers,[5] issued statements expressing their serious concerns on the matter.

This in turn shall explain why the Constitutional Court will take part in some constitutional mutations that may benefit the political ruling class.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As mentioned in section II, given that no formal constitutional reforms were discussed or introduced in Congress in 2021, we shall direct our attentions to some important rulings of the Constitutional Court that have produced important constitutional mutations.

The rulings are related to the hybrid model of constitutional review that exist in Guatemala. Article 265, mentioned in section II, states that the *amparo* proceeding serves to challenge acts, resolutions, provisions, or laws that threat or violate fundamental rights.

On the other hand, Guatemalan Constitution stipulates two different proceedings of unconstitutionality of laws. First, article 266 creates the unconstitutionality of law "in specific cases", and article 267 the unconstitutionality of law in general cases.

In the case of the former, if a law is declared unconstitutional, the law was inapplicable only to the specific case in which it was filed the challenge and does not necessarily create a binding precedent beyond the specific case. The second is the typical abstract constitutional review case. Any law can be challenged by any person with the help of three lawyers. If the law is found unconstitutional, the law is void and abolished with *ex nunc* effects.

The jurisprudence has established that in both cases the unconstitutionality of law is an exercise of confrontation between the text of the law that has been challenged and the text of the Constitution[6]. Both are a facial challenge of the law and any factual challenge based on the concrete application of the law are not admissible.

However, in a series of cases inaugurated in file 4157-2020 the Constitutional Court ruled, in a proceeding of unconstitutionality in specific case, that a Criminal Code provision was unconstitutional since a criminal judge was making a retrospective application of such provision.

That ruling not only deviated from well-established jurisprudence, but also modified Guatemala's constitutional review system. The Court reasoned that the Constitution and international conventions on human rights demanded a less formalistic approach to the procedural requirements.

The underlying case that gave rise to the unconstitutionality challenge involves powerful politicians accused of violating campaign funding rules[7]. That may explain this radical shift in jurisprudence.

This also may explain why the Constitutional Court itself issued a contradictory rule the very same day. A group of NGOs filed a proceeding of amparo challenging a law that restricts the work and funding of NGOs approved in 2020. The Court ruled that the *amparo* was not the appropriate action to challenge a law, indicating that, in any case, the unconstitutionality in general or specific cases was the adequate way given the prevailing procedural rules[8].

In any case, the criteria established in file 4157-2020 was held in a series of rulings on very similar cases[9]. This has profound implications on the model of constitutional control that existed in Guatemala until year 2021.

Until these rulings, the Constitutional Court only recognized the facial challenge in the proceedings of unconstitutionality. The effects of the ruling were always to declare a law void. Now, the Court has de facto established the possibility to include factual elements that challenge not the constitutionality of the law itself, but the way a law is being applied. A sort of law as-applied challenge that exist in the American system.

This constitutional mutation can be understood as a dismemberment since it shifts the power towards the Constitutional Court. The implication of this mutation is to give the Constitutional Court the power to decide challenges to decisions made by lower judges (or even the Supreme Court) regarding the law as applied. A power that the original Constitution didn't confer to this tribunal.

The second constitutional mutation relevant in year 2021 is found in file 4466-2021 of the Constitutional Court. This was a case challenging the approval of a state of emergency by the president. The Guatemalan Constitution states in article 138 that the president declares the state of emergency and Congress shall ratify, modify, or disapprove it in a three-day term.

In August 2021, the three-day term elapsed without Congress deciding about the state of emergency declared by the president. Some raised questions about the legal validity of the state of emergency given the Congress's silence. In August 21, the Constitutional Court ruled that Congress' failure to decide in the three-day term whether it approves or rejects the state of emergency declared by the president doesn't invalidate it.

Another constitutional mutation through jurisprudence that can be understood as a dismemberment since it shifts power towards the president. According to this precedent, a president can declare an emergency state and suspend rights even without control of Congress if this branch remains silent about it.

The volatility in the jurisprudence is explained due to the institutional context. The new Constitutional Court, inaugurated in April 2021, is showing an excessive deference towards the Executive and Legislative branches. This is in contrast with a previous Court (2016-2021) that played a counter majoritarian role specially in a context in which that an anti-graft movement was in place.

4 Inter-American Commission on Human Rights. 'IACHR Urges Guatemala to Comply with International Standards in the Selection Process for the Constitutional Court' https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2022/078.asp

5 UN Special Rapporteur on the independence of judges and lawyers. ´ Guatemala: UN expert deeply concerned by Congress refusal to reappoint top judge' https://www.ohchr.org/en/press-releases/2021/04/guatemala-un-expert-deeply-concerned-congress-refusal-reappoint-top-judge

6 Constitutional Court of Guatemala, file 2395-2012

7 César Pérez Marroquín, 'CC resuelve a favor de Mario Leal Pivaral y Rodrigo Leal Castillo, señalados de financiamiento irregular de la UNE' Prensa Libre (Guatemala, 12 May 2021) https://www.prensalibre.com/guatemala/justicia/cc-resuelve-a-favor-de-mario-leal-pivaral-y-rodrigo-leal-castillo-senalados-de-financiamiento-irregular-de-la-une-breaking/

8 Constitutional Court of Guatemala, files 859-2020, 860-2020, 879-2020, 895-2020, 896-2020, 904-2020, 905-2020 and 1029-2020.

9 See Constitutional Court of Guatemala, files, 4157-2020, 4538-2021, 4787-2021, 4788-2021, 4789-2021, 4790-2021, 4792-2021, 4793-2021, 4794-2021, 5442-2021 and 5524-2021.

IV. LOOKING AHEAD

Constitutional amendments are not expected in the short or mid-term. Since 2017, no formal constitutional amendment has been introduced to Congress by any of the two available procedures.

There is a discussion though, about the meaning and scope of prohibitions to opt the office of President established in article 186. In 2019, the Constitutional Court barred the daughter of former military dictator from taking part in presidential elections[10]. The ruling was decided by 4-3 judges.

That case made it to the Inter-American Commission on Human Rights and a friendly settlement agreement has been reached. Although the settlement is silent on whether the prohibition is compatible with the American Convention on Human Rights, a debate on the matter is expected. It is important to mention that article 186 (prohibitions to opt the office of president and vice president) is an unamenable provision according to article 281. It is possible for the constitutional mutation to occur by a Constitutional Court ruling as previous situations have demonstrated.

There is in the docket of the Constitutional Court a proceeding of unconstitutionality in general cases involving the Judicial Council of Guatemala that assumed administrative roles that prior belonged to the Supreme Court of Justice. Given that the Judicial Council was created by law and that Supreme Court competences, among them some administrative ones, some friction is expected.

If the attitude of extreme deference of the Constitutional Court remains in place, there will be a victory for the Supreme Court of Justice that will recover administrative powers. This may feed the old debate of a constitutional reform to change the justice system in Guatemala and balance the distribution of judiciary powers.

Besides these two issues, the political elite has shown no interest in amending the Constitution. Given the failure of the constitutional amendments proposals of 2017, and the risks of the outcome, civil society perceives this topic as a dead end and is not promoting this process.

V. FURTHER READING

Edgar Ortiz Romero, 'A propósito de la Solución Amistosa en la CIDH' (Fundación Libertad y Desarrollo) <https://www.fundacionlibertad.com/articulo/proposito-de-la-solucion-amistosa-en-la-cidh>

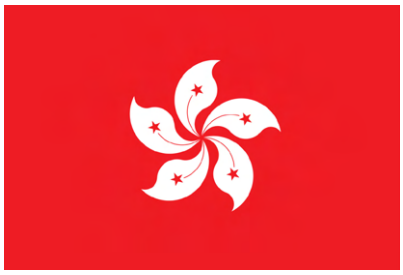
Edgar Ortiz Romero, 'Cambio de criterio en el Congreso para los estados de excepción' (Fundación Libertad y Desarrollo, 8 de noviembre de 2021) https://www.fundacionlibertad.com/articulo/cambio-de-criterio-en-el-congreso-para-estados-de-excepcion

Edgar Ortiz Romero, 'El estado de calamidad y su accidentado proceso en el Congreso' (Fundación Libertad y Desarrollo, 6 de septiembre de 2021) < https://www.fundacionlibertad.com/articulo/el-estado-de-calamidad-y-su-accidentado-proceso-en-el-congreso >

Edgar Ortiz Romero, 'Dos resoluciones contradictorias' (Blog de Edgar Ortiz, 16 de mayo de 2021) < https://edgarortizromero.com/2021/05/16/dos-resoluciones-contradictorias/>

10 Constitutional Court of Guatemala, file 1584-2019.

Hong Kong SAR, China



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I. INTRODUCTION

Hong Kong is a Special Administrative Region (HKSAR) 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, and legal and judicial systems, and serves as the HKSAR's constitutional document.[1] In 2021, the Chinese Central Authorities amended two annexes of the Basic Law to introduce reconfigured electoral systems for the selection of the Chief Executive designate for appointment by the Central People's Government (CPG) and for the formation of the Legislative Council (LegCo).[2] This Report discusses the manner, content and effect of the amendments and how they transform the constitutional and political systems of the HKSAR, and considers whether they diminish 'high degree of autonomy' that Hong Kong has under the Basic Law and whether they involve violation(s) of China's basic policies regarding Hong Kong recorded in the Sino-British Joint Declaration 1984.[3]

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Against a background of civil unrest in Hong Kong that began in mid-2019,[4] the 19th Central Committee of the Communist Party of China adopted on 31 October 2019 a decision that included a section on the system of 'One Country, Two Systems' that China adopts for national reunification and the governance of the reunified territories. The section elaborated on how the principles of 'One Country, Two Systems', 'Hong Kong people ruling Hong Kong' and 'high degree of autonomy' would be comprehensively and correctly implemented. Two propositions were underlined. The first concerned safeguarding the constitutional order established under the Chinese Constitution and the Hong Kong Basic Law. The second concerned improving the systems and mechanisms of the HKSAR related to the implementation of the Constitution and the Basic Law, thus ensuring Hong Kong is governed by patriots and building up the capacity of the HKSAR to govern in accordance with law.[5]

The NPC, the highest organ of state power under the Chinese Constitution, implemented one part of the 2019 Decision of the Central Committee Plenary Session on 28 May 2020 when it adopted a decision to establish and improve the legal system and enforcement mechanisms for safeguarding national security in the HKSAR. This NPC Decision entrusted the Standing Committee of the NPC (SCNPC) to enact legislation. On 30 June 2020, the SCNPC enacted the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (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]

Ordinary elections to form the Seventh Term LegCo, originally scheduled to take place in September 2020, were postponed in July 2020. The SCNPC adopted a Decision on 11 August 2020 to provide that after 30 September 2020, the Sixth Term LegCo was 'to continue to discharge duties for not less than one year until the seventh term of office of [LegCo] is formed in accordance with the law, its term of office remains to be four years'.[7] Then, by a further decision of the SCNPC adopted on 11 November 2020 on the qualification of members of LegCo, four members of the Sixth Term LegCo were disqualified from office on the ground that there was a determination according to law that he or she fails to meet the requirements and conditions of upholding the Hong Kong Basic Law and pledging allegiance to the HKSAR due to advocacy or support of the claim of 'Hong Kong independence', refusing

1 For the text of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, see <www.elegislation.gov.hk/hk/A101> accessed 12 April 2022.

2 The Chief Executive of the HKSAR is the head of the HKSAR and the head of the Government of the HKSAR. The LegCo is the legislature of the HKSAR.

3 See the Joint Declaration of the Government of United Kingdom of Great Britain and the Government of the People's Republic of China on the Question of Hong Kong (19 December 1984) 1399 UNTS 33; 23 ILM 1366 (1984).

4 See the section on Hong Kong SAR, China in the 2020 International Review of Constitutional Reform. 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 (21 December 2020) [87]-[97].

5 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 31 October 2019) (*Xinhuanet*, 5 November 2019) <www.xinhuanet.com/politics/2019-11/05/c_1125195786.htm> (in Chinese) accessed 11 April 2022.

6 As to the HKNSL, see the section on Hong Kong SAR, China in the 2020 International Review of Constitutional Reform.

7 See 'The Decision of the Standing Committee of the National People's Congress on the Continuing Discharge of Duties by the Sixth Term Legislative Council of the Hong Kong Special Administrative Region' (Adopted by the Twenty-first Session of the Standing Committee of the Thirteenth National People's Congress on 11 August 2020) <www.elegislation.gov.hk/hk/A216> accessed 11 April 2022.

to recognize the State sovereignty over Hong Kong and its exercise of sovereignty over Hong Kong, or seeking foreign or external forces to interfere in the affairs of the HKSAR or other activities endangering national security.[8]

On 27 January 2021, President Xi Jinping underlined during a work report session with the Chief Executive of the HKSAR that it was essential to always uphold the principle of 'patriots administering Hong Kong' to ensure the steady implementation of 'One Country, Two Systems' in Hong Kong.

In February 2021, the Government of the HKSAR introduced draft legislation to provide for criteria where a person seeking to be a candidate of elected office or taking an oath of public office would be considered as having satisfied or not satisfied the requirements and conditions of upholding the Hong Kong Basic Law and pledging allegiance to the HKSAR, incorporating under it the terms of several instruments of the Chinese Central Authorities, including the SCNPC Decision of 11 November 2020. The LegCo passed this Public Offices (Candidacy and Taking Up Offices) (Miscellaneous Amendments) Ordinance 2021 on 12 May 2021.

The NPC Session convened in March 2021 deliberated on a draft decision submitted by the SCNPC on improving the electoral system of the HKSAR and adopted a decision on 11 March 2021 for the expressed purpose of developing a system of democracy suitable to the actual conditions of Hong Kong. The NPC Decision stipulated that the HKSAR should establish an Election Committee of 1,500 members of five sectors to elect the Chief Executive designate and a portion of the members of LegCo, and to nominate candidates of the Chief Executive election and candidates of the LegCo election; that there should be established a Candidate Eligibility Review Committee (CERC) to examine and confirm the eligibility of candidates of elections of the Election Committee, the Chief Executive and members of LegCo; and that the SCNPC was entrusted to amend Annex I and Annex II of the Hong Kong Basic Law in accordance with the Decision.[9]

On 30 March 2021, the SCNPC adopted amendments to replace Annex I and Annex II to the Hong Kong Basic Law.[10] The new Annexes came into operation on 31 March 2021.

In April 2021, the Government of the HKSAR introduced draft legislation to amend the Hong Kong electoral laws to conform with the provisions of the NPC Decision of 11 March 2021 and the new Annex I and Annex II to the Hong Kong Basic Law. The LegCo passed the draft legislation on 27 May 2021 and this Improving Electoral System (Consolidated Amendments) Ordinance 2021 came into operation on 31 May 2021.

Elections were held in September 2021 to constitute the Election Committee.[11] Afterwards, the Ordinary Elections to form the Seventh Term LegCo were held in December 2021.[12] The Election Committee voted on 8 May 2022 to return the Sixth Term Chief Executive designate.[13] There were no legal challenges before the courts of the HKSAR of the election results.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Hong Kong Basic Law, which came into operation on 1 July 1997, provide for a program of development of the political system of the HKSAR, with the ultimate aim being the election of the Chief Executive designate and the formation of LegCo by a form of universal suffrage.[14] Annex I and Annex II to the Hong Kong Basic Law, in their original form, mapped out the progression of the electoral methods for returning the Chief Executive designate and forming LegCo up to the Third Term, and provided that an amendment to the electoral methods, if needed, must be made with the endorsement of a two-thirds majority of all members of LegCo and the consent of the Chief Executive, and shall be reported to the SCNPC for approval or recording. From 2004, the SCNPC had sanctioned three rounds of amendments of the electoral methods through signposting the allowable and ceiling configurations. The second round was successful in giving rise to valid amendments in 2010. On the other hand, the allowable configurations in the third round the SCNPC announced in August 2014 probably contributed to the occurrence of the Umbrella Movement of civil protests in Hong Kong between September and December 2014.

The 2021 amendments to Annex I and Annex II to the Hong Kong Basic Law were not made pursuant to a fresh round of amendments of the electoral methods sanctioned by the SCNPC in accordance with the Hong Kong Basic Law. Nor were they made under the Article of the Hong Kong Basic Law for amendment.[15] Rather, they were made pursuant to the NPC Decision of 11 March 2011, and it was explained that they were adopted in accordance with Articles 31 and 62(2) and (14) of the Chinese Constitution, and the 'relevant provisions' of the Hong Kong Basic Law and the HKNSL. Whilst these Articles of the Chinese Constitution refer to the authority to prescribe by law enacted by the NPC of 'the systems to be instituted in special administrative regions … in the light of specific conditions', and the NPC's functions to supervise the enforcement of the Constitution and to decide on the establishment of SARs and the systems to be instituted there, they do not readily explain the reconfiguration of the electoral methods by a 'decision' of the NPC, with the SCNPC entrusted to replace the pre-existing Annexes by 'amendment'.

8 See 'The Decision of the Standing Committee of the National People's Congress on the Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region (Adopted by the Twenty-third Session of the Standing Committee of the Thirteenth National People's Congress on 11 November 2020) < www.elegislation.gov.hk/hk/A217> accessed 11 April 2022.

9 See 'The Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region' (Adopted by the Fourth Session of the Thirteenth National People's Congress on 11 March 2021) < www.elegislation.gov.hk/hk/A118> (in Chinese) accessed 11 April 2022. An English translation of the Decision was published: (2021) 60 ILM 1163-1177.

10 See 'Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' (Amended by the Twenty-seventh Session of the Standing Committee of the Thirteenth National People's Congress on 30 March 2021) <www.elegislation.gov.hk/hk/A118A> (in Chinese) and 'Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' (Amended by the Twenty-seventh Session of the Standing Committee of the Thirteenth National People's Congress on 30 March 2021) <www.elegislation.gov.hk/hk/A118B> (in Chinese) accessed 11 April 2022. An English translation of the two Annexes was published: (2021) 60 ILM 1163-1177.

11 For information of the 2021 Election Committee Subsector Ordinary Elections, see <www.elections.gov.hk/ecss2021/eng/> accessed 11 April 2022.

12 For information of the 2021 Legislative Council General Election, see <www.elections.gov.hk/legco2021/eng/index.html> accessed 11 April 2022.

13 For information of the 2022 Chief Executive Election, see <www.elections.gov.hk/ce2022/eng/index.html> accessed 11 April 2022.

14 Hong Kong Basic Law (n 1), arts 45, 68.

15 Hong Kong Basic Law (n 1), art 159. This provision sets out both the procedure for proposing and adopting amendments and a constraint that no amendment to the Hong Kong Basic Law shall contravene the established basic policies of China regarding Hong Kong.

This is because the 2021 amendments to Annex I and Annex II to the Hong Kong Basic Law were a wholesale reconfiguration of the two electoral methods. The new Annex I reestablished the Election Committee as the centerpiece institution for forming the institutions of the political system of the HKSAR. Members of the Election Committee would nominate candidates for the Chief Executive election and for the LegCo election.[16] The Election Committee would elect the Chief Executive designate and 40 members of LegCo consisting of 90 members.[17] The Election Committee would have 1,500 members divided into five sectors of equal number of members: (i) Industrial, commercial and financial sectors; (ii) The professions; (iii) grassroots, labor, religious and other sectors; (iv) Members of LegCo and representatives of local organizations;[18] and (v) Hong Kong deputies to the NPC, Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference and Hong Kong members of relevant national bodies.[19] Members of the Election Committee would be returned by three routes: ex officio membership, nomination from designated bodies, and election from specified bodies.[20] All candidates of membership of the Election Committee would require confirmation of their eligibility by the CERC.[21]

Candidates of the Chief Executive election would require not less than 188 nominations from members of the Election Committee and there must be, in those nominations, not less than 15 members from each of the five sectors. Each member of the Election Committee may nominate only one candidate. The CERC would examine and confirm the eligibility of the candidates. The Chief Executive designate would be elected by the Election Committee by ballot and must receive more than 750 votes in order to be so elected. A vote would be required even where there is only one validly nominated candidate, as it was in 2022.

The new Annex II provided that LegCo would be composed of 90 members: (i) 40 members elected by the Election Committee; (ii) 30 members elected by 28 functional constituencies;[22] and (iii) 20 members elected by geographical constituencies by direct election returning 2 members from each of 10 geographical constituencies using a form of first past the post method of voters entitled to cast one vote for one candidate.[23] Candidates to the LegCo election must be nominated by two to four members of each of the five sectors of the Election Committee, and in the case of candidate for a functional constituency or a geographical constituency, a specified number of the electors in the relevant constituency. The CERC would examine and confirm the eligibility of the candidates.

The new Annex I and Annex II to the Basic Law provides for new provisions of amendment by the SCNPC, which would receive views from different sectors of the Hong Kong community by appropriate means before adopting any amendment to these Annexes.

The 2021 amendments to Annex I and Annex II to the Hong Kong Basic Law have profoundly altered the Hong Kong political landscape. The reconfigured electorate introduces a new political elite of Hong Kong members of state and national bodies and local designated bodies, who have been given either ex officio membership of the Election Committee or the power to nominate or elect members of the Election Committee. The electoral power of the ordinary Hong Kong resident is diminished to one vote in a geographical constituency in the LegCo election. The new requirement of cross-sectoral nomination from Election Committee members for the Chief Executive and LegCo elections means that candidates will require broad support from all sectors of the Hong Kong community through connecting with the new political elite said to be representative of the various sectors.[24] To date, no one has asked the courts of the HKSAR to examine the 2021 amendments along the lines of thought discussed above.[25]

The United Kingdom has claimed the 2021 amendments to the Annex I and Annex II to the Hong Kong Basic Law were a reversal of 'China's promise to Hong Kong … of gradual progress towards a system of universal suffrage and constituted a clear breach of the Sino-British Joint Declaration'.[26] This claim needs to be addressed by reference to what China stated relevantly in the Joint Declaration as its basic policies towards Hong Kong. Regarding the Chief Executive and LegCo, China declared that the Chief Executive will be appointed by the CPG 'on the basis of the results of elections or consultations to be held locally' and that the legislature of the HKSAR 'shall be constituted by

16 The political system before the 2021 amendments provided for the nomination of candidates in LegCo elections solely by voters of the relevant constituency.

17 The political system before the 2021 amendments had phased out the Election Committee's role in returning members of LegCo.

18 Given that the local organizations include district-level fight crime and fire prevention committees whose members are appointed by the Secretary of Home Affairs, the majority of members in sector (iv) are government appointees. The political system before the 2021 amendments provided for membership of the Election Committee of persons elected from the members of District Councils, which were district level deliberative bodies composed of members elected by voters of geographical constituencies.

19 The Hong Kong members of the relevant national bodies refer to Hong Kong members selected for or appointed by the All-China Women's Federation, All-China Federation of Industry and Commerce, All-China Federation of Returned Overseas Chinese, the All-China Youth Federation, and the China Overseas Friendship Association.

20 For example, the 30 members of the legal subsector of the Election Committee would consist of 6 members of the Committee for the Basic Law of the SCNPC, 9 members nominated from the council members from Hong Kong of the China Law Society and 15 members elected by 30 specified entities concerned with law and dispute resolution.

21 The CERC would consist of a chairperson, at least two but not more than four principal officials of the Government of the HKSAR (who owe their offices from appointment by the CPG) and at least one but more than three non-official members. The examination of the eligibility of the candidates would be conducted by the national security department of the Hong Kong Police Force. Reports of the police examination would be placed before the Committee for Safeguarding National Security of the HKSAR established under the HKNSL (CSNS). The CSNS would provide an opinion to the CERC in respect of those candidates who were determined to be not meeting those requirements. Decisions of the CERC are not subject to judicial review in Hong Kong.

22 The labour functional constituency would return three members of LegCo and each of the other 27 functional constituencies would return one member. The total number of electors of all functional constituencies in the 2021 LegCo General Election (including those electors that were corporate bodies) was 219,254. The political system before the 2021 amendments provided for a functional constituency system under which 239,724 electors under 28 constituencies returned a total of 30 members and 3,473,792 electors under one constituency returned five members.

23 The total number of electors of all geographical constituencies in the 2021 LegCo Ordinary Elections was 4.46 million.

24 Simon Young has critiqued the need and correctness of the reconfiguration of the political institutions and electoral methods, the CERC's mode of operation, and the process of adopting the amendments; see Simon Young, 'Political System Transformation in Hong Kong' (*Verfassungsblog*, 13 April 2021) <verfassungsblog.de/political-system-transformation-in-hong-kong/> accessed 11 April 2022.

25 In *Kwok Cheuk Kin v Chief Executive* [2021] HKCFI 1085 (27 April 2021), the Court of First Instance rejected a proposed challenge to the Improving Electoral System (Consolidated Amendments) Bill on the ground of prematurity and also stated that it was unlikely that there could be any scope for constitutional review of the enacted legislation, relying, in part, on the judgment of the HKCFA in *HKSAR v Lai Chee Ying* [2021] HKCFA 3 (1 February 2021), which held that the courts of the HKSAR had no power to review the constitutionality of the HKNSL.

26 See UK Foreign, Commonwealth and Development Office, 'The Six-Monthly Report on Hong Kong 1 July to 31 December 2021' (31 March 2022) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1065668/50th-6-monthly-report-to-parliament-on-hong-kong.pdf> accessed 11 April 2022.

elections'.[27] Hence the United Kingdom's claim of a 'clear breach' of the Joint Declaration cannot be justified. Also, this consideration disposes of any suggestion, based on judicially administered substantive unamenability,[28] that the 2021 amendments were impermissible. Further, despite the significant changes in the electoral methods, it remains a political system of 'Hong Kong people ruling Hong Kong'.

The claim about gradual progress towards universal suffrage in fact referred to the provisions of the Hong Kong Basic Law that enable the specification of the two electoral methods in the light of the actual situation of Hong Kong and in accordance with the principle of gradual and orderly progress, with the ultimate aim being methods based on universal suffrage.[29] But, as the CPG explained in a paper published in December 2021, Hong Kong's improved electoral system 'gives full expression to the policy of "One Country, Two Systems" and the Basic Law in line with Hong Kong's realities', and 'ensures the sound long-term development of democracy in Hong Kong, and fosters favorable conditions necessary for the election by universal suffrage of the Chief Executive and the Legislative Council'.[30]

IV. LOOKING AHEAD

The Chinese Central Authorities appear to have completed the structural changes deemed necessary to address the shortcomings in the governance of Hong Kong in the light of the 2019 civil unrest. Adjudications of persons accused of crimes endangering national security will continue in 2022, and it will soon be known whether the courts of the HKSAR have any tools to enforce the HKNSL consistently with the Hong Kong Basic Law's protection of fundamental rights applying international human rights standards.

V. FURTHER READING

Cora Chan, 'Subnational Constitutionalism: Hong Kong', in David S Law (ed), *Constitutionalism in Context* (CUP, 2022) 377-402

Office of the Central Leading Group for Hong Kong and Macao Affairs and the Hong Kong and Macao Affairs Office of the State Council, 'Improving Hong Kong's Electoral System to Implement the Principle of "Patriots Administering Hong Kong" and Ensuring the Steady and Sustained Institution of "One Country, Two Systems"' (2021) (May/June) *Qiushi Journal (English Edition)* <en.qstheory.cn/2021-07/08/c_640516.htm>

Simon Shen, 'Beijing's Tried-and-Tested Plan to Hollow out Hong Kong's Legislature' *The Diplomat* (9 June 2021) <thediplomat.com/2021/06/beijings-tried-and-tested-plan-to-hollow-out-hong-kongs-legislature/>

State Council Information Office, 'Hong Kong: Democratic Progress under the Framework of "One Country, Two Systems"' (20 December 2021) <english.scio.gov.cn/whitepapers/2021-12/20/content_77941455.htm>

Stefano Trancossi, 'The Hong Kong electoral law reforms: the end of democracy?' (2021) (3) *Rivista di Diritti Comparati* 266-307

Simon Young, 'Introductory note to the Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region' (2021) 60 ILM 1163-1177

27 Sino-British Joint Declaration (n 3), art 3(4); Annex I s I.
28 See n 15 above.
29 Hong Kong Basic Law (n 1), arts 45, 68.
30 See State Council Information Office, 'Hong Kong: Democratic Progress under the Framework of "One Country, Two Systems"' (20 December 2021) <english.scio.gov.cn/whitepapers/2021-12/20/content_77941455.htm> accessed 12 April 2022.

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I. INTRODUCTION

Hungary's constitution, the Fundamental Law (FL), was adopted in 2011 by the two-thirds parliamentary majority of the Fidesz government led by Viktor Orbán. Since then, three general parliamentary elections took place in 2014, 2018 and 2022, 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 ten amendments to the FL, transforming the entire constitutional order step by step in the past eleven years. As part of this constitutional project, the Constitutional Court's (CC) 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 FL, among others, restructured the system of the special legal orders – this element of the amendment will enter into force in 2023. The Tenth Amendment (2022) extended the notion of State of emergency (one type of the special legal orders) to the case of armed conflicts in a neighbouring country as a reaction to the war in Ukraine. In the year 2021, the Hungarian governmental system functioned almost entirely in special legal order (State of Danger) due to the Covid-19 pandemic.

Our report will focus on explaining the controversies related to the constitutional regulation on and practice related to special legal orders in Hungary as well as on the public discourse related to the possibility of enacting a new constitution – a significant element of the program of the opposition political movements before the 2022 parliamentary elections.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

To present the context of the topics discussed in Chapter III, in this section, we summarize the Hungarian constitution's particularities and some aspects of the constitution-making and amending practice.[1]

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 amendability, 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 2012-2021: three times in 2012, twice in 2013, and once in 2016, 2018, 2019, and 2020. (The Tenth amendment to the FL was enacted in 2022.) Some of these changes were reactions to Constitutional Court's 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, 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.

The first topic discussed in detail in Chapter III, the controversies related to constitutional regulation on and practice related to special legal orders in Hungary, were especially relevant in 2021. During this year, due to the Covid-19 pandemic, the Hungarian governmental system functioned under a special legal order, the State of Danger, declared by the Government and confirmed by the National Assembly. Even the FL contains detailed regulation related to special legal orders (specifying six types of these), it was not unequivocal in every case, which actions of the Government are subject of parliamentary control, or what kind of standards can be taken into consideration by the CC when examining the constitutionality of certain governmental

1 Certain findings are based on the report on Hungary in the 2020 International Review of Constitutional Reform.

measures taken during the states of emergencies. Moreover, the declarations of the State of Danger in 2020, nor in 2021, were not examined by the CC. Even more, during the State of Danger, other special orders functioned as well, having only statutory (not constitutional) basis.

As mentioned in the Introduction, the possibility of the enactment of a new constitution was a significant element of the programs of the opposition movements related to the 2022 parliamentary elections. This issue was raised and discussed in detail in public discourse mostly in 2021. The discourse related the legitimacy concerns in connection with the FL (mentioned above) and also the challenges related to the governance of a new parliamentary majority, which could be presumably blocked by institutions controlled by the formerly governing (Fidesz) party – both in the case a new parliamentary majority gains two-thirds of the parliamentary seats or has purely an absolute majority in parliament. These concerns were also examined in detail in scholarly works. As summarized in Chapter III, the justifications of the theoretically possible steps aimed at facing these challenges and also the possible scenarios related to the interim measures and long-term strategies varied in a wide range.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. CONTROVERSIES OF THE SPECIAL LEGAL ORDERS

We mentioned last year that, based on the special legal order system of the FL, the Government declared a State of Danger in March 2020, when the WHO decided that Covid19 is a pandemic.[2] Although among the six special legal orders[3] the State of Danger was designed for the case of an industrial catastrophe or a natural disaster, the Government interpreted the pandemic in this framework and the Parliament approved this decision by adopting an Enabling Act.[4] Further constitutional controversy concerns the extraordinary legal orders are adopted at sub-constitutional level as well. First, before the pandemic, the state of emergency caused by mass migration was one of the situations that allowed, by statutory act, special empowerments to the Government and other state institutions and allowed for an extraordinary limitation of human rights. The other such legislative measure was the epidemiological emergency in the health care act introduced after the first wave of the pandemic. Furthermore, it is problematic that the state of terrorist danger as a new special legal order was on the other hand introduced in 2016 to the FL with almost the same conditions and requirements as the already existing state of emergency, as apparently an unnecessary proliferation of the special legal orders on constitutional level as well. The catastrophe act, the health care act, and the national defence act also contained rules on special empowerments[5]. In order to simplify the current system of the special legal orders in Hungary, upon Government initiative, the two-thirds Government majority in Parliament adopted the Ninth Amendment to the FL in 2020, which will enter into force in 2023. During the year 2021, the discussions were lively in the scholarship about the values and the concerns related to the new system[6] and related to the sub-constitutional level that changed significantly already, following the new concept.[7]

According to the Explanatory Memorandum of the Ninth Amendment to the FL, the purpose of the amendment is to make the specific legal order regime more transparent; to align it with the rules of the normal legal order and crisis management, following the principle of proportionality; to focus it on the most serious challenges and threats; and to adapt it to the modern security environment and introduce additional safeguards compared to the previous regime.

The Ninth Amendment created a trial system, where the use of the military is extended in a state of war. The second special legal order is basically for a national, internal conflict that may cause serious harm to person and property. The third situation is designed to handle situations of natural disaster or industrial catastrophe. The essence of the new system is that, instead of giving descriptions of the dangers that may possibly emerge and instead of a detailed description of the related competences of state organs, the new trial system gives empowerments to the Government to issue statutory decrees in each case. Furthermore, it does not presume that forthcoming situations demanding the introduction of special legal orders could be a priori described; therefore, it gives a wider definition to both the emerging situation and the related empowerments.

As the state of emergency and war is replaced by a state of war in the new system, the declaration of a state of war became a decision of the National Assembly, in conjunction with the decision on the conclusion of peace. However, the legislation leaves unchanged the proportion of votes required: two-thirds of all members of Parliament are still needed for such a decision.

The FL as amended includes, with regard to the government's authorization of EU and NATO operations, decision-making on operations based on a decision of the International Defence and Security Cooperation Organisation, as confirmed by Parliament.

The FL as amended deals with martial law as well. It combines elements of the previous state of emergency with some of the rules of the previous preventive state of defence and the requirements of the changing security environment. Thus, it includes non-armed threats that are comparable to an armed attack in terms of Hungary's sovereignty.

As to the second extraordinary situation, the FL contains new provisions on states of national defence. A significant change is that the Parliament may declare a state of national defence not only in the event of an act aimed at overthrowing the constitutional order, but also in the event of an act aimed at subverting the constitutional order or the exclusive acquisition of power, or a serious unlawful act that poses a massive threat to the security of life and property.

The third extraordinary legal order sets out the new rules on states of danger. The rules on the declaration of danger are essentially the same as in the existing text, except that the phrase "serious threat to

2 Sára Hungler, Lilla Rácz and Fruzsina Gárdos-Orosz, 'LAC19 Country Report: Hungary' in Jeff King et al (eds), *Lex Atlas: Covid 19* (OUP 2022) https://lexatlas-c19.org/ *[forthcoming]*

3 Zoltán Szente, *The Constitutional System of Hungary* (Kluwer International 2021)

4 Kim Lane Scheppele, 'Orban's Emergency' https://verfassungsblog.de/orbans-emergency/ (29.03.2020)

5 Tímea Drinóczi, 'Hungarian Abuse of Emergency Regimes, also in the light of the COVID-19 Crisis', *MTA Law Working Papers* 2020/13

6 Opinion No. 1035/2021 of the Venice Commission (03.06.2021.) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)045-e

7 Zoltán Nagy – Attila Horváth (eds.), *A különleges jogrend és nemzeti szabályozási modelljei [The special legal order and its national regulatory models]* (Mádl Ferenc Intézet) *[forthcoming]*

life and property" is used as grounds for declaration; thus, in all other justified cases that are not foreseen at the moment the state of danger can be adopted. A further significant change is that, whereas until now Parliament could authorize the extension of the scope of a government decree relating to an emergency, from next July, as to the state of danger, the Government will be able to authorize a 30-day extension of the extraordinary situation itself.

The overall assessment of special legal order rules in Hungary is that while there are many existing perils to the life and the property of the individuals and to the society, as well as serious difficulties in the economy and politics, the responsiveness of the legal system to these social, economic and political problems was very low. The new amendment will enter into force only in 2023 and the 2021-2022 constitutional rules could not react adequately neither to the pandemic nor to the neighboring war situation. It might amount to be the failure of the constitution and constitutionality if general revision is necessary to tackle times of instability and statutory level, subconstitutional rules save the situation without proper constitutional basis.

2. PUBLIC DISCOURSE ON THE NEED AND POSSIBILITY OF CONSTITUTION MAKING

As we highlighted in our report on 2020, the FL, the constitution of Hungary, which entered into force on 1 January 2022, was heavily criticized by the opposition and NGOs, international stakeholders (most significantly the Venice Commission of the Council of Europe) and scholars. The criticisms related to the enactment procedure and the content of the FL can be summarized in challenges related to legitimacy and challenges related to democratic governance. The first criticism (legitimacy) emphasizes the unilateral enactment of the FL (by the votes of the governing Fidesz party), the lack of transparency and deliberation in the process and also the content of the document and other laws which cement the political preferences of the governmental majority as well as limit certain fundamental rights and constitutional principles (e.g. freedom of information, freedom of religion, the requirement of equal treatment, the separation of powers). The second criticism (democratic governance) relates to the practice according to which, since 2010, the leaders of every independent state organ are appointed by the ruling party. In practice, these organs do not function as counterbalances of the government and parliamentary majority, they rather proved to be loyal to it. Therefore, there is a probability that these organs would block the activity of a future government and parliamentary majority, different from the Fidesz' party.

For the very first time in the political history of Hungary, the opposition parties reached an agreement to organize primaries in 2021, in order to select their candidates for the 2022 parliamentary elections. The opposition candidates of the 106 single-member constituencies and also the leader of the opposition alliance (the candidate for the position of prime minister) were selected in primaries with the participation of six opposition parties, civic movements and also independent candidates. It is important to note that the opposition parties were forced to cooperate as the government amended the rules on the parliamentary elections by requiring at least 71 candidates in the altogether 106 single-member constituencies for a political party in order to participate in the electoral competition with its own party list. (Voters can vote for candidates in the single-member constituencies and for party lists.) In the absence of cooperation, opposition parties would be required to compete with each other in single member constituencies, which would radically strengthen the chances of the Fidesz-candidates. During the primaries, the problem of constitutional restoration – in order to handle the problems related to the FL – was a campaign topic. Furthermore, after the primaries, the leader of the opposition (the candidate who got the most votes for prime ministership) among other advisory groups, established a committee of experts in order the elaborate possible solutions related to the problem of constitutional restoration. Later, some proposals of this commission became part of the official program of the opposition (e.g. enacting a new constitution by national referendum). It is a symbolic element in the line of events related to this public discourse that the president of the CC turned to the prime minister, the president and the Speaker of the National Assembly asking for protection for the constitutional system of the state against "certain political movements that attack it". All these topics were set aside from the political agenda as the Fidesz again won the parliamentary elections in April 2022, gaining two-thirds of the seats in parliament.

The official programme of the opposition alliance, published on 9 March 2022, aims to adopt a new constitution.[8] According to the programme, the preparation of the new constitution was characterized by social consultation and the involvement of citizens and civil society organizations. In addition to the Parliament's decision, the entry into force of the constitution would have required its ratification by referendum.

While the opposition's programme did not specifically address the transition period until the adoption of the new constitution, it was a significant issue in the earlier public discourse. Many argued that if the opposition won the elections, the current constitutional environment would make it impossible to implement the new government's programme. One reason given for this was that several topics that would otherwise not be constitutional, such as the tax system, the pension system and family policy, are regulated in the FL or in cardinal laws that can be amended by a two-thirds majority. They also argued that the institutions meant to control the government are filled with people loyal to the ruling parties, and they could paralyze the new government even after a change of government.

These concerns were the basis for the concept of the so-called two-stage constitution-making process. As a first step, after the elections, it would have been possible to repeal or suspend, by a simple majority, the rules that could otherwise be amended or withdrawn by a two-thirds majority in order to restore a minimum of constitutional democracy temporarily. However, those who advocated this concept attached strict prerequisites to its possibility. The simple majority instead of the two-thirds majority could be justified if the minimum conditions for cooperation between rival political sides to restore democracy were lacking. The second step in the two-stage constitution-making process is the adoption of the new constitution, for which the authors emphasize citizens' participation and broad social acceptance.[9]

There was an approach that recognized the possibility of decision-making by a simple majority more widely. This would have

8 https://egysegbenmagyarorszagert.hu/ellenzeki-program-2022/

9 Gábor Attila Tóth, 'Autokráciából demokráciába. Új alkotmányozási modellek vázlata' *[From autocracy to democracy. The sketch of new constitution-making models] Fundamentum*, 2022/1-2.

allowed Parliament, after the elections, to declare the FL itself and the two-thirds (cardinal) laws based on it, which only serve the interests of the governing parties, unconstitutional and void.[10]

Another significant approach to the question of constitutional restoration in Hungary after the 2022 parliamentary elections (assuming a possible new governmental majority in parliament formed by the opposition parties) showed respect to the procedural rules of constitution-making, constitutional amendment, and political governance. The approach agrees with the assumption that the FL is problematic both from the point of view of legitimacy and parliamentary governance but argues that the provisions of a formally legal constitution and other laws (including cardinal laws) cannot be set aside in the practice of governance. Some scholars pointed to the trend known from international practice that after the consolidation of a new governmental (political) regime in a given constitutional system state organs and state officials elected and appointed by the previous government tend to be open to (loyal) cooperation with the new government. One can note that scholars who focus on the 'captured state' problem, have demonstrated that the key figures of the constitutional system (the CC, the president – the head of the republic –, the leaders of the Supreme Court, the prosecution service, the ombudsperson, the State Audit Office, the Budgetary Council, etc.) are loyal to the Fidesz government, they have also argued that this scenario is unlikely to happen. Moreover, the 'independent state organs' would block the activity of the new government and political majority on political grounds. Other authors argued that the possible temporary rupture of constitutionality (in the first step of the 'two-step model' of constitutional restoration and constitution-making) would necessarily lead to a social crisis due to the fact that state organs, stakeholders, social groups and citizens would be deeply divided based on whether they accept or deny the validity of the FL. In a similar vein, the formal rupture of constitutionality would be unacceptable to the international organizations, especially the European Union – however, it's possible to examine in detail the conformity of the most problematic pieces of legislation with EU Law.[11] Some authors argued that the question of rupture of formal constitutionality can only be posed after it turns out in practice that the 'independent state organs' (created by the Fidesz government) block the activity of the new government and political majority on a political basis. The vast majority of the authors supporting this approach agreed that constitutional consolidation of the country primarily requires political work – constitutional restoration can only be accomplished if unequivocally supported by the people.[12]

In another scenario, the replacement of the FL with a new constitution could be achieved through a kind of original constitution-making process. The new constitution should be created by a democratic constituent power, according to newly enacted rules. As for its preparation, the 1989 round-table discussions could serve as a model.[13]

In sum, important attempts were made not only in politics but in legal scholarship as well to reconsider the possibility of constitution making and constitutional amendment in Hungary that raises the general question of constitutional change, whether and when it is entirely limited by the rules of the effective constitution, when does a constitutional moment arrive and how do we consider the tools of innovation in the constitutional concept. Hungary provided for an outstanding case study for all these questions in 2021 and even if the opposition lost the elections, the conceptual innovations or at least some serious pieces of them could challenge our constitutional visions in times of developing authoritarianism in Europe.

IV. LOOKING AHEAD

In response to the Ukrainian conflict and the end of the State of Danger based on the pandemic, in May 2022, the National Assembly adopted the tenth amendment to the FL: the phrase "an armed conflict, war or humanitarian disaster in a neighboring country, or a serious event endangering the security of life and property" was added to the text of the FL in the provisions on the State of Danger. The tenth amendment also affects the ninth, so the reform of the special legal regime will also change from November 2022 and further in 2023. The National Assembly further amended the Catastrophe Act as well, so rules are in constant change in Hungary not only on the constitutional, but also on the statutory level. The state of the extraordinary legal order appears to become more and more ordinary due to the external circumstances and due to the Hungarian constitutional governance practice.

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India

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I. INTRODUCTION

The Constitution of India aims to guarantee a socialist welfare state to secure social, economic, and political justice. The Constitution (One Hundred and Fifth Amendment) Act in 2021 was a restorative amendment in Indian constitutional history as it paved the way to restore power to the federal constituent States to recognize and provide affirmative action to socially and educationally disadvantaged groups. Previously, the Constitution (One Hundred and Second Amendment) Act, 2018 took away the power of federal constituent States to determine such disadvantaged groups by conferring that power solely to the President of the Union. It also, inter alia, granted constitutional status to the National Commission for Backward Classes (NCBC). In January of 2021, the Supreme Court of India granted a stay on the implementation of three controversial farm laws passed by the Government of India in 2020. These laws were subsequently repealed in November 2021 by the Government of India. Constitutional reform in India is procedurally regulated by the Constitution and both procedural and substantive judicial review is possible. The basic structure doctrine developed by the Supreme Court of India in 1973 is a form of substantive review.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Social, economic, and political justice imbibed in the concept of transformative constitutionalism reflected by affirmative policies otherwise known as reservation in education, employment and politics in India is aimed to offset historical disadvantages in certain groups of the populace. These actions are entrenched in certain provisions of the Constitution of India that allow both the government at the centre and the federal constituent States to make reservations by way of specific quotas for matters of employment, admissions to educational institutions and in politics. Quota candidates enjoy privileges that include relative relaxation in standards of merit, age limits and tuition fees. Citizens who fall under these reserved categories can generally be classified into four: scheduled castes (SC), scheduled tribes (ST), other backward classes (OBC), and economically weaker sections (EWS). Other backward classes were an inclusion to the classification based on a report by the Socially and Educationally Backward Classes Commission (SEBC) in 1987. In 2019, yet another class – EWS was added by the Constitution (One Hundred and Third Amendment) Act in 2019. In this backdrop, it would be facile to comprehend that the federal constituent States in India gave due acknowledgement to socially and educationally backward classes in various schemes. A ruling of the Supreme Court of India in *Indra Sawhney and others v. Union of India* in November 1992 held that both the federal constituent States and the Union governments could recognize socially and educationally backward classes (SEBCs) and confer them with reservations through separate state lists and central list for providing appropriate benefits. The ruling also laid down a 50 per cent ceiling on quotas and emphasized the concept of social backwardness and criteria to ascertain the same. The ruling further stated that such disadvantaged groups be identified by proper evaluation by Backward Classes Commissions at the State and Union governments. Taking cue, the Parliament of India set up the National Commission for Backward Classes (NCBC) in 1993. Following suit, the States too, set up their own Commissions to evaluate and recognize SEBCs.

The Constitution (One Hundred and Second Amendment) Act, 2018 took away the power of the States to evaluate and recognize SEBCs by the insertion of Article 342A that gave the President of India power to specify SEBCs in a State or Union Territory (UT). This provision shifted the power to add or delete a specific class to or from the SEBC list solely on the Union government by virtue of Article 74 (1) of the Constitution of India that mandates inter alia that: There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. A second provision conferring constitutional status to the National Commission for Backward Classes was also added by the 2018 amendment.

However, the 102nd Amendment posed a conundrum. In August of 2018, the Maharashtra State Government passed a law – Socially and Educationally Backward Classes Act, 2018 that granted reservations to the Maratha community in that State that violated the 50 percent ceiling on reservations that had been mandated earlier in the *Indra Sawhney and others v. Union of India* case. This law was challenged before the Supreme Court of India in *Jaishri Laxmanrao Patil v. Chief Minister, Maharashtra* (2018) by a special leave petition for various reasons and inter alia that the 102nd amendment took away the power of States to evaluate and recognize SEBCs. The Supreme Court of

India in a 3:2 majority in May 2021 struck down this law since the 102nd Amendment empowered only the Union government to evaluate and recognize the SEBCs. Though a review petition was filed against this ruling, the Supreme Court dismissed the same in June 2021.

Political uproar demanded a restoration of the States' power to evaluate and recognize the SEBCs. Some communities were alarmed at the prospect of losing their reservation status. Any issue regarding reservations has far reaching consequences in Indian politics for the reason that reserved communities are considered vote-banks by all political parties. The government at the Centre was quick to recognize this and introduced the Constitution (One Hundred and Twenty-seventh Amendment) Bill in August 2021 and the same was passed by both Houses of Parliament and came into force on 15 August 2021.

Three controversial farm laws were passed by the Government of India in 2020. These were (1) Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020 (2) Essential Commodities (Amendment) Act, 2020 and (3) Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020. Though these laws were enacted to usher in a deregulated system of state managed wholesale markets, and they permitted farmers to sell their produce directly to buyers, there was a purported fear of losing price stability which was until then assured by the government. This triggered widespread protests in states that were predominantly agrarian. These laws were subsequently challenged in the Supreme Court of India in *Rakesh Vaishnav and others v. Union of India and others* (2021). The Court found it appropriate to stay the implementation of these laws and prescribed a four-member committee to address the farmers' grievances and make recommendations thereto. It also ruled that a Minimum Support Price (MSP) be maintained *pendent lite* and that farmers ought not to be disposed of their lands consequent to the implementation of these laws. Interestingly these laws were subsequently repealed in November 2021 by the Government of India.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Constitution (One Hundred and Fifth Amendment) Act in 2021 was a restorative amendment as it served to undo the changes made by the Constitution (One Hundred and Second Amendment) Act, 2018. Political compulsions mandated to shift the power to evaluate and recognize SEBCs from the States to the Union. This was a calculated move as SEBCs form vote-banks in Indian polity and by necessity whosoever determines the right to include or exclude communities as SEBCs would have a determinate power in elections. Though several questions were framed by the Supreme Court of India in *Jaishri Laxmanrao Patil* (supra) the salient were the following: (1) whether the 102nd Amendment deprived the State legislature of its power to enact a legislation to determine SEBCs and to confer them with benefits under its enabling power? (2) whether Article 342A abrogates State's power to legislate or classify SEBCs and whether such abrogation would affect the federal structure of the Constitution of India? On these pertinent questions, the Court ruled that the 102nd Amendment did take away the power of the States to identify SEBCs and after the amendment only the President could notify the list that enables such identification and that the State's role was thereafter merely recommendatory. The Court ruled that an oblique alteration of legislative power would not damage the concept of federalism nor denude the Constitution of its basic structure.

Though the impetus for the Constitution (One Hundred and Fifth Amendment) Act in 2021 was the judgment in *Jaishri Laxmanrao Patil*, the Parliament was united in support of this amendment for obvious reasons. Constitutional amendment culture in India has a history from 1951 when the 1st Amendment was made not long after the Constitution came into force. Article 13 (2) of the Constitution of India mandates judicial review for laws inconsistent with or in derogation of fundamental rights mandated in Part III of the document. However, Article 13 is not a textual provision that entrenches judicial review of constitutional amendments as law defined by this provision essentially means legislation with its cognate variations as is evident from Article 13 (4). *Shankari Prasad v. Union of India* (1951) and *Sajjan Singh v. State of Rajasthan* (1965) both affirmed that there was clear distinction between ordinary law made in exercise of legislative power and constitutional law made in the exercise of constituent power. Though this concept suffered vagaries of constitutional interpretation in *I. C. Golaknath v. State of Punjab* (1967), the Supreme Court of India overruled it in *Kesavananda Bharati v. State of Kerala* (1973). *Kesavananda Bharati* also ushered in an impediment to the hitherto unlimited power of the Parliament of India in developing the basic structure doctrine. This doctrine espoused that the power of parliament to amend the constitution is derivative and not unlimited. Furthermore, the court ruled that the power to amend the constitution was pervasive and no provision in the text was immune from amendment save certain "basic features". That the constitution is basic law in India is without doubt but there is no way of knowing which part is "more basic" than the other. As there are no objective criteria to explicate or identify these eternal and immutable basic features, there is considerable subjective difference in choices to identify the same. It would also be fatuous to classify textual provisions in the constitution in a hierarchic order in the absence of express textual cues and what may be seminal in one period may not necessarily be so at another. For the moment, the basic structure doctrine provides ground for substantive judicial review of both legislative and constitutional amendments in India. Article 368 of the Constitution provides procedural benchmark for judicial review of constitutional amendments in India. Article 368 mandates escalating thresholds of difficulty for amendment of constitutional provisions in accordance with their substantive content. The Supreme Court in *Kesavananda Bharati* ruled that fundamental rights could be amended by the Parliament. Post *Kesavananda Bharati*, the Parliament of India deleted the fundamental right to property via the Constitution (Forty-fourth Amendment) Act, 1978.

IV. LOOKING AHEAD

Though the power of the Parliament of India is plenary in both constituent and legislative spheres, rulings of the Supreme Court of India post *Kesavananda Bharati* have consistently maintained that the constituent power to amend the Constitution is derivative and therefore limited. It would be interesting to note that the Court in *Kesavananda*

Bharati did not rule that limited amendability of the Constitution was a basic feature. However, such an interpretive ruling came in *Minerva Mills v. Union of India* (1980). The Supreme Court of India serves definitive counter-majoritarian, representative, and enlightened roles to ensure that justice – social, economic, and political is maintained in the Indian polity.

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Indonesia

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I. INTRODUCTION

The Indonesian Constitution was enacted on 18 August 1945 after Indonesia proclaimed its independence the day before. In 1949, Indonesia adopted the Federal Constitution of the United States of Indonesia before the Provisional Constitution replaced it in 1950. This temporary constitution provided for the establishment of a Constitutional Assembly to draft a permanent constitution, and the members of this assembly were democratically elected in 1955. However, in 1959, President Soekarno decreed a return to the 1945 Constitution due to gridlock in the Constitutional Assembly. After the fall of Soekarno, the 1945 Constitution remained unscathed during 32 years of Soeharto's New Order regime.

With the downfall of Soeharto, strong aspirations emerged to reform the Constitution to strengthen constitutional democracy and the rule of law. Accordingly, the constitutional reform that ensued through a series of four major amendments to the Constitution from 1999 to 2002 fundamentally changed Indonesia's constitutional landscape. The constitutional amendments not only adopted the separation of powers with the principles of checks and balances, but also incorporated a Bill of Rights into the Constitution and strengthened democracy and the presidential system, among others.

Since the last constitutional amendment in 2002, several proposals have been brought forward to amend the Indonesian Constitution formally, an idea which is often called the "fifth amendment". Nevertheless, none of these proposals have been successful. This also holds true for constitutional reform in the year 2021. This report explores various proposed constitutional reforms in Indonesia in 2021 and assesses their likelihood of being enacted. These proposals include extending the presidential term by way of constitutional amendment or delaying elections and reintroducing State Policy Guidelines that bind the President and her administration. Moreover, the report also provides some recent development of informal constitutional amendments as reflected in the Indonesian Constitutional Court's decisions. Additionally, this report will explain whether there is any mechanism for constitutional reform control in Indonesia.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

One of the most contentious issues in Indonesia's current constitutional reform discourse is the idea to extend the presidential term of President Joko Widodo (Jokowi). While it has not been turned into a formal proposal, the scenario to introduce a third presidential term has been propounded since 2019, several months after the re-election of Jokowi.[1] When he first learned that there were suggestions to amend the Constitution, which, among others, would extend his presidential term and reintroduce indirect presidential elections by the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR), President Jokowi said that he would not back such plans. Instead, he asserted that he was the product of post-Soeharto democratic reform and direct elections, saying that planning for a third presidential term was akin to "a slap in the face".[2]

Jokowi's stance appears to be compromised by powerful state officials in his administration who actively campaigned for his third term. For instance, Luhut Binsar Pandjaitan, a retired army general and the most powerful minister in Jokowi's administration, insisted, based on bogus claims of "big data" on social media, that most Indonesians supported Jokowi's third term to recover from the COVID-19 pandemic.[3] In addition, three out of nine political parties in the People's Representative Council (*Dewan Perwakilan Rakyat*, DPR) called for the postponement of the 2024 elections. These include the Functional Group (*Golongan Karya*, Golkar), the Nation Awakening Party (*Partai Kebangkitan Bangsa*, PKB), and the National Mandate Party (*Partai Amanat Nasional*, PAN), all of which form part of Jokowi's big tent coalition.[4] Indeed, Muhaimin Iskandar, the chairman of the PKB, a party closely associated with the biggest traditionalist Muslim organization Nahdlatul Ulama, endorsed the idea that the 2024 elections should be delayed to sustain the country's economic recovery from the pandemic.[5]

1 Charlotte Setijadi, 'The Pandemic as Political Opportunity: Jokowi's Indonesia in the Time of Covid-19' (2021) 57 Bulletin of Indonesian Economic Studies 313.

2 Marchio Irfan Gorbiano, '"Like a Slap in the Face," Jokowi Says No to Third Presidential Term' *The Jakarta Post*, (Jakarta, 2 December 2019) <www.thejakartapost.com/news/2019/12/02/like-a-slap-in-the-face-jokowi-says-no-to-constitutional-amendment.html> accessed 26 April 2022.

3 Dio Suhenda, 'Luhut Says Most People Want Longer Term for Jokowi. But Experts, Surveys Beg to Differ' *The Jakarta Post* (Jakarta, 15 March 2022) <www.thejakartapost.com/indonesia/2022/03/15/luhut-says-most-people-want-longer-term-for-jokowi-but-experts-surveys-beg-to-differ.html> accessed 2 May 2022. When asked to reveal the data for validation, Pandjaitan always refused. See CNN Indonesia, 'Luhut Tolak Buka Big Data Tunda Pemilu, Pakar Sebut Tak Mungkin Ada' *CNN Indonesia*, (Jakarta, 13 April 2022) <www.cnnindonesia.com/teknologi/20220413094111-185-784158/luhut-tolak-buka-big-data-tunda-pemilu-pakar-sebut-tak-mungkin-ada> accessed 2 May 2022.

4 Sebastian Strangio, 'Indonesia's Jokowi Denies Plan to Extend His Term Beyond 2024' (*The Diplomat*, 11 April 2022) <thediplomat.com/2022/04/indonesias-jokowi-denies-plan-to-extend-his-term-beyond-2024> accessed 2 May 2022.

5 CNN Indonesia, 'Cak Imin soal Tunda Pemilu: Harusnya Pemerintah Enggak Ikut Ngomong' *CNN Indonesia* (Jakarta, 30 April 2022) <www.cnnindonesia.

Nevertheless, the idea to extend the presidential term – either by amending the Constitution or delaying the elections – is receding from the popular discourse. National media outlets are already turning their attention to potential candidates for the 2024 presidential election.[6] A more important indication that the idea is losing ground is the firm approach that President Jokowi recently showed. After many months of this political controversy, on 10 April 2022, President Jokowi asked his administration to not engage with the issue of delaying the 2024 elections, and to focus, instead, to assist the preparation of the elections, which have been set for 14 February 2024.[7]

Another contentious proposal of constitutional reform in Indonesia is the reinstatement of the so-called State Policy Guidelines (*Garis-Garis Besar Haluan Negara*, GBHN). This term refers to an outline of policies and principles established by the MPR which determines the direction of national development. Originally, the power of the MPR to establish the GBHN was provided under Article 3 of the original 1945 Constitution, but this was removed by the third amendment in 2001.[8] Under the previous arrangement, the president as "the mandatory of the MPR" was bound to implement the GBHN. While in theory the president could be dismissed by the MPR for failing to execute the GBHN, in practice former President Soeharto had full control of the MPR and thus was able to decide the content of the GBHN himself.

The proposal to reinstate the GBHN was brought into the public discourse after Jokowi won his reelection in 2019. After its fifth congress in 2019, the party of the president, the Indonesian Democratic Party of Struggle, proposed "a limited amendment (...) to re-establish the MPR as the highest state institution with the authority to determine the GBHN as a guideline for governance."[9] More recently, the Speaker of the MPR, Bambang Soesatyo, expressed his support for a limited 'fifth amendment' to reinstate the GBHN, albeit the term he used was "State Policy Outlines" (*Pokok-Pokok Haluan Negara* or PPHN). He claimed that PPHN differed from GBHN, as the former still leaves room for the president to set development programs. He also contended that the PPHN was necessary to ensure the coherence of long-term development plans.[10] It remains to be seen whether this idea will gain political momentum before the next general elections in 2024.

Regardless, both of these proposals raise a concern that their actual intention is to return the 1945 Constitution to its original version (the version before it was amended in 1999 to 2002). First, the original 1945 Constitution did not prescribe a limit on how many times a President may be re-elected. As a consequence, Soekarno, Indonesia's first President, was able to appoint himself as President for Life, while Soeharto, Indonesia's second President, ruled for 32 years. Second, as already mentioned above, the original 1945 Constitution provided a system where the President becomes the "mandatory" of the MPR. At the end of the President's five-year term, the MPR would ask the President whether her program was implemented according to the GBHN that the MPR had introduced. If the MPR believed that the President's program was in line with the GBHN, she could be re-elected as President for the next term. Hence, the desire to reinstate the GBHN and allow the President to serve for more than two terms cannot be separated from the idea to revive the original version of the 1945 Constitution.

The idea to return to the original 1945 Constitution itself is often voiced by those who are dissatisfied with the four amendments, notably former military generals or politicians who abhor liberal democracy.[11] The original 1945 Constitution concentrated enormous power in the hands of the President, thus leading to an "executive-heavy" system with very minimal checks and balances.[12] By contrast, the four amendments enacted in 1999-2002 are the basis of the democratic system that Indonesia enjoys today. If the original 1945 Constitution were to be reinstated, the repercussions would be massive. There would be no comprehensive bill of rights under Chapter XA of the Constitution; there would be no more direct elections of the President; there would be no more presidential term limit; there would be no more checks and balances; and there would be no more Constitutional Court, which was not conceived in the original 1945 Constitution.

Meanwhile, in the domain of informal constitutional change, the Constitutional Court issued Decision No. 16/PUU-XIX/2021 on 2 November 2021, which further reinforced the Court's case law on concurrent elections.[13] This case relates to the interpretation of the meaning of Article 22E (1) of the 1945 Constitution, which stipulates that "[g]eneral elections shall be conducted in a direct, public, free, confidential, honest, and just manner once every five years".[14] The Court especially dealt with the question of how elections shall be performed.

Previously, in 2009, the Constitutional Court held that it had become a constitutional convention at that time to organize the presidential election *after* a legislative election.[15] However, in 2014, through Decision No. 14/PUU-XI/2013, the Court changed its case law. The Court relied on the opinion of Slamet Effendy Yusuf, one of the figures involved in the drafting process of Article 22E (1) of the 1945 Constitution during the third amendment in 2001. The Court reasoned that based on the original intent of the framers and also the grammatical interpretation of that provision, presidential and legislative elections were to be conducted simultaneously.[16] Decision No. 14/PUU-XI/2013 added to or rendered concrete the meaning of Article 22E (1) of the 1945 Constitution. In this light, the Court's decision in 2021 reaffirmed the interpretation that presidential and legislative elections must be held simultaneously.[17]

com/nasional/20220430181927-32-791838/cak-imin-soal-tunda-pemilu-harus-nya-pemerintah-enggak-ikut-ngomong> accessed 10 June 2022.

6 Eve Warburton, 'Indonesia in 2021: A Year of Crisis, Development, and Democratic Decline' (2022) 62 Asian Survey 100.

7 Public Relations of the Ministry of State Secretariat, 'Jadwal Pemilu 2024 Sudah Ditetapkan, Presiden Pastikan Tak Ada Penundaan' (*The Ministry of State Secretariat of the Republic of Indonesia,* 10 April 2022) <www.setneg.go.id/baca/index/jadwal_pemilu_2024_sudah_ditetapkan_presiden_pastikan_tak_ada_penundaan> accessed 5 May 2022.

8 Riana Susmayanti, 'Indonesia Without the State Policy Guidelines (GBHN): Are We Lost?' in Hikmahanto Juwana, Jeffrey Thomas, Mohd Hazmi Mohd Rusli, Dhiana Puspitawati (eds), *Culture and International Law* (CRC Press 2019).

9 Anselmus Bata and Willy Masaharu, "Caliphate No; State Policy Guidelines Yes!': PDI-P' *The Jakarta Post*, (Jakarta, 12 August 2019) <jakartaglobe.id/context/caliphate-no-state-policy-guidelines-yes-pdip/> accessed 7 May 2022.

10 CNN Indonesia, 'Soal Amendemen UUD, Bamsoet Bantah PPHN Sama Seperti GBHN' *CNN Indonesia*, (Jakarta, 1 September 2021) <www.cnnindonesia.com/nasional/20210901172858-32-688465/soal-amendemen-uud-bamsoet-bantah-pphn-sama-seperti-gbhn> accessed 7 May 2022.

11 See Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia* (CUP 2013) 216; See also Simon Butt, 'Returning to the 1945 Constitution: What Does It Mean?' (*New Mandala*, 18 June 2014) <www.newmandala.org/returning-to-the-1945-constitution-what-does-it-mean/> accessed 13 June 2022.

12 Denny Indrayana, *Indonesian Constitutional Reform, 1999-2002: An Evaluation of Constitution-making in Transition* (Penerbit Buku Kompas 2008) 125–26.

13 Decision No. 16/PUU-XIX/2021.

14 1945 Indonesian Constitution (amended 2002), art 22E (1).

15 Decision No. 51-52-59/PUU-VI/2008, 186.

16 Decision No. 14/PUU-XI/2013, 82.

17 Decision No. 16/PUU-XIX/2021, 196.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Having explained the proposed, failed and successful constitutional reforms of Indonesia in 2021, we will now examine the scope of these (proposed) reforms. We will delve into whether the proposals to extend the presidential term of President Jokowi and to reintroduce the GBHN/PPHN can be considered a constitutional amendment or dismemberment. We will also assess how the Constitutional Court's case law on concurrent elections can be analyzed in light of the theories of constitutional amendment and dismemberment. Finally, we will explain whether there is any control mechanism for constitutional amendments in Indonesia.

With regard to the proposed extension of President Jokowi's term and the reintroduction of GBHN/PPHN, the 1945 Indonesian Constitution does not explicitly prohibit an amendment to these effects. Article 37 of the Constitution only prohibits changing the form of the unitary state of the Republic of Indonesia. One may even claim that these proposals constitute what Richard Albert called "reformative amendment" that "revises an existing rule in the constitution but without undermining the constitution's core principles."[18] One may accordingly contend that these proposals do not overstep the procedural and substantive requirements established by Article 37 of the Constitution, and nor are they repugnant to the five fundamental principles of the state, the *Pancasila*. From this perspective, these proposals are to be viewed as a mere revision of the Constitution.

Nevertheless, the scope of these changes goes beyond an ordinary constitutional revision. As already noted above, the lack of a term limit and the GBHN are difficult to dissociate from the authoritarian regime of Soeharto. After his downfall, the constitutional reform process in 1999-2002 sought to prevent the resurgence of autocracy by requiring the President to be directly elected by the people and by establishing a fixed presidential term.[19] The GBHN was also removed, thus ending the system whereby the President became the de jure "mandatory" of the MPR. By (partially) reversing these changes, the proposed amendments would become a slippery slope towards democratic backsliding. As defined by Stijn Smet and Vladislava Stoyanova, "democratic backsliding" refers to "an incremental, yet deliberate process of undermining the fundamental principles, basic structures and central institutions of liberal constitutional democracy."[20] Extending the President's term and reinstating the GBHN is a major step toward undermining the post-Soeharto constitutional order, with the end result being the concentration of power in the hands of the executive.

As a result, if the MPR today were to amend the Constitution to extend the President's term limit and reintroduce the GBHN/PPHN, this amendment would constitute what Richard Albert describes as a "constitutional dismemberment". In his words, "[c]onstitutional dismemberment (…) sets as its baseline the present commitments and understanding of the constitution and from there evaluates whether a constitutional change transforms something integral about a constitution's right, structure, or identity."[21] The constitutional reform in 1999-2002 was the most inclusive, participatory, and democratic constitutional-making process that was ever effectuated in Indonesia. This wide-ranging reform becomes the basis for democracy in Indonesia, and thus one may argue that democracy constitutes part of the Indonesian constitutional identity. From this perspective, given the risk these proposals can bring to democracy, the extension of the President's term limit and the reintroduction of the GBHN/PPHN may be considered a dismemberment of Indonesia's 'democratic' constitutional identity.

One might retort that the four amendments to the 1945 Constitution themselves constituted a constitutional dismemberment since they fundamentally changed the structure of the original 1945 Constitution. Indeed, a number of Indonesian academics and politicians have asserted that the constitutional amendments were in violation of the *Pancasila* and went beyond the intention of the framers of the original 1945 Constitution. For example, Guruh Soekarnoputra, a nationalist politician and the son of former President Soekarno, pointed out that the current Indonesian Constitution had become a liberal constitution. He added that direct presidential elections violated the fourth principle of the *Pancasila*, which mentions the *musyawarah-mufakat* principle (a term referring to the supposedly indigenous tradition of deliberation that emphasizes unanimous decision-making and the avoidance of conflict).[22] In a similar vein, Sofian Effendi, a professor of public policy, criticized the presidential system, arguing that it was inconsistent with the democratic conception as understood by the Indonesian founding fathers. Accordingly, he suggested a return to the original 1945 Constitution.[23]

However, we believe that the original 1945 Indonesian Constitution should not be used as a yardstick for measuring the constitutionality of constitutional amendments for three important reasons. First, the process by which the founding fathers created the 1945 Constitution lacked democratic representation. The Investigating Committee for Preparatory Work for Independence (*Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan*), an organization that drafted the Constitution, was established by the Japanese military authority in Java when Indonesia was still occupied by the Japanese Empire during the Second World War. Its members were selected by the Japanese and most of them hailed from Java (Indonesia's most populous Island).[24] Second, the original 1945 Constitution was intended to be temporary. During the meeting session of the Committee, Soekarno and Soepomo pointed out that the proposed Constitution was to be a provisional constitution that would operate during the independence struggle

18 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 81.

19 Andrew Ellis, 'The Indonesian Constitutional Transition: Conservatism or Fundamental Change?' (2002) 6 Singapore Journal of International and Comparative Law 4-6. The Indonesian Constitutional Court has declared that legislation unconstitutional by reference to the presidential system in the Constitution. See for example, Indonesia's Constitutional Court Decision No. 14/PUU-XI/2013, noting that the requirement that presidential and parliamentary elections be held separately was incompatible with the presidential system, and thus unconstitutional.

20 Stijn Smet and Vladislava Stoyanova, 'Introduction' in Vladislava Stoyanova and Stijn Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (CUP 2022) 12.

21 Albert (n 18) 84–85.

22 JPNN.com, 'Guruh Soekarno Anggap Amandemen UUD Kebablasan' *JPNN* (Jakarta, 3 October 2014) <www.jpnn.com/news/guruh-soekarno-anggap-amandemen-uud-kebablasan> accessed 6 June 2022.

23 Sofian Effendi, 'Sistem Pemerintahan Negara Kekeluargaan' (Dies Natalis of Wangsa Manggala University, Yogyakarta, 9 October 2004) <sofian.staff.ugm.ac.id/artikel/Sistem-Pemerintahan-Negara-Kekeluargaan.pdf> accessed 10 June 2022.

24 R. E. Elson, 'Another Look at the Jakarta Charter Controversy of 1945' (2009) 89 *Indonesia* 105, 108–09.

against the Dutch.[25] Third, the members of the MPR, who amended the Constitution four times from 1999 to 2002, were democratically elected in a process widely regarded as the first free election since 1955, with 48 parties representing almost all political spectrums participating in the election.[26] It is therefore fair to state that the amendments to the original 1945 Constitution that the MPR introduced were democratically legitimate, and they should not be overturned for the sake of a version whose democratic credentials were lacking.[27]

Meanwhile, in the domain of informal constitutional change, although the Constitutional Court Decision No. 16/PUU-XIX/2021 did not entail any implications for any unamendable rules in the 1945 Constitution along with the interpretation of it, such a decision regarding Article 22E of the 1945 Constitution closes the possibility of reinterpretation of this provision in the near future.

The Indonesian Constitution itself does not specify any control mechanisms for constitutional reforms. The authority to amend the Constitution lies exclusively with the MPR, a legislative body consisting of members of the DPR and the DPD (*Dewan Perwakilan Daerah*, the Council of Representatives of the Regions). The procedure requires a simple majority to amend the Constitution.[28] While the post-Soeharto Constitution allowed for the creation of a new constitutional court, this court is not bestowed with the explicit power to review constitutional amendments. Article 24C of the Constitution only provides that the Indonesian Constitutional Court has the authority to constitutionally review laws or national legislation. Because the whole process of constitutional reform is carried out within the sessions of the MPR and it is not necessary to introduce it in the form of law, it might seem that no judicial control is available to supervise constitutional reform in Indonesia. This is to be contrasted with the German model of constitutional amendment, which requires the introduction of a law expressly amending or supplementing the Basic Law, hence allowing the German Federal Constitutional Court to supervise the compliance of a constitutional amendment with the principles of the Basic Law.[29]

However, one question might arise: if there is an unamendable provision in the Constitution and the Constitutional Court has the power of constitutional review, but only limited to national legislation, as in the case of Indonesia, how will the unamendable provision be protected from amendment? One might argue that the Indonesian Constitutional Court should assume the authority to review constitutional amendments since it has declared in its numerous decisions that it was the guardian of the Constitution (*pengawal konstitusi*).[30] Moreover, by granting itself this power, the Court might play a key role in defending constitutional democracy, as has been the case in various jurisdictions such as India and Colombia. In any case, further research is required to fully explore whether the Court has the power to assume the task of reviewing the constitutionality of a constitutional amendment.

IV. LOOKING AHEAD

In reality, the proposals of reviving the GBHN and extending the presidential term limit are very difficult to realize, despite concerns that they could harm Indonesian democracy. The 1945 Constitution requires that a proposal to amend the articles in the Constitution must be introduced by at least one-third of the MPR members to be submitted into the agenda of the MPR session. To be enacted, a constitutional amendment proposal must be approved by at least more than half of the MPR members, with two-thirds of MPR members being present. Although this simple majority requirement might seem to be not difficult to reach, there has never been a single proposal for an amendment that was successfully introduced in Indonesia ever since the 1945 Constitution was amended in 2002. The reason is because the Indonesian political constellation has always been very fragmented. Currently, there are nine political parties in the MPR, each with its own particular interests and agenda. This is why it is difficult for any amendment proposal to receive the support of even a third of all MPR members.

V. FURTHER READING

Ahmad Rofii, 'The Religiosity of the Indonesian Constitution: Article 29(1) and Its Interpretation' (2021) 7 Constitutional Review 203.

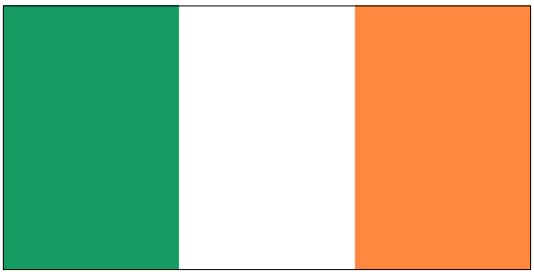
Bilal Dewansyah and Ratu Durotun Nafisah, 'The Constitutional Right to Asylum and Humanitarianism in Indonesian Law: "Foreign Refugees" and PR 125/2016' (2021) 8 Asian Journal of Law and Society 536.

Donald L. Horowitz, *Constitutional Processes and Democratic Commitment* (Yale University Press 2021).

Ignatius Yordan Nugraha, 'Legal Pluralism, Human Rights and the Right to Vote: The Case of the Noken System in Papua' (2021) 22 Asia-Pacific Journal on Human Rights and the Law 255.

25 A.B. Kusuma, *Lahirnya Undang-Undang Dasar 1945* (Fakultas Hukum Universitas Indonesia 2004) 479.
26 See, for example, Albert H. Y. Chen, 'Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations' (2010) 8 International Journal of Constitutional Law 849, 865–66.
27 Abdurrachman Satrio, 'Restoring Indonesia's (Un)Constitutional Constitution: Soepomo's Authoritarian Constitution' German Law Journal (forthcoming).
28 See 1945 Indonesian Constitution (amended 2002), art 37.
29 1949 German Constitution (amended 2014), art 79.
30 See, for instance, Decision No. 82/PUU-XVI/2018, 33.

Ireland



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I. INTRODUCTION

The 1937 Irish Constitution can be amended only by way of referendum. Ireland has had a number of high-profile referendums in recent years, most notably the approval of same-sex marriage in 2015, and the removal of the constitutional protection of the right to life of the unborn in 2018, which paved the way for the legalization of abortion. Other recent referendums—seen as a more modest exercise in constitutional modernization—include the abolition of the offense of blasphemy and the reduction of the waiting time for a divorce from four to two years. Other proposed reforms were delayed by, *inter alia*, the Covid-19 pandemic, and are expected in the near future. These will be the subject of our discussion here. The procedures around Ireland's referendum process may also be modernized and improved by the imminent establishment of an Electoral Commission, proposed in the Electoral Reform Bill 2022. This Bill is in the early stages of the legislative process, but in the future, the role of the Commission will be worthy of some discussion.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. RIGHT TO HOUSING

Ireland has been grappling with a persistent and worsening housing crisis for almost a decade. Legislative measures purporting to tackle the housing crisis (such as limiting evictions or introducing rent controls) have been opposed by successive Governments on the basis that such measures clash with constitutionally-protected private property rights.[1] This has led to mounting calls for a referendum on housing from political parties and civil society groups. The constitutional recognition of a right to housing is perceived in some quarters as a necessary counterweight to the constitutional protection of private property rights. Others have argued that, given that Art. 43 of the Irish Constitution already recognizes that private property rights can be regulated in line with social justice in the interests of the common good, the problem lies less in the constitutional text, but rather in the excessively cautious legal advice provided by the legal advisor to the Government, the Attorney General.[2]

Despite initially opposing calls for the introduction of the right to housing from Opposition parties, a commitment to a referendum on housing was included in the Programme for Government of Ireland's new coalition government in June 2020.[3] Notably, the Programme for Government did not commit to a right to housing *in terms*, but rather promised a referendum 'on housing', leaving the form of the change open.

The Housing Commission, staffed by a range of policy and legal experts, was established by the Minister for Housing to examine long-term housing policy, including tenure, sustainability, and quality-of-life issues in the provision of housing. The Minister envisaged that this body would consider the referendum question, and in March 2022, a Referendum subcommittee was announced to examine the question of the constitutional amendment on housing.

The deliberations of the referendum subcommittee are not public, nor is there any capacity for the public to make their views heard through formal channels. It is thus difficult, at the time of writing, to anticipate what its proposal for constitutional reform will involve. The form and wording of the referendum will be significant in determining how wide-ranging the constitutional reform will be: it could range from a judicially-enforceable right to a judicial policy review of housing for reasonableness, to a housing-based qualification on property rights to a rhetoric commitment. While the inclusion of a constitutional right to housing has attracted popular support in opinion polls, a referendum that is perceived to do little to challenge the status quo may struggle to garner support from Opposition parties and civil society organizations.[4] The time frame for the referendum is not precisely clear, but it is expected in the coming years.

1 Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge, 2021); Hilary Hogan and Finn Keyes, 'The Housing Crisis and the Constitution' (2021) 65 *The Irish Jurist* 87.

2 Conor Casey and David Kenny, 'The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law', *International Journal of Constitutional Law* (2022) ICON (forthcoming).

3 *Programme for Government*, 2020, 120 available at: https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/ (hereinafter PfG).

4 See, for a similar effect in the 2012 Children's Rights referendum, Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Amendment' in Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds.), *The Foundations and Tradition of Constitutional Amendment* (Hart, 2017) 199.

2. ARTICLE 41.2 — REPLACEMENT OF WOMEN'S 'LIFE IN THE HOME'

Article 41.2 is perhaps the most controversial extant provision in the Irish Constitution, and it has been the subject of controversy since the time of its drafting.[5] It states that:

> "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."

The gender politics of this provision are highly problematic. It is sometimes suggested that simply acknowledging the work of female caregivers, is positive, but it has *never* been successfully used as a means of improving the legal status of that group.[6] Instead, it has been viewed as patriarchal and patronizing, a negative symbolic aspect of the Irish Constitution. Plans to remove the provision entirely in the late 2010s were met with calls to replace it with a more strongly-worded, gender-neutral provision that would compel the State to provide greater support to caregivers. The 2020 Program for Government contained a commitment to consider whether there should be a referendum on Art. 41.2, informed by the work of the Citizens' Assembly.[7] The Citizens' Assembly on gender equality endorsed a wording that stated:

> "The Assembly should recommend replacing the text of Article 41.2 with language that is not gender-specific and obliges the State to take reasonable measures to support care within the home and wider community."[8]

The Oireachtas Committee on Gender Equality was established to consider the recommendations of the Report of the Citizens' Assembly on Gender Equality. Its recommendations are pending. A referendum largely following the recommendations of these groups is expected soon after the Committee reports.

3. REMOTE VOTING

A backbench member of one of the governing coalition parties has recently introduced a Private Member's Bill to amend the Constitution to allow the Oireachtas (the Houses of Parliament) to introduce "special and limited circumstances" where Members could vote remotely. Thirty-ninth Amendment of the Constitution (Remote Parliamentary Voting) Bill 2020 proposes 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 intention of this reform is to enable easier maternity arrangements for Members who give birth and also to allow easier arrangements for remote sittings than were possible during the pandemic. Concerns over the legality of remote voting arose during the pandemic when the speaker of the lower house of the Oireachtas received legal advice that remote sessions of the Houses of the Oireachtas would be unconstitutional. This interpretation has been contested by many constitutional law scholars (including the present authors), who argue that remote voting can be provided for by a simple amendment to the standing orders of the Houses and that a referendum is unnecessary.[9] The legal advice provided to the Oireachtas that the Constitution requires its members to gather physically together in-person to vote is based on a literal and originalist reading of several constitutional provisions which we think untenable. Any purposive reading of these provisions would suggest there is no constitutional barrier whatsoever to remote voting or hybrid settings. There are absolutely no rulings of the courts that support the interpretations adopted by the Houses and that would require a referendum, and related rulings favor broad purposive interpretations.[10] Other branches of government have had no qualms about operating remotely. The Courts held remote hearings throughout the pandemic, despite the fact that Article 34's reference to justice being administered publicly "*in courts*" could be subject to a highly literal and historical reading that would not encompass the home-office space of judges. It, therefore, seems to us to be entirely unnecessary.

Notwithstanding this objection, a referendum on the topic is likely, as the Bill has the support of the government and is passing through the legislative process. It has passed the second stage in the lower house in February 2022 and is unlikely to see serious opposition from this point on. Even if unnecessary, it will do no (direct) harm, simply clarifying the constitutional position.[11]

4. EXPANDING FRANCHISE FOR PRESIDENTIAL VOTING

Some time ago, the Constitutional Convention recommended that citizens resistant outside the State, including in Northern Ireland, should have the right to vote in Irish presidential elections. This is a very limited voting rights reform in context; voting rights groups seek much broader reforms of Ireland's very strict voting rules which have given exceedingly limited scope for absentee voting. In 2019, the

5 See, Laura Cahillane, 'Revisiting Article 41.2' (2017) 40(2) *Dublin University Law Journal* 107; Alan P. Brady, 'Gender and the Irish Constitution: Art. 41.2, Symbolism and the Limitations of the Courts' Approach to Substantive Gender Inequality' in Lynsey Black and Peter Dunne (eds) *Law and Gender in Modern Ireland: Critique and Reform* (Hart, 2019) 211; Yvonne Scannell, 'The Constitution and the Role of Women' in Brian Farrell (ed), *De Valera's Constitution and Ours* (Gill and MacMillan 1988) 125.

6 *L v L* [1992] 2 I.R. 77.

7 *PfG* 77.

8 The Citizens' Assembly, *Report of the Citizens' Assembly on Gender Equality* (June 2021) 57.

9 Conor Casey, Hilary Hogan, and Ciarán Toland, 'Remote Sittings of the Houses of the Oireachtas: A constitutional solution to a potential democratic deficit', *Constitution Project @ UCC* (7 April 2020); Seán Ó Connaill, 'Remote Dáil Sitting – a Textual Analysis', *Constitution Project @UCC* (20 April 2020); David Kenny, 'Remote Sittings for Ireland's Parliament: Questionable Constitutional Objections', *UCL Constitution Unit* (23 May 2020). See further, Professor Oran Doyle and Professor David Kenny, *Submission to the Oireachtas Special Committee on COVID-19 Response*, Covid-19 Law and Human Rights Observatory , Trinity College, Dublin, 9th September 2020.

10 See *Kerins v McGuinness* [2019] IESC 42.

11 On risk of indirect harm such as 'referendum fatigue', see discussion below in section III.

government tabled an amendment Bill to expand the presidential franchise, the Thirty-ninth Amendment of the Constitution (Presidential Elections) Bill 2019. Though a referendum was expected in 2020, the Bill lapsed with the dissolution of the government in January 2020. The Programme for Government for the new government included a commitment to hold a similar vote, though the onset of the pandemic, perhaps, has slowed this process.[12] Calls for the government to prioritize this vote and hold it in 2021 were unheeded.[13] In March 2022, the government reaffirmed its desire to have such a vote but did not commit to a particular timeframe beyond a commitment to hold the referendum in time for it to be implemented, if passed, before the next presidential election in 2025.[14] The Bill has not progressed passed the initial stages in parliament.

5. PUBLIC OWNERSHIP OF WATER

The Programme for Government contains another referendum commitment: that the government "will refer the issue of the environment, including water, and its place in the Constitution, to a relevant Joint Oireachtas Committee for consideration." This relates to a very controversial issue in Irish politics from almost a decade ago: the imposition of charges for domestic water use.[15] This was a core part of anti-austerity politics in the years when Ireland was subject to an EU-IMF bailout following the Euro crisis. The charges were scrapped after widespread public protests. One of the core goals of that movement was to ensure that privatization of water provision would not be possible by means of a constitutional guarantee of public ownership.[16] This government commitment stems from a desire to cover any criticism on this issue, and particular support from the Green Party, one of the parties in the coalition. In 2021, the government set out plans for the future of water provision in the State, which included

> "a focus on wider public policy considerations that have become relevant to engagement on the transformation program, namely its impact on the local government system, and the question of public ownership of water services, including proposals for a referendum on this matter."

A government briefing paper later in 2021 suggested that a referendum might be the appropriate approach, and discussed possible wordings.[17] It is not clear, at the time of writing in May 2022, when or if further action may be taken.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Several points may be noted about these constitutional change referendums that are either imminent or foreseeable.

The first is that the array of topics is very diverse, ranging from those with massive potential policy import (the right to housing) to those with mostly symbolic importance (the removal and replacement of Article 41.2) to those with a very little point at all (remote voting). None of these attract the public attention or have the salience of votes on abortion or same-sex marriage, which were notable worldwide, though the right to housing referendum may attract some vigorous public debate. These changes indicate a somewhat more sedate period in the history of Irish constitutional change after the 2010s was characterized by changes of huge social import.

Secondly, two of the five changes—housing and remote voting—are being proposed to 'correct' constitutional problems that may or may not really exist. As noted, that overly strict property rights stop government action on housing is not self-evidently correct, and there has not been any adverse judicial precedent suggesting a real constitutional barrier in *decades*. The objections to remote voting are, in our view, entirely specious. In neither case has the legislature been willing to test these supposed constitutional limits, opting instead to push towards constitutional change. This legislative reluctance is worthy of further examination. These might be cited as an example of the Irish political system's fixation on legality and lack of political constitutionalism.[18]

Thirdly, and relatedly, there is a risk that has been postulated that having lots of referendums, some of which are questionable as to their necessity, risks adding to 'referendum fatigue', where people may disengage when asked to vote too often or on low salience issues. This was feared in the last decade, and that fear may resurface if these referendums are held in close succession.[19]

Fourthly, the possible vote to ensure public ownership of Irish water may be an example of interest groups using constitutional changes to mark or cement major political victories and using the difficulty of constitutional change by referendum to stymie political opponents. This phenomenon has been observed in Ireland since at least the 1980s.[20] This creates a tendency for many matters that would usually be dealt with by ordinary politics to be elevated to the constitutional level.

Finally, it is worth noting that the housing referendum—in being advanced by way of a subcommittee of the Housing Commission—is something of a break from Ireland's recent trend of referring major constitutional reform questions to deliberative mini-publics.[21] It has been the case—as seen in Article 41.2 and presidential voting referendums, as well, notably, as same-sex marriage and abortion—that major changes have been instigated by a mini-public, and then filtered through some other political mechanism. The importance of this development should

12 *PfG* 113.

13 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;

14 See https://www.kildarestreet.com/wrans/?id=2022-03-01a.912.

15 For an overview of the anti-water charge movement, see David Kenny, 'Always, inevitably local: Ireland's strange populism and the trouble with theory' (2017) 7 *Public Law and the New Populism: Jean Monnet Working Paper Series*.

16 See e,g. Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No. 2) Bill 2016

17 See Michael Brennan, 'Referendum is the most 'straightforward' way to keep Irish Water in public ownership', *Sunday Business Post*, 18th July 2021, available at https://www.businesspost.ie/politics/referendum-is-the-most-straightforward-way-to-keep-irish-water-in-public-ownership/.

18 Conor Casey and Eoin Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' (2021) 17(2) *European Constitutional Law Review* 202.

19 See David Kenny, 'The Risks of Referendums: "Referendum culture" in Ireland as a solution?' in Maria Cahill, Colm Ó Cinnéide, Conor O'Mahony, Sean Ó Conaill (eds.) *Constitutional Change and Popular Sovereignty in Ireland* (Routledge, 2021).

20 See Doyle and Kenny (n 4).

21 Oran Doyle and Rachael Walsh, 'Constitutional amendment and public will formation: Deliberative mini-publics as a tool for consensus democracy' (2022) *International Journal of Constitutional Law* (forthcoming).

not be overstated: a mini-public previously endorsed addition of ESC rights, inc. a right to housing, and the outstanding questions were more about exactly how to formulate the change rather than broad policy debates. Moreover, a Housing Commission was being set up in any event, making this an appealing forum. There are also many more Citizen's Assemblies planned, on non-constitutional issues such as drug legalization, biodiversity, education, and directly-elected mayors for cities. It seems more likely that the housing issue simply was not thought to require a mini-public rather than this indicating some general shift away from this successful practice.

IV. FUTURE REFORMS

1. NEUTRALITY

Russia's February 2022 invasion of Ukraine sparked debate in Ireland about its long-standing stance of military neutrality and non-participation in common or mutual defense pacts. Given how deep Ireland's political consensus is on military neutrality, it may be surprising to some to learn it has no legal basis in the Constitution or statute but is merely a policy position adhered to by successive Governments that could hypothetically be departed from unilaterally.

The lack of a legal basis for military neutrality has prompted some members of the Oireachtas to propose a referendum to constitutionalize Ireland's policy of neutrality.[22] This proposal was defeated in April 2022 by a 53-67 margin, with the coalition government parties voting against the measures.[23] The current coalition government is dedicated to increasing Ireland's defense spending but has ruled out applying to join NATO.[24] In May 2022 Taoiseach Micheál Martin stated that he hoped a constitutional assembly on Irish neutrality would be established during the coalition government's tenure.[25] If the assembly were to recommend joining a military alliance like Nato, this step would likely require a referendum for reasons of *realpolitik*, even if one would not be strictly required by the Constitution.[26] Debates over the appropriate relationship between Ireland's approach towards military alliances and the Constitution are likely to resurface in the future.

2. UNIFICATION REFERENDUMS?

There is once again discussion of the possibility of a referendum on a united Ireland, spurred in particular by ongoing problems with the Northern Ireland Protocol and Northern Ireland's place within the EU and UK customs territories, and by the emergence of Sinn Féin—a party strongly committed to unification—as the largest party in Northern Ireland following elections in 2022. These matters have prompted speculation that a unification referendum north and south—which is provided for in the Belfast/Good Friday Agreement—may be in Ireland's near future.

While this cannot be ruled out, the importance of these matters should not be overstated. Such a vote can only be called by the Secretary of State for Northern Ireland, a member of the UK government. The Secretary must call a vote when it seems likely to him or her that a majority of people in Northern Ireland would vote in favor of such a proposition. There is no indication at this point that this threshold has been reached. Though the largest party in Northern Ireland's Assembly, Sinn Féin is still nowhere close to attracting the votes of a majority of the electorate. Opinion polling does not support the idea that a majority of people favor a vote being held. Certainly, a deterioration in Northern Ireland's present circumstances brought about by Brexit and/or disagreements about the Protocol, could lead to a drastic and swift change in this situation and precipitate a vote. But it cannot, at this stage, be said to be imminent or foreseeable. There has been recent academic work on this question, including a major report on the mechanics of such referendums should they take place, which would provide some roadmap should these referendums suddenly become much more likely.[27]

V. FURTHER READING

David Kenny, 'The Risks of Referendums: "Referendum culture" in Ireland as a solution? In Maria Cahill, Colm Ó Cinnéide, Conor O'Mahony, Sean Ó Conaill (eds.) *Constitutional Change and Popular Sovereignty in Ireland* (Routledge, 2021).

Oran Doyle and Rachael Walsh, "Constitutional amendment and public will formation: Deliberative mini-publics as a tool for consensus democracy" (2022) *International Journal of Constitutional Law* (forthcoming)

Hilary Hogan and Finn Keyes, 'The Housing Crisis and the Constitution' (2021) 65 *The Irish Jurist* 87.

Conor Casey and David Kenny, 'The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law', (2022) *International Journal of Constitutional Law* (forthcoming).

Rachael Walsh, Property Rights and Social Justice: Progressive Property in Action (Cambridge, 2021)

Final Report of the Working Group on Unification Referendums on the Island of Ireland, UCL Constitution Unit, May 2021, available at https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf.

22 Dáil Éireann debate – Wednesday, 30th March 2022, Vol. 1020 No.2, available: https://www.oireachtas.ie/en/debates/debate/dail/2022-03-30/10/.

23 Christina Finn, 'Government parties vote against bill calling for a referendum on Ireland's neutrality', *Journal.ie* (March 30 2022), https://www.thejournal.ie/irelands-neutrality-referendum-5725714-Mar2022/.

24 Ronan McGreevy, 'Simon Coveney: Ireland will not be joining Nato 'any time soon', *Irish Times* (May 17 2022).

25 Irish Times, 'Taoiseach expects constitutional assembly on Irish neutrality', (May 29 May 2022), https://www.irishtimes.com/politics/2022/05/29/taoiseach-expects-constitutional-assembly-on-irish-neutrality/.

26 Eoin Daly, 'Neutrality and the Irish Constitution' *Verfassungsblog*, (13 April 2022) available: https://verfassungsblog.de/neutrality-and-the-irish-constitution/.

27 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); *Final Report of the Working Group on Unification Referendums on the Island of Ireland*, UCL Constitution Unit, May 2021, available at https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf.

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I. INTRODUCTION

Israel started the year 2021 during a major constitutional crisis. In 2019-2020 Israel had three undecided elections. Then, based on highly disputed constitutional reform, that enabled a very unique "dual prime-ministers regime", an alternate government was formed. But the alternate government did not hold and collapsed towards the end of the year. So, Israel faced yet another election in 2021. In June 2021, a new government was formed, ending the long rule of prime minister Benjamin Netanyahu.

Amendments to Basic Law: The Government were presented and ratified quickly after the government was established. All of them were not significant and dealt with rules regarding the Knesset and the Government. The amendments made changes that allowed more time for the new government to pass the budget after forming the government; an amendment that made it possible for more ministers to resign from the Knesset (with a possibility to return to their office) in an expansion of what is termed the "Norwegian law"; amendment to the alternate government arrangement to add incentive for the existing Prime minister and his bloc not to dissolve the Knesset; and some other technical amendments.

As for the constitutional climate, after the new government – that referred to itself as "the government of change" – was formed, it was clear that the former radical wave of bills to change Israel's Basic Laws in a way that will significantly weaken the powers of the supreme court and the other gatekeepers were blocked. Nevertheless, the government did start a number of initiatives for significant constitutional amendments dealing with the separation of powers and human rights that are lacking in Israel's current constitution.

However, the government is still far from stable, and the constitutional crisis is not over: Israel still suffers from a very polarized political debate, and threats of extreme reforms of critically harming checks and balances in Israel might be right around the corner in a future government.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Two proposals of constitutional reforms were successfully passed during the year 2021; Amendment No. 51 to the Basic Law: The Knesset, which established the approval dates of the annual budget law and ministers terminating their membership in the Knesset; and Amendment No.10 to the Basic Law: The Government, which amended the alternative government arrangement.

On July 7th, 2021, the Basic Law: The Knesset (Amendment No. 51) was amended based on a proposal submitted by the Minister of Justice, Gideon Sa'ar. It includes two main amendments related to the approval dates of the annual budget law, and an amendment concerning the arrangement enshrined in section 43C of the Basic Law: the Knesset, regarding ministers terminating their membership in the Knesset.

As for the first amendment dealing with the state budget, section 36(a) of the Basic Law lays down provisions regarding the dissolution of the Knesset due to the non-adoption of the annual budget law. As a rule, if a Budget Law is not passed within three months from the beginning of the monetary year, the day after shall be deemed as if the Knesset has decided to dissolute before the end of its term, and elections shall be held on the date specified in the section. On the other hand, if a specific situation listed in section 36A(b) occurs, such as general elections to the Knesset within the period between the required submission deadline of the budget bill and March 31st, which is known as the date for passing a budget law, the Knesset dissolution day will be postponed. The Basic Law stated in its previous version that in these special situations the postponed date would be of 100 days from the date of the new government's formation or three months from the beginning of the fiscal year - whichever is later. Although, at the time, those 100 days fell on Tishrei month, which is known as a month of Jewish holidays. Therefore, the amendment seeks to adjust this period while considering, on the one hand, practical needs for formulating a serious and in-depth state budget, and on the other hand, the public interest in terms of not excessively extending the period. Accordingly, section 36A(b) of the Basic Law: the Knesset was amended, and stipulates that in cases provided in the section, the approval period of a Budget Law will be extended until "the end of the three months after the beginning of the fiscal year, or after 145 days from the government's formation - whichever is later".

Also, the appendix to the section, in its old formula, stipulated that if the government submitted the budget bill before the 55th day of its establishment, the determining day of dissolution of the Knesset would be 45 days from the date of the budget bill. In this manner, the amendment states that instead of 55 days, there will be 85 days, and instead of 45 days, there will be 60 days; while Jewish and Arab holiday dates, and those of the country of Israel, will not be considered as determined by law.

The second amendment to the law deals with the constitutional arrangement known as the "Norwegian law"; The amendment changed the maximum number of Knesset members who could terminate their membership following appointments to ministerial and deputy ministers; while the new format is based on the size of the faction only. The amendment changes the calculation of the number of ministers or deputy ministers who may make use of the special arrangements listed in section 42C of the Basic Law: The Knesset. Under the amendment, the maximum number of MKs will depend only on the size of the faction; the larger the faction, the greater the number of Knesset members from that faction who serve as ministers or deputy ministers, and who are allowed to use section 42C. If a faction has assisted at least ten members - five of them may terminate their membership; in a faction of 9 to 7 members, the maximum number that may terminate their membership will be four; and in a faction of 6 to 4 members, the maximum will be three.

In addition, on July 28, 2021, Amendment No. 10 to the Basic Law: The Government was enacted; generally, two amendments were made to the alternative government arrangement enacted by the previous Knesset, along with a general third amendment that applies to all types of governments.

The first amendment (to section 43A1) concerns an alternate government and adds a new mechanism to the most fundamental principle of the arrangement - the replacement between the prime minister and the alternate prime minister. The amendment determents that if during the first half of the exchanged government a law of dissolving the Knesset was passed, then the Alternate Prime Minister will enter the position of Prime Minister, and the incumbent Prime Minister will move to serve as the Alternate Prime Minister, for the transition period until a new government is formed; under two alternative conditions: that at least two identified MK affiliates to the first rotating prime minister voted in favor of the law, or if during the period of the first half a Budget Law was not adopted (as stipulated in section 36A of the Basic Law: Knesset).

The Second Amendment (to Section 13A) applies the voting mechanism applicable to the alternative Government governmental Plenum, to the Ministerial Committees as well. The governmental plenum mechanism ensures equality between the two blocs, and due to the amendment, also applies to ministerial committees, allowing the government to appoint a smaller number of ministers to a relevant committee. Both amendments express the experience gained from the alternative government arrangement of Naftali Bennett and Yair Lapid, and are intended to enable better implementation of the new regime arrangement.

The third amendment (to sections 25, and 43E), applies to each type of government and allows the prime minister to appoint two deputy ministers instead of appointing only one, given the workload in his office.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The reforms listed above were not fundamental in nature. The real radical reform was the 2020 amendment which created the alternate government mechanism.[1] In June 2021 a new government was formed, which was also an alternate government as the previous one. The 2021 new government decided on a few minor changes to the basic laws regarding the government and the Knesset.

The first Amendment stated above was designed to allow the government more time in passing the budget bill after its establishment. The rationale for expanding the "Norwegian Law" was to deal with a specific problem of the Knesset: In Israel, there are 120 MKs. Therefore, the majority of a coalition can be of 61 members (like the one that was formed). The political culture in Israel does not enable a small government, especially when a 61 members coalition is combined of 8 parties. The result is a very big Cabinet. The government consisted of 28 ministers and 6 deputy ministers: all of them cannot serve on the Knesset's committees. Hence, there is a major shortage of coalition members in the Knesset committees. That is the main rationale behind the Israeli Norwegian law that allows a minister to resign from the Knesset, but also to get back to the Knesset if something changes politically.

The idea behind Amendment No. 10 to the Basic Law: The Government was to give a better incentive to the bloc of the incumbent prime minister not to dissolve the Knesset or to prevent a budget from passing since the outcome will be that the alternate Prime minister will take office and will hold it during the transition government, before and after the election: a position that the precedent of ongoing elections of 2019-2021 proved to be able to last long, even more than a year.

The amendment regarding the equality of the blocs in governmental committees was technical and was basically a lesson from the former government.

All of these are amendments and not dismemberments.[2] None of these amendments raised any issues of unconstitutional amendments.[3]

Along with the amendments made in 2021, this was also a year of major developments in the field of judicial review of Basic Laws in Israel. Three important decisions made by the supreme court will be reviewed below. These decisions enhanced the scope of judicial review of constitutional amendments in Israel, mainly because of the high frequency of Basic Law amendments in recent years in Israel. This development is important for understanding the constitutional reforms of the reviewed year so the decisions will be summarized briefly.

A very important judgment of the High Court of Justice was given in May 2021.[4] The High Court of Justice dealt with a petition against two Basic Laws amendments. The first was an amendment to the Basic Law: Knesset. The government could not agree, politically, on the budget, and according to the Basic Law, if a budget is not ratified in 100 days at this situation, the Knesset dissolves. So, the Knesset passed a temporary amendment that stated that this year the government will have more time to pass a budget (even though it meant that the budget will pass close to the end of the year). Another important amendment

1 *See* Yaniv Roznai & Nadiv Mordechay, 'Israel', in *The 2020 International Review of Constitutional Reform* (Luís Roberto Barroso & Richard Albert eds., the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2021), 158-161.

2 *See*, generally, Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 The Yale Journal of International Law 1.

3 *See*, generally, Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (OUP 2017).

4 HCJ 5969/20 Stav Shafir v. The Knesset (May 23, 2021) (Isr).

that had to be done was a specific budget add of 11 billion NIS, which deviated from the 'continuing' budget which Israel had to deal with since 2020. That amendment was dealing with the Basic Law: The State Economy.

The High Court of Justice (in a decision of 6 majority judges out of 9) held that the Knesset misused its constituent power. The court did not address the first amendment since the Knesset already dissolved at the end of the year and therefore the petition was theoretical. According to the second amendment, the court ruled that the amendment 'bypassed' the Knesset's authority to supervise the government through budget law and otherwise by continuing the budget. Although the court did not strike down the amendment (since most of the money was already allocated), it gave a clear message that a similar future amendment will be void. More importantly, the court set out parameters of when is a constitutional amendment a misuse of constituent power. The first stage is 'recognition': Is this actually a constitutional norm? Is this norm stable and permanent or temporary? Is this a general norm or is it a personal, specific norm? Is this material compatible with the constitutional fabric? If the answer to one of these three parameter questions is 'no' then, according to President Hayut, the government can try to justify the deviation of the specific amendment from the parameters of recognizing a Basic Law.

Applying these parameters, the court decided that this is an extreme case of misuse of power: The law was temporary, dealing with a specific amount of money and therefore not fitting a constitutional norm. Also, there was no extreme situation that justified this (This money was not part of the 'corona compensation' money).

This decision was very important in the development of Israeli Law of judicial review of constitutional amendments. Especially in a situation where the Knesset can amend the basic laws so often and easily, the boundaries of misuse of this power were essential.[5]

Another extremely important decision made by the HCJ regarding limits to constitutional change was the judgment dealing with the various petitions against Basic Law: Israel as the Nation-State of the Jewish People ("the Nation-State Law").[6]

The Nation-State Law, a Basic Law which was enacted in 2018, defined Israel as the nation-state of the Jewish people, with various implementations, and was criticized deeply for not including in it recognition of democracy, equality, and minority rights.

The judgment of the HCJ included an extended bench of 11 judges, of whom 10 rejected the petition and only one (Judge Kra, the only Arab judge) held that part of the Basic Law is unconstitutional and void. The main issue dealt by the court was unconstitutional constitutional amendments. The court decided that the Knesset's power to constitute is not limitless: It cannot deny in a basic law, the very core values of the State of Israel as a Jewish and Democratic state. This idea was mentioned in a previous decision, in obiter dicta by some judges, but in this decision, it's established as the majority opinion. But the limits are very narrow: only harming the core values of Israel will be considered an unconstitutional constitutional amendment.

The other issue the HCJ dealt with is whether the court had the authority to review and invalidate a Basic Law or amendment to it. The court did not decide on this issue and left it open, since this case did not need a decision: It was clear, in the majority opinion, that the Nation-State Law does not interfere with Israel's core values. The court emphasized the fact that the new Basic Law will not override existing laws and assumes that the Knesset intended to protect equality and preserve the democratic values of the state. In other words, the Basic Law needs to be interpreted holistically together with the other Basic Laws (mainly Basic Law: Human Dignity and Freedom) and foundational values.[7]

The third important judicial decision concerned amendments to Basic Law: The Government that formed the alternate government in 2020.[8] A nine-judge panel of the HCJ rejected this petition. The 2020 amendment to Basic Law: The Government, made it possible to establish an alternate government with the position of an alternate prime minister, who is supposed to take over the incumbent prime minister after half of the term. This amendment made possible the former government in Israel and also the current government.

The Majority held that the amendment neither violates the basic characteristics of the state as Jewish and Democratic nor should be considered as a misuse of constituent authority. Only one judge (Judge Melcer) decided that some of the amendments should be repealed. In his view, "changing the rules of the game during the game" constitutes a misuse of constituent power. Such amendments should only apply prospectively and apply only after the next election.[9]

IV. LOOKING AHEAD

The new government presented several important proposals to amend the Israeli Basic Laws:

First, a 'coalition committee' was formed by the Minister of Justice in order to materialize an agreed proposal for "Basic Law: Legislation". This proposal is supposed to ease the current tensions regarding the powers of the supreme court for judicial review and also to solve the problem of instability of Israel's Basic Laws which can be amended by a simple majority (or a 51% majority) and a regular procedure. This committee met a few times and faced major disputes but it is nonetheless an important waypoint in this debate and towards constituting this Basic Law.

Second, the Minister of Justice initiated two amendments to Basic Law: The Government. The first dealt with the term limits of the Prime Minister. It passed a few stages in the Knesset (2022) but was not fully ratified. The other amendment presented a rule that a Prime Minister cannot hold office while criminally charged (after the Netanyahu precedent of 2020). This proposal was opposed within the coalition and never proceeded to the Knesset.

Third, the Minister of Justice proposed a Basic Law that will define the rights in the criminal process (Israel's bill of rights is flawed and

5 See e.g. Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21(3) European Journal of Law Reform 403-423; Yaniv Roznai, 'Clownstitutionalism: How to make a Joke of the Constitution?', in Richard Albert, Jaclyn Neo and Kevine Tan (eds.), *When is a Constitutional Amendment Illegitimate?* (forthcoming).

6 HCJ 5555/18 Hasson v. the Knesset (July 8, 2021).

7 See Rehan Abeyratne and Yaniv Roznai, 'Basic Structure Interpretation' in Sujit Choudhry, Catherine O'Regan and Carlos Bernal (eds.), *Research Handbook of Constitutional Interpretation* (Edward Elgar, forthcoming).

8 HCJ 2905/20 The Movement for Quality Government in Israel v Knesset: Misuse of Basic Laws; (12.07.2021).

9 See Yaniv Roznai & Duncan M. Okubasu, 'Stability of Constitutional Structures and Identity Amidst Political Settlement: Lessons from Kenya and Israel' (forthcoming) 1 Comparative Constitutional Studies.

lacking). This bill passed the first reading and is now in proceedings in the Knesset. If ratified, it will be the first new Basic Law dealing with human rights since 1992.

Fourth, several members of the coalition proposed a few suggestions to incorporate the right of equality into Israel's Basic Laws (since today it is lacking). This is a development of the debate that surrounded the Basic Law: Israel – The Nation-State of the Jewish People of 2018. There are proposals to amend that Basic law, and others to amend the Basic Law: Human Dignity and Freedom, or to form a new Basic Law: Equality. None of these suggestions had full support within the government and therefore did not proceed in the Knesset. But as long as the current government holds the debate about equality will continue.

Having said that, looking into the future there is also a different path Israel might take. The current government is weak and relies on a very slim majority, and can fall anytime. In case of elections, if the former Prime Minister Netanyahu returns to power with a full supportive coalition, Israel might face dramatic changes: regarding powers of the court, the Attorney general, other gatekeepers, and even regarding political freedoms and freedom of speech. At least relying on the statements his supporters publish, they want a major shift in Israel's democracy, a shift which will leave a lot fewer checks and balances and let "the people" rule.

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Italy

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I. INTRODUCTION

Italy has a rigid constitution; as a result, any constitutional amendments must follow a specific procedure. More specifically, Article 138 of the Italian Constitution establishes a complex process for modifying or repealing certain rules of the Constitution (Constitutional revision laws) or supplementing its content (Constitutional laws), in brief, "Reforming Laws".

In 2021 several Reforming Laws were presented or were subjected to parliamentary examination.

These included the constitutional reform on environmental protection (in brief, the "Environmental Reform") which was approved by the Senate of the Republic at the second vote with a two-thirds majority on 3 November 2021 (entering into force in 2022 as Constitutional Law no. 1 of 11 February 2022, after the second vote of the Chamber of Deputies, with the same two-thirds majority); meanwhile, Constitutional Law no. l of 18 October 2021 "Constitutional Law 1/21" entered into force on 4 November 2021.

In particular, the Environmental Reform amends Articles 9 and 41 of the Constitution, establishing that the Republic safeguards the environment, biodiversity, and ecosystems "also in the interest of future generations", and that private economic enterprise should be carried out in a manner that does not damage the environment or human health.

Furthermore, Constitutional Law 1/21, by intervening on Article 58, first paragraph of the Constitution, lowers the age for the election of members of the Senate of the Republic from 25 to 18 years.

After briefly outlining the process of amending/supplementing the Constitution and summarizing the Constitutional bills that were presented in 2021, the aim of the report is to discuss the main Reforming Laws, also contextualizing them within the category of amendment/dismemberment. Moreover, the report summarizes the scope of three tools of constitutional control (control carried out by the President of the Republic, the Constitutional Referendum, and the review by the Constitutional Court), highlighting whether they played any role concerning the aforementioned Reforming Laws.

Finally, the report highlights the role played by the judiciary and, more generally, by interpreters in filling the Environmental Reform with meaning and providing indications for its implementation.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

As previously stated, Article 138 of the Italian Constitution outlines a complex procedure for the approval of Reforming Laws. Indeed, Constitutional bills are adopted - in the same version - by each House of Parliament after two successive debates, according to the alternation method (e.g. Chamber of Deputies – Senate of the Republic - Chamber of Deputies – Senate of the Republic). At least three months must pass between the first and second vote of each House. It is worth noting that the version of the bill must be the same for the two Houses at the first and second vote. This means that if a House approves a bill at the first vote and then the second House amends the bill, the first House must reapprove the bill in the version amended by the second House; this continues until the bill is approved by both Houses in the same text (so-called "navette").

During the second vote, if the bill is approved by each House with a qualified majority of two-thirds of its members, the law is promulgated by the President of the Republic and then published in the Official Gazette, entering into force after fifteen days. Otherwise, if it is only approved with the absolute majority of the members of each House at the second vote, the law may be subjected to a popular referendum ("Constitutional Referendum" - see also below); in the absence of any referendum, the law is promulgated by the President of the Republic, published in the Official Gazette and enters into force after fifteen days.

Furthermore, there are explicit and implicit limits to constitutional amendments. More specifically, the only explicit limit is envisaged by Article 139 (the form of Republic). Furthermore, the Constitutional Court has developed some implicit limits connected to the supreme principles of the Constitution (such as the democratic principle, the principle of equality, and the principle of pluralism), also positioning at the same level the inviolable rights of the individual. In particular, in decision no. 1146 of 1988, the Constitutional Court stated that constitutional revision is not an unlimited power, as the Reforming Laws cannot violate or undermine "the essence of supreme values on which the Republican Constitution is based".

In 2021, several bills on different topics (including those concerning the rights of citizens and the organization of the Republic) were presented to the Chamber of Deputies or the Senate of the Republic and some underwent parliamentary examination.

These include the following bills, which were proposed in 2021:

1) the bill amending Article 32, concerning the promotion of sport (recognizing its social and educational value, as well as the effects on the psychophysical well-being of the individual), which was presented to the Senate on 13 December 2021;
2) the bill amending Article 67, concerning the introduction of the imperative mandate, which was presented to the Chamber of Deputies on 28 September 2021;
3) the bill amending Article 94, concerning the granting and withdrawal of confidence in the Government by the Parliament, which was presented to the Senate on 1 June 2021;
4) the bill amending Article 27 on the role of penalties (stating that the law must guarantee that the execution of sentences takes account of the social dangerousness of the offender and takes place without prejudice to the safety of citizens), which was presented to the Chamber of the Deputies on 4 June 2021;
5) the bill amending Articles 114, 131, and 132 concerning the establishment of Rome as a Region, which was presented to the Chamber of Deputies on 11 March 2021;
6) the bill proposing, in particular, the constructive vote of no confidence, which was presented to the Senate on 3 March 2021;
7) the bill proposing, in particular, to overcome equal bicameralism, which was presented to the Chamber of Deputies on 10 February 2021;
8) the bill amending Article 101 proposing citizens' right to safety, presented to the Chamber of Deputies on 16 March 2021;
9) the bill amending Article 11 on the participation of Italy in the European Union, presented to the Chamber of Deputies on 14 October 2021 and subsequently withdrawn on 10 November 2021;
10) the bill amending Article 3 on the principle of equality (eliminating the word "race"), presented to the Chamber of Deputies on 30 July 2021.

None of these bills has been definitively approved.

Moreover, a bill amending Article 119, concerning the recognition of the peculiarities of the islands and the overcoming of disadvantages deriving from insularity, was presented to the Senate on 5 October 2018 and subsequently approved by the Senate at first vote on 3 November 2021 (and at second vote on 27 April 2022).

With regard to the Environmental Reform, it was first presented to the Senate on 23 March 2018, and it was approved by the Senate at second vote with a two-thirds majority on 3 November 2021 (while it was definitively approved by two-thirds of the members of the Chamber of Deputies in 2022, with the same content).

Finally, Constitutional Law 1/21 (which was presented to the Chamber of Deputies on 17 January 2019) was definitively approved on 8 July 2021. Notably, it was approved on second resolution by an absolute majority, but the majority was less than two-thirds; however, no Constitutional Referendum was requested. Consequently, after its promulgation by the President of the Republic and publication in the Official Gazette on 20 October 2021, it entered into force on 4 November 2021.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Constitutional Law 1/21 and the Environmental Reform can be considered the two main reforms of 2021.

Due to their characteristics, they can be positioned in the category of amendment (rather than dismemberment) according to the content-based approach.

In fact, they are authoritative changes that correct specific parts of the Constitution, without affecting its core presuppositions. Indeed, the Italian Constitution, as amended, remains coherent with the fundamental assumptions of the pre-amendment Constitution.

This also seems to apply to the Environmental Reform: its scope still needs to be defined (see below), but it appears to stress the duty of solidarity already stipulated by Article 2.

More specifically, as anticipated, Constitutional Law 1/21, by amending Article 58, first paragraph of the Constitution, lowers the age for the election of members of the Senate from 25 to 18 years, aligning it with the age for the election of members of the Chamber of Deputies (regulated by Article 56).

It should be noted that, at the initial stage, there were some proposals (which were not taken forward) aimed at amending not only Article 58, first paragraph of the Constitution but also Article 58, second paragraph, modifying the passive electorate of the Senate (reducing the age to be elected to the office of senator from 40 to 25 years). With these changes, the active and passive electorate requirements for the Senate of the Republic would have been brought into line with those already envisaged for the Chamber of Deputies. If these amendments had also been approved, the two Houses would have been even more identical.

Indeed, in that regard, it is worth pointing out that the Italian Constitution envisages the so-called "perfect bicameralism": the two Houses have the same functions and the same powers (particularly with regard to the approval of laws), with some differences in their composition and in the Parliamentary Regulations; one of these differences was precisely the different age for electing their members.

When considering the reform with respect to the limits on constitutional amendments mentioned above, no tension was created with the non-amendable rules; on the contrary, even though it passed over almost in silence, it expanded popular participation. Indeed, it strengthens the participation of young people in the political life of the country and confirms the effectiveness of the punctual constitutional reforms (as previously made with Constitutional Law no. 1 of 19 October 2020 on "Amendments to Articles 56, 57, and 59 of the Constitution on reducing the number of members of Parliament").

Secondly, the Environmental Reform introduces environmental protection into the Italian Constitution for the first time. In this regard, it should be noted that the evolution of constitutional protection of the environment is in fact entirely due to case law of the Constitutional Court, based on extensive interpretation of Articles 9 and 32 of the Constitution, which permitted, in particular, the original meaning of landscape protection to be overcome[1]. Indeed, prior to the Environmental Reform,

1 See *ex multis:* Paolo Colasante, 'La ricerca di una nozione giuridica di ambiente

only Article 117 (on the division of legislative powers between the State and the Regions) mentioned the environment, stating that the "protection of the environment, the ecosystem and cultural heritage" is a matter under the exclusive legislative powers of the State, while the "enhancement of cultural and environmental properties" is one of the matters of concurrent legislation with the Regions.

The Environmental Reform amends Article 9, requiring the Republic to safeguard not only the natural landscape and the historical and artistic heritage of the nation, but also the environment, biodiversity, and ecosystems, "also in the interest of future generations" (with an implicit reference to the concept of sustainable development). Moreover, it states that the State has a duty to protect animals.

It should be noted that Article 9 is one of the fundamental principles of the Italian Constitution; such principles have only been amended once before (indeed, Article 10 establishes that a foreigner may not be extradited for a political offense; according to Constitutional Law no. 1 of 21 June 1967, this provision does not apply to crimes of genocide).

As anticipated, the new provision highlights the duty of solidarity established by Article 2, which states, in particular, that "the Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled". Indeed, environmental protection is a fundamental objective of the State and all public entities, as well as a duty of every citizen.

Moreover, the Environmental Reform amends Article 41, stating, in particular, that private economic enterprise is carried out freely, but it may not be performed against the common good or in a manner that could damage not only safety, liberty, and human dignity, but also the environment and human health. Moreover, the law envisages appropriate programs and controls so that public and private economic activity can be oriented and coordinated for social and environmental purposes.

It can be argued that the Environmental Reform - which is another example of punctual reform - creates no tension with non-amendable rules (even though the actual content and scope of the reform itself is yet to be identified - see below - and also considering the limits to constitutional reforms).

Finally, it should be verified whether there has been any constitutional control in the aforementioned reforms.

Generally speaking, there are three hypotheses of "control" of constitutional reforms: two preventive (control exercised by the President of the Republic during the promulgation and the Constitutional Referendum - see below) and one subsequent (review by the Constitutional Court). Only the former applies to all laws, whilst the remaining two only happen under specific circumstances.

Firstly, the President of the Republic promulgates a law only if it complies with the Constitution. Indeed, he has a "guarantee function" and may refuse to promulgate a law if there are profiles of constitutional non-conformity.

Secondly, the Constitutional Referendum may be requested - when a bill is approved only with the absolute majority of the members of each House - within three months from the publication, by one-fifth of the members of a House, or five hundred thousand voters or five Regional Councils; in this case, the law is promulgated if it obtains the majority of valid votes (i.e. excluding null votes and blank ballots) since a structural quorum (a turnout above 50%) is not required. Consequently, as anticipated above, not all laws are subject to the Constitutional Referendum.

Thirdly, generally speaking, the Constitutional Court has a counter-majoritarian role, *i.e.* it has the power to control and invalidate legislative acts. Moreover, over the years, the Court has also played an enlightened role, driven by the core values and fundamental rights of the Constitution. However, it should be noted that the Court may only review Reforming Laws when there is a violation of Article 138 or the aforementioned supreme principles.

In 2021, as seen previously, Constitutional Law 1/21 was approved at second vote by an absolute majority, but with a majority of less than two-thirds; however, as no Constitutional Referendum was requested, the President of the Republic verified whether the law complied with the Constitution and then promulgated it.

There has not yet been any control by the Constitutional Court.

IV. LOOKING AHEAD

Firstly, it should be noted that after the reduction of the number of members of Parliament with Constitutional Law no. 1 of 19 October 2020, the modification of the electoral legislation - which is an urgent measure - has not taken place yet. Conversely, Parliament is proceeding with punctual changes to the Constitution, which - one after the other - compose a puzzle that may gradually alter the structure of the Constitution itself, going beyond a mere amendment.

On the other hand, the Environmental Reform poses several questions. Indeed, it is unclear whether it is a mere "recap" of an existing situation, or whether it has introduced new rules on the protection of the environment and public health. Indeed, the Constitutional Court has developed certain interpretations of the environment over the years (in the near absence of any ground in the Constitution). By way of example, we can cite the indication that the environment - as a constitutionally protected "value" - delineates a sort of "transversal" matter[2] (in relation to which different competences arise, which may be regional) and is not focused on an exclusively "anthropocentric" view.

Moreover, the purpose of the reference made to the interest of future generations is also unclear and it can be questioned whether this implies a duty and solidarity in connection with Article 2 of the Constitution. Furthermore, another question concerns whether the balance between the environment and the other interests has changed (for example, whether the environment has become more important, also taking account of the challenges posed, for example, by the worsening problems of climate change and environmental degradation).

Considering the above, the judiciary (the Constitutional Court *in primis*) and, more generally, the interpreters will have a strong role in filling the Environmental Reform with meaning and providing indications for its implementation.

This role of the Constitutional Court is not new, as indicated above; on the contrary, it confirms its activist attitude, with a key example of this being the protection of the environment, as illustrated above.

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2 See judgement of the Constitutional Court of October 12, 2017, no. 212.

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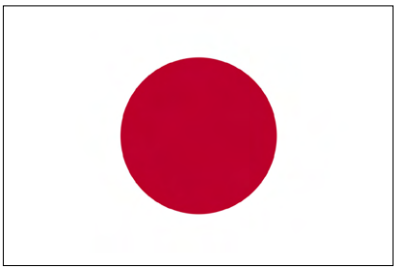
Japan*



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I. INTRODUCTION

On May 3, 2022, the Constitution of Japan celebrated its seventy-fifth anniversary of never being revised. In Japan, constitution-related events and gatherings are customarily held across the country on this day of commemoration. This year, Prime Minister (PM) Fumio Kishida, also the leader of the ruling Liberal Democratic Party (LDP), sent a message to a meeting in Tokyo of civil society groups that support constitutional revision. In it, he mentioned, amongst other things, Japan's measures against the novel coronavirus pandemic, Russia's invasion of Ukraine, and "growing interest in preparing for a state of emergency" as well as "the need for the early realization of new constitutional articles on a state of emergency and related affairs."

In this statement, the recent trend of constitutional reform is well illustrated. We will therefore address the issue of measures against the novel coronavirus pandemic in Section II and that of constitutional problems concerning national security measures in Section III. Section IV will introduce key constitutional decisions in the rulings handed down by Japan's courts from 2021 to the time of present writing. Finally, Section V will also address the recent trends in debates on the Emperor System.

II. COVID-19

1. OUTLINE OF THE SPECIAL MEASURES ACT

As mentioned in our previous report,[1] Japan's coronavirus response has primarily been based on the Special Measures Act for New Infectious Diseases (Special Measures Act). Based on the law, when infections grow severe enough to meet certain conditions, a "declaration of a state of emergency" will be issued by PM (Article 32[1]). The governors of local government in targeted regions may subsequently adopt "state of emergency measures" (Article 45) and "request" that the administrators of schools, social welfare facilities, entertainment venues, and other facilities used by large numbers of people as specified by cabinet order restrict or suspend the use of these places (Article 45[2]).

There is no legal obligation per se to comply with any such "request." However, governors may "order" anyone who refuses to comply to do so if their refusal is "without justifiable cause," but "only when it is particularly necessary" (Article 45[3]). Compliance with such orders is obligatory, and violations will incur an administrative fine (Article 79; Article 80[1]). This system of orders, newly established by a February 2021 amendment to the Act, has created several constitutional conundrums.

2. THE CASE OF GLOBAL-DINING INC.

On January 7, 2021, the government declared a state of emergency, to which the governor of Tokyo responded with a request that restaurants cease operations after 20:00 as an emergency measure. On March 18, the same governor issued an order against Global-Dining Inc., which runs a chain of restaurants, for failing to comply with this "request." The order's written reasons stated that by continuing its operations, the corporation had "increased the traffic of people linked to food consumption, which raises the risk of infections within the city area," and that "including its strong signaling of non-compliance with a state of emergency measure, it threatens to induce other restaurants to remain in business after 20:00." However, does an order based on such reasons meet the condition of "only when it is particularly necessary?"

Global-Dining Inc. filed a lawsuit contesting the illegal and unconstitutional nature of this order that garnered much attention.[2] On May 16, 2022, the Tokyo District Court ruled in the first instance that the order against the company did not fall under the rubric of being "only when it is particularly necessary" and deemed this action by the metropolitan government illegal.[3] (Nonetheless, the court dismissed the claim for state compensation on the grounds that no negligence had been established in the order's issuance.[4])

1 Keigo Komamura, Satoshi Yokodaido, and Mai Sugaya, 'Japan', in Luís Roberto Barroso, and Richard Albert (eds), *The 2020 International Review of Constitutional Reform* (2021 the Program on Constitutional Studies at the University of Texas at Austin and the International Forum on the Future of Constitutionalism).

2 'Restaurant Chain Operator Sues Tokyo over Early Closure Order' *The Asahi Shimbun* (Tokyo, 23 March 2021) <https://www.asahi.com/ajw/articles/14294887> accessed 11 June 2022.

3 See 'In First, Court Rules Tokyo's Order to Cut Business Hours Amid COVID Spread Was 'Illegal'' *The Japan Times* (Tokyo, May 16 2022). < https://www.japantimes.co.jp/news/2022/05/16/national/crime-legal/japan-covid-measures-illegal-ruling/> accessed 11 June 2022.

4 For a claim for state compensation under the State Redress Act to be admissible, in addition to being unlawful, there must also be a finding of intent or negligence.

3. THE CASE OF BENEFITS FOR SEX WORK

Another prominent lawsuit that challenges the illegality and unconstitutionality of Japan's coronavirus measures concerns the issue of benefits for sex work. National and local governments provide certain subsidies to businesses that comply with "requests" under the Special Measures Act. One such measure, called the Subsidy Program for Sustaining Businesses, excludes the operators of sex-related businesses and related enterprises prescribed in the Act on Control and Improvement of Amusement and Entertainment Businesses. This suit asserts that such exclusions are unconstitutional.

To justify the exclusionary measures, the government's response to the Diet included the explanation that "conventional wisdom makes it difficult to gain the public's acceptance of such businesses receiving public funds." Yet doesn't using the difficulty of gaining public acceptance as a basis to refuse the provision of benefits only to a specific profession—even when those engaged in it are legally recognized and said benefits are available to their counterparts in other professions—pose problems concerning the constitutional stipulation on freedom of occupation in Article 22(1), as well as that on equality in Article 14? Despite much criticism, the Tokyo District Court almost entirely accepted the government's justification of the legal measure on June 30, 2022.

4. THE DEBATE ON LOCKDOWNS AND AN EMERGENCY CLAUSE

The Special Measures Act also permits "requests" for the general public to wear masks, refrain from outdoor activities, and other related actions (Article 24[9]; Article 31-6[1]; Article 45[1]). However, as there is no legal obligation to comply, strict measures like the lockdowns carried out in other countries cannot be enforced. Therefore, some argue that the Special Measures Act should be revised to permit lockdowns. Still, the government has indicated that this would be difficult due to constitutional hurdles and thus that constitutional revision would be required. Against this stance of the government and the LDP, the Constitutional Democratic Party (CDP), Japan's largest opposition party, has asserted: "Some say we need stronger restrictions on private rights during emergencies and thus that the Constitution must be changed. But we can respond to emergencies with current laws.[5]"

At first glance, the government's position appears to prioritize basic rights even during emergencies. Still, it could also be read as an attempt to use the coronavirus pandemic to implement some constitutional revisions. On the other hand, their CDP critics are so eager to prevent constitutional revision that they even claim a restriction as extensive and harsh as a lockdown is justifiable under "public welfare" as the current Constitution's general provisions for basic rights restriction. This position presents a problem from the standpoint of guaranteeing constitutional rights. In this way, even over a constitutional issue as vital as the issues on emergencies, Japanese politics remains unfortunately mired in an oppositional structure between pro-and anti-constitutional revision groups.

5 Yuko Aizawa, 'Coronavirus and the Debate over Constitutional Change' *NHK World Japan* (Tokyo, 8 May 2020) <https://www3.nhk.or.jp/nhkworld/en/news/backstories/1078/> accessed 11 June 2022.

5. THE DEBATE ON AN ONLINE DIET

Another problem that surfaced during the coronavirus pandemic is whether the Diet can constitutionally be held online. Presently, Diet plenary sessions and committees are not being remotely convened, but the consideration of future scenarios has raised a debate on whether doing so would be constitutionally permissible. Article 56(1) stipulates that "Proceedings cannot be commenced in either House unless one-third or more of total membership is *present* [emphasis added]." Moreover, Article 56(2) states: "All matters shall be decided, in each House, by a majority of those *present* [emphasis added], except as elsewhere provided in the Constitution, and in case of a tie, the presiding officer shall decide the issue." Because the Constitution's provisions are premised on being "present," the issue here is whether attendance at online sessions is constitutionally recognizable as "present."

On this point, the Commission on the Constitution in the House of Representatives holds that "present" should "on principle be interpreted as a physical presence," but it has also adopted a report with the provision that "in exceptional cases, this interpretation should include online attendance"—such as a state of emergency during which the holding of a plenary session is deemed necessary.[6] Despite the LDP's initial position that constitutional revision would be required, it has accepted the other parties' insistence that such interpretation will suffice. After this episode, regardless, remote Diet sessions have not been convened due to the stabilization of domestic coronavirus infections.

III. NATIONAL SECURITY

1. RUSSIA'S INVASION OF UKRAINE AND ARGUMENTS ON NATIONAL SECURITY

Russia's invasion of Ukraine has turned Japanese attention towards China's potential actions towards Taiwan and animated debates over national security measures. On constitutional revision, the opinions within LDP that specify the existence of the Self-Defense Forces (SDF) and establish a new constitutional clause on states of emergency are growing stronger.[7] In 2018, the party announced that it would prioritize four items in its discussion of constitutional revision: specifying the SDF's existence, adding an emergencies clause, dissolving merged constituencies, and enhancing education.[8] The invasion of Ukraine has strengthened calls within the LDP to speed the revision of the first two items, a position particularly advocated by former PM Shinzo Abe and others.

On the one hand, although PM Kishida is not unenthusiastic about constitutional revision, given his expressed hope of sparking greater public discussion about this issue,[9] his government has yet to state how it would go about doing so. It appears to be keeping its distance from the stance associated with its predecessor. On the other hand, in

6 'Lower House Adopts Report Backing Online Diet Debate' *The Asahi Shimbun* (Tokyo, 3 May 2022) <https://www.asahi.com/ajw/articles/14562961> accessed 11 June 2022.

7 Eric Johnston, 'Ukraine War Pushes Revision of Japan's Constitution into the Spotlight' *The Japan Times* (Tokyo, 3 May 2022) <https://www.japantimes.co.jp/news/2022/05/02/national/constitutional-revision-kishida-pressure/> accessed 11 June 2022.

8 Komamura, Yokodaido & Sugaya (n 1) 166-68.

9 'Japan Constitutional Debates Up in Air before Election' *Jiji Press* (Tokyo, 2 May 2022) <https://sp.m.jiji.com/english/show/19518> accessed 11 June 2022.

response to the LDP's moves, the CDP and others have criticized it for attempting to use the furor over the crisis in Ukraine to enact constitutional revision, and they have also opposed the proposals to specify the SDF and to introduce a new emergency clause.

2. PRE-EMPTIVE STRIKE CAPABILITIES

Even before the invasion of Ukraine, a point of contention in the debate on amending Japan's National Security Strategy (NSS) had been ongoing with North Korea and China over the issue of whether Japan may possess pre-emptive strike capabilities enabling it to attack another country even without a direct attack on itself. [10] Article 9(1) of the Constitution of Japan states: "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;" Article 9(2) further stipulates: "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," by which this clause mandates the non-possession of military power. Article 9's provisions have heretofore been understood to mean that the use of force is recognized only in the event of an attack on Japan's national territory. And based on this interpretation, the government has assumed that it is solely during times such as a missile attack, when it is clear that no other recourse is available, that the Constitution would, on legal principle, recognize attacking an enemy base as self-defense, thus enabling such actions to remain within the ambit of non-aggressive defense.

Subsequently, former PM Abe modified the above interpretation of the Constitution by Cabinet decision in 2014 to enable the use of force in situations of an attack on "countries with close relations to ours" if this endangered Japan's existence and the government determined that no other means to eliminate such a threat existed. Should the so-called "enemy-base-attack-capability" under this new interpretation be recognized, Japan would be able to launch a counterattack if, for example, another country fired a missile against a fleet of the United States, which is an allied nation. Although PM Kishida has emphasized that he will not engage in discussions that deviate from established understandings of the Constitution, international law, or the division of roles between Japan and the United States, enemy-base-attack-capability might increase the wariness of neighboring countries toward Japan.

3. NUCLEAR SHARING

Although former PM Abe no longer leads the country, he continues to hold power within the LDP. In a broadcast news program, he remarked that nuclear sharing—the deployment and joint operation of U.S. nuclear weapons in Japanese territory for self-defense purposes—should not be considered a taboo topic to discuss. In response, the LDP has organized internal research and study groups on nuclear sharing.

However, it turns out that most LDP members believe that nuclear sharing would be deleterious for Japan's security environment and create more disadvantages than benefits. PM Kishida has also said that nuclear sharing "would be difficult to recognize from the standpoint of adherence to the 'Three Non-Nuclear Principles' and a legal system founded on the Atomic Energy Basic Law."[11]

4. TRENDS IN PUBLIC OPINION ON CONSTITUTIONAL AMENDMENT

What is the Japanese public's stance towards the abovementioned debates on national security within their government and political parties? Even in a May 2022 opinion poll by the *Asahi Shimbun*, a national daily known for its liberal disposition, 56% of respondents said that "changes are necessary" to the current Constitution, outnumbering the 37% who said that "no changes are necessary"; this is the largest percentage of responses favoring constitutional revision among available comparisons to opinion polls carried out after 2013.[12]

"National defense" was the most frequently cited reason for constitutional revision in this May 2022 poll. However, even though it was conducted amidst Russia's invasion of Ukraine, the percentage of respondents citing national defense increased only slightly from last year (incidentally, the reason with the largest increase was "the parliamentary system of the Diet," at 21%). And in response to the question "Do you think Article 9 should be changed?" 59% said no, while 33% said yes. Even in the stratum of respondents who agreed that the Constitution needed revision, only 53% wanted Article 9 to be changed, while 41% wanted to preserve it.

We can thus discern a difference between public enthusiasm for constitutional revision and revision of Article 9. According to this poll's results, at least, implementing the proposal to specify the SDF will likely require the segment of the public amenable to revising the Constitution but not Article 9 to be convinced otherwise.

IV. TRENDS IN NOTABLE CONSTITUTIONAL LITIGATIONS

To understand the constitutional changes in Japan, whose written constitution has not undergone any revision, we must consult sources of law outside the Constitution. The sections below will introduce important constitutional decisions by Japan's courts in this term.

1. SUPREME COURT DECISIONS ON UNCONSTITUTIONALITY

The Supreme Court has recently ruled on unconstitutionality in the following two cases, which involve a Confucian temple and the public review of Supreme Court judges, respectively.

(1) OKINAWA'S CONFUCIAN TEMPLE

In March 2021, the court ruled that the mayor of Naha City in Okinawa Prefecture had violated Article 20(3) of the Constitution when he

10 'Japan to Revise National Security Strategy in Late 2022' *The Japan Times* (Tokyo, 7 November 2021) <https://www.japantimes.co.jp/news/2021/11/07/national/security-guideline-revision/> accessed 11 June 2022.

11 Jesse Johnson,'Kishida Calls Idea of Japan Sharing Nukes with U.S. 'unacceptable" *The Japan Times* (Tokyo, 28 February 2022) <https://www.japantimes.co.jp/news/2022/02/28/national/politics-diplomacy/kishida-nuclear-sharing-abe/> accessed 11 June 2022.

12 Hideki Kitami, 'Survey: Record 56% of Voters back Changes to Constitution' *The Asahi Shimbun* (Tokyo, 3 May 2022) <https://www.asahi.com/ajw/articles/14612968> accessed 11 June 2022.

permitted a civil society organization to establish a Confucian temple in an urban park managed by the city and subsequently exempted said organization from paying the full usage fee.[13] The second sentence of Article 20(1) in the Constitution stipulates that "No religious organization shall receive any privileges from the State, nor exercise any political authority," and Article 20(3) that "The State and its organs shall refrain from religious education or any other religious activity," while Article 89 states that "No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority." These clauses are referred to as the provisions for separation of religion and state.

The Supreme Court has held that in cases when the national or a local government exempts the premises of a facility located on national or public land from usage fees, it is reasonable to conclude that such exemptions should be comprehensively judged in light of conventional wisdom, taking into consideration various factors including the nature of the facility, the circumstances that led to granting the exemption, the manner in which the land was provided gratis in conjunction with the exemption, and the public's evaluation of said factors. Based on this framework of comprehensive consideration and an examination of the specific facts in the case at hand, the Court concluded that this exemption constitutes religious activity of the kind prohibited by Article 20(3) of the Constitution.

(2) PUBLIC REVIEW OF SUPREME COURT JUDGES

The second case challenges the unconstitutionality of withholding from Japanese voters overseas the opportunity to publicly review Supreme Court judges that the Constitution provides. Article 79(2) of the Constitution stipulates that "The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten 10 years, and in the same manner thereafter." The Law on Public Examinations of Supreme Court Judges, enacted soon after the Constitutional enactment, based on Article 79(4)'s prescription that "Matters pertaining to review shall be prescribed by law," but it did not allow overseas nationals to participate in reviews.

The State argued that, unlike elections where voters simply write candidates' names, national reviews would require ballots printed with the names of the judges under review, and that conducting such reviews overseas would be difficult. Still, all fifteen judges on the Supreme Court grand bench unanimously ruled this unconstitutional.[14] In 2005, the Supreme Court had already deemed the Public Office Election Law unconstitutional for not granting overseas nationals the chance to exercise their right to vote[15]; based on this, it determined that the opportunity for public review may not be restricted without compelling reasons, and technical difficulties are not to be the reasons.

The issues in this lawsuit included whether an action for declaratory judgment of illegality is permissible, and whether, even if not granting overseas nationals the opportunity for public review is illegal, the Diet's legislative negligence in leaving the situation as it was could be considered willful or negligent, which are requirements for compensation under the State Redress Act. Both these issues were upheld, and their impact on future practice will be extremely significant.

2. FAMILY AND THE CONSTITUTION

(1) JAPAN'S SHARED SURNAME LAW FOR MARRIED COUPLES

In June 2021, the Supreme Court rejected the final appeal in a case whose plaintiffs, in a de facto marriage, claimed that they suffered mental anguish from being unable to legally marry under provisions of the Civil Code and other laws that prohibit married couples from maintaining separate surnames.[16] Article 24(1) of the Constitution guarantees that "Marriage shall be based only on the mutual consent of both sexes." Moreover, Article 24(2) stipulates: "With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes." These provisions recognize the Diet's legislative discretion in shaping the institution of marriage. Based on this, Article 750 of the Civil Code holds that "a married couple shall take the name of the husband or wife as determined at the time of marriage," and Article 74(1) of the Family Registration Law requires a marriage registration to state the surname under which the couple shall be known.

Prior to this case, other lawsuits had previously been filed against this system of forcing married couples to share a surname, but the Supreme Court in 2015 refused to find a violation of Article 14(1) of the Constitution on the grounds that the system per se engenders no formal inequality between men and women since either spouse's surname can be chosen. It also found no violation of Article 24 of the Constitution in regard to the disadvantages associated with changing one's surname, because "these can to some extent be alleviated" by the use of a common name.[17] But five of the Supreme Court's fifteen judges wrote dissenting opinions that the Code was unconstitutional.

In this case, whether the 2015 ruling should be overturned was discussed. However, eleven judges have adhered to the 2015 ruling and determined that the system of married couples sharing a surname is constitutional. The majority opinion concluded that the 2015 ruling should not be amended despite a following increase in women's employment rate and the number of people who favor introducing an optional system of separate surnames for married couples. It emphasized that the nature of the system should be debated and determined in the Diet. In addition, it made no substantive determination regarding a violation of Article 14 of the Constitution.

13 Saikō Saibansho [Sup.Ct.], grand bench, 24 Feb. 2021, 75(2) Saikō Saibansho minji hanreishū [Minshū] 29.

14 Saikō Saibansho [Sup.Ct.], grand bench, 25 May 2022, Saibansho saibanrei jōhō [Saibanshoweb] http://www.courts.go.jp.

15 Saikō Saibansho [Sup.Ct.], grand bench, 14 Sep.2005, 59(7) Saikō Saibansho minji hanreishū [Minshū] 2087.

16 Saikō Saibansho [Sup.Ct.], grand bench, 23 June 2021, 266 Saikō Saibansho saibanshū minji [Shūmin] 1.

17 Saikō Saibansho [Sup.Ct.], grand bench, 16 December 2015, 69(8) Saikō Saibansho minji Hanreishū [Minshū] 2586.

(2) SAME-SEX MARRIAGE

Along with the shared surname law for married couples, the issue of same-sex marriage raises serious questions about how to consider "marriage" under Japan's Constitution. Many same-sex couples have simultaneously filed lawsuits in several jurisdictions claiming that civil laws which do not recognize same-sex marriage are unconstitutional. Among these suits, the Sapporo District Court ruled for the first time in March 2021 on the unconstitutionality of not recognizing same-sex marriage.[18]

As mentioned above, Article 24(1) of the Constitution stipulates that marriage shall be solely based on "the mutual consent of both sexes". The plaintiff couples asserted that since this same Article 24 does not prohibit same-sex marriages, any refusal to accept the marriage registrations of same-sex couples violates not only this article but also Articles 13 and 14 of the Constitution, which stipulate the right to the pursuit of happiness and equality under the law respectively; they thereby claimed damages against the State.

In regard to these points, the Sapporo District Court ruled that homosexuality is a personal characteristic that cannot be chosen or changed of one's own volition, and thus that the plaintiffs' inability to receive any legal effect of marriage violates Article 14(1) of the Constitution, which stipulates equality under the law. However, the Sapporo District Court found no constitutional violation of either Article 13 or Article 24(1). In particular, the court's interpretation that Article 24 of the Constitution provides just for heterosexual marriage has led the plaintiffs to appeal its ruling.

V. LOOKING AHEAD

The House of Councillors elections are scheduled for July 10, 2022. If the ruling parties win this election, and the chances of their victory are relatively high at this point, they could be given a super majority in both houses of the Diet, which is necessary for constitutional revision. If so, for the first time since the end of World War II, the Japanese Constitution may be revised.

Another area that has been undergoing a variety of changes in recent years is that of the Emperor System. In the followings, a brief perspective on this issue is referred to.

1. IMPERIAL ABDICATION

It is worth touching on recent changes regarding the imperial system that characterizes Japan's structure of government. This concern the so-called "living abdication" by an emperor.[19] In August 2016, then Emperor Akihito expressed his intention to abdicate due to his advanced age, and in June 2017, the Law for Special Exception of the Imperial House Law concerning Abdication of the Emperor and Other Affairs (Special Exception Law) was enacted to allow a special abdication of the throne limited to Akihito's generation. Akihito abdicated in April 2019, and Naruhito, then the Crown Prince, ascended to the throne in May.

On accession to the imperial throne, the Constitution of Japan solely stipulates hereditary succession (Article 2), but given that the Imperial Household Law states that "Upon the Emperor's demise, the Imperial Heir shall immediately accede to the Throne" (Article 4). Namely, the law interprets the Constitutional provision as an emperor can be replaced only in case of "death."

It then follows that if an emperor abdicates in life, even if this is confined to a single generation, the Special Exception Law could potentially violate Article 2 of the Constitution. It would become possible to enact a special law for each future instance of abdication, which might incur the risk of the Cabinet or the Imperial Household instigating an arbitrary imperial succession. Furthermore, some conservatives have argued that an emperor cannot abdicate before death once they have acceded to the throne. But every emperor will grow old. This issue is thus linked to the critical question of how to understand the humanity of the organ responsible for Japan's unique imperial system.

2. SUCCESSION TO THE IMPERIAL THRONE

The current heirs in line to Japan's Imperial Throne, in order of eligibility, comprise Fumihito of the Akishino family, the fifty-six-year-old Crown Prince, 'the present Emperor's younger brother', his fifteen-year-old son Hisahito, and the eighty-six-year-old Masahito of the Hitachinomiya family. As Article 1 of the Imperial House Law restricts succession to "male offspring in the male line" of the imperial family, the imperial line would be severed if Hisahito does not have a son. This issue led to the convening of an expert panel on "Supplementary Resolutions to the Special Bill on the Imperial House Law Concerning the Abdication of the Emperor and Other Affairs." However, the establishment of the panel drew criticism from conservatives, who argued that it would upset the current order of succession to the throne. This controversy overshadowed the panel's original intention of ensuring stability in said succession. As a result, the panel's report submitted to the Diet in December 2021 focuses solely on securing the requisite number of imperial successors.[20]

The report proposed two options. The first recommends halting the decline in imperial heirs by creating "female lineages" in which its female members would retain their status after marriage. The second recommends allowing adoptions, which are currently forbidden, and securing new male members from patrilineages of the eleven imperial families excluded from the registers of nobility in 1947. Though the report makes no mention of stable succession to the throne, the two aforementioned proposals suggest the expectation that a male from the former eleven imperial families may be adopted as a son-in-law into a female imperial family, where any male child begotten will be qualified to succeed the throne as a patrilineal male descendant.

In response to this, on top of criticism that the issue of succession stability has simply been deferred, some say the government should secure eligible heirs to the throne by allowing female emperors to succeed male emperors and so-called female-lineage emperors to succeed female emperors. In fact, around 80% of the Japanese public favors the succession of female emperors, and roughly 70% also approve of

18 Sapporo Chihō saibansho [Sapporo Dist. Ct.] 17 March 2021, 2487 Hanrei Jiho [Hanji] 3.

19 Linda Sieg, 'Explainer: Japan Emperor Abdication Rare, but Could Set precedent' *Reuters* (Tokyo, 30 April 2020) <https://www.reuters.com/article/us-japan-emperor-abdication-explainer-idUSKCN1S524Z> accessed 11 June 2022.

20 Taro Ono, 'Panel Won't Look at Changing Rule That Only Men Can Be Emperor' *The Asahi Shimbun* (Tokyo, 27 July 2021) <https://www.asahi.com/ajw/articles/14404314> accessed 11 June 2022.

female-lineage emperors.[21] Yet there are conservatives who cling to the preservation of a male lineage and deeply oppose the idea of a female or female-lineage emperor, so the abovementioned report does not even mention either of these options. On this point, the following comments said to have been uttered by the late Prince Philip of England are highly instructive: "Most of the monarchies of Europe were really destroyed by their greatest and most ardent supporters. It was the most reactionary people who tried to hold on to something without letting it develop and change."[22]

VI. FURTHER READING

For more on the legal system for the fight against the pandemic in Japan, see, Narufumi Kadomatsu, 'Legal Countermeasures against COVID-19 in Japan: Effectiveness and Limits of Non-Coercive Measures' (2022) China-EU Law J <https://doi.org/10.1007/s12689-022-00093-x> accessed 11 June 2022.

As for historical developments on the dynamics of constitutional reforms and civic activism in postwar Japan, see, Helen Hardacre, Timothy S. George, Keigo Komamura, and Franziska Seraphim (eds), *Japanese Constitutional Revisionism and Civic Activism* (Lexington Books 2021).

Note: Former Prime Minister Shizo Abe was assassinated on July 8, 2022. This report does not refer to that incident or subsequent events.

21 See '80% of Japanese Support a Reigning Empress as Pool of Heirs Shrinks' *The Japan Times* (Tokyo, 1 May 2021) <https://www.japantimes.co.jp/news/2021/05/01/national/females-imperial-family-survey/> accessed 11 June 2022.

22 John Pearson, *The Ultimate Family: The Making of the Royal House of Windsor* 156 (Bloomsbury Reader 1986).

Jordan

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I. INTRODUCTION

The Constitution of the Hashemite Kingdom of Jordan has been amended this year, 2022. The amendments were surprising for most Jordanians, but it was also considered an advanced step toward legal improvements. This paper will cover only four arias. The first amendment relates to the Jordanian rights and duties, which caused great tension between the political powers in the Parliament. Second, The ministerial power and the limitations for the former minister. This amendment can cause many interpreting consequences based on the meaning of minister "during his ministerial office." Third, the separation of power is one of the most important amendments because it strictly separates the legislative branch from the executive branch. Four, The single-filter mechanism for the constitutional court.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The current Constitution of the Hashemite Kingdom of Jordan is the third official version in the history of the Kingdom of Jordan. The first version was in 1928 when establishing the political system of the Emirate of Transjordan, in the name of the Basic Law issued in 1928.[1] Then the second form of the constitution of Jordan was issued during the independence phase of 1946.[2] Later, the Constitution of 1952[3] replaced the previous constitution, which defined political powers, laid the foundations for balance among them, and laid the foundations of democracy for the hereditary monarchical parliamentary system. It should be noted that this constitution is the current official version and preserved its name as the 1952 constitution until now, even though many of its articles were implemented over different periods for fourteen amendments,[4] hereinafter referred to by the name Constitution of the Hashemite Kingdom of Jordan.

Although the Jordanian constitution is a Rigid Constitution regarding the process needed to amend the constitution, and the constitution has been amended so often lately. The constitution is not born out of a vacuum outside the political, historical, social, and cultural context. Constitutional amendments are an objective response to political developments and pushes that create new legislative necessities and needs in many cases. The 1952 Constitution, for example, came after the unity of the two banks of the Jordanian river. This constitution is a result of the feeling of the state and the various political forces of the need to develop the internal political equation to be able to contain the political and social developments and the pressing popular aspirations for a system closer to a democratic and representative character.

I would cover the latest amendment of the Jordanian Constitution in 2022. The reasons for the draft amendment to the Jordanian constitution can be summarized as follows:

(1) Consolidating the principle of the rule of law, consolidating the principle of separation of powers, and strengthening the independence of parliamentary work in a way that ensures the effectiveness of the parliamentary programmatic blocs and ensures the constitutional oversight role of members of the National Assembly and the development, strengthening and advancement of legislative performance.
(2) To empower women, youth, and people with disabilities and enhance their role and status in society.
(3) To develop mechanisms for parliamentary work to keep pace with the political and legal developments that the Jordanian constitutional system has witnessed since the issuance of the

1 The Basic Law of Transjordan was published in the Official Gazette Issue 188 on page 2 on 04/19/1928 and in effect on 04/16/1928.
2 The Jordanian Constitution No. 3 of 1947 published in the Official Gazette Issue 886 on page 602 on 01-02-1947 and in force on 01-03-1947.
3 The Constitution of the Hashemite Kingdom of Jordan published in the Official Gazette Issue 1093 on page 3 on 01/08/1952 and in effect on 01/08/1952.
4 Amended by (1) The Jordanian constitution for the year 1954 published in the Official Gazette issue 1179 on page 321 on 04-17-1954 and in effect on 01/11/1955 (2) The Jordanian constitution for the year 1955 published in the Official Gazette issue 1243 on page 953 on 10-16-1955 and in force on 11-01-1955 (3) The Jordanian constitution for the year 1958 published in the Official Gazette issue 1380 on page 518 dated 04-05-1958 and in effect on 05-04-1958 (4) The Jordanian Constitution No. 1 of 1958 published in the Official Gazette Issue 1396 on page 776 on 09-01-1958 and in effect on 08-01-1958 (5) The Jordanian Constitution of 1960 published in the Official Gazette Issue 1476 on page 153 dated February 16 1960 and valid on February 16 1960 (6)The Jordanian constitution for the year 1965 published in the Official Gazette issue 1831 on page 378 on 01-04-1965 and in effect on 01-04-1965 (7) The Jordanian Constitution of 1973, published in the Official Gazette Issue 2414 on 04-08-1973 and in force on 04-08-1973 (8) The Jordanian constitution for the year 1974 published in the Official Gazette issue 2523 on page 1813 on 11-9-1974 and valid on 11-9-1974 (9) The Jordanian constitution for the year 1976 published in the Official Gazette Issue 2605 on page 223 on 02-07-1976 and in effect on 02-07-1976 (10) The Jordanian constitution for the year 1984 published in the Official Gazette Issue 3201 on page 67 on 01/09/1984 and in effect on 01/09/1984 (11) The Jordanian Constitution for the year 2011 published in the Official Gazette Issue 5117 on page 4452 on 10/1/2011 and in effect on 10/1/2011 (12) The Jordanian Constitution published in the Official Gazette Issue 5299 on page 5138 on 09/01/2014 and in effect on 09/01/2014 (13) the Jordanian Constitution for the year 2016 published in the Official Gazette Issue 5396 on page 2573 on 05-05-2016 and in force on 05-05-2016 (14) The Jordanian Constitution for the year 2022 published in the Official Gazette Issue No. 5770 on page 1139 on 01/31-2022 and in force on 01/31-2022.

constitution in 1952 to strengthen the system of party work and political life in general.

(4) To give members of the House of Representatives the right to choose the speaker of the Council and evaluate his performance annually and grant two-thirds of the members of the Council the right to dismiss the speaker.

(5) To immunize the political parties and protect them from any political influences and entrust the authority to supervise their establishment and follow up their affairs to the independent commission, as it is a neutral and independent body from the government in a way that enhances the principles of justice, equality and equal opportunities and avoiding any governmental influences.

(6) To unify the jurisprudence issued in the appeals against the validity of the representation of members of the House of Representatives.

(7) To establish the principle of transparency and equal opportunities among the candidates for the parliamentary elections, establish the rule of non-conflict of interests, and tighten restrictions on the actions and actions that members of the Senate and the House of Representatives are prohibited from doing during their membership.

(8) To establish a National Security and Foreign Policy Council to handle all issues related to the Kingdom's defense, national security, and foreign policy.

The tension of the constitutional amendments has been seen in the very early starting with the title of rights and duties of Jordanian men and Jordanian women, which passed with 94 votes of 120 parliamentarians present last month, changed the title of the constitution's second chapter to. The political dispute in the Jordanian parliament exploded into a fight during a discussion to add "Jordanian women" to a constitutional clause on equal rights. [5] Although some claim that the amendment is useless in practice since the provisions of Section 1 of Article VI of the Constitution did not include the word "gender" as a basis that the Constitution prohibits for distinction, as it now only prohibits discrimination on the basis of "race, language, and religion."

However, a true reading of the text of Article Six indicates that the constitution abolishes all forms of discrimination, including "race, language, and religion," which were used as examples, but not limited to so gender discrimination is not permissible by the constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

I. RIGHTS AND DUTIES OF JORDANIAN MEN AND JORDANIAN WOMEN

The 2022 constitutional amendment attached to Article VI of the constitution by deleting section 5 that stated: "The law shall protect motherhood, childhood and the old-aged; and shall avail care for the youngsters and those with disabilities and protect them against abuse and exploitation." This section dealt with (1) state support for children, (2) state support for the disabled, and (3) state support for the elderly. However, the amendment resulted in adding three separate sections

The new fifth section of Article VI of the constitution appears as redundance. It states that: "[t]he law protects the rights of persons with disabilities and enhances their participation and integration in various aspects of life. It also protects motherhood, childhood, and old age, takes care of young people, and prevents abuse and exploitation." This provides the same practical rights for the rights of maternity and people with disabilities. The question of its necessity can be seen in the future, especially concerning the item that promotes the participation and integration of people with disabilities in different walks of life. It is not the duties of the constitutional texts to detail the nature of protection and care that it be in participation and integration in life.

Another two sections have been added to Article VI of the constitution. The first one, numbered section 6, states that: "the state guarantees the empowerment and support of women to play an active role in building society in a way that guarantees equal opportunities based on justice and equity and protects them from all forms of violence and discrimination."

This section acts like a directive role in the empowerment and support of women. The purpose of this empowerment and support is limited to play a role in building society with equal opportunities and protect women from all forms of violence and discrimination.

In my opinion, this section supports the interpretation mentioned above that the constitution never allows discrimination based on gender even though these grounds did not mention explicitly in section 1 of Article VI of the constitution. Even more, mentioning this right in a separate section pays attention to women's rights and bans any kind of discrimination. I would be so interested to see the results of this section in the Jordanian domestic laws especially the right of nationality.

The second section numbered section 7, states, "State guarantees the promotion of the values of citizenship, tolerance, and the rule of law, and guarantees, within the limits of its capabilities, empowering young people to participate in political, economic, social, and cultural life, developing their capabilities, and supporting their creativity and innovations." It is another guiding section to promote the values of citizenship and support young people to engage with society. It shows the rule of government to facilitate all aspects of young people in their projects of innovation and creativity.

II. MINISTRY

The amendment to Article (44) of the Constitution is so interesting. It is seen by adding the phrase "during his ministerial office" after the word "minister" in its beginning and by deleting the word (government) in it and replacing it with the word (state). To become the article after modification as follows:

"The Minister, during his ministerial office, may not purchase or lease any State property even if this is in a public auction. He may not, during his ministerial office, be a member of the board of directors of any company, take part in any commercial or financial business or receive a salary from any company."

This amendment is interesting because It contains a reference to allowing the minister to buy and rent any of the Jordanian state property after terminating his ministerial work completely.

5 Hanna Davis, *Elephant in the Room: Jordanian Women and Equal Rights* (Aljazeera 2022) https://www.aljazeera.com/news/2022/2/18/elephant-in-the-room-jordanian-womens-struggle-for-rights

The description of a minister is applied to whoever holds a ministerial portfolio and not before that because he bears the burden of ministry only after the king of Jordan makes him or her responsible for His Majesty's actions. As for the minister's description after the end of his work, he does not remain in this status and does not enjoy any of its political privileges except for some ministerial benefits, such as retirement and health insurance.

Based on this, the constitutional amendment came to set a different understanding. Adding the phrase "during his ministerial office" shows that we could understand the provision differently without this addition. Constitutional interpretation by reference to the text and the historical interpretation shows that the minister's ban followed him or her even after the expiry of his service. The restrictions on buying and renting any Jordanian state property follow the minister. So, this amendment wants to change this understanding and keep the restrictions only "during his ministerial office," not after.

Who does terminate the ministerial restrictions after finishing his ministerial office to buy or rent any state's property? This amendment came to correct the situation and remove this restriction on the minister outside his ministry. In other words, after instituting this amendment, the constitutional legislator understands that the former minister is prohibited from the same prohibitions as before except "buy or rent any state's property."

And since the phrase "during his ministerial office," although it appears to be temporal, it does not necessarily mean during the minister's tenure of his ministerial portfolio, and if he presents an objection to the delay in her assumption, the minister is prevented from assuming his duties such as illness or travel. In this case, he is still in the legal and political position of the minister. Therefore, he is prohibited from buying and renting any Jordanian state property.

III. SEPARATION OF POWERS

Since Article (52) of the Constitution, which talks about the Head of government's role in the legislature, has been significantly changed, this amendment shows a shifting step in the separation of powers. The deleted previous stated that: "The Prime Minister or the Minister who is a member of either the Senate or the House of Representatives shall be entitled to vote in his House and to speak in both Houses. However, the Ministers who are not members of either House may speak in both of them without having the right to vote. The Ministers or their deputies shall have the right of priority to the other members to address both Houses. The Minister who receives the Ministry salary shall not receive, at the same time, the allocations of the membership in either House."

The amendment retained the right of the prime minister, minister, or their representative, to speak in the Senate and the House of Representatives. The amendment also retained the right of the prime minister, minister, or representative to precede other members in addressing the two chambers. This text may lead us to understand that this provision is only an organizational provision dealing with the roles of speaking and addressing in the House of Representatives and the Senate. However, from a structural interpretation point of view, this provision can also establish an understanding of a priority to the executive branch over the legislative branch. The latter understanding contradicts the provisions of Article 1 of the Constitution, which established the principles of the system of government in Jordan as a representative, monarchy, and hereditary.

This organizational provision may raise the question about the strength and degrees of some constitution articles over others. On the one hand, the House of Representatives and the Senate are the owners of the first jurisdiction of legislating under the dome of Parliament, and their members are residents by nature, and ministers are visitors, and the visitor does not precede the resident.

Hence, the importance of the existence of this regulatory text in the constitution emerged because it is not effective if it is in any other place lower in the legislative hierarchy than the constitution.

Therefore, what does it conclude from the right of priority? Does the executive authority have the right to precede the legislative authority in a conflict between the two authorities, or is the provision here merely an organizational provision that does not carry any explanatory value for the relationship between the executive and the legislative authority?

Despite the sensitivity of the constitutional provisions and its importance in assigning rules and tools of constitutional interpretation to reveal the relationship that the constitutional legislator wanted for the authorities among them, the right of priority should not be held as more than a mere organizational right to address under the dome of Parliament. In fact, we are comfortable saying that the right of priority is limited to organizing the roles of addressing the House of Representatives and the Senate without affecting the constitution's interpretation of the nature of the relationship between the executive and legislative branches. Two main reasons lead to this understanding:

The first is that the right to progress is an organizational right limited to addressing the House of Representatives and Senate and does not go beyond what is stipulated in the constitution regarding addressing the two Houses, as it is an organizational text and not a directive.

The second is the Jordanian political system. The political system in Jordan is contained in the first article of the constitution, which constitutes the basis and form of the system of government in it as a representative system. This representative theme is mentioned even before mentioning the monarchy choosing the leader of the Jordanian state. So, the representatives hold the priority over the other branches in this order.

The representative branch trumps all other branches in legislative power except where it is mentioned in the constitution. One of these exceptions is the right of priority. The right of priority is not, as a result, a guiding provision but an organizational provision confined to the limits of addressing the House of Representatives and Senate. Therefore, the right of priority is only an exception to the theme of the system of the Jordanian constitution.

IV. THE CONSTITUTIONAL COURT

Article (60) of the Constitution talks about the constitutional court. This court was established in 2011. This article adapted the double-filter mechanism. It used to require two levels of studying the case before referring it to the constitutional court to answer constitutional questions. This article has been amended to become that "the right to directly challenge the constitutionality of laws and regulations in force at the Constitutional Court is limited to a- The Senate or the House of

Representatives, provided that the decision is issued with the approval of no less than a quarter of the members of the concerned council. b- The Council of Ministers."

And since this article did not address any amendment to the authorities entitled to appeal directly to the Constitutional Court on the constitutionality of laws and regulations in force. Rather, he decided on the legally required quorum to refer the appeal to the Constitutional Court by making it a decision with the approval of no less than a quarter of the members of the council concerned. That is, the House of Representatives alone has the right to directly challenge the constitutionality of laws and regulations in force with the Constitutional Court, with the approval of 33 deputies, at a minimum, given that the number of the current House of Representatives is 130 according to the latest election law.

The same goes for the Senate. The Senate alone has the right to directly challenge the constitutionality of the laws and regulations in force before the Constitutional Court by a decision of approval from 17 appointed as a minimum.

The Senate, including the president, does not exceed half the number of the current House of Representatives is 130 according to the latest election law. The number of members of the Senate is 65 members, and a quarter of the assembly is 16.25, i.e., by a decision of approval of 17 appointed as a minimum.

It should be noted that the constitutional criterion for taking the quorum of the Senate and the House of Representatives is a legal and not a material one. According to the latest amendment to the electoral law, the number of parliamentarians is 130. Material facts decreasing the number of parliaments, such as death, resignation, or even dismissal, shall not be considered.

Perhaps one of the most prominent constitutional amendments is the abandonment of the double filtering of constitutional referral from the courts and the adoption of the principle of direct referral from the courts, as the previous procedure was that in the case before the courts, any of the parties to the case may raise the plea of unconstitutionality, and the court, if it finds that the defense is serious, must refer it to the Court of Cassation Which to decide on the matter referred to the Constitutional Court. However, the current constitutional text (in the case before the courts, any of the parties to the case may raise the plea of unconstitutionality, and the court, if it finds that the argument is serious, must refer it to the Constitutional Court following the provisions of the law.)

IV. LOOKING AHEAD

The modifications are very interesting in the sense of separation of powers. Encouraging the separation of power and omitting the ability of ministers or the prime minister to be members of one of the Senate and the House of Representatives.

The constitutional rules of the relationship between the constitutional authorities are based on their separation. Separation and balance is a flexible separation where there can be some common tasks among the authorities to achieve a specific constitutional or national function. The 2022 constitutional amendment, besides amending article 52, amends Article 64 of the constitution related to the Eligibility of the Senate chamber.

Ministers are not anymore eligible to be a member of the legislative branch. The essence of the amendment shows this trend. The abolition of the phrase "the presence of ministers or the prime minister as a member of one of the House of Representatives and the Senate" from Article 52 of the constitution means that a minister cannot hold a ministerial portfolio and become a member of one of the Senate and the House of Representatives. It makes the manifestations of the separation of powers clearer and more definitive than the constitutional provisions in their previous form.

Perhaps the question about the former minister's ability to join one of the Houses of Representatives or the Senate is presented again. Can a former minister, no "during his ministerial office," be a member of one of the Houses of Representatives or the Senate?

As the constitutional legislator wanted to change the status quo in Article 44 of its constitutional provisions, it added: "during his ministerial office" to allow the former minister no "during his ministerial office" to buy or rent Jordanian state property. The minister, under this understanding, remains a description that pursues the minister even after the end of his ministry. He is prohibited from joining the membership of either of the two Houses unless the constitutional legislator specifies that the restriction on the separation of powers only pursued the minister "while assuming his ministry."

We see that withdrawing this understanding to this extent is an over-analysis and loading of provision into what is intolerable. There is nothing in the constitutional text that allows or prevents a minister from joining the membership of one of the two chambers, but it is implicitly understood from the principle of separation of powers, which became clearer and firmer after deleting the provision acknowledging the existence of a case in which the minister is a member of one of the two chambers. Therefore, an explicit provision should call for the minister to be banned from membership in either the Senate or the House of Representatives. Only after that can we discuss the value of the phrase "during his ministry" or not. Given this, the former minister who is no longer "during his ministerial office" can join the membership of one of the two Houses of Representatives or the Senate. This is reinforced by the domestic Jordanian applications and even by the global application too.[6]

V. FURTHER READING

Alsamhan Eyad, 'Secession and Self-Determination: A Comparison between Kurdistan and Catalonia' (Ph.D. University of Pécs 2022).

Barroso LR and Albert R (eds), *The international review of constitutional reform: 2020* (eyad Judge Alsamhan, Ph.D. Program on Constitutional Studies 2021).

6 Like William Howard Taft, who was elected the 27th President of the United States (1909-1913) and later became the tenth Chief Justice of the United States despite of the clear separation of powers in the United States. He ruled one of the most famous judgments during his judicial position, Myers v. United 272 U.S. 52 (1926).

Kazakhstan

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I. INTRODUCTION

The Constitution of the Republic of Kazakhstan was adopted at a nationwide referendum on August 30, 1995. The year 2021 was a stable one for Kazakhstan's Constitution itself, but it marked a continuation of those political initiatives of President Tokayev which aimed at the modernization of society. In 2021 the President proposed a third package of political initiatives. The first and second packages had been introduced in 2019 and 2020 respectively.[1] The overall goal of all these initiatives is the democratization of society and the bringing of valuable experiences in the field of human rights into the everyday life of the Kazakh people.

The developments of the year 2021 can also be considered to be a preparation for the political reforms and further amendments to the Constitution that were brought in via the national referendum held on June 5, 2022. In 2022 after the violent events of that January, President Kassym-Jomart Tokayev decided to hold a nationwide referendum on proposed amendments to the Constitution of the Republic. A package of changes brought before the voters on June 5, 2022, concerned the abolishment of the death penalty, the establishment of a commissioner for human rights at a constitutional level, the replacement of the Constitutional Council by the Constitutional Court, the abolition of the special status belonging to President Nazarbayev, an assurance that natural resources belong to the people, etc. The previous amendments of 1998, 2007, 2011, 2017, and 2019 to the acting Constitution of Kazakhstan had been aimed mainly at strengthening the political power of President Nazarbayev and had been carried out via discussion at Parliament avoiding any nationwide referendum. President Tokayev used a privilege given by article 10 of the Constitutional Law of Kazakhstan on the Nationwide Referendum that only the President of Kazakhstan can decide to hold it. Overall, making amendments to the Constitution via a national referendum meets legal technique and simple logic when a state body or a subject creating law amends or abolishes that normative legal act.

1 One of the greatest achievements of 2020 that stemmed from the second package of initiatives of President Tokayev was an adoption of a new law on the Procedure for Organizing and Conducting Peaceful Assemblies. This introduced the principle that local bodies needed to be simply notified in order to hold an assembly; the law of 2020 replaced the previous one dating from 1995 in which special permission needed to be requested from state bodies to hold an assembly.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The President opened the year 2021 by setting out his program for reform in the publication on January 5 of his article "Independence is above all". In this article, the President defined further directions of development and the goals of the fourth decade of Kazakhstani statehood such as the building of a fair society and an efficient state.[2] On that occasion, he mentioned that apart from the position of the village mayor, the post of district mayor would become elective. This means that amendments to the Law on Local Governance and Self-Governance are to be expected.

The independence of local self-governance was promoted under a new Concept on the Development of Local Self-Governance in Kazakhstan, which was approved on August 18, 2021, by President Tokayev, and runs until 2025. Under the amendments of 24 May 2021 to the Constitutional Law on the Election, the position of mayor of a town of district importance, and that of a village and rural settlement became elective directly by the population for four years. This will advance local self-government since the position was previously appointive. A candidate for the position of mayor may be nominated either by a political party or via self-nomination. As per the political initiatives of the President, direct elections of mayors of the districts are planned for 2024. Such reforms aim at increasing civil activism and developing political competitiveness.

With the Decree of the President of Kazakhstan Tokayev of October 21, 2020, and in accordance with article 44 subparagraph 2 of the Constitution of Kazakhstan and article 85 of the Constitutional Law of Kazakhstan on the Elections in the Republic of Kazakhstan, the regular elections of the deputies of the *Mazhilis* (the lower Chamber of the Parliament) grounded on *party lists* were held on January 10, 2021.[3] The regular elections of the deputies of the Assembly of People of Kazakhstan (the institution that represents the ethnic minorities of Kazakhstan) were held on January 11, 2021. Thus, the representatives of three political parties such as the Democratic party "Aq zhol", the People's party, and "*Nur Otan*" Party (means "light homeland") were

2 Kassym-Jomart Tokayev, *Independence is above all*. <https://kazpravda.kz/n/polnyy-tekst-stati-tokaeva-nezavisimost-prevyshe-vsego/> accessed 12 June 2022

3 The Decree of the President of Kazakhstan Tokayev of October 21, 2020 on Regular Elections of the Deputies of the *Mazhilis* of the Parliament of Kazakhstan. <https://www.akorda.kz/ru/legal_acts/decrees/o-naznachenii-ocherednyh-vyborov-deputatov-mazhilisa-parlamenta-respubliki-kazahstan> accessed 12 June 2022

elected. The third package of the political initiatives of President Tokayev of 2021 included the reduction of the electoral threshold to the lower branch of the Parliament *Mazhilis* from 7 to 5 %. So, further amendments concerning the reduction of the electoral threshold to the Law on the Elections and the Constitutional Law on the Parliament, and the status of its deputies are to be expected.

The third package of political initiatives also dealt with human rights issues. The year 2021 started and ended with achievements in the field of human rights. Strengthening the status of the Commissioner for Human Rights (similar to an Ombudsman) and adoption of a separate law on the Commissioner was offered by President Tokayev in his package of proposed political initiatives. These initiatives proved successful.

First of all, the Law on the Status of the Commissioner for Human Rights in the Republic of Kazakhstan was signed on December 29, 2021.[4] Taking into account that the Commissioner's legal status since its establishment in 2002 had been regulated only by the Regulations approved by the Presidential Decree, the adoption of a special law by the Parliament of Kazakhstan is of great success. According to the Law, the post of Commissioner is created to ensure state guarantees for the protection of human rights and freedoms, and their observance by state bodies, entities, and officials. The tasks of the Commissioner include assistance in the restoration of violated human rights and freedoms, improvement of normative legal acts, and promotion of human rights and freedoms. The most important development provided by the Law on the Commissioner is the organization of representatives in the regions and cities of national importance and in the capital (Article 18 of the Law). The representative in the region is an official and manages the activities of the National Center for Human Rights on site. Secondly, with the constitutional amendments of June 5, 2022, the Commissioner for Human Rights became an important institution and is covered by the Constitution itself. As per the new amendments, the Commissioner has the right to request the Constitutional Court to consider whether a normative legal act complies with the provisions of the Constitution. The adoption of a special Constitutional Law regulating the status of the Commissioner for Human Rights is expected in Kazakhstan in the near future.

Another achievement in the field of human rights is that President Tokayev on January 2, 2021, signed the Law on ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights of 15 December 1989, aiming at the abolition of the death penalty. The Protocol itself was signed by the Permanent Representative of Kazakhstan to the UN on 23 September 2020. With the amendments to the Constitution of June 5, 2022, Kazakhstan abolished the death penalty fully without any exceptions, which goes beyond international standards.

Several of the 23 political initiatives of the President put forward on February 26, 2021, concerned human rights. Accordingly, Kazakhstani national indicators on human rights observance will be grounded on 14 global indicators, and equality in the judicial trial between a prosecutor and lawyer will be better ensured to guarantee the adversarial nature of the judicial trials. The political initiatives of the President were strengthened by the adoption of the Decree of the President of Kazakhstan 'On further measures of the Republic of Kazakhstan in the field of human rights' on June 9, 2021.[5] The Decree approved a human rights action plan that includes the following:

- improving the mechanisms of interaction with the UN treaty bodies and special procedures of the UN Human Rights Council;
- ensuring the rights of persons with disabilities;
- ensuring the rights of victims of human trafficking;
- elimination of discrimination against women;
- the right to freedom of association;
- the right to freedom of expression;
- human rights to life and public order;
- improving the efficiency of interactions with non-governmental organizations;
- human rights in the field of criminal justice and enforcement and prevention of torture and ill-treatment.

Political modernization in the Republic has brought about the modernization of institutions and the creation of the ones which directly subordinate to the President. In order to protect women and children from violence, a special division within the Ministry of Internal Affairs was restored. In January 2021, in line with Article 44 subparagraph 5 of the Constitution, the Agency for Financial Monitoring was created to combat money laundering and suspicious financial transactions. It was the fourth agency established as soon as Mr. Tokayev became President of the country. Organized in September 2020 the Agencies for Strategic Planning and Reforms and for Protection and Development of Competition, the Supreme Council for Reforms were tasked to expand political, economic, and social reforms in the country.

Land is a sensitive issue within the traditions of Kazakh society. It is perceived to be part of the sovereignty of the nation and a strategic resource. According to Kazakh customary norms, the land is received from ancestors and should be transferred to future generations with integrity. In May 2016 the people of Kazakhstan expressed their dissatisfaction in the streets, protesting against a draft law permitting the long-term renting and selling of land to foreigners. Demonstrations were held in the main regions of Kazakhstan over concerns that renting or selling the land to foreigners would impact the sovereignty of the nation amid fears that returning the land to the nation would not be possible. For the first time in the history of statehood, on account of the people's disagreement, the Government organized a public Commission to discuss the issue and withdrew the draft law. From the beginning of his presidency, Mr. Tokayev followed the principle that the land will not be sold to foreigners. Accordingly, in February 2021 he initiated a draft law prohibiting the sale and lease of agricultural land to foreigners and foreign legal entities. Politically, this helped President to win the recognition of the people. The President of the country has the right to initiate the adoption of legislation and its administration was instructed to prepare such a draft on land. The draft law was discussed during March, April, and early May 2021 at Parliament. On May 13, 2021, it was signed by the President of the Republic.

4 The Law of the Republic of Kazakhstan on the Status of the Commissioner for Human Rights in the Republic of Kazakhstan #90-VII ZRK. < https://online.zakon.kz/Document/?doc_id=37622147&pos=5;-106#pos=5;-106> accessed 12 June 2022

5 The Decree of the President of Kazakhstan of 9 June 2022 'On Further Measures of the Republic of Kazakhstan in the Field of Human Rights'. <https://www.akorda.kz/ru/o-dalneyshih-merah-respubliki-kazahstan-v-oblasti-prav-cheloveka-9505> accessed 9 June 2021

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The jurisdiction of the Constitutional Council is regulated by the Constitution itself and by the Constitutional Law of Kazakhstan of 29 December 1995.[6] The Constitutional Council is a single state body that has the right to give an official interpretation of the provisions of the Constitution. The Council considers the laws, resolutions of the Parliament, and international treaties to determine whether they comply with the Constitution of Kazakhstan. In accordance with article 72 paragraph 1 subparagraph 1 of the Constitution and Article 17 of Constitutional Law, the Council considers whether the elections of the President and deputies of the Parliament or any nationwide referendums were held in a correct manner.

In line with Article 78 of the Constitution, the courts have no right to apply the laws and normative legal acts if they infringe the rights and freedoms of a human being and citizen. If a court considers that the law or normative legal act infringes the constitutional rights and freedoms of a human being and citizen, it is obliged to terminate the consideration of the case and lodge a request before the Constitutional Council to consider whether the law is constitutional or not. According to Article 72 paragraph 2 of the Constitution of Kazakhstan, the Constitutional Council considers the requests of the President to review the law entered into force or any other normative legal act on its compliance with the Constitution of the Republic for the sake of protection of human rights and freedoms, ensuring national security, sovereignty, and integrity of a state.

The President has the right to request the Constitutional Council to give an opinion on a case when the amendments to the Constitution are expected to be done via the national referendum or discussion at the Parliament. This right was used in May 2022 when President Tokayev requested the Council to consider whether the draft law "On bringing the amendments to the Constitution of the Republic of Kazakhstan" complied with Article 91 paragraph 2 of the Constitution.[7] Article 91 paragraph 2 of the Constitution says that independence of the state, unitarity and territorial integrity of the Republic, its form of the government, as well as the fundamental principles of the Republic laid down by the First President of Kazakhstan are inviable. After examining the legislation, the Council concluded that the amendments initiated conform to Article 91 paragraph 2 of the Constitution because they aim to ensure the protection of natural resources and provide additional human rights guarantees, strengthen the local governance and the status of the Parliament, balance the power between its branches, develop political competitiveness and election rights.

The issue of national provisions concerning the application of the death penalty was under consideration of the Constitutional Council of Kazakhstan in 2020 upon the request of the President of the RoK to give an official interpretation to article 15 paragraph 2.[8] In 2020 Article 15 paragraph 2 envisaged the death penalty for terrorist crimes resulting in loss of lives and very serious crimes committed in wartime. The questions of the President were:

- whether the constitutional provisions of Article 15 paragraph 2 of the Constitution of Kazakhstan oblige to envisage the death penalty for the crimes mentioned in the article;
- whether the ratification of the Optional Protocol to the ICCPR is possible with reservations taking into account that the crimes implying the death penalty in the Constitution are larger than in the Optional Protocol.

Taking into account international tendency toward the abolition of the death penalty and the first article of the Constitution proclaiming human rights are the highest values of the state, Kazakhstan imposed a moratorium on the application of the death penalty and follows the humanization of penal law policy. The Council mentioned that the Parliament ratified the Optional Protocol with a reservation making an exception for an application of the death penalty for the very serious crimes committed during war times. The Council was of an opinion that the provisions of article 15 paragraph 2 of the Constitution do not impede the ratification of the Optional Protocol and harmonization of penal legislation with the provisions of the Protocol.

As we see in Part II, the scope of the reforms covered issues concerning human rights and improving respected institutions, developing active citizenship via elections and elective democracy, the protection of natural resources such as land, initiating laws and adoption of relevant decrees, and the creation of institutions with real power to combat money laundering.

Each of the political initiatives discussed gradually brought changes to the Constitution. The political initiatives of 2021 received recognition by the Constitutional Council and are reflected in the amendments to the Constitution of 5 June 2022.

IV. LOOKING AHEAD

Kazakhstan expects to have a package of changes in the judicial system, and political electoral system. We expect at least two Constitutional Laws to be adopted in 2022 and respected changes into subordinate legislation.

V. FURTHER READING

Beibit Shangibayeva, Monograph 'Kazakhstan'. In International Encyclopaedia of Laws: Constitutional Law. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2020. 312 p. ISBN 978-90-654-4944-3.

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6 The Constitutional Law of Kazakhstan of 29 December 1995 No. 2737 "On the Constitutional Council of the Republic of Kazakhstan". <https://adilet.zan.kz/rus/docs/U950002737_> accessed 13 June 2022

7 Opinion of the Constitutional Counil of the RoK of 4 May 2022 # 1 "Review of a draft law "On bringing the amendments to the Constitution of the Republic of Kazakhstan" on its compliance to the requirements of Article 91 paragraph 2 of the Comstitution of the Republic of Kazakhstan". <https://www.gov.kz/memleket/entities/ksrk/documents/details/302000?lang=ru> accessed 14 June 2022

8 Normative Resolution of the Constitutional Council of Kazakhstan of 15 December 2020 #4 "On official interpretation of article 15 paragraph 2 of the Constitution of the Republic of Kazakhstan". <https://adilet.zan.kz/rus/docs/S2000000004> accessed 15 June 2022

Kenya

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I. INTRODUCTION

A Constitutional Amendment Bill unveiled in October 2020 by the President and former Prime Minister was challenged at the High Court. The Bill's proposals would have resulted in dismemberment of the Constitution of Kenya, 2010. The Constitutional Amendment Bill made proposals that radically restructured the Executive and the Legislature. Articles 255, 256 and 257 of the Kenyan Constitution provide for the process within which constitutional amendments may be undertaken. Under Article 255, the 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. A summary of the specific proposed amendments was published in the 2020 International Review of Constitutional Reform.

The High Court petition challenged the constitutionality of the substance of the Bill and the processes within which the Bill was being considered. Following the High Court decision, an appeal was made to the Court of Appeal. The Court of Appeal's decision was appealed at the Supreme Court. The Supreme Court essentially ended the journey of the Constitutional Amendment Bill. The summary below contains highlights of the questions before the High Court and decisions made at the High Court, Court of Appeal and Supreme Court.

II. FAILED CONSTITUTIONAL REFORMS

1. HIGH COURT

At first instance, the Constitutional Amendment Bill was challenged at the High Court in the *David Ndii & others v Attorney General & others* case which was a consolidated petition. The High Court, in a five-judge bench, unanimously rendered its decision on 13th May 2021.[1] The questions for determination by the High Court in relation to constitutional reforms included:

a) Whether the Basic Structure Doctrine of Constitutional interpretation was applicable in Kenya.
b) If the Basic Structure Doctrine was applicable in Kenya, what were its implications for the amendment powers in Articles 255, 256 and 257 of the Constitution of Kenya?
c) Who could initiate a Popular Initiative to amend the Constitution?
d) Was the Constitutional Amendment Bill's process of initiating amendments to the Constitution in conformity with the legal and constitutional requirements?
e) Was the President in Contravention of Article 73(1)(a) of the Constitution for claiming authority and purporting to initiate constitutional changes through the Bill?
f) Was there an adequate legislative framework in place to guide constitutional amendments through a Popular Initiative?
g) Was it permissible for County Assemblies and Parliament to incorporate new content into or alter existing content in a Constitution of Kenya Amendment Bill through a Popular Initiative following Public Participation exercises?
h) Did the Constitution envisage the possibility of a Bill to amend the Constitution by Popular Initiative to be in the form of an omnibus Bill or must specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions?
i) Was it lawful for a Constitution of Kenya Amendment Bill to set a specific number of constituencies under Article 89(1) of the Constitution and directly allocate and apportion the constituencies it creates without a delimitation exercise using the criteria and procedures as set out in Article 89 of the Constitution?
j) Had the Independent Electoral and Boundaries Commission (IEBC) carried out nationwide voter registration? If not, could the Proposed Referendum be carried out before the IEBC has done so?
k) Was the IEBC Properly constituted to conduct the proposed referendum?

Based on these questions, the High Court rendered its judgement. On the Basic Structure Doctrine, the Court determined that the Basic Structure Doctrine was applicable in Kenya and that the Basic Structure Doctrine limited the amendment power set out in Articles 255, 256

1 http://kenyalaw.org/caselaw/cases/view/212141/

and 257 of the Constitution. Essentially the Court stated that the Basic Structure Doctrine limited the power to amend the Basic Structure of the Constitution and eternity clauses. To this end, the Court was of the view that the Basic Structure of the Constitution and eternity clauses could only be amended through the Primary Constituent Power which was to include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum.

According to the High Court, the Basic Structure of the Constitution consisted of the foundational structure of the Constitution as provided in the Preamble; the eighteen chapters; and the six schedules of the Constitution. It also included the specific substantive areas Kenyans thought were important enough to pronounce themselves through constitutional entrenchment including land and environment; Leadership and Integrity; Public Finance; and National Security.

The Court stated that the President did not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment could only be initiated by Parliament through a Parliamentary initiative under article 256 or through a Popular Initiative under Article 257 of the Constitution. The Court in its finding pronounced that the power to amend the Constitution through the Popular Initiative under Article 257 of the Constitution was reserved for the private citizen. Neither the President nor any State Organ was permitted under the Constitution to initiate constitutional amendments through Popular Initiative. To this effect, a Steering Committee established by the President to spearhead the constitutional review process was declared to be an unconstitutional and unlawful entity.

The Court indicated that the process culminating with the launch of the Constitution of Kenya Amendment Bill, 2020 was done unconstitutionally and was a usurpation of the People's exercise of Sovereign Power. The Court further stated that the President had contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution. Thus, the entire unconstitutional constitutional change process promoted by the Steering Committee appointed by the President was unconstitutional, null and void.

In addition to these findings by the Court, the Court was of the view that the Constitution of Kenya Amendment Bill 2020, could not be subjected to a referendum before the Independent Electoral and Boundaries Commission (IEBC) carried out nationwide voter registration exercise. It also indicated that the IEBC did not have the required quorum to verify the signatures supporting the Bill. Further, there was no legislation governing the collection, presentation, and verification of signatures nor a legal framework to govern the conduct of referenda. Thus, the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda in the circumstances of this case rendered the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill 2020 flawed.

The Court also found that County Assemblies and Parliament could not, as part of their constitutional mandate to consider a Constitution of Kenya Amendment Bill initiated through a Popular Initiative under Article 257 of the Constitution, change the contents of such a Bill.

On substance, the Court declared the proposed provisions to allocate seventy constituencies to be unconstitutional. In the Court's view, the Bill could not direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation. Further, the delimitation of the number of constituencies and apportionment within the counties was unconstitutional for want of Public Participation.

Regarding referendum questions, the Court declared that all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People.

In view of the findings of the Court, the Constitution of Kenya (Amendment) Bill 2020 was declared to be unconstitutional, and a permanent injunction was issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill 2020.

2. COURT OF APPEAL

An appeal was filed at the Court of Appeal *(Independent Electoral and Boundaries Commission & 4 others v Ndii & 312 others; Ojwang & 4 others (Amici curiae)* challenging the High Court decision. A seven-judge bench rendered its decision on 20th August 2021.[2] By a majority, the Court of appeal upheld the judgement of the High Court as highlighted below.

The Court of Appeal found that the Basic Structure Doctrine was applicable in Kenya and that it limited the amendment power set out in Articles 255, 256 and 257 of the Constitution. The basic structure of the Constitution could only be altered through the Primary Constituent Power which was to include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum.

The Court stated that the President did not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment could only be initiated by Parliament through a Parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution. Hence, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (The BBI Steering Committee) had no legal capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution.

The Court of Appeal ruled that the Constitution of Kenya Amendment Bill 2020 was unconstitutional and a usurpation of the People's exercise of sovereign power. Further, the Bill could not be subjected to a referendum in the absence of evidence of continuous voter registration by the Independent Electoral and Boundaries Commission(IEBC) and that IEBC did not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum, including the verification whether the initiative as submitted by the Building Bridges Secretariat was supported by the requisite number of registered voters in accordance with Article 257(4) of the Constitution. At the time of the launch of the Constitution of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was neither legislation governing the collection, presentation, and verification of signatures, nor an adequate legal/regulatory framework to govern the conduct of referenda.

2 http://kenyalaw.org/caselaw/cases/view/217967

Just like the High Court, the Court of Appeal stated that County Assemblies and Parliament could not, as part of their constitutional mandate, change the contents of the Constitution of Kenya Amendment Bill, 2020 initiated through a popular initiative under Article 257 of the Constitution.

The Court also indicated that the second schedule to the Constitution of Kenya (Amendment) Bill 2020, in so far as it purports to: predetermine the allocation of the proposed additional seventy constituencies, and to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation, was unconstitutional.

As per the Court of Appeal, the Administrative Procedures for the verification of signatures in support of the Constitution Amendment Referendum made by the Independent Electoral and Boundaries Commission were illegal, null and void because they were made without quorum and in violation of Sections 5, 6 and 11 of the Statutory Instruments Act, 2013.

The Court of Appeal thus issued a permanent injunction restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill, 2020.

The Court of Appeal, however, reversed some of the High Court's finding by stating that:

The President had not contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution.

Article 257(10) of the Constitution did not require all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People.

The BBI Steering Committee established by the President vide Kenya Gazette Notice No. 264 of 3rd January 2020 and published in a special issue of the Kenya Gazette of 10th January 2020 was a constitutional and lawful entity.

3. SUPREME COURT

A final appeal was made to the Supreme Court *(Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amici curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (Constitutional and Human Rights)*. The Supreme Court's full quorum of seven judges rendered its decision on 31st March 2022.[3] The Court reversed most of the findings of the Court of Appeal. The majority and final determination of the Supreme Court was:

a) That the Basic Structure Doctrine is not applicable in Kenya. On the Basic Structure Doctrine, the majority at the Supreme Court were of the view that a constitutional review process was constitutional so long as it is undertaken within the confines of Articles 255, 256, and 257 of the Constitution. Articles 255, 256, and 257 provide for the framework within which all provisions of the Constitution may be amended.

b) That there was no obligation under Article 10 and 257 (4) of the Constitution, on IEBC to ensure that the promoters of the Constitution of Kenya (Amendment) Bill, 2020 complied with the requirements for public participation. And that there was public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020.

c) That the IEBC had the requisite composition and quorum to undertake the verification process under Article 257(4).

d) That the question raised regarding the interpretation of Article 257(10) of the Constitution on whether it entails or requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination.

e) The President cannot initiate Constitutional amendments or changes through the popular initiative under Article 257 of the Constitution; that the President initiated the amendment process in issue. Consequently, under Article 257 of the Constitution, the Constitution (Amendment) Bill, 2020 is unconstitutional.

f) The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional for being in breach of Articles 10(2) and 89(7)(a) of the Constitution of Kenya, 2010.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The courts examined both the substance and process related to the Constitutional Amendment Bill. The Constitution grants the courts such powers. Article 165 of the Constitution grants the High Court the powers to hear any question respecting the interpretation of the Constitution including the determination of a question whether any law is inconsistent with or in contravention of the Constitution; whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The Court of Appeal has powers to entertain appeals from the High Court and the Supreme Court entertains appeals from the Court of Appeal.

It is through these powers that the courts were able to question a constitutional review process spearheaded by the Executive. The final determination by the Supreme Court indicates that, when called upon, the courts will again examine the substance and process of constitutional review in Kenya.

IV. LOOKING AHEAD

While the Constitution of Kenya (Amendment) Bill, 2020 was stopped on its tracks, it is possible that the political party/coalition that wins the August 2022 general elections might revive the Bill and perhaps subject it to a process in line with the pronouncements of the Supreme Court.

3 http://kenyalaw.org/caselaw/cases/view/231325/

V. FURTHER READING

Gautam Bhatia 'The Kenyan High Court's BBI Judgement: An Instant Classic'. Available at: https://www.theelephant.info/op-eds/2021/05/17/the-kenyan-high-courts-bbi-judgement-an-instant-classic/

Gautam Bhatia 'The Kenyan Court of Appeal's BBI Judgement: Thirsting for Sunlight'. Available at https://www.theelephant.info/op-eds/2021/09/03/the-kenyan-court-of-appeals-bbi-judgment-thirsting-for-sunlight/

Gautam Bhatia 'The Kenyan Supreme Court's BBI Judgement – Part I: On Constitutional Amendments and the Basic Structure'. Available at: https://www.theelephant.info/op-eds/2022/04/11/the-kenyan-supreme-courts-bbi-judgment-part-i-on-constitutional-amendments-and-the-basic-structure/

Gautam Bhatia 'The Kenyan Supreme Court's BBI Judgement – Part II: Public Participation, Direct Democracy, and the Popular Initiative'. Available at https://www.theelephant.info/op-eds/2022/04/12/the-kenyan-supreme-courts-bbi-judgment-part-ii-public-participation-direct-democracy-and-the-popular-initiative/

Gautam Bhatia 'The Kenyan Supreme Court's BBI Judgement – Part III: On Referendum Questions, Other Implications and Untidy Endnotes'. Available at: https://www.theelephant.info/op-eds/2022/04/13/the-kenyan-supreme-courts-bbi-judgment-part-iii-on-referendum-questions-other-implications-and-untidy-endnotes/

Lithuania

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I. INTRODUCTION

With a delay of more than fifteen months, the year 2021 finally marked the end of the renewal of the composition of the Constitutional Court. The Constitutional Court failed to be reconstituted in 2020 in accordance with the time limit provided for in the Constitution. Under Article 103 of the Constitution of the Republic of Lithuania, every three years, one-third of the Constitutional Court shall be reconstituted. The constitutional justices are appointed by the Parliament from among the candidates proposed by the Speaker of the Parliament, the President of the Republic, and the President of the Supreme Court of Lithuania. Then the Parliament appoints the President of the Constitutional Court from among its justices upon submission by the President of the Republic.[1] The regular rotation should have taken place in March 2020. The candidates were proposed by the respective authorized state officials in December 2019 under the procedure prescribed by the Law on the Constitutional Court.[2] Voting on the appointment of new constitutional justices should have taken place immediately before the third Thursday of March 2020.[3] However, the worldwide pandemic led to the postponement of certain parliamentary sittings in March 2020. When voting finally took place, none of the proposed candidates was appointed (after failing to receive the required number of votes cast by secret ballot). The appointment of justices in the Parliament is a political process; nevertheless, no such rejection of all three candidates had ever occurred before. The Law on the Constitutional Court provides that, in cases where a new justice is not appointed at the fixed time, a justice whose term of office has expired shall act for him until the new justice is appointed and takes the oath. Therefore, the justices whose mandate had expired continued to perform their duties until the appointment of new justices.

The failed rotation of constitutional justices brought legal uncertainty and a number of questions to the legal community. Do the authorized state officials have the right to resubmit the same three candidates for an appointment?[4] How long can the Constitutional Court operate in its composition that includes justices whose term of office has expired and should it start the consideration of new cases or wait until its composition has been renewed? Who would preside over the Constitutional Court, as the President of the Court was among the justices whose term of office had already expired by then? Should three new justices be appointed at the same time or is it at the discretion of every state official entitled to propose candidates to choose the right time for submitting a new or the same candidate?

All these questions led to the presumption that the existing legal regulation, including the constitutional one, should be revised and amended, to avoid such future failures posing threats to the coherent existence of the constitutional control institution, whose mission is to ensure the supremacy of the Constitution and the implementation of the fundamental principle of the rule of law. Thus, this article will discuss the possible (or timely) constitutional reform related to the failed renewal in the composition of the Constitutional Court.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Although there have been no actual constitutional amendments regarding the appointment of constitutional justices, certain amendments might be expected, as discussion concerning the renewal of the composition of the Constitutional Court is still ongoing.

The procedure for the appointment of justices to the Constitutional Court is established in the Constitution. Under the Constitution, when justices are appointed to the Constitutional Court, only the following entities *expressis verbis* specified in the Constitution enjoy the respective powers: (1) the authorized state officials (the President of the Republic, the Speaker of the Parliament, and the President of the Supreme Court), who each submit to the Parliament a candidate for the position of a justice of the Constitutional Court; (2) the Parliament, which adopts a decision concerning the appointment of the nominated candidate as a justice of the Constitutional Court. No institution

1 Paragraph 2 of Article 103 of the Constitution: https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192.

2 Article 4 of the Law on the Constitutional Court, Official Gazette, 1993, No 6-120, identification code 0931010ISTA0000I-67.

3 Article 4 of the Law on the Constitutional Court provides that "The expiry of the term of office of the justices of the Constitutional Court shall be the third Thursday of March of the respective year".

4 In the history of the Lithuanian Constitutional Court, there have been only a few exceptional cases in which, after the Parliament rejected a candidate nominated for the position of a constitutional justice, the same nomination was immediately resubmitted, and the Seimas finally approved by secret ballot the appointment of such a candidate for the office of a justice of the Constitutional Court.

and no official enjoy powers to deny or limit the constitutional right of the above-mentioned state officials, specified in Paragraph 1 of Article 103 of the Constitution, to choose and present to the Parliament a candidate for a justice of the Constitutional Court, or the right of the Parliament either to appoint the nominated person as a justice of the Constitutional Court or not to appoint him.[5] Therefore, under the Constitution, while voting by secret ballot on the appointment of constitutional justices, the Parliament has the right to appoint or reject the nominated candidates. Unfortunately, the Constitution remains silent on what should happen next, when a candidate or all three candidates are not appointed by the required time.

The Constitutional Court is one of the most important institutions in the state; it guarantees the supremacy of the Constitution and the implementation of the principle of the rule of law. Therefore, the procedure for the appointment of constitutional justices should be exempted from opportunities of political manipulation, which occurred in Lithuania in 2020–2021. It can be noted that Lithuania is not the only country where the regular rotation of constitutional justices within the envisaged time frame has struggled or failed.[6] The constant partial rotation of constitutional justices following the end of the non-renewable term of office of nine years makes it possible to ensure the successful uninterrupted work of the Constitutional Court and the continuous development of constitutional doctrine. However, the provision of the Law on the Constitutional Court consolidating the possibility for a justice whose term of office has expired to continue to perform duties until the appointment of a new justice (which may be regarded as a "safeguard" provision) can provide only a temporary solution. Moreover, the question of the presidency of the Constitutional Court in the event of the non-appointment of new justices remains unsolved. Therefore, there have been some initiatives to clarify the appointment procedure at the level of ordinary regulation, whereas constitutional amendments might be awaiting in the future.

First of all, in cases of failed rotation, especially when it takes place with a delay of more than a year, two constitutional provisions face each other. According to one of them, the rotation should take place every three years. This provision ensures the continuity of effective constitutional control. According to the other, the term of office of a constitutional justice is nine years and it is non-renewable. The question that needs to be answered is when the justices appointed with a delay end their mandate:

- if they end their service as a constitutional justice at the time of regular rotation ("every three years"), their term of office would be not nine years, but some seven years and ten months;[7] thus, the constitutional provision guaranteeing a constitutional justice the term of office of nine years would be violated;
- if they end their service as a constitutional justice after the period of nine years from their appointment, the regular rotation according to the time limits provided for by the Constitution ("every three years") will not take place by the time envisaged; thus, it will be delayed again.

The nature of the Constitution as the act of the supreme legal force and the idea of constitutionality imply that the Constitution may not contain, nor does it contain, any gaps or internal contradictions. Although following the unsuccessful rotation of constitutional justices, this seems to be not the case, the said constitutional uncertainty should be resolved. Moreover, if no appropriate constitutional reform is carried out, the necessary solutions can be introduced by the way of constitutional interpretation. Under the Constitution, only the Constitutional Court has the power to interpret the Constitution officially. The official constitutional doctrine, *inter alia*, reveals the content of various constitutional provisions, their interrelations, the balance between constitutional values, as well as the essence of the constitutional legal regulation as a whole. Thus, in this case, the Constitutional Court itself could clarify interrelations between the two constitutional provisions in question concerning the renewal of its composition and the term of office of its justices; but, for this to happen, the appropriate case must be brought before the Constitutional Court by the bodies entitled to apply to it.

The second aspect of the failed rotation concerns the presidency of the Constitutional Court. The main elements pertaining to the appointment of the President of the Constitutional Court are enshrined in the Constitution. According to it, two state institutions participate in the appointment of the President of the Constitutional Court: the President of the Republic, from among the justices of the Constitutional Court, chooses the candidate for the position of the President of the Constitutional Court and presents it to the Parliament; the Parliament appoints the President of the Constitutional Court. First of all, it needs to be noted that the President of the Republic can implement this right to choose the candidate for the position of the President of the Constitutional Court only when all nine justices of the Constitutional Court are appointed. Secondly, it is clear that the great consensus of the Parliament and the President of the Republic is needed in order to appoint the President of the Constitutional Court.

The failed rotation of constitutional justices in 2020–2021 not only showed the weaknesses of the procedure for the appointment of constitutional justices, but it also prompts to question whether the appointment of the President of the Constitutional Court by political institutions – the President of the Republic and the Parliament – is the best solution for the effective functioning of the constitutional control institution and whether it does not create the preconditions for political interference with the functioning of the Constitutional Court.[8] The appointment of the President of the Constitutional Court is a constituent element of its constitutional status. Disagreements between the President of the Republic and a governing majority in the Parliament are not a rare case; thus, the appointment of the President of the

5 The ruling of 2 June 2005 of the Constitutional Court.

6 See, Slovak Republic – Opinion on questions relating to the appointment of Judges of the Constitutional Court, adopted by the Venice Commission at its 110th Plenary Session, Venice Commission, CDL-AD(2017)001-e <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)001-e>.

7 The last one of the three new justices of the Constitutional Court was appointed and took the oath only on 8 June 2021 instead of March 2020.

8 Jolita Miliuviene "Konstitucinio teismo teisėjų sudėties atnaujinimo mechanizmas kaip konstitucinių teismų nepriklausomumo prielaida" ["The mechanism for the renewal of the composition of the Constitutional Court as the precondition of the independence of the Constitutional Court] in *Konstitucija ir teisinė sistema: Liber Amicorum Vytautui Sinkevičiui* (MRU, 2021), 235–266.

constitutional control institution can become a battlefield for political ambitions. Although the absence of the President of the Constitutional Court cannot paralyze the work of the Court itself and preclude constitutional control in the state, because the Court can still adopt decisions, it may, nevertheless, complicate the functioning and governance of the Court. Moreover, it may create the possibilities of interference with the administration of the Court and distort the "checks and balances" system, as the politically favorable President of the Court may be committed to forcing through the "right decisions". In a situation where the votes of constitutional justices are divided equally, the vote of the President of the Court might determine the resolution of the case. Even procedural presiding over the sittings of the Court may influence the outcomes of the case. In this context, it is needless to say that effective constitutional control is one of the fundamental pillars in ensuring democracy, the rule of law, and the protection of human rights in the state.

Moreover, the term of office of the President of the Constitutional Court is provided for neither in the Constitution nor in the Law on the Constitutional Court. Therefore, it is considered that the term of office of the President of the Constitutional Court corresponds to the term of office of the constitutional justice who is appointed as the President. However, uncertainty arises where the President of the Court, although his term of office has expired, continues to work in the Constitutional Court under the above-mentioned "safeguard" provision, because the new justice is not appointed. Thus, it remains unclear whether the term of office of the presidency is also prolonged. It is this aspect that provided the grounds to raise doubts as to the legality of the composition of the Constitutional Court in 2020. The reservations expressed regarding the status of the Constitutional Court, implying that it is no longer the "tribunal established by law", called into question the legality of constitutional decisions adopted by it. The Constitutional Court even issued a statement explaining the situation, but this is not a regular means of activity of the Court and, in any case, has no legal power.

Therefore, it seems that the time has come for constitutional amendments regarding at least the appointment of the President of the Constitutional Court. However, strong political will is needed to implement them, as politicians should voluntarily refuse their influence on the Constitutional Court in favor of greater judicial independence and the enhanced administration of justice. It can be mentioned that there have been some initiatives and proposals to amend the legal regulation concerning the renewal of the composition of the Constitutional Court and the term of office of the President of the Constitutional Court, however, they have occurred not on the constitutional level and have not been successful.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Changes in the procedure for the appointment of constitutional justices would not transform the constitutional system itself and would not create any new competences for the Constitutional Court. They can only contribute to greater transparency in the formation of the composition of the Constitutional Court and increase its independence from politicians. The consistency of the Constitution and the essence of constitutional adjudication would be preserved and the harmony of the constitutional regulation would not be infringed, as the changes would complement the existing constitutional architecture, without negatively impacting the current "checks and balances" system. Therefore, there are no grounds for regarding such changes as a constitutional dismemberment. The failed renewal of the composition of the Constitutional Court has initiated further discussion and highlighted the need for these changes with an outcome that can be predicted to be quite positive.

The constitutionality of this reform might be, if needed, verified by the Constitutional Court itself, as it has the competence to pronounce on the compliance of constitutional amendments with the Constitution. Albeit *expressis verbis* not provided for in the Constitution, the competence to verify constitutional amendments stems from the Constitution implicitly and is disclosed in the constitutional jurisprudence. It is based on the assumption that no legal act, thus also no law amending the Constitution, may have immunity from constitutional review. Otherwise, it would be impossible to effectively ensure the supremacy of the Constitution and the rule of law.[9] The Constitutional Court has recognized the special nature of laws amending the Constitution, stating that, by means of them, amendments to the Constitution are incorporated into the text of the Constitution and the content of the provisions of the Constitution, as well as interrelations between these provisions, are modified. These laws can also change the balance of values consolidated in the Constitution. Therefore, in Lithuania, laws amending the Constitution have the force of the Constitution.[10] However, laws amending the Constitution are not acts of a constituent nature and are not a primary source of law, stemming from the direct will of the people. They are adopted 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, which arise from the Constitution, otherwise these constitutional limitations would be rendered meaningless.[11]

The Constitutional Court is also empowered to decide whether the Law on the Constitutional Court is in conformity with the Constitution, including the provisions on the appointment of constitutional justices, their term of office, the occupancy of the position of the President, other procedural details, such as the time limit for presenting candidates for deliberation, the possibility of resubmitting the same candidate if such a candidate has been once rejected, etc. The position that the constitutionality of the provisions regarding the functioning of the Constitutional Court itself is not exempted from the competence of the Constitutional Court was clearly stated in the ruling of 6 June 2006, in which the Constitutional Court was brought to pronounce on the provision of the Law on the Constitutional Court stating that the

9 This constitutional competence was revealed in the Constitutional Court's ruling of 24 January 2014, in which the Constitutional Court had to assess the compatibility of a law amending the Constitution (procedural aspects of its adoption) <https://www.lrkt.lt/en/court-acts/search/170/ta850/content>

10 The Constitutional Court's ruling of 30 July 2020 <https://www.lrkt.lt/en/court-acts/search/170/ta2220/content>

11 *Ibid.*

Constitutional Court belongs to the judicial system and performs judicial power.[12] In that case, the petitioner doubted the very nature of the Constitutional Court itself, arguing that it is not a judicial institution with the power to adopt binding decisions. The Constitutional Court resolved the case showing that no questions can escape constitutional review and that, even in cases related to the Constitutional Court itself, the Court has the power to adjudicate the case in order to ensure the supremacy of the Constitution.

This falls within the regular competence of any institution assigned to carry out control over the constitutionality of legal acts adopted by the legislative and executive. In terms of this point of view, the Constitutional Court of the Republic of Lithuania is not an exception; it plays the counter-majoritarian role while invalidating legal acts adopted by the Parliament, the President of the Republic or the Government, and the Law on the Constitutional Court is one of them. The Constitutional Court occasionally also plays the enlightened role when it invalidates a legal regulation against common sense or superstitions and prejudices of the society to ensure human dignity[13] or broadens the scope of its review when it encounters provisions that are in conflict with the Constitution but were not contested by the petitioner (however, such provisions should be interrelated with the contested ones).

It should also be noted that, whether it comes to a law amending the Constitution or ordinary legal regulation specifying the provisions of the Constitution on the appointment of constitutional justices, constitutionality in both these cases can be verified only if there is the respective petition filed with the Constitutional Court, i.e. the Court cannot initiate constitutional review procedure *ex officio*, even if there is a necessity to clarify the situation concerning the Constitutional Court itself. Therefore, in order to obtain the interpretation of the earlier mentioned two constitutional provisions that have become quasi contradictory during the latest unsuccessful rotation of constitutional justices, i.e. namely, which one of them should prevail – the rule of the renewal of the Constitutional Court every three years or the exact nine-year term of office served by a constitutional justice (making impossible to have the future rotation in time[14]), the respective petition to the Constitutional Court must be filed. As the Constitution has not been amended, there is no reason for analyzing the possibility of the review of constitutional amendments by the Constitutional Court in this case; however, several possibilities might be considered: the individual decision adopted by the Parliament to appoint the concrete justice can be challenged as missing the required time-limit of the term of offices of a justice[15] or the actual provisions of the Law on the Constitutional Court related to the appointment procedure or the designation of the President of the Constitutional Court might be contested. The interpretation of relevant constitutional provisions would follow in any of those cases.

IV. LOOKING AHEAD

The renewal of the composition of the Constitutional Court, as well as the designation of its President, is a recurring phenomenon repeating every three years. Thus, the questions raised in this article and the possible constitutional reforms may lie ahead in the nearest future. It will not be an easy step to make, as a strong political will to amend the relevant constitutional provisions is necessary. The experience of other states shows that the politicization of the constitutional control institution[16] might create the preconditions for eliminating effective constitutional control, leading straight to backsliding away from the fundamental constitutional principle of the rule of law, on which the entire legal system is based. In order to avoid the allegations that any constitutional justice case, especially a sensitive one, has been decided upon the political request, the judicial appointment system should be revised, and the Constitution should be amended.

One of the possible solutions might be to follow the experience of the states where the President of the Constitutional Court is elected from among the justices by a majority vote of the justices themselves. The President of the Constitutional Court has equal rights as any justice while resolving cases; therefore, when all the justices are appointed by political institutions, there is no reason to create more possibilities for politicians to interfere with the work of the Court. Giving the justices of the Constitutional Court the opportunity to decide for themselves who should organize their work and represent the Court would undoubtedly strengthen the independence and autonomy of the Constitutional Court and reduce the possibilities of politicizing the process of the appointment of justices to the Constitutional Court.

12 The Constitutional Court's ruling of 6 June 2006 < https://lrkt.lt/en/court-acts/search/170/ta1339/content>

13 The best example is the development of the constitutional definition of family, starting from the married opposite-sex couple, which is sought to be written in the Constitution, and now determined to be a gender-neutral concept, based on mutual relationship, which might be other than marriage (rulings of 11 January 2019 and 28 September 2011), whereas Lithuanian society has 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.

14 The year of ordinary rotation was 2020; the next one should take place in 2023, when the three justices appointed in 2014 are to leave the Court; the following rotation is envisaged in 2026, when the justices appointed in 2017 are to leave; therefore, the rotation following afterwards should be in 2029 in order that the rule of "every three years" would be respected; however, if this rotation takes place in 2029, the justices appointed in 2021 will have their mandate only of 8 or even 7 years and several months long. The rule of the inviolability of the clearly determined term of office in the Constitution also should not be violated. Thus, the rotation of 2029 should be postponed to 2030, which is 4 years after the rotation of 2026.

15 In all the parliamentarian decisions on appointing a constitutional justice, there was the provision that the person is appointed as a constitutional justice for nine years; whereas, in the decisions of the appointment of 2021, there is only the provision that the person is appointed as a constitutional justice, without specifying for which time period.

16 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

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

A Constitution is a unique document that occupies a special position in a nation's history.[1] It stipulates the national values,[2] and embodies not only the views of a few but the collective ideas and will of all the people of that nation.[3] Although, as a living document, a Constitution is designed to serve more than one generation,[4] it is never immune from alternation. The 1994 Constitution of the Republic of Malawi (hereinafter "the 1994 Constitution or the Constitution") bears testimony to that. Since its adoption, it has been altered multiple times, and the year 2021 only continued this trend. What is particularly interesting about Malawi's 2021 constitutional reforms, however, is that they contained some proposals that were heavily contentious and considered to be discordant with the Constitution's core values. This report discusses these proposals. It starts by, in the next section, presenting all the 2021 constitutional reform proposals in Malawi (both the successful and the unsuccessful) as contained in Constitution (Amendment) Bill, 2021.[5] In section three, the essay contends that whereas the majority of the proposals were compatible with the Constitution's underlying values – hence qualifying as amendments – the proposal to appoint judges on contract was an affront to at least one core value of the Constitution – judicial independence – thereby attaining the status of a dismemberment. Section three also discusses the constitutional control of the reforms and the role of the court. This section is succeeded by a presentation of what Malawi can learn from the 2021 constitutional reform proposals as we move forward.

II. PROPOSED, FAILED, SUCCESSFUL CONSTITUTIONAL REFORMS

Premised on the principles of constitutional democracy, Malawi's Constitution establishes the Executive, the Legislature, and the Judiciary as the three branches of Government.[6] A majority of the 2021 constitutional reform proposals were in relation to the judicial and legislative arms of Government. Starting with the former, prior to 2021, the Judiciary was the only arm of Government that had the head, the Chief Justice, without an established office to deputize him or her. Under the executive arm, the Constitution prescribes for at least one Vice-President to deputize the President.[7] Equally, under the Legislature, the Speaker of the National Assembly has at least one Deputy Speaker.[8] As for the Judiciary, the arrangement before 2021 was that if the Chief Justice leaves office or is, for whatever reason, unable to discharge his or her functions, the task of discharging such functions would be passed on to the most senior judge sitting on the Supreme Court of Appeal (SCA).[9] The 2021 reforms, however, altered this arrangement and introduced the office of the Deputy Chief Justice.[10] The amended provision expressly provides that if the office of the Chief Justice falls vacant, the Deputy Chief Justice shall discharge the duties of that office and it is only when the offices of both the Chief Justice and the Deputy Chief Justice are vacant that the most senior judge sitting on the SCA can perform the functions attached to the Chief Justice's office.[11]

The second reform in relation to the Judiciary, which was also successful, concerns the criteria for appointing judges of the High Court and the SCA. The reform, firstly, introduces two new qualifications for appointing judges, namely: that the appointee must be fit and proper to discharge the duties of the office,[12] and that he or she must have no prior record of a criminal conviction by a competent court, which conviction resulted into imprisonment without an option of a fine.[13] Secondly, the reform specifies who may be appointed to the SCA. Before these reforms, the Constitution did not lay down the specific requirements that one needed to meet to qualify for appointment as an SCA judge. The general trend then was that if a vacancy arises in the SCA, the most senior High Court judge would fill that post. There was no express mention regarding how long this judge needed to have served in the previous position. The Constitution was equally mute regarding

1 Mwiza Jo Nkhata, 'Popular Involvement and Constitution-Making: The Struggle Towards Constitutionalism in Malawi' in Morris Kiwinda Mbondenyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (PULP 2013) 222.
2 Mwiza Jo Nkhata, Anganile Willie Mwenifumbo and Alfred Majamanda, 'The Nullification of the 2019 Presidential Election in Malawi: A Judicial Coup d'Etat?' (2021) 20 J Afr Elect 57.
3 John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (CUP 2004).
4 *Dow v Attorney-General* [1992] LRC 623, 668.
5 The Malawi Gazette Supplement dated 2nd July 2021.
6 Siri Gloppen and Fidelis Edge Kanyongolo, 'The Judiciary' in Nandini Patel and Lars Svasand (eds), *Government and Politics in Malawi* (kachere Series 2007) 116.
7 1994 Constitution of the Republic of Malawi, s 79 (the Constitution).
8 ibid s 53.
9 ibid s 113(1) (prior to the amendment).
10 Constitution (Amendment) Act (CAA) 2021, ss 5, 6 and 8.
11 The Constitution, s 113(1) as amended by s 8 of the CAA,2021.
12 ibid s 112 as amended by s 7(1)(a) of the CAA 2021.
13 ibid as amended by s 7(1)(b) of the CAA 2021.

whether someone from outside the Judiciary can be appointed directly to the SCA. The 2021 reforms resolve this ambiguity by specifying that for a High Court judge to qualify for appointment as an SCA judge, he or she must have served in that position for at least 10 years.[14] They further expressly permit a person from outside the Judiciary to be appointed judge of the SCA provided that person is entitled to practice as a legal practitioner or an advocate or a solicitor in a court having unlimited jurisdiction and has been entitled so to practice for at least 20 years.[15]

Another successful reform concerning the Judiciary relates to the criteria for removal of judges from office. Whereas initially, the Constitution stipulated that a judge could be impeached for misbehavior,[16] the 2021 reforms eliminate misbehavior as a criterion for that purpose.[17] Instead, they introduce misconduct and inability to perform the duties of a judge as the new grounds for removing judges operating in addition to the retained ground of incompetence.[18]

Fourthly, following the creation of the Industrial Relations Court (IRC) as a subordinate court,[19] the offices of the Chairperson and Deputy Chairperson of that court were established.[20] Although the Chairperson and the Deputy Chairperson discharge judicial functions, the Constitution was not, after the formation of the IRC, amended to include such offices within the list of judicial offices. The 2021 reforms rectify that error by listing them as judicial offices.[21]

The most contentious proposal under the 2021 reforms related to the introduction of a provision for the appointment of judges on fixed-term contracts. The original design of Malawi's 1994 Constitution does not make provision for the appointment of judges on fixed-term contracts. Under this Constitution, once a judge is appointed, he or she is entitled to hold office until the retirement age is reached. A judge can lose his or her post earlier only through death, resignation, or the occurrence of prescribed factors that would justify the judge's removal. However, even where such factors exist, the Constitution prescribes a quite rigorous process that must be followed before removing a judge from office.[22] This was deliberately done to strengthen judges' security of tenure hence giving them the tenacity to withstand political pressure and interference by the Executive.[23] The 2021 reforms, however, proposed giving power to the President to appoint judges on contracts.[24] The proposal received strong resistance from the public. For example, the Malawi Law Society (MLS) – a mother body for all lawyers in Malawi whose responsibility includes 'protect[ing] matters of public interest touching, ancillary or incidental to law'[25] – issued a press statement against the proposal and urged members of Parliament to reject it.[26] Following discussions between the Legal Affairs Committee of Parliament and the Solicitor General, representatives of the Judiciary, and the MLS, the proposal was eventually dropped.[27]

Regarding reforms concerning the legislative arm, both the Executive and the Judiciary have their own bodies that deal with, among others, issues of recruitment of staff and disciplinary control over such recruits. The Judiciary has the Judicial Service Commission which plays a prominent role in the recruitment of judicial officers and exercises disciplinary powers over them.[28] Under the executive arm, there is the Civil Service Commission with powers to appoint persons to hold offices in the civil service and to discipline them.[29] The arm of the Government also has the Prison Services Commission with powers to appoint persons to hold offices in the prison services of Malawi and to exercise disciplinary control over them,[30] and the Police Service Commission with similar powers.[31] All these bodies are established under the Constitution. The Legislature, however, prior to 2021, did not have any such body. To remedy the anomaly, the Constitution has been successfully amended by inserting a whole new chapter establishing the Parliamentary Service.[32] This Service is intended to render the 'National Assembly and its committees, such administrative, professional, technical, and other support services as are necessary to facilitate the operation of the National Assembly and the carrying out by members of the National Assembly of their duties and functions'.[33] The new chapter also establishes the Parliamentary Service Commission with powers to, among others, appoint persons to work in the Parliamentary Service, discipline them, and, where necessary, remove them.[34]

Two other successful amendments in 2021 concerned altering the date for the dissolution of local government authorities and increasing the term of office of the Defense and Security Committee of the National Assembly (DSCNA). Regarding the former, the date has been shifted from April to July in the year in which the elections are to take place.[35] On the tenure of the DSCNA, it has been increased from one year to two and a half years.[36]

III. SCOPE OF THE REFORMS AND CONSTITUTIONAL CONTROL

Constitutional reforms can be classified into either amendments or dismemberments. While a dismemberment changes at least one essential feature of the constitution, an amendment makes changes to the constitution that are 'consistent with the existing design, framework, and fundamental presuppositions of the constitution'.[37] In terms of purpose, constitutional amendments can serve any of the following four functions. Firstly, they can be corrective, that is, altering the

14 ibid as amended by s 7(1)(d)(ii) of CAA 2021.
15 ibid.
16 ibid s 119(2) (prior to the 2021 amendment).
17 ibid as amended by s 9 of the CAA 2021.
18 ibid.
19 ibid s 110(2); Labour Relations Act (Cap 54:01 of the Laws of Malawi), Part VII.
20 Labour Relations Act, s 66.
21 The Constitution, s 111 as amended by s 6(b) of the CAA 2021.
22 ibid s 119.
23 Gloppen and Kanyongoro (n 6) 122-24.
24 Constitutional Amendment Bill 2021, s 3(b).
25 Legal Education and Legal Practitioners Act, s 64(d).
26 Malawi Law Society, 'On Appointment of Judges to Embassies and Proposed Amendment to the Constitution to Provide for Fixed Term Contract for Judges' (Press Statement, 3 July 2021).
27 'Parliament Passes Bill Creating Position of Deputy Chief Justice' (*Malawi24*, 8 July 2021) <https://malawi24.com/2021/07/08/parliament-passes-bill-creating-position-of-deputy-chief-justice/> accessed 15 April 2022.
28 The Constitution, ss 116, 117 and 118.
29 ibid ss 186 and 187.
30 ibid s 167.
31 ibid s 155.
32 CAA 2021, s 14.
33 The Constitution, s 194A(1) as introduced by s 14 of the CAA 2021.
34 ibid s 194C as introduced by s 14 of the CAA 2021.
35 ibid s 147(5) as amended by s 10 of the CAA 2021.
36 ibid s 162(2) as amended by s 11 of the CAA 2021.
37 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 79.

constitution in order to repair an error in it or to align expectations with performance.[38] Secondly, constitutional amendments can be elaborative by expanding the meaning of the constitution as it is presently understood.[39] Thirdly, they can be reformative by revising a rule in the constitution within the framework of that constitution's core principles.[40] Lastly, constitutional amendments can be restorative by putting the constitution into its original status that was destabilized by a transformative judicial process or some emerging political practice.[41] Malawi's 2021 constitutional reform proposals comprise of both dismemberment and amendments. The amendments perform corrective, elaborative, or reformative functions.

A. DISMEMBERMENT

Whereas the majority of the proposed reforms were amendments, the proposal to appoint judges on fixed-term contracts was an affront to judicial independence, a core value of Malawi's 1994 Constitution, thereby qualifying as a dismemberment. The experience that Malawians had under Kamuzu Banda's one-party era shows that through the 1994 Constitution, they deliberately intended to create an independent judiciary manned by judges with secure tenure. During Banda's reign which ran from 1964 to 1994, the judiciary in Malawi was not independent.[42] The Constitution in force then, the 1966 Constitution of the Republic of Malawi, gave Banda the power to remove judges from their positions for various reasons including if he considered that it was in the public's interest so to do.[43] This, in effect, placed judges' tenure at the mercy of the President.[44] But even under these circumstances, Banda largely sidelined the High Court system[45] and went on to create traditional courts to operate parallel to the High Court system.[46]

These courts had myriad issues. Firstly, officers presiding over them were traditional authorities who lacked legal training.[47] Secondly, the appointing authority for such officers was the Minister of Justice (effectively the President himself) who also had the power to suspend or remove them.[48] Thirdly, both the right to legal representation and the rules of evidence were inapplicable in these courts.[49] Despite these issues, such courts were given jurisdiction to try even serious offenses like treason, murder, and manslaughter,[50] and it is in these courts that Banda's regime used to prosecute its political opponents.[51] During Banda's era, therefore, the whole judicial system was under the control of the Executive thereby making it hard for judicial officers to make decisions that were against that arm of Government. Unsurprisingly, judicial review of administrative action was practically non-existent then.[52]

With this historical background, when moving from the one-party era to the multiparty era, Malawians thought that power should no longer be left to one man.[53] It was agreed that it would be better to create a judicial system that can ably monitor the conduct of the executive arm of Government. To be able to do that, the judiciary needs to be independent and impartial. The 1994 Constitution, therefore, explicitly states that judicial officers 'shall exercise their functions, powers, and duties independent of the influence and direction of any other person or authority'[54] and enjoins them to, in discharging their functions of interpreting, protecting, and enforcing the Constitution and all laws in Malawi, do so 'in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law'.[55]

Besides these prescriptions, the Constitution further cements the independence and impartiality of the judiciary by securing the tenure of judges. It does so by specifically indicating their retirement age, that is, sixty-five years,[56] and prescribing an arduous process for their removal before that age. The procedure for impeaching a judge requires a motion for that purpose to be tabled in the National Assembly, to be debated, and to be passed by a majority of the votes of all members of the National Assembly.[57] If the National Assembly passes the motion, it has to present it to the President as a petition.[58] Thereafter, the President makes the decision whether or not to remove the judge.[59] But when making the decision, the President must consult the Judicial Service Commission.[60] The Constitution further requires the process for a judge's removal to comply with the principles of natural justice,[61] meaning that, among others, the concerned judge must be notified of the charges laid against him or her and must be heard before he or she can be removed.[62] This rigorous process was purposely put in place to ensure that judges cannot be easily removed from their positions for making decisions that offend some people who occupy powerful positions.

The proposal to appoint judges on contract, however, would have eroded judge's security of tenure. Since the security of tenure is a crucial component of judicial independence,[63] the lack of it would have resulted in the weakening of judicial independence, a principle that is revered under Malawi's 1994 Constitution. Also, because having an independent judiciary is central to the realization of the rule of law[64] – one of the values under Malawi's 1994 Constitution[65] – the weakening of judicial independence would have had the potential effect of undermining the rule of law. For instance, knowing that they may need the favor of the appointing authority (the President) to have their contracts extended or renewed, judges appointed on contract would have found

38 ibid 80.
39 ibid.
40 ibid 81.
41 ibid.
42 A Peter Mutharika, 'The 1995 Democratic Constitution of Malawi' (1996) 40 JAL 205; Msaiwale Chigawa, 'The Fundamental Values of the Republic of Malawi Constitution of 1994' (1st National Constitutional Review Conference, Lilongwe, March 2006).
43 1966 Constitution of the Republic of Malawi, s 64(3)(c).
44 Chigawa (n 42) 8.
45 Gloppen and Kanyongolo (n 6) 115. See also Siri Gloppen and Fidelis Edge Kanyongoro, 'Courts and the Poor in Malawi: Economic Marginalization, Vulnerability, and the Law' (2007) 5 ICON 258.
46 Fidelis Edge Kanyongolo, 'The Constitution' in Judiciary' in Nandini Patel and Lars Svasand (eds), *Government and Politics in Malawi* (kachere Series 2007) 30.
47 Gloppen and Kanyongoro (n 6) 115.
48 Chigawa (n 42).
49 Mutharika (n 42) 215.
50 Chigawa (n 42) 8-9.
51 Siri Gloppen and Kanyongoro (n 6) 115.
52 Mwiza Jo Nkhata, 'The High Court of Malawi as a Constitutional Court: Constitutional Adjudication the Malawian Way' (2020) 24 Law, Democracy and Development 442, 443.
53 Mutharika
54 The Constitution, s 103(1).
55 ibid s 9.
56 ibid s 119(6).
57 ibid s 119(3).
58 ibid.
59 ibid.
60 ibid.
61 ibid.
62 Gloppen and Kanyongolo (n 6) 124.
63 *State and others; Ex Parte Malawi Law Society* [2007] MLR 346.
64 Chigawa (n 42) 15-17.
65 Gloppen and Kanyongolo (n 6); Chigawa (n 42).

it hard to make decisions that counteract the interest of the President. They would have been compelled to make decisions that please him. This is not how the 1994 Constitution expects judges to act. The proposal to introduce a provision to appoint judges on contract, therefore, was more than a mere amendment. It was a reform that would have weakened judicial independence and would have created challenges in the upholding of the rule of law. The proposed reform was therefore a dismemberment.

B. AMENDMENTS

Whereas the proposal to appoint judges on contract was a dismemberment, the other proposed reforms were amendments. First, regarding the proposal to establish the office of the Deputy Chief Justice and to provide that he or she will exercise the functions of the Chief Justice where that office falls vacant, the reform was intended to match the Judiciary's setup with the arrangement in the other branches of Government.[66] It was also intended to correct an error in the institutional design. Under the previous arrangement, although the law required the most senior judge sitting on the SCA to perform the duties of the Chief Justice in his or her absence, in practice, the Chief Justice's absence would cause the duties and functions of that office to slow down considerably.[67] Any hearing of a petition for admission to practice law in Malawi, for instance, would not proceed in the Chief Justice's absence.[68] To fix this flaw in the institution's design, the 2021 reforms, implementing the recommendations of the 2007 Special Law Commission on the Review of the Constitution,[69] establishes the office of the Deputy Chief Justice to discharge the functions of the Chief Justice where the holder of that office is unavailable or unable to perform his or her duties. The reform does not contravene any core value of the Constitution. It is, therefore, an amendment performing a corrective function.

Another corrective amendment is in relation to the establishment of the Parliamentary Service and the Parliamentary Service Commission. Like the amendment introducing the office of the Deputy Chief Justice, this amendment was made to fix an error in the design of the legislative arm of Government. Without its own body in charge of, among others, recruiting staff and disciplining them, the Legislature lacked some autonomy. The amendment was therefore partly done to strengthen 'the operational autonomy of the National Assembly as a separate branch of Government'.[70] Besides that, however, the amendment was also done to match the design of the Legislature with what is happening in the other arms of Government.

A third corrective amendment relates to the change in the month for the dissolution of local government authorities from April to July in the year in which the elections are to take place. Like the above-discussed reforms, this reform does not alter any core value of the Constitution. Given that both councilors, who are members of the local government authorities,[71] and people's representatives in the National Assembly – members of Parliament – are elected at the same time under the currently applicable tri-partite elections in Malawi, it was an anomaly for local government authorities to be dissolved earlier (in April) than the National Assembly (in July). The amendment fixes that error by aligning 'the date of dissolution of local councils [with] that of the National Assembly'.[72] This amendment, therefore, is also corrective.

Regarding the reforms relating to the criteria for appointment and removal of judges, however, they are elaborative amendments. These reforms do not alter any core value of the Constitution. Given the nature of a judicial office, judges need to be people that are fit for the purpose. That includes the fact that they must be people that are considered to be morally upright in society and who the public can trust. A criminal conviction coupled with a custodial sentence weakens the respect and trust that people may have for someone. The inclusion of conditions regarding fit and proper for the office and lack of criminal conviction with a custodial term therefore merely reaffirms what is expected of persons holding the judgeship office. Equally, the introduction of incompetence as a ground for impeaching a judge just goes to highlight the point that judges must at all times be persons who are capable of discharging their functions. Regarding the specification of the criteria for appointing SCA judges, again, this does not contravene any core value of the Constitution. It merely clarifies the requirements that one must meet before being appointed to that Court. Unlike the initial section 112 of the Constitution which only provided the general criteria for appointing judges without specifying the requirements that one must meet to be appointed an SCA judge, the amended provision specifies such qualifications. The laying down of the qualifications will help to resolve the problems that the silence in the provision created. With the silence, protests would at times ensue if someone other than the most senior High Court judge is appointed to fill a vacancy in the SCA.[73] The stipulation of the conditions removes the perception that it is automatic that the most senior High Court judge is the next in line to go to the SCA and lays bare to all aspiring to be SCA judges regarding what conditions they must meet. These amendments, therefore, perform an elaborative function.

Another elaborative amendment is with respect to the incorporation of the offices of the Chairperson and the Deputy Chairperson of the IRC in the list of judicial offices. Without in any way contravening any core value of the Constitution, this reform extends the meaning of the term 'judicial office' in Malawi following the establishment of the IRC as one type of a subordinate court.

As for the extension of the tenure of the DSCNA from one year to two and a half years, this reform also does not alter any core value of the Constitution. It is, therefore, an amendment. However, there was nothing wrong really with the one-year term that the Constitution initially prescribed. Actually, in 2007 the Special Law Commission considered the tenure of the DSCNA and concluded that the one-year term was proper and must be retained given that the Committee deals with matters of security.[74] Increasing the term to two and a half years, therefore,

66 Law Commission, *Report of the Law Commission on the Review of the Constitution* (Law Com Rep No 18, 2007) 92.
67 ibid 93.
68 ibid.
69 ibid.
70 Constitutional Amendment Bill 2021, preamble; 'AFIDEP Congratulates Parliament for Passing Legislations to Enhance the Independence of the August House' (*Afidep*, 1 August 2021) <www.afidep.org/afidep-congratulates-parliament-for-passing-legislations-to-enhance-the-independence-of-the-august-house/> accessed 15 April 2022.
71 The Constitution, s 147(1).
72 Constitutional (Amendment) Bill 2021, Preamble.
73 'Malawi Judicial Officers Protest Mbendera Appointment [As] Justice of Appeal' (*Nyasa Times*, 4 February 2013) <www.nyasatimes.com/malawi-judicial-officers-protest-mbendera-appointment-at-justice-of-appeal/> accessed 11 June 2022.
74 Law Commission (n 66) 112.

seems not to have been based on any significant flaw with the one-year term except for some challenges 'experienced by the Committee due to high turnover occasioned by' the short term of its members.[75] The reform, therefore, is reformative.

C. CONSTITUTIONAL CONTROL OF THE REFORMS

Malawi's Constitution has in-built mechanisms that regulate how constitutional reforms must be carried out.[76] While the Constitution allows Parliament to alter some of its provisions if the proposal is supported by at least two-thirds of the members of the National Assembly entitled to vote,[77] it expressly restricts the substantive alteration of some provisions.[78] An amendment to such "entrenched" provisions that alter their substance cannot be made except after a referendum is held, and the majority of those voting vote in favor of the proposed amendment.[79]

It is only after this that Parliament can amend the provision by a simple majority.[80] Some of the constitutional provisions whose amendment is restricted are section 9 (the separate status, function, and duty of the Judiciary), section 103 (the independence and jurisdiction of the courts and the Judiciary), section 111 (appointment of judicial officers), and section 119 (tenure of judges). Considering that the proposal to appoint judges on contract would have necessitated a substantial alteration of sections 111 and 119 of the Constitution, it is, partly, on this basis that the MLS really mounted a strong protest against the proposal.

D. ROLE OF THE COURT

From the reading of the spirit and provisions of Malawi's 1994 Constitution, Malawi's Judiciary, Dingake claims, 'is bound to be interventionist in character'.[81] Indeed, since the adoption of that Constitution, Malawian courts have never shied away from intervening whenever called upon to do so. In so doing, they have exhibited both counter-majoritarian and representative characteristics. For instance, when Malawi's first multiparty President, Bakili Muluzi, issued a directive barring the public from demonstrating against a proposed constitutional amendment to extend his term of office, the High Court intervened, declaring the directive unconstitutional and therefore proceeding to quash it.[82] Recently, the High Court, sitting as a Constitutional Court, orchestrated a change in the system for electing the President from the unpopular first-past-the-post system to the highly favored 50% +1 system.[83] With respect to the 2021 reforms, however, the swift dropping of the controversial proposals after a public backlash made it pointless for the concerned parties to approach the courts. Resultantly, the court played no notable role in either the adoption or abandonment of the reforms.

75 Constitutional (Amendment) Bill 2021, Preamble.
76 The Constitution, Chapter XXI.
77 ibid s 197.
78 ibid s 196.
79 ibid s 196(1).
80 ibid s 196(2).
81 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.
82 *The State, The President of Malawi and others and ex parte Malawi Law Society and others* [2002–2003] MLR 409
83 *Chilima and Chakwera v Mutharika and Electoral Commission (Constitutional Reference No. 1 of 2019)* [2020] MWHC 2.

IV. LOOKING AHEAD

Malawi's 1994 Constitution was drafted within a short period of time – less than six months.[84] The plan was that after its adoption and following the transition into a democratic state, the Law Commission would conduct a detailed study of the Constitution and make proposals to correct the drafting oversights and ambiguities in it.[85] The obvious expectation, therefore, was that after the Commission makes proposals, Government would act on them quickly to avoid unnecessary constitutional litigation later. However, while the Commission has indeed carried out a study of the Constitution and has made its recommendations, the Government has not acted on them with the urgency that they deserve. The 2021 reforms, for instance, reveal that over a decade after the 2007 Special Law Commission made its recommendations, we are still in the process of implementing them. As if that is not enough, there are also other crucial recommendations that were made by the Law Commission in 1998 which have not been acted upon to date.[86] The delay in implementing the recommendations is antithetical to the original plan regarding the review of the Constitution. As we move forward, Malawi should strive to act on the constitutional reform recommendations urgently. This may help to prevent future constitutional litigation thereby saving Government's costs.

V. FURTHER READING

Nkhata MJ, Mwenifumbo AW and Majamanda A, 'The Nullification of the 2019 Presidential Election in Malawi: A Judicial Coup d'Etat?' (2021) 20 J Afr Elect 57.

84 Mutharika (n 42) 206.
85 ibid.
86 *The State (Xiaoxiao) v The Director General – Immigration and Citizenship Services and another* [2020] MWHC 5, para 12.4.

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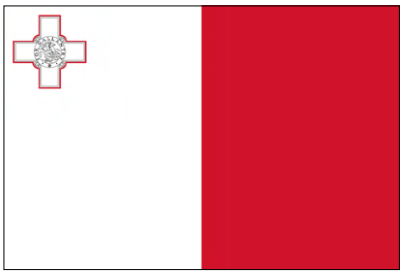

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I. INTRODUCTION

This report examines a set of constitutional amendments that were passed or discussed by the Maltese Parliament in 2021 within the framework of a comprehensive process of reforms that, in recent years, has characterized Malta's political life. Indeed, the media attention to the murder of journalist Daphne Caruana Galizia, which took place in 2017 and was strongly linked to her corruption investigation, prompted international community institutions to call for the urgent approbation of various reforms that would enhance the effectiveness of the rule of law, as well as strengthen the separation of powers and the system of checks and balances of the Maltese government.

Based on these demands, in 2020 the Maltese Parliament approved several constitutional amendments to increase the independence of the judiciary and the efficiency of the justice system. Moreover, the rules on the election of the President of the Republic underwent a significant reform within a view to strengthening its independence from the party system and its fundamental role of constitutional guarantee.

Alongside this process, in 2021 four more constitutional reforms were brought to the attention of Parliament. Two of them were focused largely on reducing the role played by the Prime Minister in the appointment of public service officers. A further constitutional amendment concentrated on enhancing gender equality in the formation of the national Parliament. Finally, another proposal dealt with fair trial requirements in proceedings before administrative authorities which could lead to the imposition of large administrative penalties.

This report initially presents the main aspects of the reforms. It then provides some brief remarks on the constitutional amendment procedure and on the political system in order to be able to better understand their success or failure. Thereafter, it assesses the scope and nature of the reforms, as well as any shortcomings of the same. Finally, some remarks are made on their effectiveness and on the way ahead.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In accordance with international community demands, in 2021 the Maltese Parliament implemented an initial intervention aimed at limiting the role of the Prime Minister and his margin of appreciation in appointing senior officers of key administrative bodies. In particular, Act No. XII of 2021 amended the ordinary laws governing authorities such as the Central Bank of Malta, the National Financial Service Authority, the Arbitration Centre, and the Data Protection Commissioner. With regard to the appointment of the chairpersons or managing officers of these institutions, which is ordinarily under the remit of the Prime Minister in full freedom, the reform established the duty for the Head of the Executive to act on the advice of the Cabinet of Ministers. A similar provision was adopted with reference to Employment Commission for Malta. Since the appointment of such an institution is expressly governed by Art. 120 of the Constitutional Charter, Parliament had to pass Act No. XII as a constitutional amendment. The reform added a new sub-article (4) at the end of Art. 86 of the Constitution on the exercise of functions conferred on the Prime Minister. Therefore, the appointment of both the chairperson and two members of the Commission, formally vested in the President of the Republic, now relies on the advice of the Prime Minister, who must, in turn, act on the recommendations of the Cabinet of Ministers.

An even more tangible reduction in the Prime Minister's role can be seen in a second constitutional amendment, which focused on the inner composition of the executive power. Act No. XXVI of 2021 thus reformed the text of Article 92 of the Constitution on the appointment of both Permanent Secretaries and the Principal Permanent Secretary. Although the Prime Minister continues to be responsible for assigning government departments to Permanent Secretaries, he is no longer involved in the appointment procedure. Indeed, the Constitution no longer asks the President to act on the PM's advice, which must, in turn, be based on previous, non-binding consultations with the Public Service Commission. According to the current wording, the President must be guided directly by the Public Service Commission, which should act after having received and evaluated the recommendations given by the Principal Permanent Secretary. The latter officer, on the other hand, is no longer appointed in accordance with the same procedure as the other Secretaries. Due to its key position in the functioning of the executive body, the amendment established a specific requirement: indeed, the role of the Public Service Commission is limited to a preliminary consultation with the Cabinet of Ministers, which must submit its advice to the Head of State. Therefore, no substantive role is now vested in the Prime Minister.

In addition to reforms aimed at improving the system of checks and balances, in 2021 the Maltese Parliament introduced some innovations relating to the composition of the legislative assembly, with the aim of achieving greater gender equality. Due to the traditional

under-representation of women (in the 2017 elections, only 9 out of 67 elected MPs were women), a bipartisan proposal was approved for an increase of up to 12 MPs of the under-represented sex in order to achieve an average of 40% of the number of Members of Parliament or, in any case, to reduce the gender representation imbalance. According to the new provision of Act. No. XX of 2021, the increase in seats should not go beyond reaching the 40% threshold for the under-represented sex and in any case, should not exceed the number of 12 MPs. Based upon the most recent debate on gender issues, the constitutional amendment further states that persons who are identified as gender-neutral in their documents would be included in the under-represented sex. Ultimately, in line with the traditional temporary nature of positive actions aimed at addressing gender discrimination, the reform expressly states that the provision will remain in force for a period of 20 years from entering into force unless it is revoked or extended by means of a new constitutional intervention.

From the specific point of view of the functioning of the system of government, the reform was unlikely to have had any substantial effect on the conformation of the parliamentary assembly. In fact, given the Westminster-inspired constitutional framework, Malta presents a consolidated tradition of a bi-party system with only representatives of the two leading parties being elected. Based on this aspect, the constitutional amendment expressly states that additional MPs should be equally apportioned between the majority and the minority party. Consequently, the balance of power between the two parties should not have been significantly affected.

Alongside the three reforms on institutional issues, a fourth constitutional amendment proposal was brought to the attention of the Maltese Parliament. In line with the suggestions and guidelines provided by the international community, the current reform process has largely dealt with issues related to the independence of the judicature, the effectiveness of the justice system, and the safeguarding of fair trial rights. In this framework, the Government submitted a proposal (Bill No. 166 - Constitution of Malta (Amendment No. 4) Bill) aimed at introducing "a provision in the Constitution regulating administrative penalties of a financial nature and to reduce the discrepancy between the right to a fair trial as protected by Article 39 of the Constitution of Malta and the same right as protected by Article 6 of the European Convention on Human Rights and the case-law of the European Court of Human Rights". Basically, the proposal dealt with the issue of the empowerment of the administrative and independent authorities to impose administrative penalties and the corresponding protection of fair trial rights. Unlike the other reforms, this bill ultimately failed. The reasons for the failure are based upon the peculiarity of the Maltese constitutional amendment procedure and the basic framework of the political system.

Firstly, it should be noted that the Constitutional Charter provides for three different cases. Aside from the case of reforms on the term of office of Parliament or on changes to the amending provision itself, which require a compulsory referendum, Art. 66 of the Constitution basically requires a two-thirds majority of all Members of Parliament for any amendment proposal on key aspects of both the form of government and the protection of fundamental rights. Residually, for cases not expressly mentioned, the Charter prescribes the absolute majority rule.

Secondly, as already noted, the Maltese political framework echoes the UK model. Consequently, the polarised party system leads to strong competition between the two main parties, which traditionally hinders any collaboration effort.

In this context, unlike the reform on the composition of the House of Representatives, in which the proposed change would not have altered the functioning of Parliament, the amendment on fair trial rights would have affected different aspects of the system. Hence, taking advantage of the qualified majority required by the Charter, the opposition ensured that the proposal failed. The Government attempted to overcome the expected gridlock, proposing in the meantime an amendment to the Interpretation Act aimed at providing a new classification of laws or punishments as criminal in nature if implemented by public authorities with regulatory, supervisory, compliance, or investigatory functions. Nevertheless, once again, the attempt was unsuccessful due to the intervention of the Venice Commission.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

An overall analysis of the constitutional reforms passed by the Maltese Parliament in 2021 must not overlook the basic element of the diversity of the issues tackled. Albeit within a comprehensive modernization process of the constitutional framework, the approved amendments were made in three different fields.

Firstly, innovations in the appointment procedures of public authorities' officers and Permanent Secretaries can be contextualized within the general project of enhancing the effectiveness of the checks and balances system. In this context, they follow the guidelines and comply with the demands expressed by international community institutions. Undoubtedly, they represent an effort to modernize the Constitutional Charter. Therefore, they do not give rise to any issue on their nature as a constitutional amendment, and they do not trigger any need for constitutional control from the domestic or supranational courts.

Different considerations can be made with regard to the second field of intervention. In relation to the proposal on fair trial guarantees related to administrative penalties, it should be noted that the main purpose of the constitutional Bill focused on the justice system and, above all, on the protection of fundamental rights. In this case, the gridlock triggered by the parliamentary opposition persuaded the Government to attempt to achieve the final goal through both constitutional changes and ordinary law amendments. Due to the harsh political debate, the Government issued an urgent opinion to the CoE Venice Commission.

In its advice (Venice Commission, Opinion no. 1034/2021, 5 July 2021), the Commission stated that the attempt, envisaged by the constitutional amendment proposal, to ensure that independent regulators can impose administrative sanctions which might be characterized as criminal, albeit consistent with the case-law of the Maltese Constitutional Court, might "look like a blanket immunity rather than the integration of administrative justice into the constitutional framework" and "*de facto* amount to a derogation" of the guarantees carved out by the Constitution.

Even more explicitly, the assessment of the amendment proposal on the Interpretation Act stressed the idea of an attempt to "introduce

amendments to the Constitution without amending the Constitution". In the Commission's view, "to read the interpretative power of Parliament so widely as to enable it to be used as an alternative to having to use the amendment procedures would open the way for the government of the day easily to circumvent individual rights and other protections set out in the Constitution". Therefore, the advisory opinion emphasized the opportunity to act in accordance with constitutional amendment procedures, highlighting that the rigidity of the Constitutional Charter, demanding broad consensus on constitutional changes, duly confers to the parliamentary opposition a power of participation, supervision, and even blockage on the most important decisions in the political life of the national community.

The third field of constitutional innovation focuses on the conformation of the House of Representatives. Even though Act No. XX of 2021 formally focuses on the topic of gender equality, the real consideration of the constitutional legislator related to the composition of the parliamentary assembly. Indeed, the content of the intervention is confined to the provision of an additional number of parliamentary seats aimed at achieving equal gender representation. However, when looking closer at the text, it is clear to see the legislator's overall focus on the effects that such an innovation could produce on the conformation and functioning of Parliament. On one hand, it must be observed that the increase in the number of MPs could only occur in the event of an election result in which only candidates of two parties are elected. If candidates of several different parties were elected, no additional seats would be assigned. On the other hand, as already mentioned, the candidates elected by virtue of the constitutional provision are to be apportioned equally between the majority party and the minority party, so as not to affect the actual balance of powers established by the elections. Within this framework, Parliament's urgency to safeguard the correct functioning of the inherited Westminster model can clearly be seen.

The subordinate nature of the interest in gender equality issues further emerges from the regulation on the selection of additional MPs. In fact, the constitutional amendment expressly states that additional MPs belonging to the under-represented sex should be selected from the list of candidates not directly elected. If the number of seats to be assigned is not reached, any vacant seats would be filled by co-option by the House of Representatives. Therefore, the additional MPs, officially appointed for the purpose of achieving gender equality, might not be representative of the voters' will, as they may be selected merely on the basis of their alignment with the party leaders' political goals. This clearly entails a shift in focus from the gender equality plan to the strengthening of the party role.

Factual evidence of this consideration can be seen in the events related to the 2022 political elections when the amendment was first implemented. The popular vote assigned only 10 seats to female candidates (as previously mentioned, in 2017, 9 female representatives were elected). By virtue of the new constitutional provision, however, ultimately there were 22 female MPs, amounting to 28% of the parliamentary seats. Nevertheless, the gender-correction mechanism has been roundly denounced. Among other considerations, there was the case of a female candidate who refused to run for the casual election round (this supplementary election occurs when a candidate is elected in two different districts in the meantime) as she was certain to be elected via the corrective mechanism in any case. In this way, she left the seat free for the election of another male candidate. From another perspective, anecdotal evidence reveals that during the political campaign some male candidates told voters to vote for them since women candidates would be elected in the additional number of MPs.

Even before its initial implementation, the shortcomings and patent failures of the new provision had raised serious concerns. An independent candidate challenged the mechanism before the constitutional judge, alleging a breach of the national Constitution, Art. 21 of the EUCFR, and Art. 14 of the ECHR. An initial ruling of the Civil Court in its constitutional jurisdiction dismissed the case due to the plaintiff's lack of direct juridical interest. Nevertheless, the Constitutional Court recently upheld the plaintiff's appeal and returned the pleadings to the Civil Court for a further decision.

Regardless of any evaluation of the merits of the case, it is worth observing that, firstly, the mechanism was passed via a constitutional amendment; secondly, Malta does not provide for any limit on constitutional revision. Hence, the constitutional judge may ultimately be compelled to reject the idea of any breach of the Constitutional Charter.

A different solution might arise in the event of a preliminary referral to the CJEU. Nevertheless, even in this case, a major concern would arise with regard to the relationship between the national system and the EU framework specifically in relation to the counter limits to the primacy of EU law.

In any case, on one hand, the innovation adopted has proven to be unsuccessful in achieving the substantive goals formally expressed by the constitutional legislator. On the other hand, the solutions implemented give rise to serious concerns and may be considered not to be fully consistent with the principle of free democratic political representation.

IV. LOOKING AHEAD

An overall evaluation of the 2021 constitutional amendments approved by the Maltese Parliament must not overlook the general modernization process which began some years ago and is still ongoing. The analysis of the recent innovations has revealed the shortcomings and serious concerns to which some of the solutions have given rise.

From a general perspective, due to the peculiar conformation of the Maltese political system, such changes risk being ineffective. Indeed, many elements could play a significant role in their material implementation. It should be noted that, despite the disproportion compared to other European countries (the implementation of the gender-corrective mechanism brought the ratio to 1 MP for every 6,500 inhabitants), the number of Maltese MPs is very limited. As a consequence, almost all representatives of the majority party are directly involved in the Government's activity, mostly holding government positions. Secondly, the limited dimension of the electorate fosters unhealthy nepotism in the relationship between political actors: in fact, MPs mostly vote along the party line without the need to be compelled by the party whips. Thirdly, as, in the Maltese system, MPs serve on a part-time basis, the fundamental functions of scrutinizing the Government's activity and identifying political directions inevitably suffer: most MPs have other 'daily' jobs and devote only a tiny portion of their time to their parliamentary duties.

Given this framework, the reduction in the Prime Minister's role in appointment procedures and his replacement with that of the Cabinet of Ministers runs the risk of being ineffective: the Prime Minister may continue to play the leading role in determining selections for leading public positions, by way of the strict control of governmental action.

On the other hand, taking advantage of the rigid party discipline and the substantial weakness of the candidates, the party leaders could easily control the gender-corrective mechanism and use it for their own ends.

Despite these remarks, it can be said that the innovations adopted are not inappropriate. Indeed, in a different framework, they could work more effectively. In this respect, it must be observed that in recent years, the Maltese Parliament has implemented several major changes. Some of the 2021 constitutional amendments matched some of the recommendations expressed by different international community institutions. Other demands have not yet been fulfilled. Amongst others, the Venice Commission repeatedly demanded a reform of the Parliament that would enhance its independence from the executive. In this framework, it has been suggested to make MPs full-timers and to endow them with a parliamentary office and staff, thus making their controlling function more effective. From a different perspective, attention has been drawn to the fact that judgments of the Constitutional Court which find legal provisions unconstitutional should have *erga omnes* force in order to enhance the protection of the constitutional provisions and, above all, human rights.

This context strongly recalls the evaluation expressed with regard to the amendments enacted in 2020. Despite several shortcomings and serious concerns, the 2021 amendments represent a further step in the right direction. However, "more needs to be done to prevent abuse of power, fight corruption, and make the institutions more credible, forceful and accountable" (Borg T., 2020).

V. FURTHER READING

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Mexico

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I. INTRODUCTION

Liberalism has been challenged in recent years in Mexico. Under false pretenses of austerity and asceticism, the political establishment is often using its electoral mandates to destabilize liberal institutions. The judiciary has not been immune to such overreaching influence. On multiple occasions and fronts, the bench has been under attack by political elites, leading them to compromise the judiciary's independence, as well as its long-standing process of institutional renovation. Throughout Mexico's history, constitutional reform has served different purposes. In the years of authoritarian rule, it served as a mechanism to maintain the *status quo* and political control by the executive power over the other branches of government. However, as the country transitioned into a more democratic setting, the judiciary became subject to various reforms aiming to establish a more efficient court system and overcome the obstacles of a weak justice system that triumphed in the past.

Since the mid-80s, the Mexican Congress has enacted constitutional and legal reforms addressing various dilemmas pertaining to the administration of justice, including structural, institutional, and procedural challenges. The still historical 1994 judicial reform incorporated profound changes aiming to institutionally renovate the judiciary into an independent branch of government. This reform redefined the powers of the Supreme Court as a constitutional tribunal, proposed a novel judicial appointment process, and created a Judicial Council to assume the administrative responsibilities formerly exercised by the Supreme Court. It also became a guiding beacon for future constitutional reforms and came to be the landmark constitutional change enacted in the twentieth century. In the aftermath of one of the most consequential economic, political, and social crises experienced in the country, Congress adopted the 1994 reform with comprehensive political and social consensus. Over the years, its content and consequence have been the subject of substantial reflection by various sectors of society.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

On March 11, 2021, another constitutional reform adopted by Congress entered into force. This reform amended various provisions of the Constitution and legislation related to the federal judicial power. Unlike the 1994 reform, this constitutional amendment was adopted in the midst of political controversy and criticism. The political environment prevailing in the country matters to understand its scope. Since the beginning of 2018, Mexico's judiciary has been facing a growing challenge in terms of its credibility, its standing, and independence *vis-a-vis* the other powers of the state, as well as in its function to provide an institutional setting for the fair, impartial, and efficient resolution of controversies. Conventional wisdom suggests the judiciary has been sieged, and this reform confirms a pledge of allegiance of members of the judicial power with the politics and rhetoric of the current administration, as perceived in the language contained in the draft reform.

On February 12, 2020, President Andrés Manuel López Obrador presented in his morning press briefing a judicial reform package, alongside Arturo Zaldívar, the current Chief Justice of the Mexican Supreme, and members of the president's cabinet. The reform was introduced as the "most transcendent" and the "greatest" judicial reform since the 1994 reform. The presenters announced profound changes in the judiciary. What confers the quality of transcendence or grandeur to a constitutional reform? Was it premature to grant such values to constitutional amendments that have not been fully implemented and subject to impact assessments over time? These set of questions become pertinent considering that similar issues have been already addressed in other constitutional reforms adopted in 2008 and 2011, such as combating corruption and making the justice system accessible to society, among others.

The 2021 constitutional reform covers both functional and procedural areas. On the functional side, the reform seeks to establish a judicial career –with a gender perspective, limiting the opportunities for discretionary judicial appointments based on other factors than professional merit. It pursues the strengthening of judicial authority to combat corruption and nepotism inside the judicial power. It grants further authority to the Federal Judicial School over the training and professionalization of public officials, including those serving at the Federal Institute of Public Defense. The reform also intends to strengthen the Federal Institute of Public Defense for public defenders to become attorneys for the poor.

On the procedural side, and similarly to the 1994 reform, 2021 seeks to transform the Supreme Court into a constitutional tribunal. In the mid-nineties, former President Ernesto Zedillo (1994-2000) proposed the creation of two additional mechanisms to safeguard the Constitution: The constitutional controversies and actions of unconstitutionality. The former served as an arbiter of federalism over alleged

direct or indirect violations of the powers conferred in the Constitution to federal, local, and municipal authorities. The latter still reviews the conformity of federal and local laws with the Constitution. Since 1994, the Supreme Court has operated as a constitutional tribunal; nonetheless, the 2021 reform modified the scope of the constitutional controversies, limiting the possibility to challenge only direct violations of the Constitution. This change bears upon the opportunity for municipal authorities to challenge a violation of its powers under the Constitution. The reform also revises the Supreme Court's system to reach binding judgments (*jurisprudencia*), aiming to embrace the United States' model of judicial precedent. The reform redesigns the current organization and functioning of circuit courts across the country, and it creates new bodies to attain better quality and legal certainty when rendering judicial opinions.

Generally, the reform aims to combat corruption, nepotism, and impunity more effectively by establishing a *real* judicial career. It intends to transform the Federal Institute of Public Defense into an institution capable of defending the poor. In its legislative reasons or *exposición de motivos*, the Senate expresses a series of conjunctures, such as how federal judges do not always conduct themselves with ethics, professionalism, independence, and impartiality. "Many times, judges succumb to petty interests," the legislative reasons notes. The reform also describes how the judicial career system has not been successful in ensuring that "those who become judges be the most honest and qualified professionals." Judicial vacancies are filled up with relatives and friends, who often benefit from public resources rather than serve justice. It also underlines how corruption remains an entrenched practice in the judiciary. "These challenges have generated inequalities inside the judicial system, and it has made more difficult for the poor to be heard in a court of law," the Senate stated.

On June 7, 2021, the legal reform of the Organic Law of the Judicial Power of the Federation and the Judicial Career Law of the Federal Judicial Power entered into force, as well. These pieces of legislation implemented both the functional and the procedural portions of the March 2021 constitutional reform. However, these legal reforms were not uneventfully adopted. At the very end of the Decree that issued the Organic Law of the Judicial Power of the Federation, Congress included a last-minute clause (*Transitorio Décimo Tercero*). This clause extended the judicial term of the Chief Justice from four to six years, and it was adopted by Congress and entered into force in clear violation of Articles 97 and 100 of the Mexican Constitution, which provides otherwise. On July 15, 2021, and as a response to that last-minute political move, 197 members of the opposition challenged before the Supreme Court the constitutionality of the clause that extended the Chief Justice's judicial mandate. The implications of this daunting political move will be discussed in the following section.

Has the reform failed or succeeded? It is premature to provide an assessment just now. Both the constitutional and legal reforms entered into force in 2021, but their overall substance has been tarnished with criticism and disbelief based on the brazen political encroachment over the work and decision-making of the judiciary. Despite any possible contribution to the operation of the federal judicial power, the reforms have been delegitimized given the political turmoil under which they were presented and passed by Congress. Various sectors of society, in fact, are more concerned about the gradual erosion of judicial independence *vis-à-vis* leading political forces, than the contribution of this reform to ameliorate the challenges facing the justice system.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Mexican case offers an account of constitutional dismemberment—a political self-conscious effort to repudiate the essential characteristics of the Constitution and thwart its foundations. Mexico's 2021 judicial reform was subjected to concerns and considerable scrutiny for various reasons.

First, the erosion of judicial independence. On the day of the presentation of this reform, the Chief Justice appeared on the presidential daily press briefing to announce its content. It raised concerns about the public forum selected to announce a reform to the judiciary, a forum that has served to discredit and launch smear campaigns against those who shared different views of the country's state of affairs, including against some members of the judicial power.

Second, as opposed to the experience of 1994, this reform was drafted only by the Chief Justice and his legal team, without consulting his fellow justices or lower judges and magistrates—as asserted in a public interview. Experts questioned how a profound renovation of the judicial power could be achieved without including the opinions and views of those who are directly involved in the responsibility of administering justice in the country?

Third, as described above, the language contained in the reform package includes a series of perilous generalizations. On many accounts, it is undeniable that the weakness of justice institutions and alarmingly high impunity rates have led the way in corruption practices, and human rights abuses in the country. Nevertheless, the improper practices of a few should not lay the foundation for discrediting the entire federal judiciary. The reform pursues the establishment of a judicial career that protects judges against interference by external actors. However, those generalizations have not only perpetuated negative views against the judiciary, but also, have risked the personal integrity of judges and court officials at all levels. The lack of a national diagnosis of the issues subject to reform makes it more challenging for society to understand the rationale behind such statements, and the available data to support those generalizations.

Four, after hours of legislative debate, the Chamber of Deputies approved the 2021 judicial reform, including a clause that extended the judicial term of the Chief Justice for two additional years. Article 97 of the Mexican Constitution states that "every four years, the justices will elect the President of the Supreme Court from among its members, which may not be re-elected for the immediate subsequent period." Despite the strictness of the constitutional provision, the extension was adopted in clear violation of the Constitution. The pertinent part of this debate is that the clause was included and approved as part of a constitutional reform, which primarily was intended to combat and prevent corruption practices inside the judicial power. Even more serious is the fact that the clause was acquiesced by a public official –the Chief Justice, who is responsible to serve as guardian of the Constitution. On November 16, 2022, in a unanimous decision, the Supreme Court of Mexico declared the clause unconstitutional.

IV. LOOKING AHEAD

Mexico is undergoing a crisis of trust in its Supreme Court. The 2021 reform has generated frustration among various constituencies given the deliberate and conscious political interference in judicial affairs. The public perception of political allegiances at the expense of the independence of the judiciary has overshadowed the substance and legitimacy of this reform.

That situation is reflected in the latest survey conducted by Latinobarómetro in 2020. Citizens were asked: "Would you say you have a lot, some, a little or no trust in the Judicial Branch?" Only 3% of the respondents expressed to have "a lot¨ of trust in the judicial branch, followed by a 20.9 % who had "some"; 42.8% who had "little", and 31.5 % who had "no trust" in the Mexican judiciary. As mentioned earlier in this chapter, it is still premature to assess the impact of this reform on the work of the judiciary. Hence, there are two central questions that await Mexico in the context of constitutional reform: How to take back the Supreme Court from the current political control? And what will be the long-term consequence of not perceiving the judicial power as an independent, responsive, and politically legitimate institution?

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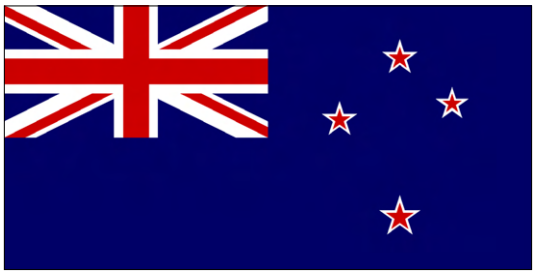
New Zealand



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I. INTRODUCTION

Political reform has not been a prominent feature of New Zealand's constitutional practice and discourse in 2021. A relatively conservative and incremental approach from the government and the ongoing need to respond to the global pandemic has perhaps hampered purposeful, forward-looking change. The exception to this has been efforts to improve Māori representation at the local government level. This development has been controversial politically, but it falls within a broader trend towards more effective political representation for a historically marginalized community.

The quiet political approach to constitutional change may be contrasted with an assertive approach from the senior judiciary towards developing New Zealand constitutional law. This propensity towards active development is most evident in two respects: (1) a willingness to afford deeper recognition to indigenous rights and interests, including through New Zealand's founding document Te Tiriti o Waitangi; and (2) the use of creative or strained interpretative techniques to better protect basic constitutional norms. The latter approach in particular has implications for the fraught balance between the judicial and political branches of government, and so has a structural reform dimension.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The contribution to the 2020 iteration of this publication noted that New Zealand's unwritten constitution makes it difficult to coherently analyze constitutional reform in conventional terms. Without repeating the detail of that previous account, change (or perhaps just as importantly, the prospect of change) is a constant feature of the New Zealand constitution. I suggested that often the best we can do is to seek to understand the reasons for and direction of change, which I termed 'constitutional momentum', and whether change is likely to be lasting, which I termed 'stickability'. This non-standard analytical approach is partly based on a discourse theory of constitutional change because constitutional norms are established and solidified through discourse,[1] but it is also an approach that calls for close attention to different approaches and behaviors as well as substantive amendments or formal reforms.

It is in engaging this sort of framework that reveals constitutional reform was initiated by the senior New Zealand judiciary in 2021. In two high-profile cases, a majority of the New Zealand Supreme Court adopted muscular interpretative presumptions in order to better give effect to basic constitutional values. The New Zealand courts do not have powers of invalidation with respect to legislation, so interpretative methods can be a key way of giving effect to, or protecting, basic legal and political norms. Changes in those interpretative methods point the way toward constitutional reform.

In *D v New Zealand Police*,[2] the appellant had been charged with and convicted of offenses related to the possession of child pornography. Between the time of the offenses and charges on one hand, and the conviction and sentence on the other, new legislation had come into force requiring the registration of offenders.[3] The key question before the Supreme Court was whether the registration requirement could be applied to the appellant retrospectively.

The legislation itself seemed to contemplate such retrospective effect. Explicit statutory wording indicated that the timing of the offense was not relevant to registration.[4] But there is a deeply embedded constitutional norm in New Zealand that resists the application of retrospective penalties on rule of law grounds. This norm is a feature of the common law, but it has also received statutory recognition in the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and sentencing legislation.[5] A majority of the Court placed significant weight on the muscular application of the principle of legality, which holds that the courts will presume a rights-consistent meaning if available. The strength of the presumption in the context of resisting retrospective penalties was such that the Court found it displaced the apparently clear statutory language. As a result, the appellant was not subject to the registration regime.

A similar approach was taken by the Court in *Fitzgerald v R*.[6] In this case, the appellant had been convicted of a low-level sexual assault after aggressively kissing a woman without her consent. A 'three strikes'

1 See Paul Rishworth, 'New Zealand' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011) 235 at 236-237; Philip Joseph and Gordon Walker, 'A Theory of Constitutional Change' (1987) 7 OJLS 155.

2 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2.

3 Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

4 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 9(1A).

5 New Zealand Bill of Rights Act 1990, s 25(g); Sentencing Act 2002, s 6.

6 *Fitzgerald v R* [2021] NZSC 131.

sentencing policy, set out in legislation,[7] required that the sentencing court apply the maximum sentence as this was the appellant's third strike. In this case, that meant a jail term of 7 years.

On appeal, it was accepted that the sentence was so disproportionality severe that it was in breach of the statutorily protected right not to be subject to torture or cruel treatment.[8] Again, however, the legislation's intended effect seemed abundantly clear: the three-strikes regime was expressly said to apply despite any other enactment. This time using the statutory presumption of rights-consistent interpretation in section 6 of the Bill of Rights, rather than the common law principle of legality, a majority of the Supreme Court held that the Bill of Rights could only be excluded if that legislation was mentioned specifically by name. The general words referring to other enactments, as were employed by the relevant legislation in this case, were not sufficient. The appellant's sentence was therefore overturned.

We can analyze the significance of these decisions in terms of substantive rights protection or structural terms. In terms of substantive rights protection, not much has really changed. Parliament acted swiftly to amend the registration regime so that it would apply to offenders in the appellant's position from *D v New Zealand Police*.[9] Further, the government has signaled that it will be repealing the three-strikes sentencing regime in any event. From this perspective, it seems clear that rights protection is still very much at the discretion of the political branches of government. If the courts were attempting reform on rights issues with these decisions, then that reform has failed.

However, the potential structural change represented by these decisions is significant. Such muscular use of interpretative presumptions is novel in New Zealand.[10] A strong affinity for Parliamentary sovereignty, and therefore a degree of deference towards legislative intent, has been the controlling idea in rights cases for some time.[11] An awkward but ingrained separation between the legislative (creative) function of Parliament and the interpretative (applicative) function of the courts has predominated. The strong, assertive use of interpretive presumptions is therefore a change in constitutional practice, and is arguably of significant moment. It weakens any commitment by the courts to an absolutist interpretation of Parliamentary sovereignty, with the role of legislative authority becoming more contextual. It also suggests room for recognition that the courts are engaged in a (limited) form of legislation when interpreting constitutional issues. This rebalancing goes to the heart of conventional understandings of the New Zealand constitution.

The judiciary has also taken a lead on indigenous rights issues. The New Zealand state was founded as a British colony on the basis of a treaty-based relationship with iwi Māori (indigenous political communities) that guaranteed political autonomy to Māori and a regime of co-government. Those guarantees in the Treaty of Waitangi/Te Tiriti o Waitangi have historically been ignored. Reinvigoration of Te Tiriti o Waitangi and increasing recognition of tikanga (Māori customary law) has been at the forefront of judicial consideration of indigenous rights.

In terms of recognition of tikanga, 2021 saw clarification from the High Court that tikanga exists and evolves independently of the common law and statute.[12] This is an important finding politically, as it helps ensure iwi Māori retain control over their tikanga and it does not become colonized by the dominant western system of law. Further, there have been clear assertions that tikanga can, in some contexts, be a form of law in its own right.[13] It does not depend on its interaction with western law for legal recognition (as tests for customary law might). Reinvigoration of Te Tiriti o Waitangi has come in the form of a softening of the traditional rule that the Te Tiriti does not have direct legal effect in its own right.[14] Much like with other basic constitutional norms, statutory provisions will generally be given a broad and generous interpretation when touching on Te Tiriti matters. Finally, it has also been found that Crown entities can owe duties of good faith to Māori.[15]

These developments are important changes in their own right, but also demonstrate the direction of travel on indigenous rights issues. There has been a trend towards greater judicial willingness to address such matters directly, rather than approaching them with the deference usually reserved for political matters. tikanga is part of the context in which statute and common law take effect, and Te Tiriti continues to be elevated to constitutional importance.

These developments lead neatly to the most important aspect of deliberate political reform of constitutional matters in 2021 — improving the prospects for Māori representation in local government. The Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 took important steps toward dedicated electoral representation for Māori in respect of local authorities (city councils and similar bodies).

The Local Electoral Act 2001 had provided for over 20 years that local authorities could establish Māori wards or constituencies subject to holding binding referenda. However, such decisions were subject to elector-demanded polls with binding effect for 6 years. In practice, every attempt by local authorities to establish Māori wards or constituencies was overturned by these binding polls.

The Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 removed the provisions related to elector-demanded polls on these matters, effectively empowering local authorities to establish Māori wards and constituencies on their own motion. The amendment was made urgently so as to take effect before local authority elections were held in 2022. Further changes are anticipated to formalize Māori representation at the local government level.

The amendment is politically controversial. It is colloquially seen as contrary to the 'one person, one vote' principle that underpins New Zealand's commitment to representative democracy, and criticism based on this line of reasoning carries a degree of political currency. However, there are other constitutional norms that lean in favor of such a change. Māori rights and interests have always challenged crude, majoritarian accounts of democracy and modern interpretations of Te Tiriti have established expectations of co-governance arrangements

7 Sentencing Act 2002, s 86D.
8 New Zealand Bill of Rights Act 1990, s 9.
9 Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021.
10 Compare, for example, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (UKHL).
11 See *R v Hansen* [2007] 3 NZLR 1, [2007] NZSC 7.
12 *Ngawaka v Ngāti Rehua-NgĐtiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291; *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 2101.
13 *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127; *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654.
14 *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127.
15 *Stafford v Attorney-General* [2021] NZHC 335.

between Māori and non-Māori. The amendment also removes the differentiated treatment between the establishment of Māori versus general wards and constituencies and supports obligations under the Local Government Act 2002 for local authorities to provide opportunities for Māori to contribute to decision-making.

For those reasons, the changes are likely to have a degree of stickability despite sitting awkwardly with democratic norms. The momentum is towards rather than away from more meaningful representation for Māori is a clear trend in New Zealand constitutional reform.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In summary, 2021 saw reform in the form of a rebalancing of judicial and political authority in the context of protecting basic constitutional norms, clearer recognition of indigenous rights in legal thinking, and improvements in Māori electoral representation. But how do we understand these changes as instances of constitutional reform?

As I have previously claimed, New Zealand's unwritten constitution makes it difficult to apply a traditional constitutionalism lens. The amendment/dismemberment distinction is difficult to apply because there is no differentiated, canonical set of constitutional norms which form a clear baseline. Potentially everything is open to incremental or radical change, there being no formal instances of unamendability. There is no constitutional court, or indeed any other form of constitutional control distinct from ordinary legal and political processes. Instead, changes need to be understood in their informal context and analyzed in terms of trends rather than 'moments'. Even informed, expert comments will invite contestation.

When seeking to understand the identified changes as reform, perhaps it is convenient to start with the fact that aspects of these changes are certainly politically controversial. The muscular use of interpretative presumptions by the judicial may be interpreted as eroding an absolutist version of Parliamentary sovereignty, and as politicians exercise considerable legal authority through Parliament they are likely to be resistant to such changes.[16] Similarly, dedicated electoral representation for Māori is controversial among political conservatives, despite the evidence of under-representation of Māori interests. As is usually the case, minority rights are a hard-won phenomenon.

It is partly the politically controversial nature of these changes that assists in identifying them as instances of reform. The changes set themselves against one kind of accepted narrative based on prioritizing one set of constitutional norms. Instead, the changes privilege another set of norms and help to construct or reinforce alternative narratives. But this does not mean that the changes are revolutionary or even radical. They follow clear trendlines in the constitutional discourse and practice of our young nation.

For instance, New Zealand is not immune to the international community's growth in support for human rights protection that began in earnest in the Twentieth Century. Further, absolutist interpretations of Parliamentary sovereignty have been on the wane. The manner and form thesis appears to be ascendent, and political developments such as indigenous rights recognition and international trade arrangements erode Parliamentary sovereignty from the outside. The use of assertive interpretative presumptions needs to be seen in this broader context. *D v New Zealand Police* and *Fitzgerald* are following a recognized trend towards more substantive constitutionalism.

The local government amendments have already been placed in a legal and political context above, as they cannot even be described independently of that context. Effective Māori representation is a trend that will continue despite its implications for overly simplistic accounts of democracy.

That leaves us to consider the increasing judicial recognition of Māori rights and interests, particularly based on Te Tiriti and tikanga. This is a quiet revolution, led by the courts and yet to attract particular attention in political circles or popular imagination. But the implications of such recognition are of such significance that the label 'reform' is more than apt. The Western (largely British) hegemony that has dominated New Zealand's legal system is being directly challenged. Much remains to be worked out — the judiciary and their supporters are playing a long game. But make no mistake: these first steps are not made tentatively but with the clear purpose of striking out in a new direction. This is how constitutional reform can take shape in an unwritten constitution.

IV. LOOKING AHEAD

My contribution to the 2020 edition of this publication noted increasing the maximum Parliamentary term from 3 to 4 years and lowering the voting age from 18 to 16 years as potential areas for future reform. Neither issue has really progressed. The campaign to lower the voting age has brought an action for a declaration that the current ineligibility of 16 and 17-year-olds to vote in both the High Court and Court of Appeal. The claim was dismissed on both occasions. Leave to appeal to the Supreme Court has been granted, and we wait to see if the claim is any more successful in that forum.

That said, a formal review of New Zealand's electoral laws by an expert panel has very recently been announced.[17] Both issues are likely to receive a meaningful airing in that review. Altering other aspects of New Zealand's 'mixed-member proportional' voting system will also be investigated.

The perennial issues of adopting a written constitution and/or a republican form of government have likewise not advanced significantly in the last year. New Zealand is scheduled to hold a national election in 2023, and that may provide an opportunity to revisit the popularity of such reforms.

Numerous legal and political challenges continue in respect of the New Zealand government's COVID-19 response. While many of the formal legal challenges on Bill of Rights grounds or by way of judicial review (in the administrative law sense) have been unsuccessful, some of the challenges have prompted introspection on the nature of emergency powers.[18] The New Zealand Law Commission has opened a

16 See, for example, Chris Penk, 'Labour's Bad judgment on Three Strikes Appeal' <https://www.national.org.nz/labours-bad-judgment-on-three-strikes-repeal> (New Zealand National Party, 21 November 2021) accessed 5 May 2022.

17 See Kris Faafoi 'Independent panel appointed to review electoral law' <https://www.beehive.govt.nz/release/independent-panel-appointed-review-electoral-law> (New Zealand Government, 24 May 2022) accessed 31 May 2022.

18 For example, *Borrowdale v Director-General of Health* [2021] NZCA 520; *Four Midwives v Minister of COVID-19 Response* [2021] NZHC 3064; *Te Pou Matakana Limited v Attorney-General* [2021] NZHC 3319; *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012; *GF v Minister of COVID-19 Response* [2021] NZHC 2526; *Bolton v The Chief Exec-*

project examining the use of emergency powers, both in retrospect and prospect, led by one of the country's leading public lawyers.[19] There is a strong possibility of reform being recommended, and as is the case with emergency powers any change will likely have broader implications for our understanding of executive government.

V. FURTHER READING

Andrew Geddis and Sarah Jocelyn, 'Is the NZ Supreme Court Aligning the NZBORA with the HRA?' (*UK Constitutional Law*, 1 December 2021) <https://ukconstitutionallaw.org/2021/12/01/andrew-geddis-and-sarah-jocelyn-is-the-nz-supreme-court-aligning-the-nzbora-with-the-hra/> accessed 5 May 2022.

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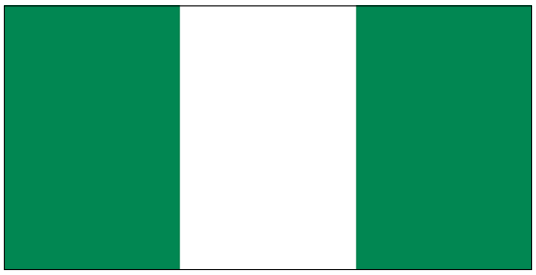
utive of the Ministry of Business, Innovation and Employment [2021] NZHC 2897.

19 New Zealand Law Commission, 'Emergency Powers for Pandemics and Other Threats' <https://www.lawcom.govt.nz/our-projects/emergency-powers-pandemics-and-other-threats> (9 April 2021) accessed 5 May 2022.

Nigeria



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I. INTRODUCTION

The Nigerian Constitution has two amendment rules: a general rule (requiring a two-thirds legislative majority threshold), and a special rule with a higher threshold (four-fifths majority). The former applies to all amendments except three: amending the amendment rules, the fundamental rights provisions, and the rule governing creation of new states.[1] Given these stringent amendment rules, the Nigerian Constitution may be considered overly rigid. Although scholars have questioned whether amendment rules actually matter,[2] (or the extent to which they matter[3]), given the number of veto players in the amendment of the Nigerian Constitution, its amendment rules seem to matter. In the 8th National Assembly, for example, 33 amendments were sponsored, of which 17 were passed and transmitted to the State Houses of Assembly for ratification. All but 12 of which were rejected or allowed to lapse. Of the dozen ratified, only 5 received presidential assent. That is a 75 percent failure rate. In our 2020 Nigeria report in this Review, we explained the impact of veto players on the amendment of the Constitution and why successful amendments are rarely consequential.

As there is little civil society pressure on the veto players, the constitutional amendment process is essentially a "top-down' elite constitutionalism.[4] To be sure, at the preparatory stage of the constitutional amendment process, the National Assembly initiates popular participation by inviting memoranda from the public and holding public hearings around the country (May-June 2021), although the penetration is not necessarily deep.[5] At any rate, adoption of proposed amendments by the National Assembly is by parliamentary negotiation and vote, which are generally not acutely sensitive to the preferences of the civil society. Beyond the National Assembly, there is neither public input in ratification of amendments by the state legislatures nor in presidential assent or veto. The consequence of the elite constitutionalism is there is no visible political cost for the high attrition rate of proposed constitutional amendments.[6]

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Included on the agenda for constitution review by the present 9th National Assembly were the following:

a) The federal structure and power devolution.
b) Public revenue, fiscal federalism, and revenue distribution.
c) State police.
d) Gender equity/increased participation of women and vulnerable groups in governance.
e) Local government administration and autonomy.
f) Judicial reform.
g) Socio-economic rights.
h) Equal rights for residents who are non-natives where they reside.
i) Removal of immunity for the President and Governors.

Each of the foregoing is a perennial subject in the constitutional review programmes of the 4th-9th National Assembly. Yet, success has eluded every attempt in spite of the strong popular demand for constitutional change. This failure testifies to the low influence popular

1 "Section 9 (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 House 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 sections 48 and 49 of this Constitution."

2 Tom Ginsburg and James Melton, 'Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty' (2015) 13 Int'l J. Const. L.686.

3 George Tsebelis, 'Constitutional Rigidity Matters: A Veto Players Approach' (2022) 52 British Journal of Political Science 280.

4 Todd A. Eisenstadt, A, Carl LeVan and Tofigh Maboudi, *Constituents before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (Cambridge, 2017) ch. 4.

5 See Idayat Hassan, 'Nigeria's Constitutional Review: The Continuing Quest for a Legitimate *Grundnorm*' <https://constitutionnet.org/news/nigerias-constitutional-review-continuing-quest-legitimate-grundnorm> accessed 19 May 2022

6 See, e.g., Adejumo Kabir, 'Groups and individuals opposed to the current review of the 1999 Constitution by the National Assembly say it is a waste of resources and time' Premium Times <https://www.premiumtimesng.com/features-and-interviews/469419-analysis-constitution-review-more-opposition-criticism-trail-process.html> accessed 19 May 2022

demand has on the amendment process and the power of the veto players. Below is a review of the first three, and easily the most important, subjects on the above list:

A. REFEDERALIZATION

At the top of the public political agenda is decentralization of the Nigerian federation. Although there is far from a consensus on the desired reform, there is no question that the present highly centralized system is way off the optimal point of center-periphery balance in federalism. The Nigerian federation began officially with the colonial Constitution of 1954.[7] The Independence Constitution of 1960 and the Republican Constitution largely preserved, and even improved on, the federal structure of the 1954 Constitution.[8] The military coup of January 1966 overthrew the 1963 Constitution and began the process of the centralization of the Nigerian federal system. By 1979, when civilian rule was restored, this centralized federalism was largely preserved by the new constitution.[9] The present military-imposed Constitution of 1999 largely replicated the 1979 Constitution. Ironically, "one factor that accounts for the eventual democratizing effects of the 1999 constitution is that it is almost identical to the 1979 constitution, which though crafted under the watchful eye of an outgoing military regime, embraced deliberative important qualities."[10]

The makers of the 1979 Constitution considered the centralized federal system normal and even desirable[11] to the extent that the Constitution Drafting Committee did away with the Concurrent Legislative List entirely. Although the Constituent Assembly restored the List, it was a severely truncated list.[12] The result is the present ballooned Exclusive Legislative List. Table A tracks the depletion of the Concurrent Legislative List from the 1954-1963 model to a skinny 1979-1999 model.

7 The preceding colonial constitution of 1951 was quasi-federal.
8 See Eme O. Awa, *Federal Government in Nigeria* (University of California Press, 1964).
9 Sam Egite Oyovbaire, *Federalism in Nigeria: A Study in the Development of the Nigerian State* (St. Martin's Press, 1984).
10 Todd A. Eisenstadt, A, Carl LeVan and Tofigh Maboudi, *Constituents before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (Cambridge, 2017) 108.
11 L Adele Jinadu, 'The Constitutional Situation of the Nigerian State' (1982) 12 Publius 155.
12 B.O. Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (Sweet & Maxwell, 1983).

TABLE A. THE SHRINKING CONCURRENT POWERS

(E = Exclusive power; C = Concurrent power; R = Residual power (reserved to the states))

Subject	1954 Const.	1960 Const.	1963 Const.	1979 Const.	1999 Const.
Administration of estates	C[13]	E	E	R	R
Antiquities/Archives	C	C	C	C	C
Arms and ammunition		C	C	E	E
Bankruptcy and insolvency	C	C	C	E	E
Census	C[14]	C	C	E	E
Chemical services	C	C	C	-	-
Commercial and industrial monopolies, combines and trusts	C	C	C	E	E
Control of the voluntary movement of persons between territories	C	C	C	-	-
Drugs and poisons	C	C	C	E	E
Electricity and gas	C[15]	C	C	C/E	C/E[16]
Estate tax		C	C	R	R
Evidence	C[17]	C	C	E	E
Exhibition of cinematograph films	C[18]	C	C	C	C
Fingerprints, identification, and criminal records	C	C	C	E	E

13 Removed to the Exclusive Legislative List by S.I. 1957/1530
14 Removed from to the Exclusive Legislative List by S.I. 1957/1530
15 Electricity removed from the Exclusive Legislative List by S.I. 1957/1530. Gas moved to the Exclusive Legislative List by S.I. 1957/1530
16 Electricity is a concurrent subject while [natural] gas is on the Exclusive Legislative List.
17 Removed from the Exclusive List by S.I. 1958/429
18 Removed to the Exclusive Legislative List by S.I. 1957/1530.

TABLE A. THE SHRINKING CONCURRENT POWERS (CONT.)

(E = Exclusive power; C = Concurrent power; R = Residual power (reserved to the states))

Subject	1954 Const.	1960 Const.	1963 Const.	1979 Const.	1999 Const.
Higher education	C	C	C	E	E
Income tax other than income and profit of companies		R	R	R	R
Industrial development	C	C	C	C	C
Insurance	C[19]	C	C	E	E
Labour and trade unions	C	C	C	E	E
Legal and medical professions	C	C	C	E	E
National monuments	C	C	C	E	E
National parks	C	C	C	E	E
Prisons and other institutions for the treatment of offenders	C	C	C	E	E
Promotion of tourist traffic	C	C	C	E	E
The maintaining and securing of public safety and public order	C	C	C	E	E
Quarantine	C	C	C	E	E
Registration of Business names	C	C	C	E	E
Scientific and industrial research	C	C	C	C	C
Service and execution with a state of civil and criminal process, judgments, decrees, orders, and other decisions of any court of law		C	C	E	E
Statistics	C	C	C	C	C
Traffic on federal roads	C	C	C	E	E
Tribunals of inquiry with respect to all or any of the matters mentioned elsewhere in this list	C[20]	E	E	-	-
Trigonometrical, cadastral, and topographical surveys	C	C	C	E	C
Trustees	C[21]				
Waterpower	C	C	C	C	C
Incidental or supplementary matters	C	C	C	E	E

19 Removed to the Exclusive Legislative List by S.I. 1957/1530

20 Subsequently removed as a power incidental/supplemental to the concurrent subjects.

21 Removed to the Exclusive Legislative List by S.I. 1957/1530.

B. FISCAL FEDERALISM

At par with greater decentralization of the federation is the demand for a fairer distribution of public revenues.[22] The most important revenue sources, including mineral revenues, corporate taxes, customs and excise, and VAT, are collected by the central government and distributed between it, the 36 states and 774 local government areas, but with the central government keeping half of the revenues (except VAT).[23] The present revenue distribution is unsatisfactory to the petroleum-producing states in particular and to all states generally, whose preference is to have a greater share of the revenue for states vis a vis the central government. Under the 1960 and 1963 Constitutions, petroleum-producing states kept half the revenue from that source.

C. DECENTRALIZED POLICE

Section 214 of the Constitution creates one central police for a country of roughly 1 million square kilometres and a population exceeding 200 million:

> 1. There shall be a police force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section no other police force shall be established for the Federation or any part thereof.
>
> 2. Subject to the provisions of this Constitution:
>
> a) the Nigeria Police Force shall be organised and administered in accordance with such provisions as may be prescribed by an Act of the National Assembly;
> b) the members of the Nigeria Police Force shall have such powers and duties as may be conferred upon them by law;
> c) the National Assembly may make provisions for branches of the Nigeria Police Force forming part of the armed forces of the Federation or for the protection of harbours, waterways, railways, and airfields.

Insecurity amid generalized violence is easily the highest concern of Nigerians today. There is a practical consensus that a centralized police force is no longer fit for purpose. Even without an amendment of section 214, states are creating their own local security agencies and vigilantes to address the exponential rise in violent crimes and sectarian attacks and reprisals. The central police have a long history. Initially during colonial rule, policing was the responsibility of local authorities.[24] The central Nigeria Police Force was created in 1930 to coexist with the various local polices. Notwithstanding, "police, including bureaux of intelligence and investigation" was placed on the Exclusive Legislative List (Item 30) in the 1954 Constitution. Preparatory to the 1960 Constitution, the matter of police was extensively discussed at the 1957 Constitutional Conference. Below is the summary of the deliberation in the record of the Conference:

Item 30. Police, including bureaux of intelligence and investigation. The Conference discussed this item at length and reached agreement on the following recommendations which took account of the many views expressed.

THE CONFERENCE

1. Agreed that no police force in Nigeria should, so far as its use and operational control were concerned, at any time come under the control of political parties. To this end, for example, at the stage when the use and operational control of the Nigeria Police ceased to be vested in the Governor-General acting in his discretion, the appointments of the Inspector-General of Nigeria Police and of the Regional Commissioners of Police, whether or not they were at that time subordinate to the Inspector-General, should be strictly safeguarded by special constitutional provision.
2. Recognized that the Federal and Regional Governments would always have a concurrent responsibility for law and order throughout the Federation and that after independence the ultimate responsibility for this, at present vested in the [United Kingdom] Secretary of State [for the Colonies], would be inherited by the Federal Government.
3. Expressed the view that it would always be necessary to have a Federal Police Force and a Federal Police organization to discharge the Federal Government's responsibility throughout Nigeria, to coordinate the training and equipment of all Police Forces in the Federation and to be responsible for the Federal C.I.D.
4. Took note of the professional view that the Nigeria Police could not for administrative reasons be regionalized during the next three years.
5. Agreed that during the transition period every effort should be made to strengthen the contingents of the Nigeria Police stationed in the Regions, so that they could become the nucleus of Regional Forces.
6. Recognized the value and importance of local polices free from political control and agreed that every help be given by the Inspector-General of Police towards their development.
7. Agreed that, before his constitutional responsibilities for Nigeria came to an end, the Secretary of State, after consultation with all the Nigerian Governments, should reach a decision whether or not the Regional Governments should set up their own forces.
8. Agreed that, in the meantime, Item 30 of the Exclusive Legislative List should be deleted and an item on the following lines should be inserted in the Concurrent Legislative List: Police, provided that the Legislature of any Region shall not enact any law in pursuance of this item unless the Secretary of State has, after consultation with all the Nigerian Governments, decided that Regions should set up their own police forces.[25]

Accordingly, Item 30 was expunged from the Exclusive Legislative

22 Alice Valdesalici and Francesco Palermo (eds), *Comparing Fiscal Federalism* (Brill Nijhoff, 2018).

23 See Dele Babalola, The Political Economy of Federalism in Nigeria (Palmgrave Macmillan, 2019); Chiichii Ashwe, Fiscal Federalism in Nigeria (Centre for Research on Federal Financial Relations, 1986).

24 Native Authority Ordinance, No. 4 of 1916; Protectorate Laws (Enforcement) Ordinance, No. 15 of 1924

25 *Report by the Nigeria Constitutional Conference held in London in May and June, 1957* (Cmnd. 207, 1957) 19-20.

List of the 1954 Constitution.[26] However, at the resumed Constitutional Conference of 1958, there was an apparent volte face because of an adverse review of the excesses of the existing local police.[27] According to its official report,

> The Conference discussed at length the arrangements for the police and reached an agreement to recommend that there should be constitutional provision for a *single force under an Inspector-General responsible to the Federal Government*. The bulk of this force would continue to be stationed in the Regions, each Regional contingent being under the control of a Commissioner and being recruited by the Commissioner, under the supervision of the Inspector-General, as far as practicable from within the Region. It was agreed that as far as possible constables would be posted to an area where they understood the language spoken.[28]

The result of the Conference decision was section 98 of the 1960 Constitution:[29]

> Establishment of Nigeria Police Force
>
> 98. (1) There shall be a police force for Nigeria, which shall be styled the Nigeria Police Force.
>
> (2) Subject to the provisions of this Constitution, the Nigeria Police Force shall be organised and administered in accordance with such provision as may be made in that behalf by Parliament.
>
> (3) Subject to the provisions of this Constitution, the members of the Nigeria Police Force shall have such powers and duties as may be conferred upon them by any law in force in Nigeria.
>
> (4) Subject to the provisions of this section, *no police forces other than the Nigeria Police Force shall be established for Nigeria or any part thereof.*[30]
>
> (5) Parliament may make provision for police forces forming part of the armed forces of the Crown or for the protection of harbours, waterways, railways and airfields.
>
> (6) Parliament may make provision for the maintenance by any local authority within the Federal territory of a police force for employment within the Federal territory.
>
> (7) Nothing in this section shall prevent the legislature of a Region from making provision for the maintenance by any native authority or local-government authority established for a province or any part of a province of a police force for employment within that province.

As the terms of the section state, although "no police forces other than the Nigeria Police Force shall be established for Nigeria or any part thereof," any existing or future local authority police forces remained lawful (s. 98(7)). Subsequently, however, during the military dictatorship, these local police forces were dissolved and abolished, thereby concentrating policing in the Nigeria Police Force for the first time. This arrangement was constitutionalized by the 1979 Constitution and section 214 of the 1999 Constitution (above).

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The ongoing constitutional amendment programme of the 9th National Assembly is the fifth revision of the 1999 Constitution. However, only the revision by the 6th (2007-2011) and the 8th (2015-2019) National Assembly produced successful amendments to the Constitution. The amendments passed by the 7th National Assembly though ratified by state legislatures were vetoed by the President, which testifies to his strong veto-player status. The present 9th National Assembly passed 68 bills amending various provisions of the Constitutions. These amendments are yet to be transmitted to the state legislatures for ratification.

Together, the 68 bills cover about two dozen subjects ranging from federal, fiscal, electoral, legislative, judicial, and local government reforms to human and women's rights, education, food security and sundry subjects. The bills passed have not attracted significant public satisfaction, yet this is the phase where public input and participation is greatest. The sheer number of the amendment bills passed by this National Assembly may increase the chances of a substantial number being ratified by the state legislatures. As we pointed out earlier, in the 8th National Assembly two-thirds of the amendments passed were ratified by the state legislatures whereas the President assented to about half of the ratified amendments. As we showed in our 2020 report, the President is without doubt the strongest veto player. Although he cannot initiate an amendment (that being the exclusive function of the National Assembly), he appears so far to exercise little restraint in blocking amendments to the Constitution. This is remarkable given that the Constitution does not expressly create any role for the President in its amendment. The role was acquired thanks to a highly legalistic judicial reasoning (discussed in our 2020 report).

The three veto players — a bicameral National Assembly, unicameral state legislatures, and the President — aside, there is little exogenous control over the constitutional amendment process. There has been almost no judicial intervention and the better view is that the Constitution did not intend to create a significant role for the courts in the process. That said, given that Nigerians are highly litigious, it may not be entirely farfetched for a judicial doctrine of unconstitutional constitutional amendment to creep into local judicial doctrine sooner than later.

IV. LOOKING AHEAD

The next general elections will be in February 2023. A new president will be elected (the incumbent is in his second and final term) as well as the entire National Assembly and all the 36 state legislatures. In effect, all the veto players in constitutional amendment will be replaced. A particular challenge this creates is the high turnover of the National Assembly in every election since 1999.[31] As a matter of fact, already, 58

26 S.I. 1957/1530.

27 *Report of the Commission appointed to Enquire into the Fears of Minorities and the Means of Allaying Them (Cmnd. 505, 1958)* 90-94.

28 *Report by the Resumed Nigeria Constitutional Conference held in London in September and October, 1958* (Cmnd. 569, 1958) 9-10 [emphasis supplied]

29 Same as section 105 of the 1963 Constitution.

30 Emphasis supplied.

31 See Joseph Yinka Fashagba and Chiedo Nwankwor, 'Legislative Turnover in a New Democracy: An Insight from The Nigerian National Assembly (1999-2019)' (2020) 20 Studia Politica: Romanian Political Science Review 549; Richard Amaechi Onuigbo and Okechukwu Innocent Eme, 'Legislative Turnover in the National Assembly: A Study of the South – East Zone, 1999-2015' (2015) 15 Global

of the 109 senators will not be returning to the Senate after the elections because they failed to secure the nomination of their parties, retired, or chose not to seek re-election.[32] The post-election retention rate averages just 30 percent, as Table B shows.

TABLE B. TURNOVER OF MEMBERSHIP OF THE NATIONAL ASSEMBLY

Election	Senate (n = 109)		House of Representatives (n = 360)	
	No. re-elected	%	No. re-elected	%
2003	35	32	108	30
2007	27	24.7	110	30
2011	35	32	103	28.6
2015	41	37.6	135	37.5
2019	39	35.8	137	38.

An immediate consequence of the high turnover of membership is the low retention of experienced legislators, which in turn diminishes institutional memory and capacity. Because most of the constitutional amendment agenda of one National Assembly is carried over to the next, the drain of experienced members entails relearning by a new National Assembly and a lack of consistency in populating the agenda. It is not surprising that there is a high failure rate of constitutional amendment proposals in the National Assembly. Thus, in the 8th National Assembly, consequential amendments, for example, on decentralization of the police and the Correctional Services, single term for the President and Governors, appointment of a minister from the Federal Capital Territory, and abrogation of immunity for the President and Governors, did not get sufficient votes for passage. The same pattern is observed in the 9th National Assembly.

Another challenge characterizing constitutional amendment is the paucity of consequential amendments. The extensive veto players in the process almost certainly ensures that consequential amendment proposals have almost no chance of being passed by the National Assembly, let alone ratified by state legislatures or receive presidential assent. This is remarkable given that there is strong popular demand for a wholesale revision of the Constitution or even for convoking a constituent assembly or constitutional conference to write a new constitution. This demand predates the 1999 Constitution and is unlikely to wane any time soon, although the longer the present Constitution survives, the more likely the citizens and interest groups will learn to live with it. It already holds the title of Nigeria's longest-surviving post-independence constitution.

Journal of Human-Social Science and Political Science 17 < https://globaljournals.org/GJHSS_Volume15/2-Legislative-Turnover-in-the-National.pdf> accessed 28 June 2022.

32 'At least 58 senators exiting as NASS braces for another high turnover in 2023' Premium Times < https://www.premiumtimesng.com/news/headlines/539568-at-least-58-senators-exiting-as-nass-braces-for-another-high-turnover-in-2023.html> accessed 28 June 2022.

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Paraguay

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I. INTRODUCTION

Reporting on constitutional reform in Paraguay can be quite a challenge. Partial reforms to the text of the Constitution barely take place in this country. Throughout its independent history, which began in 1811, Paraguay has had six different constitutions and only three formal constitutional amendments. That is, the country has had more constitutions than partial reforms to them.

Under the current Constitution of 1992, only one formal amendment has taken place. In 2011, a constitutional referendum approved an amendment granting Paraguayans living abroad the right to vote. Other than this amendment, no other formal reform has taken place under the current Constitution.

Previous amendments took place in 1977, allowing for the reelection of the President without term limits under the Constitution of 1967, and in 1856, when a law allowed the President's son to run for office (among other reforms). Perhaps the nature of these reforms contributed to creating a culture of resistance toward constitutional amendments, which are perceived as attempts by those in power to change the rules of the game in their favor.

Be that as it may, unlike formal changes, informal modifications have taken place in several forms. Perhaps some of the most visible changes have taken place through the jurisprudence of the Supreme Court and its Constitutional Chamber. Under the Paraguayan model of concentrated constitutional review, both the Supreme Court acting with its nine members, as well as its Constitutional Chamber (comprised of three of the court's members), can exercise, exclusively, the power of judicial review of legislation and other regulations.

Beginning in 1999 (although perhaps even earlier), the Supreme Court began issuing a series of rulings that, in the long run, would have the effect of bringing about important transformations to the Constitution.[1] Some of these decisions were made in response to serious political crises. Others simply modified the plain meaning of the text via interpretation, in a different array of cases of uneven institutional significance.

Aware of its enormous power, the Court soon began to issue more controversial rulings that seemed to benefit their own members in different ways, and that had the effect of producing constitutional transformations.[2] Perhaps the most important group of informal changes operated via Supreme Court decisions that affected its own members had to do with the duration of their terms in office.

In this report, I will cover two decisions from 2021 that, in my view, consolidated a process of constitutional dismemberment that started a couple of decades ago. The process began when the Justices of the highest court started issuing rulings that held that their terms in office lasted until they reached the age of seventy-five, without the necessity of going through the confirmation processes required for all other judges that do not belong to the Supreme Court.

Although this strand of decisions is not new, the two decisions that will be covered by this report are special in at least two ways. First, they were probably propelled by a decision from the Inter-American Court. Second, the way the Court proceeded in 2021 was less prone to observe certain important legal forms that were followed in the past. This signals that, despite public opposition, the Court is determined to maintain its position on this issue, thus consolidating the process of constitutional transformation. Furthermore, the Court may have opened the gates for introducing other major modifications to the Paraguayan system of judicial review.

While the Court's main underlying principle for defending these decisions was the independence of the judiciary, these rulings have wide-ranging effects on the political system as a whole, which may not be positive, and they do not necessarily deliver a more independent justice.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

A. THE LAST FORMAL PROPOSAL: A FAILED ATTEMPT

No proposed formal constitutional reforms have been put forward in the past year. The last formal constitutional reform attempt took place in 2017 when then-President Horacio Cartes tried to modify the Constitution to allow his re-election for a second term. Both he and his political allies were determined to use the less stringent of the two constitutional procedures for modifying the Constitution, to secure the majority that would guarantee the success of his attempt.[3]

However, this strategy provoked a fierce reaction from some parties and movements of the opposition (even within his own political party),

1 D Moreno, 'Veinticinco años de evolución de la justicia constitucional', in AA VV, *Comentario a la Constitución* (Corte Suprema de Justicia, Asunción, 2018).

2 To provide just a couple of examples, some of these decisions allowed the Court's members to hold positions such as dean of the major national law school, something prohibited by article 254 of the Constitution; while another decision regarded a Justice's own pension plan, and so on.

3 Paraguay has two distinct articles that regulate different procedures, with vary-

which held that a more burdensome procedure was required to modify the clause prohibiting the re-election of the President. After violent protests and turmoil that included the burning of the building of Congress, as well as the assault of the main opposition party's headquarters and the assassination of a young activist at the hands of the police, President Cartes backed down from his attempt.

Thus, Paraguay's historical reluctance to formal constitutional change could have been enhanced by this recent traumatic political event. Constitutional 'amendment' seems like a bad word for some sectors of public opinion, and it stands as a symbol not of institutional improvement or enhanced democratic participation and rights, but as a means for using the Constitution to increase politicians' own power.

B. INFORMAL CONSTITUTIONAL CHANGE THROUGH JUDICIAL INTERPRETATIONS: THE CASES INVOLVING THE TENURE OF MEMBERS OF THE SUPREME COURT

However, as stated in the introduction, a very significant constitutional transformation via judicial interpretation did take place in October of 2021. Even though it is not the first time that Justices of the highest court make this move, on this occasion the rulings had some distinctive features that show that, despite the controversy, the decisions generate among the public, the Court is determined to have the final say on this matter, even at the cost of reshaping the meaning of the Constitution.

Before discussing the Court's rulings, some background on the two cases is required. The Court, comprised of nine justices, had recently undergone a process of renewal of its members. Five of them had been recently appointed to the office.

A couple of months before the rulings, the Inter-American Court on Human Rights issued a decision regarding two former Paraguayan Supreme Court Justices that had been removed from office through the impeachment process established in the Constitution.[4] The Inter-American Court held that Paraguay had acted in breach of due process rights guaranteed under the American Convention on Human Rights. It made several references to judicial independence, and finally determined the responsibility of Paraguay for violation of the Convention.

What the Inter-American Court did not carefully consider, however, was Paraguay's long history of legitimate public contestation regarding the interpretation of the Constitution's provisions regulating the duration of the terms of office that the Justices of the highest court were supposed to serve.

Since the early 2000s, the members of the Court had favored an interpretation that claimed that once appointed, Justices were to remain in office until the age of seventy-five, unless removed through an impeachment process, as stated in article 261 of the Constitution. This provision, however, is better understood as regulating both the *manner* in which Justices of the highest court are to be removed (ie, impeachment through Congress, as opposed to lower judges, which can be removed through a special constitutional organ, the Jury for the Prosecution of Magistrates), as well as *the maximum* duration of their appointment (seventy-five years of age).

Besides, it is clear that this provision should be read jointly with articles 252 of the Constitution and 8 of its transitory provisions, which state that *all magistrates* (ie, judges), are appointed for five-year terms and that they shall only remain in office until the age of seventy-five *if* they are subsequently confirmed twice in office.[5]

One of the main arguments used by the Justices to disregard this provision is that the rule governing their situation on this specific subject is different than the one regulated in article 252. The latter is applicable only to lower judges, according to the Court, whereas Justices –which, unlike ordinary judges, receive the title of 'Ministers' by the Constitution– have their own special regime established by article 261, which regulates the means of the Ministers' 'removal' from office (through impeachment) and their tenure until the age of seventy-five (without specifying that two prior confirmations are required).

However, this reading of the Constitution is deeply problematic. There is no question that Justices, despite receiving the title of 'Ministers', are themselves judges ('magistrates'), or else, they would not have certain basic jurisdictional guarantees and prohibitions established by the Constitution for all judges, which is absurd.[6] Furthermore, it is also clear that article 261 is meant to establish that Justices can only be removed from office through impeachment, not through the Jury for the Prosecution of Magistrates, as is the case with lower judges. This special regulation, however, by no means modifies the requirement of a double confirmation process after the nomination, which is mandated by article 252 (both for lower judges *and* Ministers of the court).[7]

Furthermore, the drafters of the Constitution of 1992 indeed held judicial independence as a fundamental value that had to be consolidated for the first time in Paraguayan constitutional history. Hence, various constitutional provisions were directed at making judicial independence as robust as possible. But it must *also* be kept in mind that the whole structure and system of the constitution was designed to fragment power (that is, to avoid its concentration in the hands of a few), and to limit the duration of terms in office for those who held the highest positions in any of the three branches of government (and even in those institutions that do not fall within any of the three branches).

ing degrees of difficulty, for introducing formal changes to the Constitution (articles 289 and 290).

4 IACtHR, 'Case of Ríos Avalos et al. v. Paraguay,' Judgment of August 19, 2021.

5 Confirmations of lower court judges are made by the Supreme Court itself, while its Justices should be confirmed by the same process though which they were appointed, which involves the Senate and the President (some would add the Council of the Judiciary).

6 The distinction is also difficult to sustain once one looks at the transitory clauses, where the term 'magistrate' clearly applies to 'ministers' as well.

7 J Seall-Sasiain, 'Cuestionable inamovilidad permanente de los Ministros de la Corte y limitación al Consejo de la Magistratura' in *Anuario Iberoamericano de Justicia Constitucional* (Centro de Estudios Políticos y Constitucionales, 2007). Having said this, it must be granted that, as a matter of interpretation, a case could be made in favor of the Court's view on the issue (though this does not excuse the form in which the cases were solved.) The truth is that the Constitution is not precisely a model in rigorous drafting. See D Moreno, 'La inamovilidad de los Ministros de la Corte Suprema de Justicia', in *Comentario a la Constitución* (Corte Suprema de Justicia, 2012) 366-8. However, the better view is the one that clearly distinguishes between the process of removal of Justices and the duration of the five-year term for which they are initially appointed, from the requirements needed in order to acquire tenure until the age of seventy-five. Besides, it is significant to point that, during the nomination process, some of the Justices publicly favored the five-year term interpretation. Furthermore, the Senate resolution that nominates Justices normally states that appointments are made for five-year terms.

C. THE RULINGS AND ITS CONSEQUENCES FOR CONSTITUTIONAL CHANGE

In this context, the five newly appointed Justices saw in the Inter-American Court's recently adopted decision an opportunity to claim an aura of legitimacy that the international court arguably conferred (even though the Inter-American Court did not directly address the matter as to how to interpret the Constitution of Paraguay on this point).

The five new members of the Court thus decided to challenge the constitutionality of a law that establishes, in line with the Constitution, that the Justices are to serve until the age of seventy-five, *but only if confirmed twice according to constitutional procedures*.[8]

In the past, different Court Members at different moments had already benefitted from decisions issued by the Court exempting them from the confirmation processes and granting them direct access to a near-life tenure (either through the Supreme Court or its Constitutional Chamber). This time, the Court acted through its Constitutional Chamber, comprised of only three Justices.[9] In total, two resolutions were issued on the same day, each declaring unconstitutional the relevant article of the challenged law, adding that all five plaintiffs were automatically to remain in office until the age of seventy-five.[10]

In issuing these rulings, the Court violated a recently approved law that, in the name of transparency, obliges its sessions regarding judicial review of statutes and other regulations to be publicly transmitted.[11] Quite strikingly, the transmission was omitted in these cases, which raised suspicions and eventually led to public condemnation. Furthermore, the swiftness with which the cases were resolved also raised concerns as to the Court's impartiality when deciding cases that involve its own members' interests. (The effective resolution of a claim of constitutionality raised by any ordinary citizen can take several years to be solved.)

Finally, these decisions are also different from previous similar cases in more procedural and technical aspects, of which I shall refer here to only two.[12] First, judicial review in Paraguay requires, as a justiciability requirement, a 'standing' in the case. In previous cases, the Justices' mandates were about to expire, and hence, plaintiffs clearly had standing, something that was totally lacking in this case. As mentioned before, all Justices were relatively new appointments, and therefore, there was no actual threat to their offices that could give rise to the justiciability requirement of 'standing'. Hence, the case had to be dismissed, but the decisions paid no attention whatsoever to this issue.

Second, rulings that declare norms unconstitutional in Paraguay have *inter partes* effects (they bind only the parties to the case). This issue was thoroughly and carefully debated in the Constitutional Convention of 1992. The idea was to avoid giving judges too much power.[13] However, based on a somewhat flexible interpretation of the Constitution, the Supreme Court, acting with its nine members, had a history of declaring some norms unconstitutional with *erga omnes* effects in some exceptional cases. Feeble as the argument may have been in these few cases, the truth is that there was at least some (remote) textual grounding for the Supreme Court *when acting with its nine members*, to proceed in this manner.[14]

In the two cases decided in 2021, it was the three Justices of the Constitutional Chamber (not the Supreme Court acting with its full nine members) that issued the rulings with *erga omnes* effects (presumably with the intention of avoiding any future challenges to the court's decision). As opposed to the Supreme Court acting with its nine members, the Constitutional Chamber is expressly and unmistakably granted the power to issue *inter partes* rulings only.

If this trend consolidates, it means that, without any textual basis whatsoever, and contradicting the design of the system of judicial review established by the Constitution, a parallel, but important transformation, could have taken place regarding the effects of rulings issued by the Constitutional Chamber, as well as a general relaxation of the 'standing' requirement.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

To recap, there may not only be one informal reform to the Constitution in the period covered by this report (the suppression of the two confirmation processes required before Justices acquire tenure until de age of seventy-five), but other related reforms that add up to form a bundle or cluster of reforms (ie, the fact that the Constitutional Chamber can issue rulings with *erga omnes* effects, despite contradicting the text of the Constitution, or the fact that in some cases, parties can question before the Court the constitutionality of a statute regardless of whether or not they have an actual 'standing' in the case).

In my view, these transformations can be described as a case of constitutional 'dismemberment.'[15] These changes reconfigure some of the cornerstones of the Paraguayan Constitution, its republican form of government, and its system of judicial review, which is one of the most sensible parts of the Constitution.

Justices of the highest court, which originally had to go through two confirmation processes, can now attain tenure nearly for life immediately after their designation. Furthermore, the cases under study suggest that the Constitutional Chamber of the Supreme Court, without much doctrinal elaboration and directly contradicting the text of the Constitution and the framers' intention, can issue rulings with *erga omnes* effects. Finally, the standing requirement has been relaxed to a point that could transform the Paraguayan model of judicial review into a different model from the one devised by the Constitution.

8 Article 19, Law 609/95.

9 Had the Supreme Court acted through its nine members, the Court should have been integrated by lower judges, as required by law in cases when the Court's original members cannot issue a ruling, eg., because they are the plaintiffs in the proceedings, as happened to be the case.

10 Ac y Sent No 671 [2021], CSJ (Sala Constitucional); Ac y Sent 672 [2021], CSJ (Sala Constitucional). Both of them were signed by two of the Justices who had already been serving prior to the newer justices. As to the third vote, two of the newest members 'switched places' signing the opinion in which they were not acting as plaintiff, thus adding further doubts as to the impartiality of the Court.

11 Law 6299/2019.

12 Another one may be the fact that the Court, contrary to its practice, did not make any mention whatsoever to the Public Attorney's opinion, which is issued pursuant to the procedural laws regulating challenges to the constitutionality of statutes.

13 D Moreno, 'Una defensa de los efectos inter partes de la declaración de inconstitucionalidad', *Anuario Paraguayo de Derecho Constitucional* (La Ley Paraguaya, 2021).

14 The Supreme Court had relied on Article 137, *in fine*, in combination with articles 132 and 259.5, in support of its *erga omnes* decisions, although this doctrine remains controversial.

15 See R Albert, *Constitutional Amendments. Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) ch 2.

Of course, one could argue that judicial independence is better served by Justices that hold office (almost) for life. However, in the Paraguayan context, this empirical claim is highly contestable. The truth is that Paraguay has a very poor record when it comes to international rankings on judicial independence (despite its Justices having served without confirmation processes for over two decades).[16]

On a different but related note, Justices of the Supreme Court do not perform a merely technical law-applying function, which might be a more accurate description of the role that lower judges are supposed to play. In exercising judicial review within a concentrated system, Justices of the Supreme Court perform an important political task that has enormous consequences for the political system as a whole. Having nine unelected judges sitting for decades in the Court –even long after the representatives who appointed them are no longer in office– only strengthens the democratic objection to judicial review. Even more so when it is those same Justices who got to determine the length of their terms in office, and in the process, erased constitutional restrictions on their powers by relaxing the standing requirement and issuing *erga omnes* decisions.

Furthermore, the fact that there was a ruling related to the matter by the Inter-American Court that sparked the decisions discussed in this report, far from granting legitimacy to the Supreme Court, only reinforces suspicions of judicial corporatism among judges from the international sphere and those of the domestic domain.

It is true that previously, all but one of the Justices that under the Constitution of 1992 joined the Court managed to obtain self-interested resolutions with identical effects. But with the last two decisions discussed in this report, the constitutional dismemberment seems to have been consolidated. One congressman even lobbied in favor of enacting a law embracing the court's interpretation.

This last point is significant, as Congress historically defied what is considered as a usurpation of its constitutional duty to appoint new Justices (or confirm those already serving) every five years (and perhaps even the role of the Council for the Judiciary). This time, however, Congress did not formally react against the decisions. Hence, it seems as if the process of dismemberment that began a couple of decades ago may have been consolidated in 2021.

IV. LOOKING AHEAD

In light of what has been described in this report, a formal constitutional reform setting a reasonable term limit for Justices of the Supreme Court (five to ten years, at the most), could perhaps solve the problem discussed. It is unlikely, though, that such a reform will be taking place anytime soon. This is so despite the fact that the Constitution of Paraguay will be turning thirty years old in 2022, an anniversary that many have used to discuss possible reforms to the Constitution.

Be that as it may, aside from the specific problems discussed in this report, several challenges lie ahead in this jurisdiction.

First, different problems of interpretation and application of the Constitution have risen over the past thirty years in different contexts. Some of them may require constitutional modifications in order to be settled properly. Others, however, can be dealt with by a better constitutional practice on behalf of political actors; as well as through the Supreme Court acting as a settler of contested questions by providing legally sound interpretations to them; and finally, by the academia through carefully thought-through proposals and impartial reasons in favor of certain interpretations and against less plausible ones.

As noted above, Paraguay has historically been reluctant to formally amend its Constitution. Perhaps there are valid reasons for this reluctance. However, such a culture may also prove problematic. For instance, a constitutional reform in response to the Court's interpretation in the cases discussed in this report could have solved the problem decades ago, limiting the Justices' terms in office for a reasonable period of time, and avoiding unnecessary political friction and even the condemnation by an international tribunal. So even if there are well-founded fears against reforming the Constitution, these fears must be counter-balanced with the consequences of constitutional inertia.

However, a culture more open to amendment and reform would pose a different kind of challenge. Rules for changing the Constitution of 1992 are problematic. As stated before, the Constitution establishes two distinct tracks for introducing formal reforms. The so-called 'reform procedure' requires more demanding majorities, and convening a national constitutional convention. Besides, it does not impose a limit as to what the convention can or cannot do, which reinforces fears against reforms. The 'amendment procedure,' in turn, turns out to be very narrow in scope, severely limiting the possibility of meaningful constitutional change.[17]

To sum up, considering reforms to the rules of constitutional change might be one of the biggest challenges lying ahead for this jurisdiction.

16 See, eg, reports published by the World Economic Forum (https://www.weforum.org/); or The World Justice Project (https://worldjusticeproject.org/).

17 L Lezcano Claude, *Derecho Constitucional. Parte Orgánica* (Imprenta Salesiana, 2018) 669-672.

Peru

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I. INTRODUCTION

In Peru, the proposed, failed, and successful Constitutional reforms (or Constitutional reform laws) of the past year have been particularly related to issues regarding the Executive or Legislative Branches, the interaction between Congress and Government or mechanisms to allow or hinder future Constitutional reforms.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS[1]

As stated before, there have been different proposals to reform the Peruvian Constitution. Some of them have been passed; other relevant ones have been rejected or are still pending decisions from Congress.

1. SUCCESSFUL CONSTITUTIONAL REFORMS (IN CHRONOLOGICAL ORDER)

A) Enabling the double employment or remunerated public position of specialized medical personnel, in cases of health emergency

On February 10, 2021, Act No. 31122 was issued, which approved the following constitutional amendment:

> "Article 40. The law regulates the entry into the Administrative Career and the rights, duties and responsibilities of public servants. Government functionaries who hold political or entrusted positions are not included in such career. No public official or public servant may hold more than one remunerated public job or position, with the exception of one more for a teaching position [...]
> By law, with the approving vote of more than half of the legal number of Congress members, the exception of the preceding paragraph is temporarily extended to medical specialists or health care personnel, in the event of a sanitary emergency [...]"

The motive for this reform was that the Constitution banned public workers from engaging in more than one simultaneous paid position. Since public health personnel were under that general rule, this hindered the provision of medical care during the COVID-19 pandemic due to the need to provide services for more than one health institution.

As a result, several health centers reported not meeting the human resources necessary to cope with the COVID-19 outbreak. In order to prevent a recurrence of such a scenario, an amendment to Article 40 of the Constitution was approved to allow public sector health personnel to work in more than one job in the event of a sanitary emergency.

B) Establishing a temporary residence regime for former Presidents of the Republic

On July 16, 2021, Act. No. 31280 was enacted in order to approve the amendment of Article 112 of the Constitution:

> "Article 112. The Presidential Term of Office is a five-year mandate; there is no immediate reelection [...]
> At the end of the Presidential Term, the former President of the Republic, or the person who has assumed said office, shall remain within the national territory for a minimum duration of one year, unless an authorization to leave is granted by Congress with more than half of the legal number of its members, bearing in consideration the objective reasons for which the request was made"

The Committee in charge in Congress (the Constitution and Regulations Committee) supported this Constitutional change as shown in the Report dated December 12, 2020. According to said Report, this reform was deemed as necessary given that, in the past 30 years, former Presidents of the Republic of Peru –and even those in office– have faced judicial proceedings related to acts of corruption, in which there have been fugitive cases to foreign countries that have required extradition efforts.

Therefore, Congress considered it reasonable to establish a temporary residence regime for up to one year for former Presidents in order to ensure the proper conditions for them to be held accountable for their actions in the duties performed as President of the Republic and, thus, avoid any type of obstruction of justice.

1 The underlined text represents the modified version of the cited Article.

C) Strengthening the anti-corruption measures with the withdrawal of bank secrecy and tax confidentiality

Act. N° 31305 was passed on July 23, 2021, whereby the following reform was approved:

> "Article 2.- Every person has the right:
> [...]
> 5. To request, without expression of cause, the information sought and to receive it from any public entity, within the legal term, assuming the cost incurred on the request. Exceptions are made for information concerning personal privacy and that which is explicitly excluded by law or for reasons of national security.
> Every person has the right to bank secrecy and tax confidentiality. The withdrawal of such secrecy can only be granted upon petition:
> 1. From the judge.
> 2. From the Public Prosecutor of the Nation.
> 3. From an inquiry committee of the Congress in accordance with the law and so long as they refer to the case under investigation.
> 4. From the General Comptroller of the Republic regarding officials and public servants who manage funds of the State or agencies supported by it, at the three levels of government, within the framework of a supervisory proceeding.
> 5. Of the Superintendent of Banking, Insurance and Private Pension Fund Administrators for the specific purposes of financial intelligence.
> The lifting of these fundamental rights is carried out in accordance with the law, which includes a well-founded decision under the responsibility of its holder"

Before the reform, Article 2.5 of the Constitution allowed the disclosure of bank secrecy and tax confidentiality solely upon the request of a Judge, the Attorney General and an inquiry committee of Congress. Act No. 31305 granted such power to two additional entities: The General Comptroller of the Republic and the Superintendent of Banking, Insurance and Private Pension Fund Administrators.

It is worth noting the roles of these agencies. The main duty of the General Comptroller's Office is to supervise the lawful execution of the State Budget, while the Superintendence of Banking, Insurance and Private Pension Fund Administrators oversee companies that handle money deposits from the public.

Hence, the Constitution and Regulations Committee of Congress considered that the engagement of these two entities would improve the effectiveness of the investigation against money laundering and the financing of terrorism.

D) Reinforcing the protection of the Cultural Heritage of the Nation

Act. No. 31304 was adopted on July 23, 2021, seeking to improve the safeguard of cultural heritage:

> "Article 21.- Archaeological sites and remains, monumental structures, places, bibliographic and filed documents, artistic pieces and testimonies of historical value, explicitly declared as cultural assets, and provisionally those that are presumed as such, are considered cultural heritage of the Nation, regardless of their condition of private or public property. They are protected by the State.
> The State has ownership over undiscovered cultural assets located in the subsoil and underwater areas of the national territory. Said ownership is inalienable and indefeasible.
> All assets that are part of the cultural heritage of the Nation, whether public or private, are subject to the public interest. The State promotes private contribution to the conservation, restoration, exhibition and diffusion of the cultural patrimony, as well as its restitution to the State when it has been illegally transferred out of the national territory, in accordance with the law"

In its Report of February 4, 2021, the Constitution and Regulations Committee noted that the protection provided by Article 21 of the Constitution (prior to the reform) did not cover cultural patrimony that had not yet been discovered. In other words, cultural sites that had not been properly identified or declared were left unprotected. As a result, for example, thousands of intangible areas in the Lima Region were encroached upon, which endangered undiscovered archaeological remains.

Then, the Commission concluded that such sites (i.e., those of cultural importance not yet found or declared) required further constitutional protection.

E) Interpreting Articles 132 and 133 of the Constitution in regard to the Vote of Confidence

Although in this case the Constitution was not reformed *per se*, it is worth mentioning as it interprets the scope of the Vote of Confidence. A controversy arose in 2020 between the Executive Branch and the Legislative Branch as a result of the Vote of Confidence requested by the government for the Draft Bill to strengthen transparency, publicity and citizen participation in the election of the Constitutional Court Justices. The Legislative Branch dismissed said Vote of Confidence (not by voting its denial, but rather continuing with the election of the Constitutional Court Justices). Subsequently, the Congress was dissolved by the then President of the Republic, considering it was the second denial of the Vote of Confidence (being the prior one in 2017[2]), condition enabled by the Constitution (Article 134[3]).

In order to avoid that situation in the future, the Congress issued Act No. 31355 on October 21, 2021. This law regulated the use of the Vote of Confidence as set in the last paragraph of Article 132 and in Article 133 of Constitution and it limited the grounds in which a Vote of Confidence can be submitted:

2 The former Peruvian government started in July 2016 and lasted until July 2021. In the beginning, the President was Pedro Pablo Kuczynski, and the Vote of Confidence presented by his former Prime Minister was denied in September 2017. In March 2018, the then President resigned and the then Vice-president, Martin Vizcarra, took office.

3 "The President of the Republic has the power to dissolve Congress if it has censured or denied its confidence to two Cabinets [...]".

> "On the implementation of the Vote of Confidence regulated in the last paragraph of Article 132 and in Article 133 of the Peruvian Constitution.
> The attribution of a Minister and the President of the Council of Ministers on behalf of the Council, to raise a Vote of Confidence in accordance with the last paragraph of Article 132 and Article 133 of the Peruvian Constitution, pertains to matters within the competence of the Executive Branch directly related to the fulfillment of its general government policy, not including those related to the approval or non-approval of constitutional reforms or those that affect the procedures and exclusive and excluding competencies of the Congress of the Republic or other constitutionally autonomous entities".

Furthermore, the transitory dispositions of the Act also established that an explicit denial of the Vote of Confidence is required (rejecting any implicit interpretation)[4].

Thus, the aforementioned Act prevents the Ministers or the President of the Council of Ministers (officers of the Executive Branch) from resorting to the Vote of Confidence when it concerns the approval or non-approval of constitutional reform proposals or other topics related to the functions of Congress or other constitutionally autonomous entities.

The Executive Branch considers this Act to be unconstitutional and has presented a Draft Bill[5] to reinstate the prior text of the Constitution.

F) Limiting the scope of referendums for Constitutional Reforms

As the aforementioned legal reform, another Act was issued to interpret another article of the Constitution, in spite of being at a legal level. It was Act No. 31399.

Among the experts, the vast majority considered that the only way to amend the Constitution was according to the procedure detailed in Article 206 of the Constitution[6], which requires: *(i)* a vote in Congress with qualified majority in two consecutive sessions; or, *(ii)* the approval of an absolute majority of Congress followed by a referendum. However, others argued that Article 32 of the Constitution could enable a direct Constitutional reform (without participation of Congress) by calling for a referendum to enquire about a total Constitutional change.

In order to avoid any possibility of the latter interpretation being applied, the Act was passed to change the current Citizen Participation and Control Law (Act No. 26300) and stated (Article 40):

> "Topics and regulations in the second paragraph of Article 32 of the Constitution cannot be subjected to referendum, nor those that are not conducted according to the procedure established in the first paragraph of the article 206 of the Constitution".

With that regulation, an interpretation of the Article 206 of the Constitution has been legally institutionalized in the Peruvian legal framework.

2. PROPOSED AND FAILED CONSTITUTIONAL REFORMS

Besides the reforms that were successfully approved (those that were proper Constitutional reforms and the ones that implied a direct Constitutional interpretation), there were others that were proposed and some that failed.

A) Total reform of the Constitution

The most important ones have to do with Draft Bills[7] to install a Constituent Assembly. The current constitutional framework allows amending the Constitution as long as the procedure set forth in Article 206 is duly executed. Under that Article, a Constituent Assembly may not be appointed or elected for the enactment of a new Constitution. Therefore, to enable this procedure a prior Constitutional modification was required[8].

For such purpose, the Draft Bills seek to reform the Constitution in order to introduce the Constituent Assembly as the competent entity for the overall amendment of the Constitution. As such, the Congress would be in charge of the partial reform of the Constitution, while the Constituent Assembly would be entrusted with the total reform of the Constitution.

By the end of 2021, it was pending the issuance of the corresponding opinion by the Constitution and Regulations Committee. Nevertheless, during 2022, the issue was directly faced, due to a draft bill presented by the Executive Branch[9]. The initiative was rejected by the vast majority of the Committee. It was never debated or voted in the plenary session of Congress.

B) Presidential responsibility and balancing political control

The debate was centered in the interaction between the Executive and Legislative Branches, and the passed reforms have focused on enhancing the political control that Congress has over the government.

There has also been some Draft Bills that have not been discussed. Initiatives taken forward by the Executive Branch or the ones that sought for a certain balance in the political control that the Congress has over the government were not subjected to debate. Likewise, proposals to eliminate the possibility to vacate the President of the Republic due to permanent moral incapacity[10] (in a procedure similar to an impeachment) or to reduce Congress functions to censor Ministers or Cabinets[11] have not been prioritized in the agenda.

4 In 2019, it was considered that continuing with the election of Constitutional Court Justices (despite the draft law presented by the government to modify its procedure) was an implicit way to deny the Vote of Confidence.

5 Draft Bill No. 01704/2021-PE.

6 "*Any initiative of constitutional reform must be adopted by Congress through an absolute majority of the legal number of its members, and must be ratified by a referendum. The referendum may be exempted when the consent of Congress is obtained in two successive regular sessions, with a favorable vote of greater than two-thirds of the legal number of Congress representatives in each case […]*".

7 Draft Bills No. 00174/2021-CR, 00274/2021-CR, 01016/2021-CR and 01744/2021-CR.

8 Although it was not thoroughly discussed, the debate remains whether only original constituent power can establish a new procedure to reform the Constitution. Although several countries in the region (Chile, Colombia, Bolivia and Venezuela, as examples) have considered a Constitutional Assembly a mechanism that could be incorporated through a Constitutional reform.

9 Draft Bill No. 01840/2021-PE.

10 Since its establishment (in the XIX century), only three Presidents had been removed from office invoking this reason. In the recent years (since 2016), there have been six attempts to vacate Presidents due to alleged permanent moral incapacity (two during the current Administration). One of them was successful in November 2020.

11 The Executive Branch presented the Draft Bill No 00841/2021-CR. There were also initiatives presented by Congress members (Draft Bills No 00095/2021-CR, 00421/2021-CR, 00474/2021-PE and 01364/2021-CR).

In this context, there was an initial debate (with draft bills in that regard[12]) on whether an alternative would be to add to the reasons for which a President can be accused while in office[13]. Nevertheless, the debate lost momentum due to some criticism for potential political use due to the ongoing criminal investigation towards the President for alleged participation in acts of corruption. The development of those circumstances could either hinder or promote the restart of the aforementioned debate in Congress (especially with a growing movement to call for new general elections for Executive and Legislative Branches[14]).

12 Draft Bills No 00918/2021-CR, 01154/2021-CR, 01204/2021-CR and 01249/2021-CR.

13 In article 117 of the current Constitution, the President can only be accused while in office for: treason against the country, preventing elections, dissolving Congress for different reasons than the ones allowed in the Constitution, or preventing its sessions or functioning, as well as the ones of the electoral management bodies.

14 67% of the population believes that the most convenient solution for the country is to call general elections and to elect an new President and a new Congress. Source: IEP Opinion's Report – May 2022 (Available in Spanish here: https://iep.org.pe/wp-content/uploads/2022/05/Informe-OP-Mayo-2022-Primera-parte.pdf).

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. ANALYZING THE CONSTITUTIONAL REFORMS

In general, the Constitutional Reforms passed[15] can be qualified as amendments, since their scopes were designed as such in accordance to the substantive aspects of the Constitution. However, as we will further explain in regard to the judicial constitutional control, the Constitutional Court ruled against them, as the Justices considered that the procedure followed to approve them was inadequate. Relating to their purpose, the ones that are proper Constitutional Reforms can be considered reformative amendments.

15 The ones properly considered as Constitutional reforms, described in Sections II, II.1, 01-04.

Topic	Amendment or Dismemberment?	Purpose	Description
Double employment or remunerated public position of specialized medical personnel, in cases of a sanitary emergency	Amendment	Reformative	It incorporates an exception to the general prohibition of double employment or remunerated public position.
Temporary residence regime for former Presidents of the Republic	Amendment	Reformative	As a response to the current investigations against most former Presidents, this reform was approved to change the regulation that did not establish any restrictions on leaving the country after their term of office.
Withdrawal of bank secrecy and tax confidentiality	Amendment	Reformative	With the reform, new authorities (aside from prosecutors, the Judicial Power or a commission of inquiry in Congress) were deemed competent to access information product of the withdrawal of bank secrecy and tax confidentiality, in order to contribute to their functions.
Protection of the Cultural Heritage of the Nation	Amendment	Reformative	A protection was extended to cultural patrimony still remaining to be discovered, identified or declared in such condition.

There are not explicit unamendable rules in the Constitution. Nevertheless, the Constitutional Court has established that certain topics are

implicit substantial limits to the reform power since its modification would imply "a destruction of the Constitution" (probably with a similar understanding as "dismemberments"). The following principles constitute such limits: dignity, people's sovereignty, the democratic rule of law, the republican government and the political regime and State form[16]. It is possible to consider that those topics have not changed significantly with the Constitutional changes approved during the year 2021.

As previously mentioned, most of the Constitutional Reforms passed were considered not to have followed the procedure required for their approval[17], due to the fact that Congress created a special term to debate Constitutional reforms. That was deemed against the Constitution[18]; hence, the modifications that were approved during said special term were repealed. Consequently, the constitutional text currently in force is the one prior to the reform[19].

<table>
<tr><th>Act which approved the reform</th><th>Was said Act ruled as unconstitutional?</th></tr>
<tr><td>Act No. 31122</td><td>No, it was not.</td></tr>
<tr><td>Act No. 31280</td><td rowspan="3">Yes, they were.

The Constitutional Court declared these reforms as unconstitutional by Sentence No. 918/2021, dated November 11th, 2021.</td></tr>
<tr><td>Act No. 31305</td></tr>
<tr><td>Act No. 31304</td></tr>
</table>

16 Sentence Nº 014-2002-AI/TC, 76, ii.

17 The votes from above three quarters of the members of Congress in two ordinary consecutive sessions are necessary for a Constitutional Reform to be approved without referendum. As explained, this is one of the procedures established in article 206 of the Constitution.

18 Sentence No. 918/2021 (Available in Spanish here: https://tc.gob.pe/jurisprudencia/2021/00019-2021-AI.pdf).

19 Peruvian System of Legal Information (SPIJ, by its acronym in Spanish).

2. CONSTITUTIONAL ARTICLES INTERPRETED BY LAWS[20]

Despite not being strictly modifications of the Constitution, the two Acts described as interpretations of the Peruvian Constitution can be qualified as either amendments or dismemberments. The first one (related to the Vote of Confidence) is certainly a dismemberment; however, the second one could spark a debate on whether it should be classified as a dismemberment or an amendment.

Topic	Amendment or Dismemberment?	Type	Analysis
Interpreting the Vote of Confidence	Dismemberment	Structural	The Vote of Confidence has been an important element in the interaction between the Executive and Legislative Branches, due to the application of the regulation by the Government and Congress, especially in recent years. Limiting its scope (only certain topics and with an explicit rejection) could affect the balance between the two Branches, in the context of the governance system (presidential with elements of parliamentarism). The connection between the interpretation of the Vote of Confidence and the current governance system ("political regime") in Peru could create tensions with the implicit substantial limits established by the Peruvian Constitutional Court (quoted before).
Referendums for Constitutional Reforms	A) Dismemberment B) Amendment	A) Fundamental rights B) Elaborative	The authors have different opinions on this matter. One of us[21] believes that this act could be a dismemberment since there is a core restriction of the intrinsic content of the right to political participation (which includes the possibility to call a referendum). The other author[22] is of the opinion that it could be qualified as an amendment which expressly clarifies that the procedure to modify the Constitution requires the mandatory presence of the Congress.

None of the aforementioned Acts have been ruled as unconstitutional, though there is one with an ongoing process before the Constitutional Court.

20 The ones that approved an interpretation of the Constitution described in II, II.1, 05-06.
21 Ana C. Neyra Zegarra.
22 Carol E. Venegas Ruiz.

Act which approved the reform	Was said Act ruled as unconstitutional?
Interpretation of the Vote of Confidence - Act No. 31355	No, it was not. The Constitutional Court rejected the complaint to declare this Act unconstitutional by Sentence No. 6/2022, dated February 3rd, 2022. According to the current regulation[23], five votes are required to declare an Act as unconstitutional. Four out of six Justices[24] considered the Act constitutional.
Referendums for Constitutional Reforms - Act No. 31399	On February 7th, 2022, the Executive Branch filed a complaint requiring the Constitutional Court to declare this reform unconstitutional, which is still ongoing under File No. 00001-2022-PI/TC.

The Constitutional Court in Peru has played a representative role, rather than an enlightened or counter-majoritarian one in the protection of rights (as the final instance in specific constitutional mechanisms), following the prevailing view of the majority of the Peruvian population in a more conservative agenda[25].

In constitutional control, prior to 2021, the Court was assigned the role of arbitrator in the political crisis provoked by the tension between the Executive and Legislative Branches[26].

Recently, in May 2022, there has been a new appointment of six Justices. The election process raised some critics due to the lack of a complete screening of candidates and their political connections. It remains to be seen which will be the new role of the Constitutional Court in the following years.

23 Constitutional Procedural Code (current version approved in July 2021): article 107.

24 The Constitucional Court has seven members, but one had recently passed away and a new one was not still appointed.

25 Being still highly unpopular for the majority of the population, the Court has repeatedly denied to rule that the civil registry should recognize same sex marriages celebrated in countries that allow them (Peru does not enable the union of people of the same gender). Sentences No. 676/2020, 172/2022 and 191/2022 are examples of those rulings. Moreover, they denied free distribution of emergency contraception for women in 2009 (File No. 02005-2009-AA/TC), but there is still a pending complaint in order to establish whether distribution can continue.

26 With the Vote of Confidence in 2018 (File No. 0006-2018-P1/TC), and then when Congress was dissolved (File No. 0006-2019-CC/TC). When the vacancy of the President was requested, the Court did not analyze the matter since the vacancy had already been declared by Congress (Sentence No. 778/2020).

IV. LOOKING AHEAD

During 2021 and the first half of 2022, as for the Constitutional Reform efforts underway, the Draft Bills that tend to spark the most controversies are those related to the State Branches (Executive, Legislative and Judicial) and the interactions with one another, or those that suggest the enactment of a new Constitution.

Some of the Constitutional reform initiatives awaiting approval and that will be or are object of debate in the country are the following:

1. STRUCTURE OF CONGRESS: BICAMERALISM AND REELECTION OF CONGRESS MEMBERS[27]

With the current Constitution, the Peruvian Congress has only one chamber and immediate reelection of Congress members is forbidden.

In the history of the country, the majority of Constitutions (eight out of twelve) have established a bicameral system. Currently, the Congress is debating the possibility of changing its structure to one conformed by a Senate and a Chamber of Deputies. This proposal has already been approved by the Constitution and Regulations Committee of Congress stating that the role of the Senate, as a revision Chamber, would improve the quality of the laws being issued. Moreover, this would also alleviate tensions between the Executive and the Legislative Branches, as it would avoid the frequent observations by the Executive Branch on draft bills, which could turn in preventing conflict between them.

Prohibition of immediate reelection was not established in the original text of the Constitution. It was incorporated after a referendum called upon in the year 2018, in which bicameralism was also rejected by the majority of the population.

The possibility of changing the structure of Congress and for Congress members to be immediately reelected, although unpopular, is a current pending subject in the parliamentary agenda.

2. POLITICAL CONTROL: INCREASE OR RESTRICTIONS?

In the current context, this topic will remain in the agenda with draft bills that intend –or claim to intend– to improve the balance of powers by establishing limits and objective parameters for the proper use of the political control mechanisms and even reversing reforms established by Acts already approved.

Vacancy (permanent moral incapacity clause), Vote of Confidence and political control in general are still issues that the Government pursues to modify[28], which includes trying to repeal Act No. 31355[29]. Among other arguments, the Executive Branch claims that such an Act is unconstitutional, as it contravenes the jurisprudence of the Constitutional Court, which has pointed out that the Constitution has regulated the Vote of Confidence in an open manner, providing a wide range of possibilities for the Executive Branch to file it. It also stated that, if the legislator deemed it necessary to modify the scope of the Vote of Confidence, they should have resorted to the procedure prescribed by Article 206 to reform the Constitution, rather than doing it by law.

The Constitution and Regulations Committee has yet to release an opinion on the matter, analyzing the feasibility and validity of the proposals to either increase or reduce the political control. This will probably still be an important part of the debate and strain between the two Branches.

V. FURTHER READING

Francisco Eguiguren, *Las relaciones entre el Gobierno y el Congreso en el régimen político peruano* (Palestra Editores, 2021).

César Landa, "Peru's uncertain process to establish a constituent assembly" (2021) <https://constitutionnet.org/news/perus-uncertain-process-establish-constituent-assembly> accessed 14 June 2022.

Ana Neyra, "¿Se puede modificar la Constitución por Asamblea Constituyente?" (2021) <https://www.patamarilla.com/2021/04/se-puede-modificar-la-constitucion-por-asamblea-constituyente/> accessed 14 June 2022.

Ana Neyra, "La reforma contra el referéndum" (2021) < https://larepublica.pe/opinion/2021/12/21/la-reforma-contra-el-referendum-por-ana-neyra/> accessed 14 June 2022.

27 Draft Bills No. 02231/2021-CR, 02025/2021-CR, 02004/2021-CR, 01959/2021-CR, 01708/2021-CR, 00724/2021-CR, and others. The report of the Constitution and Regulations Committee of Congress (June 8, 2022) has analyzed all the draft bills about this topic.

28 Draft Bills No. 00474/2021-PE and 01364/2021-CR.

29 The repeal was proposed by Draft Bill No. 01704/2021-PE.

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I. INTRODUCTION

The year 2021 should be considered a period of continuation of the current line of conduct in terms of the constitution's understanding and alteration. Therefore, no formal change in the content of the constitution has been noted, however, several important informal modifications can be identified. In the Polish legal system, the Constitutional Tribunal has the strongest systemic position to undertake this type of action, as the central body for controlling the constitutionality of the law. Many of its decisions are law-making decisions. One of the forms of informal change of the constitution was also the definition of constitutional priorities. The main forces that set the tone for "the process of determining or giving priority to certain constitutional rules (constitutional provisions) and assigning lesser importance to others"[1] were political bodies such as the Council of Ministers, the parliament, and the President, but also the courts and the public.

In the absence of any amendment to the content of the constitution, this study will present the most important, in the opinion of the authors, cases of informal modifications. First, two judgments of the Constitutional Tribunal are worth noting. The first one was important primarily for the internal sphere of law enforcement and application, as well as for the protection of individual rights and freedoms. By virtue of the ruling, the statutory provision allowing for the performance of the duties of the Human Rights Ombudsman after the end of the term of office, until the appointment of a new person for this position, was found inconsistent with the Constitution of the Republic of Poland[2]. The second judgment, apart from the effects expected in domestic law, was also a manifestation of a confrontational policy towards European Union law and the judicature of the Court of Justice of the European Union (CJEU)[3]. Selected provisions of the Treaties on the European Union were found unconstitutional to the extent to which the CJEU issues interim measures related to the system and jurisdiction of Polish courts and the procedure before Polish courts. The report also analyzes the priority given to the defense of the state's external borders in the face of the migration crisis on the Polish-Belarusian border. In particular, in the context of the introduction of martial law and far-reaching restrictions on the constitutional rights and freedoms of an individual.

1 Dorota Lis-Staranowicz, Kamila Doktór-Bindas, '*Constitutional Priorities as an Example of Substantive Amendment of the Constitution*' (2022) Toruńskie Studia Polsko-Włoskie, 105, 114-115.

2 The CT judgment of 15 April 2021 (K 20/20).

3 Monika Florczak-Wątor, '(Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21. Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego ' (2021) Europejski Przegląd Sądowy.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Changing the constitution may mean adopting a completely new constitution, revising, or amending the present act[4]. It should be associated with the occurrence of the so-called constitutional moment. The last significant attempt to modify the Constitution of April 2, 1997, took place on the initiative of the President of the Republic of Poland. The head of state-initiated a nationwide debate and proposed a consultative referendum on the amendment to the Constitution on April 2, 1997[5]. These actions were not favorably received by any of the dominant political forces in the parliament. Likewise, the citizens themselves did not seem particularly interested in the proposal. Nevertheless, the question of whether we are currently dealing with the appropriate time for introducing constitutional changes in Poland seems to be an open question, as the constitutional moment occurs not only when the text of the constitution is changed or a new one is adopted[6]. According to A. Młynarska-Sobaczewska, it can also be reflected "by changing the interpretation of the constitution, that is, the change in the constitution occurs without changing its text when political or social conditions change"[7].

After the failure of the president's initiative, no further serious attempts were made to change the content of the constitution. It also indirectly results from the introduction of a multi-stage procedure for amending the constitution, with simultaneous rationing in the exercise of the right of initiative. The group of entities authorized to submit a bill to amend the Constitution was limited in relation to the legislative initiative only to at least 1/5 of the statutory number of deputies, the Senate, and the President of the Republic of Poland (Article 235 (1)). Amending the constitution requires the adoption of the Act on Amending the Constitution in the same wording by the Sejm and the Senate. And so, the lower house of parliament adopts it by a majority of at least two-thirds of votes in the presence of

4 Sabina Grabowska, Radosław Grabowski, Zasady zmiany konstytucji w państwach europejskich, Warszawa 2008. R. Grabowski, Zróżnicowanie trybu zmiany jako kryterium klasyfikacji konstytucji współczesnych państw europejskich, Rzeszów 2013.

5 Marcin Matczak, 'Why the Announced Constitutional Referendum in Poland is not a Constitutional Referendum after all, (2017) 5/13Verfasssungsblog https://verfassungsblog.de/why-the-announced-constitutional-referendum-in-poland-is-not-a-constitutional-referendum-after-all/ accessed 27 April 2022.

6 Michał Ziółkowski 'Constitutional Moment and the Polish Constitutional Crisis 2015–2018 (a few Critical Remarks) ' (2018) 4 Przegląd Konstytucyjny 77, 80-81.

7 Anna Młynarska-Sobaczewska, Wokół pojęcia momentu konstytucyjnego, Dookoła Wojtek... In Ryszard Balicki, Mariusz Jabłoński (eds.) *Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi* Wrocław 2018.

at least half of the statutory number of deputies, while the upper house - by an absolute majority of votes in the presence of at least half of the statutory number of senators (Article 235 (4)). In the Constitution of the Republic of Poland, the degree of difficulty in introducing changes to its provisions was differentiated. In the event of a change in the provisions of Chapter I, II, or XII, i.e., with regard to the fundamental principles of the constitutional system, human rights, and the constitutional amendment procedure, entitled entities may request an additional approval referendum. However, each time it is optional and not obligatory[8]. It should be noted that, as a rule, the Polish constitution does not introduce any clear restrictions as to the possibility of changing its content.

So far, formal changes to the binding constitution were introduced only twice - in 2006 and 2009. On the one hand, this allows us to believe that the adopted procedure protects against far-reaching ad hoc interventions in the text of the fundamental law performed under pressure and responding to specific needs, while on the other - it may indicate the lack of broad social and political agreement needed to introduce fundamental formal amendments to the constitution. In the current parliamentary term, the ruling coalition does not have the necessary constitutional majority to effectively amend the constitution or adopt a new one. However, working out a common position and gaining support from the opposition is currently hard to imagine.

In this context, an exception worth noting is the motion submitted by the parliamentary club of the Civic Platform. According to the assumptions of the initiators, the application aimed to secure Poland's presence in the EU structures by adding the binding constitution to the text, namely to Art. 90 of the Basic Law, a part that reads: "Termination of an international agreement requires consent expressed in the act, passed by the Sejm by a majority of two-thirds of votes in the presence of at least half of the statutory number of deputies and by the Senate by a majority of two-thirds of votes, in the presence of at least half of the number of senators or a nationwide referendum". Currently, a simple majority of votes is sufficient. This draft was prepared and submitted to the Sejm shortly before the judgment of the Constitutional Tribunal of October 7, 2021, which set the turning point for the new anti-EU jurisprudence of the Constitutional Tribunal. The judgment of the Constitutional Tribunal K3/21 questioned the compliance with the Constitution of the Republic of Poland of the foundations of European integration, such as the primacy of EU law and the EU understanding of the independence of the judiciary. At the same time, in the political, academic, and social debates, it was argued that the possible consequence of this ruling would be Poland's exit from the European Union. Despite the seemingly neutral attitude of the ruling coalition towards the proposed bill, in the end, it did not receive the required support in parliament, and it collapsed.

8 Jarosław Szymanek 'Zabezpieczenia konstytucji przed zmianą konstytucji', (2015) 6 Prawo i Polityka 7, 19.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

THE TERM OF OFFICE OF THE HUMAN RIGHTS OMBUDSMAN - CONSTITUTIONAL NORM VS. STATUTORY NORM

Chronologically speaking, the first thing that should be mentioned is the judgment of the Constitutional Tribunal of April 15, 2021, recognizing article 3.6 of the Act on the Commissioner for Human Rights[9] as unconstitutional. The challenged statutory norm allowed him to perform the function of the ombudsman after the end of the term of office until the appointment of a new person for this position by the parliament. Thus, it provided grounds for maintaining the continuity of the organ's operation. The constitutional provisions refer quite laconically to the election and term of office of the Ombudsman, stating that he/she shall be appointed by the Sejm, with the consent of the Senate, for a period of 5 years. The aforementioned judgment of the Constitutional Tribunal was issued in a situation when the term of office of the incumbent Ombudsman ended seven months earlier, i.e. on September 9, 2020, and the parliament was not able to select a candidate who would gain the support of both chambers during that time. In the procedure of electing the Ombudsman, the role of the Sejm is to select a candidate, while the Senate has 30 days to respond to this proposal. It should be noted that the upper house has an absolute veto in this case. Lack of consent means that the procedure of selecting a candidate is restarted by the Sejm. It should be noted that in the current parliamentary term, the majority in the Senate has an opposition, which successfully blocked the proposals of candidates put forward by the lower house. A political impasse lasted for several months.

In the justification to the position of the Constitutional Tribunal of April 15, 2021, the judge-rapporteur argued that since the constitution-maker established the term of office of the Ombudsman for 5 years, it should not last longer than the designated period, i.e. it should not be automatically extended without time limits. Extending the term of office beyond the five-year limit provided for by the constitution could open the way for citizens to question the constitutionality and legality of the actions of the Human Rights Ombudsman. On the other hand, the Constitution of the Republic of Poland allows for the regulation of the functioning of this office by statute (Article 208 (2)), and similar solutions as in the case of the Ombudsman were applied to the presidents of the Supreme Audit Office (NIK) and the Polish Central Bank (NBP). In practice, the vast majority of Polish ombudsmen to date held their positions for more than five years. Although, for the sake of accuracy, it should be added that never as long as the outgoing Ombudsman in 2021 - Adam Bodnar.

The provision of the act challenged by the Constitutional Tribunal expired three months after the announcement of the judgment, which gave the parliament little time to agree on a joint candidate. The specter of the vacant office of the Ombudsman was real, and it is one of the key organs from the point of view of the protection of human and civil rights and freedoms in Poland. Article 208 of the Polish Constitution explicitly

9 The Act of 15 July 1987 on the Commissioner for Human Rights, Journal of Laws of 2014, item 1648.

defines its role as safeguarding the freedoms and rights of persons and citizens specified in the Constitution and other normative acts.

In the described case, without the majority of votes in the parliament necessary to carry out the procedure of a formal amendment to the constitution, an amendment to an ordinary act of law regulating the operation of one of the most important organs of law protection was introduced.

THE QUESTION OF THE PRIMACY OF THE CONSTITUTION OVER THE EU LAW

The application initiating the proceedings before the Constitutional Tribunal regarding the primacy of the Constitution of the Republic of Poland over EU law was submitted by the Prime Minister after the Court of Justice of the European Union answered the questions referred for a preliminary ruling by the Supreme Administrative Court in November 2018. At the beginning of March 2021, the Court of Justice of the EU replied to them, and in its judgment de facto granted Polish courts the right to ignore national provisions on the appointment of judges, provided that national courts find that the changes made to the National Council of the Judiciary have removed the actual control over the appointment process judges.

Ultimately, the Constitutional Tribunal in the judgment in case K 3/21, issued on October 7, 2021, ruled that Art. 1 TEU in conjunction with Art. 4 sec. 3 TEU, as well as Art. 2 TEU and Art. 19 paragraph 1 TEU is inconsistent with the Polish Constitution.

First, the Tribunal found that Art. 1, paragraphs 1 and 2 of the TEU enabled a new stage of European integration, in which the EU institutions operate outside the limits of competences enshrined in the Treaties and transferred by Poland in accordance with Art. 90 of the Polish Constitution. This violates the sovereignty of the Polish state, which is inconsistent with Art. 2 and 8 of the Polish Constitution. Pursuant to these provisions, the Republic of Poland is a democratic state, and the Constitution is its highest law. Secondly, the Tribunal ruled that Art. 2 and art. 19 paragraph 1 of the TEU are inconsistent with the Constitution of the Republic of Poland to the extent that they enable lower-instance national courts and the Polish Supreme Court not to apply the Constitution, overrule judgments of the Constitutional Tribunal and review the legality of the procedure for appointing judges, which - according to the Tribunal - lies outside the competences of the EU. The Tribunal argues that, deriving from Art. 19 paragraph 1 of the TEU, the right to examine the organization and structure of the judicial system of a Member State, the CJEU has, in fact, granted itself a new competence. In the opinion of the Tribunal, this competence cannot in any way be derived from Art. 2 TEU, which is a list of values with only "axiological" meaning and not establishing clear rules.

Previously, the Constitutional Tribunal referred to the overriding legal force of the Constitution only once in its judgment in case K 18/04 issued in May 2005, shortly after Poland joined the EU. It then pointed out that a possible conflict between the constitutional norm and the provisions of EU law ultimately comes down to making a decision either to amend the Constitution, introduce changes in EU regulations, or - ultima ratio - to a decision to leave the European Union.

The decision of the Constitutional Tribunal in case K 3/21 has many consequences, both in the external and internal sphere. For the conducted analysis, it is enough to indicate that by questioning the fundamental principles of mutual cooperation, such as the supremacy of EU law, friendly interpretation of EU law, and recognition of the jurisdiction of the CJEU, is another flashpoint in relations between Poland and the European Union. It seems that prioritizing Art. 8 of the Constitution of the Republic of Poland, which recognizes the supremacy of the Constitution as the supreme source of law, took place while disregarding the constitutional provisions which provide for Poland's respect for international obligations and direct application of EU law in the Polish legal system (Article 9 and Article 91 of the Constitution of the Republic of Poland).

BORDER SURVEILLANCE – INTERPRETATION OF THE ART. 5 AND ART. 26 OF THE CONSTITUTION

Pursuant to Art. 230 of the Constitution, a state of emergency may be introduced in a situation of a threat to the constitutional system of the state, the security of citizens, or the public order. Art. 5 of the Constitution states that Poland guards the independence and inviolability of its territory, and pursuant to Art. 26 of the Constitution, the Armed Forces ensure the inviolability of Poland's borders.

In the face of the migration crisis on the border of the Republic of Poland with the Republic of Belarus on September 2, 2021, the President of the Republic of Poland, pursuant to Art. 230 paragraph 1 of the Constitution of the Republic of Poland and Art. 3. of the Act on the state of emergency, at the request of the Council of Ministers of August 31, 2021, issued an ordinance on the introduction of a 30-day state of emergency in part of the Podlaskie and Lubelskie provinces. By the regulation of October 1, 2021, with the consent of the Sejm, the President of the Republic extended the period of the state of emergency in the indicated area for another 60 days.

The decision to introduce a state of emergency was motivated by the threat to the security of citizens and public order. The measures applied so far have turned out to be insufficient to fully secure the border against the illegal mass influx of migrants from the territory of Belarus. Due to the introduction of the state of emergency in the area covered by it, a number of restrictions were introduced. Namely, the right to organize and hold assemblies and mass events was suspended, as well as a ban on staying at certain times in designated places, facilities, and areas, and a ban on recording the appearance or other features of specific places, facilities or areas by technical means. Access to public information on activities carried out in the area covered by the state of emergency in connection with the protection of the state border and the prevention and counteracting of illegal migration has also been limited. Actions taken as a result of the introduction of a state of emergency should comply with the constitutional principles of proportionality and purposefulness, i.e. they must correspond to the degree of threat and should aim at restoring the normal functioning of the state as soon as possible.

In the discussed case, doubts are primarily raised by the interpretation of the discussed threat as a premise for the application of the state of emergency. Secondly, the defense of borders, treated in this case as a constitutional priority, is subordinated to other constitutional values - especially the right to information.

It seems that the migration crisis on the Polish-Belarusian border was more of an external threat than an internal one[10], in fact, it does not fully exhaust the premises for introducing neither the state of emergency nor martial law. In such a case, a possible solution was to change or reinterpret the existing provisions of the Constitution - in the light of the current threat. However, on November 17, 2021, the Sejm passed the act on the protection of the state border and some other acts (Journal of Laws, item 2191), because further extensions of the state of emergency were unacceptable under the constitutional provisions in force. Although this act did not formally introduce a state of emergency, it de facto repeated both the conditions underlying the declaration of a state of emergency and leads to similar legal effects[11].

It is argued that it circumvents Art. 230 of the Constitution limiting the duration of a state of emergency to a maximum of 150 days and Art. 228 paragraph. 6, expressly prohibiting the introduction of changes to the provisions relating to states of emergency during the duration of a state of emergency. It was also indicated that it breached the principle of proportionality, as set out in Art. 31 sec. 3 of the Constitution, as it allows for the arbitrary restriction of rights and freedoms by way of a ministerial ordinance.

In this context, it should be emphasized that during the state of emergency and during the validity of the act on the protection of the state border and some other acts, the freedom of the media and the society's right to obtain information were practically suspended. Such a position was expressed e.g. by the Ombudsman, who questioned the adequacy and legitimacy of the complete exclusion of transparency of the activities of Polish services and the course of events on the Polish-Belarusian border. All the more so as the freedom of the press and other means of social communication in the Constitution was raised to the rank of a systemic principle, and the European Court of Human Rights in its jurisprudence indicates the essence of the right of society to receive reliable information on matters of public importance and the role of the media in this matter. Freedom of obtaining and disseminating information expressed in art. 54 sec. 1 of the Constitution of the Republic of Poland may be subject to extraordinary restrictions during a state of emergency, but this may only take place to the extent that corresponds to the degree of threat, and only to the extent that the restriction aims to restore the normal functioning of the state as soon as possible (Article 228 par. 5 of the Polish Constitution). In this case, following the example of neighboring Lithuania, where the state of emergency was also introduced, it was possible to use the mechanism of issuing passes for journalists. The ban on journalists staying in the areas covered by the state of emergency was additionally combined with the complete exclusion of the right to access public information.

To conclude the topic devoted to the states of emergency, it should be noted that after a year of the pandemic, the Council of Ministers did not decide to announce the fact that, in line with Art. 232 of the Constitution of the Republic of Poland of the state of natural disaster, but consciously upheld the non-constitutional state of the epidemic. Despite the fact that a year has passed since the outbreak of the COVID-19 pandemic, it has not been possible to solve the problem of the lack of coherence and unconstitutionality of legislation during the pandemic. Violations of the constitutional principles of introducing restrictions on freedoms and rights have been confirmed by numerous judgments of common courts, as well as the rich jurisprudence of the Supreme Court and the Supreme Administrative Court.

The more difficult the formal procedure for constitutional changes is, the stronger the temptation to change the content and meaning of a constitution informally. This is evidenced by the activities undertaken in 2021 in Poland. It is not without reason that the Polish constitution, along with other contemporary fundamental laws, is referred to as the "judicial constitution"[12]. Its actual meaning and content are determined in the jurisprudence of the courts. The concretization of constitutional norms, which, after all, are characterized by a high degree of generality, is carried out, as was mentioned at the beginning, above all in the jurisprudence of the Constitutional Tribunal[13]. The Constitutional Tribunal cannot, therefore, be defined as a counter-majoritarian force. Rather, the judgments of this body follow the line of interpretation and constitutional priorities set by the ruling majority.

Only some of the examples of informal changes to the constitution can be called "amendments". Most of them, especially those relating to the relationship between national law and EU law, and the understanding of the premises for introducing extraordinary measures and the scope of human rights restrictions during their duration, bear the features of dismemberments. The changes made are controlled by common courts and administrative courts - including the Supreme Court and the Administrative Court[14]. The Ombudsman also plays an important signaling role.

IV. LOOKING AHEAD

The Polish Basic Law was adopted as one of the last new constitutions in the circle of Central and Eastern European states. In the coming year, we will celebrate the 25th anniversary of its operation. Its strength was to be a compromise approach to many systemic issues and abandoning radical solutions. The legal act subject to the time test turned out to be permanent and resistant to ad hoc changes. In recent years, it has become the subject of a lively academic and social debate, and the awareness of its importance has increased.

The polarization of the Polish political scene turned out to be so great that in 2021 the implementation of systemic reforms was an impossible task in practice. Therefore, in principle, attempts to initiate formal changes to the current constitution were abandoned, and instead, informal constitutional changes were introduced through the back door. It seems that this practice is well established in Polish constitutionalism and its continuation can be expected in the near future. The judgments of the Constitutional Tribunal are an effective tool allowing for further informal changes to the constitution.

10 Suffice it to say that on 29 October 2021, the parliament passed a law on the construction of equipment for the protection of the state border, allowing for the construction of a wall in the Polish and Belarusian border strip, thus fending off an external source of danger.

11 Dorota Lis-Staranowicz, Kamila Doktór-Bindas, '*Constitutional Priorities as an Example of Substantive Amendment of the Constitution*' (2022) Toruńskie Studia Polsko-Włoskie, 105, 114.

12 Dariusz Dudek, 'Konstytucja i zaufanie' 2020 1 (156) Przegląd Sejmowy 9, 35-37.

13 Agnieszka Bień-Kacała, 'Informal constitutional change: the case of Poland' (2017), 6(40) Przegląd Prawa Konstytucyjnego 199, 211.

14 Piotr Kardas, Maciej Gutowski 'Konstytucja z 1997 r. a model kontroli konstytucyjności prawa', (2017) 4 Palestra 11, 17.

We should not expect a departure from fundamental systemic disputes in the near future, but it does not seem to lead to a formal change of the constitution. Similarly, in the coming year, it will not be necessary to introduce regulations concerning Poland's membership in the European Union into the constitution. However, such a scenario cannot be ruled out in the future. More and more often, voices are raised accepting the purposefulness of the amendment to the constitution in this respect, and the scope of the necessary changes and the manner of the amendment are invariably a controversial issue.

Each change of the constitution requires gaining a constitutional majority, which the ruling coalition neither has got nor has the political capacity to create. It can be assumed with a great deal of caution that only care for the raison d'etat of Poland, which is more and more often understood as ensuring the internal and external security of the state, could lead to the development of a compromise allowing for changes to the content of the constitution.

V. FURTHER READING

Bárd P., Bodnar A., *The end of an era The Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust* (https://www.ceps.eu/ceps-publications/the-end-of-an-era/, accessed: 6.12.2021).

Ludwikowski, R. R., Kraśnicka, I., *Comparative arguments in the legal debat over judiciary reform in Poland*, (Krakowskie Studia Międzynarodowe. Krakow International Studies 2021), 2, 95-118.

Portugal

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I. INTRODUCTION

As stated in the 2020 report[1], the Constitution of the Portuguese Republic (hereinafter 'Constitution' or 'Portuguese Constitution') was passed on 2 April 1976 and empowers the Parliament ('Assembly of the Republic') to revise the Constitution, subject to specific limits. The applicable provisions are laid down in Articles 284-289, included in Title II ('Revision of the Constitution') of Part IV of the Constitution ('Guaranteeing and revision of the Constitution')[2].

In 45 years, this prerogative was used seven times[3]. In this respect, it is important to bear in mind that, while Article 284(1) of the Constitution (on competence and time for revisions) enables the Assembly of the Republic to revise the Constitution *five years after the date of publication of the last ordinary revision law*, Article 284(2) allows the Assembly to take *extraordinary revision powers at any time, by a four-fifths majority of all the Members in full exercise of their office*.

Title II of Part IV of the Constitution provides for the rules applicable to 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 four-fifths majority 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 (Power to initiate 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 shall be submitted within thirty days.

Article 286 (Passage and enactment)

1. Amendments to the Constitution shall require passage by a two-thirds majority of all the Members of the Assembly of the Republic in full exercise of their office.

2. Such amendments to the Constitution as are passed shall be collected together in a single revision law.

3. The President of the Republic shall 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 such replacements, eliminations and additions as may be necessary.

2. The new text of the Constitution shall be published along with the revision law.

Article 288 (Material limits on revision)

Constitutional revision laws shall 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 in relation to the ownership of the means of production;

g) The requirement for economic plans, within the framework of a mixed economy;

h) The elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and periodic suffrage, and the proportional representation system;

i) Plural expression and political organisation, including political parties, and the right to democratic opposition;

j) The separation and interdependence of the bodies that exercise sovereign power;

l) The subjection of legal rules to a review of their positive constitutionality and of their unconstitutionality by omission;

1 See the Parliament website here: https://www.parlamento.pt/sites/EN/Parliament/Paginas/Constitutional-revisions.aspx, [last accessed: 09.06.2022], in order to collect more information on the different revisions of the Portuguese Constitution.

2 Title I relates to the 'Review of constitutionality'.

3 Further reading may be found in ALEXANDRINO, José de Melo – '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; PÉREZ AYALA, Andoni – 'Tres Décadas de Evolución Constitucional en Portugal' (1976-2006) (Revista de Derecho Político, 70, UNED 2007), 65-134, and GONÇALVES, Fernando Paulo - 'Las Revisiones de la Constitución de 1976', *in* AA.VV. (J. Tajadura, coord), **La Constitución Portuguesa de 1976: un estudio académico 30 años después** (Madrid, Centro de Estudios Políticos y Constitucionales 2006) 291-308.

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 shall be undertaken during a state of siege or a state of emergency.[4]

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

As stated in the previous report, for the year 2020, the Covid pandemic crisis came with circumstances - state of siege and state of emergency - in which the revision shall be restricted, as stated in Article 289[5].

The constitutional revision procedure initiated in 2020 was suspended due to the state of emergency. On 30 April 2021, it was resumed (after the end of the state of exception). On 12 May 2021, according to Articles 37 and 28 of its Internal Regiment, the Assembly adopted a Deliberation[6] establishing an Eventual Commission for Constitutional Revision with the mandate to consider the projects for constitutional revision presented in due time[7]. The same Deliberation set out the composition of the Commission as well as a 90 days-operating period from the date of the respective installation, extendable by the decision of the Plenary and the request of the Committee itself.

The installation of the Commission took place on 13 May 2021. The Commission then scheduled two meetings to discuss and vote on the Project for Constitutional Revision of *Chega* party no. 3/XIV/2.a (CH) - *Changing several constitutional norms*[8]. Other proposals have been presented by another party - *Iniciativa Liberal* – but they ended up withdrawn[9].

In short, the project of *Iniciativa Liberal* intended, among others, to (i) remove the historical remnant that, in the preamble, assigns the Constitution the objective of "opening the way to a socialist society", together with other 'surgical' changes also related with the aim of removing the socialist ideological ballast; (ii) consecrate a health system that integrates public, private and social health services, guaranteeing effective freedom of choice to all citizens; (iii) integrate continuous and palliative care as a state's task; (iv) guarantee the right to education by a network of public, private and cooperative establishments with administrative and pedagogical autonomy, promoting effective freedom of choice for families; (iv) end the public service of radio and television; and (iv) introduce the possibility of a municipal minimum wage. In the end, *Iniciativa Liberal* withdrew its project considering it "more serious" that its proposals be discussed in a new process "in the near future", in circumstances more suitable for a "more in-depth discussion"[10].

With the withdrawal of the initiative of *Iniciativa Liberal*, only *Chega*'s project for constitutional revision remained under discussion. The following main objectives emerged from the project: (i) to remove the socialist ideological ballast, mainly present in the preamble of the Constitution; (ii) to allow both the additional penalty of chemical castration for conduct constituting the crimes of rape or sexual abuse of children, dependent minors or adolescents, as well as, in some cases specifically provided for by law and under the strict terms defined by special law, physical-surgical castration; (iii) to order compulsory hospitalization of people suspected of contamination by any type of infectious-contagious virus, in cases of proven and imminent threat to public health to people able to contaminate others (by indication of a duly substantiated binding opinion by the Directorate-General of Health); (iv) to stipulate the possibility of predicting life sentence condemnations; (v) to make suffrage a civic duty of compulsory nature; (vi) to reduce the minimum number of deputies of the Assembly of the Republic; (vii) to stablish that the office of Prime Minister is limited to individuals holding original Portuguese citizenship; and, finally, (v) to eliminate Article 288 laying down the material limits on constitutional revision.

On 25 May 2021, the discussion of that project was carried out in record time. Following the discussion, all the proposals included in Project for Revision no. 3/XIV/2.a (CH) were rejected and extremely criticized both by other parties and by the public opinion in general. This might explain why the discussion lasted less than two hours, leading to unanimous rejection by all the other parties involved, with the exception of *Chega*'s leader, who voted in favor.

The Commission approved its final report and ended its activities in June[11] 2021.

Later, in July 2021 (well after the 30-day deadline stipulated in Article 285(2) of the Constitution for the submission of other draft constitutional revision proposals), the leader of the Social Democratic

4 Based on the English translations of the Portuguese Constitution available here: https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf [last accessed: 14.06.2022] and here: https://www.constituteproject.org/constitution/Portugal_2005?lang=en, [last accessed: 14.06.2022].

5 See also: www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45430, [last accessed: 29.01.2021].

6 See Deliberation no. 2-PL/2021, of 12 May, published in the Supplement to the Official Gazette, Series II - A, no. 131, available here: https://www.parlamento.pt/Documents/2021/maio/DAR-II-A-131-Suplemento.pdf, [last accessed: 09.06.2022].

7 See https://www.parlamento.pt/ActividadeParlamentar/Paginas/IniciativasLegislativas.aspx, [last accessed: 09.06.2022].

8 Project for Constitutional Revision no. 3/XIV/2.a (CH) - *Altera diversas normas constitucionais* (*Changing several constitutional norms*) – see https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45272, [last accessed: 09.06.2022].

9 The *Chega* Party's deputy presented four other projects of revision, later withdrawn – Project for Constitutional Revision no. 1/XIV/1a (CH) - *Pela defesa da população em cenários epidémicos* (*For the population' s defence in epidemic scenarios*) – available here: https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=44520, [last accessed: 09.06.2022]; Project for Constitutional Revision no. 2/XIV/1 (CH) - *Pela redução do número mínimo de deputados constitucionalmente previsto* (*For a reduction of the number of members of parliament provided for in the Constitution*) – available here: https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=44578, [last accessed: 09.06.2022]; Project for Constitutional Revision no. 4/XIV/2 (CH) - *Pela consagração constitucional da compatibilidade entre o princípio da presunção de inocência e a criminalização do enriquecimento ilícito* (*For constitutional recognition of the compatibility between the principle of presumption of innocence and the criminalisation of illicit enrichment*) – available here: https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45430, [last accessed: 09.06.2022], and, finally, Project for Constitutional Revision no. 6/XIV/2 (CH) - *Altera diversas normas constitucionais* (*Changing several constitutional norms*), *cit.*

10 The deputy of *Iniciativa Liberal* presented a project for constitutional revision (Project for Constitutional Revision no. 5/XIV/2.a (IL) - *Uma nova Constituição para o Século XXI* (*A new Constitution for the 21st Century*) withdrawn on 13 May 2021 - see https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45445, [last accessed: 09.06.2022]. On the subject: https://www.publico.pt/2021/05/13/politica/noticia/iniciativa-liberal-retira-projecto-revisao-constitucional-1962503, [last accessed: 09.06.2022].

11 See the Activity Report of the Commission of May 2021, available at https://www.parlamento.pt/sites/COM/XIVLeg/CERC/Paginas/RelatoriosActividade.aspx, [last accessed: 09.06.2022].

Party (*Partido Social Democrata*) announced a new project for constitutional revision, with more than 50 modifications listed, although not articulately written[12].

This proposal was also criticized by the public opinion[13], being considered as restrictive of citizens' fundamental rights. This resulted, in particular, from the following proposals: (i) the possibility of decreeing a state of emergency for sanitary reasons, without a defined duration (the duration would be defined by law), which, *in extremis*, could lead to the suspension of certain *rights, freedoms and guarantees* of the citizens for an indefinite period of time; (ii) the possibility of confinement or internment of a person with a serious contagious disease, if necessary for reasons of public health, even without a court order (under conditions to be determined by law); (iii) the possibility of collecting metadata communications for intelligence purposes of the Republic (namely, the prevention of terrorism), subject to a court order, among others. Among the proposals, there was also (iv) the establishment of specialized courts in criminal matters.

In the context of recovery from the pandemic crisis, the project for constitutional revision presented by the Social Democratic Party was received as a *solution of continuity* in view of the suspension of citizens' *rights, freedoms, and guarantees* adopted during the pandemic. In particular, the criticism directed at those restrictive measures, along with its adoption exclusively by the Government (without the intervention of the Assembly of the Republic or the President of the Portuguese Republic), led to this project being interpreted as an attempt to consecrate the restriction of those fundamental rights in the Portuguese Constitution.

Until now, no formal draft revision was presented. Besides, considering that the majority of the deputies elected in the last electoral exercise are from the Socialist Party, it is unlikely that the modifications included in such a proposal would be able to pass in the current legislature. Notwithstanding, it should be noted that at the time of the project's presentation, the leader of the Social Democratic Party mentioned his intention to negotiate the proposal with the Socialist Party, in order to obtain the necessary number of votes to approve those measures.

Also worthy of mention is the fact that, following the October political crisis resulting from the non-approval of the Budget Law by the Assembly of the Republic (Articles 105 to 107 of the Constitution), and by Decree no. 91/2021 of 5 December, the President of the Republic decided to dissolve the Assembly of the Republic. Following that, the legislative elections were scheduled for January 2022. According to Article 133(e) of the Constitution, the dissolution must meet the provisions of Article 172 and requires prior consultation with both the Council of State and the parties with seats in the Assembly of the Republic[14].

In accordance with the Constitution, dissolution does not prejudice the continuation of the deputies' term of office until the first sitting of the Assembly after elections (Article 172(3). During periods in which the Assembly of the Republic is dissolved, the Assembly of the Republic's Standing Committee shall be in session, as stated by Article 179. The Standing Committee shall be chaired by the President of the Assembly of the Republic and shall also be composed of the Vice-Presidents and of Members nominated by each of the parties, each in proportion to the number of seats it holds in the Assembly (Article 179(2)[15]. As a replacement body, its competences are reduced (Article 179(3) and do not include revision powers. As seen above, only members of the Assembly of the Republic have the competence to initiate revisions, which must be passed by a two-thirds majority of their members. To conclude, the possibility of constitutional revision ceased until 2022.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As explained, there were no successful Constitutional Reforms during 2021, as had also happened during 2020 due to the declaration of the state of emergency.

IV. LOOKING AHEAD

As already stated in the 2020 report, it is likely that we will have a constitutional reform in the near future, namely as there is now a large majority in the Portuguese parliament. As to the intents of the right-wing party – *Chega* - future political circumstances could push them aside.

The prospective challenges for 2022 derive from what has been previously stated. Indeed, the system will have to deal with major topics and discussions that have already arisen, including:

a) the extent and content of the matters that constitutional revision laws shall respect (material limits of revision);

b) the circumstances - state of siege or state of emergency - in which revision shall be prohibited;

c) the possible reform of the conditions for declaring a state of siege or state of emergency, notwithstanding the need to guarantee political checks and balances and citizen's rights, and bearing in mind that a multilevel system may consider the possible benefit of applying Article 15 of the European Convention on Human Rights;

d) the question on the electoral law, enhanced by the 'episode' that, in early 2022, led to the need to repeat general elections and wait for the results of the votes of the Portuguese abroad, causing a three-month delay in the beginning of Government functions[16];

12 See the proposal, available here: https://www.psd.pt/sites/default/files/2021-07/projeto_rc_psd.pdf, [last accessed: 12.06.2022].

13 For instance, the note by Luís Menezes Leitão, Professor at the Faculty of Law, University of Lisbon (now, President of the Portuguese Bar Association), with the title (in English) 'An untimely and dangerous constitutional review', available here: https://portal.oa.pt/comunicacao/imprensa/2021/8/03/uma-revisao-constitucional-inoportuna-e-perigosa/, [last accessed: 09.06.2022].

14 Based on the English translation of the Portuguese Constitution available here: https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf [last accessed: 14.06.2022].

15 Based on the English translation of the Portuguese Constitution available here: https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf [last accessed: 14.06.2022].

16 On the topic, see: https://www.publico.pt/2022/03/22/politica/noticia/legislativas-contagem-votos-emigrantes-europa-comeca-tercafeira-lisboa-1999669, [last accessed: 12.06.2022].

e) the possible reform of the methods of appointment of the Constitutional Court judges'[17], considering the most recent controversies and difficulties arising from the system of co-optation by those appointed by the Assembly of the Republic;

f) the potential revision of the Constitution to overcome the difficulties arising from the approval of the Metadata Law's[18] within the current constitutional framework.

V. FURTHER READING

AAVV – 'O Direito Constitucional da Exceção na Alemanha: Um novo modelo para os estados de emergência?' ('*Constitutional law of exception in Germany: A new model for states of emergency?*'), Vol. 7 no. 3, December 2020, ICJP, CIDP, available here: https://www.e-publica.pt/

AAVV – 'Liberdade e desinformação no contexto da pandemia' ('*Freedom and disinformation in the pandemic context*'), Revista E publica, Vol. 8 no. 3, December 2021, ICJP, CIDP, available here: https://www.e-publica.pt/

GOUVEIA, Jorge Bacelar – 'A demissão do Governo como "efeito externo estrutural" da dissolução da Assembleia da República' ('*The Government's resignation as a "structural external Effect" of the dissolution of the Assembly of the Republic*), available here: https://observatorio.almedina.net/index.php/2021/11/04/a-demissao-do-governo-como-efeito-externo-estrutural-da-dissolucao-da-assembleia-da-republica/

LEITÃO, Luís Menezes – 'Uma revisão constitucional inoportuna e perigosa' ('*An untimely and dangerous constitutional review*'), available here: https://portal.oa.pt/comunicacao/imprensa/2021/8/03/uma-revisao-constitucional-inoportuna-e-perigosa/

SANCHEZ, Pedro Fernández – 'A Modificação das Regras de Competência dos Órgãos de Soberania em Estado de Excepção: o Caso Exemplar da Aprovação de Normas sem Autorização Parlamentar em Matéria Penal' ('*The Modification of the Rules of Competence of Sovereign Organs in a State of Exception: the Exemplary Case of the Approval of Norms without Parliamentary Authorisation in Criminal Matters*'), Revista Portuguesa de Direito Constitucional, no. 1, 2021, 103-139, https://rpdc.pt/

17 On the issue, see: https://www.tsf.pt/portugal/politica/constitucionalistas-defendem-maior-transparencia-na-cooptacao-de-juizes-do-tc-14908017.html, [last accessed: 12.06.2022].

18 In judgment no. 268/22, procedure no. 828/2019, the Constitutional Court decided a) to declare the unconstitutionality, with mandatory general force, of the rule in Article 4 of Law no. 32/2008 of 17 July, combined with Article 6 of the same law, for violation of the provisions of nos. 1 and 4 of Article 35 and no. 1 of Article 26, in conjunction with no. 2 of Article 18, all of the Constitution; b) to declare the unconstitutionality, with mandatory general force, of the rule in Article 9 of Law no. 32/2008, of 17 July, on the transmission of stored data to the competent authorities for the investigation, detection and prosecution of serious crimes, insofar as it does not provide for a notification to the person concerned that the data stored were accessed by the criminal investigation authorities, as long as such notification is not likely to jeopardise investigations or the life or physical integrity of third parties, for violation of the provisions of no. 1 of Article 35 and no. 1 of Article 20, in conjunction with no. 2 of Article 18, all of the Constitution. It is important to consider, as well, the explanations of voting accompanying it – available here: https://www.tribunalconstitucional.pt/tc/acordaos/20220268.html, [last accessed: 09.06.2022]

Following this, the Prosecutor General of the Republic argued that judgment 268/2022 was null and void, invoking the provisions of no. 1 of Article 219 of the Constitution, as well as Article 4(1)(a), (d) and (e) of the Statute of the Public Prosecutor's Office and Article 615(1)(c) and (d) of the Code of Civil Procedure. On 13 May 2022, by judgement no. 382/2022, procedure no. 828/2019 (available here: https://www.tribunalconstitucional.pt/tc/acordaos/20220382.html, last accessed: 09.06.2022], the Constitutional Court decided not to hear the request, as the Prosecutor lacked procedural and constitutional legitimacy to raise it. In any case, the Constitutional Court considered that the arguments invoked by the applicant were manifestly unfounded, under the following reasoning: on the one hand, the permission to store data in a territory outside the jurisdiction of an independent administrative authority violates the obligation of retention in a European Union's Member State; on the other hand, the effects of the declaration of unconstitutionality are determined by the Constitution and not by the Constitutional Court and relate to the date on which the unconstitutional rules entered into force. A possible limitation of the effects of unconstitutionality was not only not requested by any of the intervening parties, but it would also place the Portuguese State in a situation of non-compliance with European Union law. In any case, the Court advanced, rules that determine an undifferentiated obligation to store metadata, under no. 4 of Article 8 of the Constitution, could no longer be applied by any national authority (including judicial) since 2014, when the Court of Justice of the EU concluded that they were incompatible with the Charter of Fundamental Rights of the European Union.

Romania

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I. INTRODUCTION

No proposals for the revision of the Romanian Constitution were initiated in 2021, nor were advanced the three revision initiatives registered in 2019 (and continued in 2020). On the contrary, concerning two of them, the new Parliament, formed as a result of the elections at the end of 2020, has decided "the termination of the legislative procedure", "by not complying with the provisions of Article 63 (5) of the Constitution."[1] In the following sections, we will provide some considerations regarding the content of these initiatives.

Nevertheless, 2021 was a year of reflection on the revision of the Constitution, as 8 December marked the 30th anniversary of the adoption of the Romanian Constitution. This anniversary has given rise to many debates on the need, issues for the revision of the Constitution, and the revision procedure itself, being considered too difficult.

Further, we will refer briefly to the main topics of the revision discussed during this period, as well as to a latent topic determined by the rising tensions in the relationships between the Constitutional Court of Romania (CCR) and the Court of Justice of the European Union (CJEU). As for the latter issue, we consider that it is not specific only to Romania, but to the constitutionalism of the European Union (EU), in general.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

At the beginning of 2021, three revision initiatives of the Constitution were already registered in the Romanian Parliament.

The first of these, in chronological order (Pl-x no. 237/2019), initiated by over 800,000 citizens, aims at **amending Article 37 of the Constitution – *Right to be elected***, in the sense of excluding citizens who have been definitively sentenced to imprisonment for intentional offenses, until a situation removing the consequences of such conviction arises. CCR found the constitutionality of the revision initiative[2]. After being adopted by the Chamber of Deputies on 14 July 2020, the initiative was forwarded to the Senate, where it still is[3]. We shall mention that, according to the Romanian Constitution, the revision of the Constitution involves: the formulation of the revision proposal/initiative (by the President upon the proposal of the Government, at least one quarter of all Deputies or Senators, or at least 500,000 citizens having the right to vote), *ex officio* review of CCR, which shall rule upon the compliance with the procedure and the limits of revision, the adoption of the revision law by Parliament (which in Romania is bicameral, consisting of the Chamber of Deputies and the Senate), the constitutional review carried out by CCR regarding the law adopted by Parliament, the approval of the revision law by referendum.

The other two revision initiatives, with a similar purpose, but promoted separately by Deputies and Senators belonging to the majority and the parliamentary opposition (Pl-x no.331/**2019** and Pl-x no.332/**2019**), referred to **the amendment of the same Article 37 – *Right to be elected***, as well as to **other constitutional texts, in the sense of banning pardon for corruption offenses, banning amnesty and collective pardon for acts of corruption, banning legislative initiatives submitted by Deputies, Senators and Government for amnesty and collective pardon on acts of corruption.** Likewise, **the more restrictive regulation of the legislative delegation** was proposed to remove the possibility of the Government to legislate by emergency ordinance in the field of crimes, punishments, and their enforcement regime, 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, an amendment related to the widening of the scope of subjects who can directly challenge the Government Emergency Ordinances before CCR. Ruling upon these initiatives, CCR found some of the proposals unconstitutional and submitted a number of remarks to Parliament. Thus, we mention the ascertainment of the unconstitutionality of the proposals limiting the power of Parliament, the Government, and the President, regarding the regulation and the granting of leniency measures (amnesty and pardons). Primarily, CCR held that the general prohibition proposed by the initiators violates the limits of the revision because it "excessively limits the power of the State and its ability to assess itself, which unduly affects the exercise of public power in favor/benefit of citizens. Thus, a category of citizens is deprived of a vocation on considerations of a circumstantial nature, contrary to human dignity, as an effect of the limitation of the public power."[4] With regard to both proposals of revision, the Parliament decided in 2021 to terminate the

1 http://www.cdep.ro/pls/proiecte/upl_pck2015.lista?cam=2
2 Decision No 222/2019 (Official Gazette no. 425 of 30 May 2019)
3 Pl-x no. 237/2019, Legislative proposal on the citizens' initiative for the revision of the Romanian Constitution, http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17842
4 Decision No 464/2019 and Decision No 465/2019 (Official Gazette no. 645 of 5 August 2019) – for a summary, see Constitutional Law Review no 1/2020- Iulia

legislative procedures by infringing the provisions of Article 63 (5) of the Constitution[5] (BP 01-02-2021)[6].

Consequently, at the end of 2021, only one Constitution revision proposal was pending in Parliament, aiming to amend the requirements for the right to be elected.

However, in 2021, many other ideas of revision were publicly debated, the discussions on this topic being enhanced by the 30th anniversary since the adoption of the Romanian Constitution on 8 December 2021. Beyond the political discourse that advanced the idea of "a constitutional reform, which would make the basic law an instrument for modernizing the country", specific criticisms/proposals were expressed by politicians and scholars, such as the need to define more exactly the institution of the President and, in general, of the extension of the powers of public authorities, amending those constitutional texts which have over time led to legal disputes of a constitutional nature, such as those concerning the appointment of the Government and the relationships between the President and the Prime Minister, or texts which, by their general nature, give rise to provisions regarding the legislative delegation of the Government. The regulation of the CCR, especially the constitutional provisions regarding the appointment of judges and its powers/jurisdiction is also a topic of revision that was mentioned. At the same time, it was critically argued that the subject of the revision of the Constitution was present on the agenda of all post-December parliamentary majorities and that both the center-right parties, when in opposition, turned the revision of the Constitution into an emergency, ranked once they came to power. It has also advanced the idea that perhaps not only a revision of the Constitution would be necessary, but a new Constitution[7].

Likewise, it is noteworthy the issue that marked the legal debates in 2021 and which also called into question, *inter alia*, the revision of the Constitution. This refers to the relationship between national and EU law, more specifically to the position of the Constitution in relation to the EU binding acts.

In the case-law dispute between CJEU and CCR regarding priority vs. primacy of EU law, CCR noticed in a press release[8] that "the conclusions of the CJEU ruling that the effects of the principle of the primacy of EU law apply to all organs of a Member State, without national provisions, including those of a constitutional nature, being capable to hindering this, and according to which national courts are obliged to disapply, of their own motion, any national legislation or practice contrary to a provision of EU law, requires revision of the Constitution in force. From a practical point of view, the effects of this judgment [CJEU] can only produce effects after the revision of the Constitution, which, however, cannot be done by operation of law, but only on the initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself." However, no further legislative action has been taken, and the issue remains open for resolution by the courts of law in the enforcement of the law, in the specific cases also covered by the divergent case law of the CJEU[9] and CCR[10].

In a partial conclusion, it could be stated that the constitutional reforms initiated in 2019 have failed in part, if we consider, for example, the proposal to amend the Government's emergency ordinance regime, both in terms of regulation and the possibility of challenge before CCR. As for the proposal to amend the regulation of the right to be elected, it seems to be further sustained, although its debate in Parliament has not progressed in recent years. It is also true that the period marked by the Covid-19 pandemic and the successive extensions of the state of alert was not favorable for the amendment of the Constitution. However, the significant interval elapsed since the adoption of the Constitution (30 years), and its only successful revision (in 2003) determined a focus of attention on the need and dimensions of the revision of the Romanian Constitution.

As for the idea of extensive constitutional reform promoted at the level of political discourse, it seems quite illusory, as long as it would involve a broad political agreement for support. To this effect, the criticisms brought to the regulation of the revision procedure (Articles 150-152) which qualify the Romanian Constitution as a rigid one, quite difficult to amend, are also noteworthy. Particularly, the coagulation of a qualified parliamentary majority for the adoption of the revision law of the Constitution (2/3 or ¾ of the number of Deputies and Senators, as appropriate) is difficult to achieve, especially in the case of extensive revisions.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As long as no amendments to the Constitution have been made during the reference period, we do not have an object of analysis limited to this section. However, a number of remarks regarding the power and the role of the CCR in the revision procedure of the Constitution, in conjunction with other powers of the court, would be useful.

CCR is organized according to the Kelsenian model of constitutional justice, and its powers are regulated by the Constitution (Article 146) and Law No 47/1992 on the organization and functioning of the Constitutional Court, subsequently amended and supplemented. The constitutional review is mandatory in the revision procedure of the Constitution and its object is the verification of the observance of the procedure and the limits of the revision, expressly regulated in the Constitution (Articles 150-152). CCR shall rule *ex officio* upon the revision initiatives of the Constitution, as well as on the revision law adopted by the Parliament, thus "securing" the core of the democratic values

Elena Nistor, Initiatives to revise the Romanian Constitution of 2019. Brief presentation of the decisions of the constitutional court http://www.revistadedrept-constitutional.ro/wp-content/uploads/1contents/2020_1/2020_1_Iulia_Elena_Nistor_Initiatives_to_revise_the_Romanian_Constitution_of_2019.pdf

5 Article 63 (5) of the Constitution: "*Bills or legislative proposals entered on the agenda of the preceding Parliament shall be carried over in the session of the new Parliament*"

6 The internal memorandum approved at the meeting of the Standing Bureau of the Chamber of Deputies on 1 February 2021 states, in point 2, that for the revision proposals of the Constitution in the Standing Committees of the Chamber of Deputies there is no obligation to continue the procedure in the new Parliament and they rank http://www.cdep.ro/bp/docs/F1298191947/img02042021_0008.pd

7 Professor Ioan Stanomir, in Revising the Constitution or the road to the wall, https://www.dw.com/ro/revizuirea-constitu%C8%9Biei-sau-drumul-la-zid/a-59262606

8 https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/

9 Judgment of 21 December 2021 of the CJEU in related cases C-357/19 Euro Box Promotion and Others, C379 / 19 DNA - Oradea Territorial Service, C-547/19 «Romanian Judges Forum» Association, C-811/19 FQ and Others and C-840/19 NC; CJEU reiterated in this case its established case-law that "under the principle of the primacy of Union law, the invocation by a Member State of the provisions of national law, whether or not of a constitutional nature, may not prejudice the unity and effectiveness of Union law. Indeed, according to an established case-law, the effects associated with the principle of the rule of law are imposed on all the organs of a Member State, without, in particular, internal provisions, including constitutional ones, being able to prevent" Paragraph 251

10 Decision No 390/2021, Official Gazette no. 612 of 22 June 2021

of Romania. The decisions of the CCR shall be generally binding, so that a revision initiative/revision law of the Constitution found unconstitutional will not be able to be adopted by the Parliament and, namely, not subject to the referendum for the revision of the Constitution. Consequently, the responsibility for the future of the Constitution lies also in the hands of the Constitutional Court, which raises the awareness of the importance of its role as an independent, highly competent institution, above and beyond any intrusions that would hinder and jeopardize its purpose. We remind in the context of the words of the President of the Constitutional Court of the Czech Republic,[11] a Court holding the Presidency of the Conference of the European Constitutional Courts at the Eighteenth Congress of the Organization (2021, Prague)[12] which emphasized the role of the constitutional courts: "they were not established to be popular, but to ask unpleasant questions and cancel legal acts by their decisions if they violate the Constitution and the fundamental human rights. A constitutional court is not a decoration of the rule of law. A constitutional court is not an ornament of the palace of State power. A constitutional court is an assurance that the State will abide by its own constitutional rules. They must fulfill their role with caution, without compromise, and without taking into account other interests".

Returning to the revision proposals abandoned in 2021, we believe that the connection between the constitutional review of the revision initiatives of the Constitution and other powers of the CCR, namely, in this context, that of the referendum, may be relevant. The experience of a consultative referendum validated by CCR, followed by the implementation of the referendum result through revision initiatives of the Constitution found in part unconstitutional by the same Court, and finally, the abandonment of those initiatives, reveals the need for more coherent regulation of the revision and referendum (consultative) and the Court's jurisdiction in this regard. Such regulation is necessary for not creating an unrealistic waiting horizon, with negative consequences on popular confidence in constitutional institutions.

We note that the "engine" of the parliamentary initiatives for the revision of the Constitution mentioned in the previous sections was the result of a national consultative referendum initiated by the President of Romania. In that referendum, 85.91% of the votes were in favor of the answer "YES" to the question "prohibition of amnesty and pardon for corruption offenses" and 86.18% answered "YES" to the question of "prohibition of adoption by the Government of the emergency ordinances in the field of crimes, punishments and of the judicial organization and the extension of the right to challenge the ordinances directly to the Constitutional Court". That referendum was challenged before CCR, *inter alia*, on the grounds that the subject of the referendum concerned issues which, according to Article 152(1) and (2) of the Constitution, cannot be reviewed and cannot be subject to referendum, thus true "dismemberments" in terms of doctrines[13]. However, regarding these criticisms, CCR held that it is based on the undifferentiated approach of several constitutional institutions and types of referendums, meaning that they aim at revising the Constitution, including the referendum as a stage of the revision procedure, a legal hypothesis different from the consultative referendum. According to the Court, if the revision of the Constitution cannot violate the limits of the revision, as regulated by Article 152 of the Constitution, neither the referendum for the approval of the revision law can violate the limits of the revision. Therefore, as another type of referendum was challenged in the case, namely a consultative referendum, the Court held that the criticisms made exceeded the limits of the Court's jurisdiction in carrying out the power established by Article 146 i) of the Constitution[14], namely to guard the organization and holding of a referendum. The analysis of the observance of the limits of the revision shall be carried out within the CCR's powers aiming at revising the Constitution, which, moreover, happened later as the political forces represented in the Parliament promoted revision initiatives of the Constitution to capitalize on the popular options expressed in the consultative referendum. These initiatives have been found, in part, unconstitutional[15].

Compared to the briefly presented remarks, the question of the usefulness of the consultative referendum thus arises, being somewhat predictable that part of the issue submitted to the said referendum would raise constitutional issues if it took the form of a revision of the Constitution. It is true that in the same ruling, which confirmed the results of the referendum[16] CCR emphasized that the effects of the referendum initiated by the President of Romania are not juridical, but political, to guide public authorities, an approach that can be materialized "in various measures of public authorities, without imposing an option for one category or another of measures, as the revision of the Constitution would be".

Therefore, seeing the subsequent developments, it follows that this "political" effect of guiding the authorities assigned to the consultative referendum may have no significance given the passivity of political actors. Lacking concrete measures, the consultative referendum becomes a pure opinion poll or a tool used to strengthen a political position at some point[17]. Further, for the citizens participating in both democratic exercises, it is difficult to understand why during the referendum their options received confirmation as a validation of the referendum by CCR, but later, the same options, transposed in revision proposals of the Constitution, were found unconstitutional.

IV. LOOKING AHEAD

CCR has recently celebrated 30 years since its establishment (1992). Along with the anniversary messages and the report of 30 years of activity, the idea of an extensive constitutional reform was again advanced by the representatives of the authorities participating in the event. Meanwhile, recent developments in the relationships between the courts of law and the constitutional judiciary have been mentioned, emphasizing the need for jurisdictional dialogue to eliminate disputes.

11 Mr. Pavel Rychetský

12 https://www.cecc2017-2020.org/cecc-news/detail/under-the-chairmanship-of-the-constitutional-court-of-the-czech-republic-the-xviii-congress-of-cecc/

13 Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions, by Oxford University Press, 2019

14 Ibidem

15 Pl-x no. 331/2019, Legislative proposal for the revision of the Romanian Constitution, http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17975 : "the termination of the legislative procedure by not complying with the provisions of Article 63 (5) of the revised Romanian Constitution" BP 01-02-2021 and Pl-x no. 332/2019, Legislative proposal for the revision of the Romanian Constitution, http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17976, "the termination of the legislative procedure by not complying with the provisions of Article 63 (5) of the revised Romanian Constitution" BP 01-02-2021

16 Ruling no.2/2019 (Official Gazette no. 803/3 October 2019)

17 As for Romania, the consultative referendum can only be initiated by the President of Romania

Consequently, the prospect of resuming the issue of revision, also within the cessation of restrictions related to the Covid-19 pandemic, is foreseen as a perspective. However, another major threat, very close to Romania's borders and endangering the whole of humanity, means that at this time the most pressing issues are limited to the concern to ensure peace, security, and a decent standard of living. In such a turbulent context, it is difficult to predict when and how a revision of the Romanian Constitution will be possible.

As for the latent tensions specific to the constitutionalism of the EU, they remain an open issue, as it is not clear how much these disputes concern the regulation of these relationships and how much the interpretation of legal provisions or collateral aspect.

Nevertheless, at this moment, the Romanian Constitution regulates in a separate article the relationships with the EU, establishing, in Article 148 (2) - Integration into the European Union, as a result of the accession, *"the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act."* Relating these provisions to those of Article 11 – *International law and national law,* found in Title I – *General Principles*, of the Constitution, as well as those of Article 147-*Decisions of the Constitutional Court*, we find a fairly clear regulation of the relationship of norms. Thus, norms violating the Constitution are prohibited from entering the national system, as long as, according to Article 11 (3), "*if a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution"* and according to Article 147 (3) final sentence of the Constitution, "*the treaty or international agreement found to be unconstitutional shall not be ratified*". It follows that once ratified by Parliament, the treaty enjoys a presumption that it complies with the Constitution. It is a relative presumption, as it results from the *per a contrario* interpretation of the provisions of Article 147 (3), the first sentence of the Constitution, according to which "*if the constitutionality of a treaty or international agreement has been found according to article 146 b), such a document cannot be subject of an exception of unconstitutionality"*. Therefore, if the constitutionality of the treaty or international agreement has not been found according to Article 146 b), it may be subject to an exception of unconstitutionality. Likewise, once ratified, the treaty obliges the Romanian State, which according to Article 11 (1) of the Constitution, "*pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to*".

As for the obligations specific to EU accession, a special regulation of the relationships of norms in this case was established, through the provisions of Article 148 of the Constitution, given the special nature of the EU. The case law of CCR is in the same sense, emphasizing that the provisions in question (Article 148) represent a particular enforcement of the provisions of Article 11 (2) of the Constitution, according to which "*Treaties ratified by Parliament, according to the law, are part of national law*".[18] The Constitution was amended in 2003 precisely to make it possible for Romania to access the EU. As a fundamental law, the Constitution provides the basis for the legal norms in the two systems and the premises of their coherence, being guaranteed by Article 148 (2), cited above, which gives priority to the constitutive treaties of the EU and other binding European regulations, contrary to the provisions of national law. As CCR has ruled in an established case-law, starting with Decision No 148/2003, the phrase "*national laws*" means the other regulations in the national normative system, and not the Constitution itself, a conclusion based on both the systematic and logical interpretation of the constitutional provisions. Therefore, if there is a collision of a treaty with the Constitution itself, including in the sphere of relationships at the EU level, we apply the general rules established by Article 11, in the sense of calling into question the revision of the Constitution.

V. FURTHER READING

Alejandro Linares Cantillo, Camilo Valdivieso-León, and Santiago García-Jaramillo - Constitutionalism: Old Dilemmas, New Insights (Oxford Scholarship Online: July 2021).

Schutze Robert, European Constitutional Law (Oxford University Press: 2021).

18 referring to the meaning of the Article 148 (2) of the Constitution, CCR stated that they aim at "implementing Community law in the national system and establishing the rule of priority application of Community law over the contrary provisions of national law, in compliance with the provisions of the Act of Accession" and that "[...] Member States of the European Union have agreed to place the acquis communautaire - the founding treaties of the EU and the regulations derived from them - on an intermediate position between the Constitution and other laws, when it comes to binding European legislation". (see Decision No 148 of 16 April 2003, Official Gazette, Part I, no. 317 of 12 May 2003, and Decision No 80 of 16 February 2014, Official Gazette, Part I, no. 246 of 7 April 2014).

Russia

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I. INTRODUCTION

The Russian Constitution turned out to be a highly functional document that laid down the widely-accepted procedures during the transition to liberal democracy in post-soviet Russia. Since its adoption by popular vote in 1993, Yeltsin's Constitution has undergone only a few blocks of substantive amendments. In 2008, the changes extended the terms of office of the President and the State Duma and created the institution of Government's annual reports. In February 2014, a constitutional change merged the Supreme Court and the Supreme Arbitration Court, and in July 2014, an amendment to the Constitution granted the President the prerogative to appoint up to 17 senators to the Upper Chamber. In addition to these changes, during the 2000s there have been several minor amendments to the Article 65 regarding state-territorial composition of the Russian Federation.

Finally, the Russian Constitution underwent the most large-scale changes in 2020 as a result of a massive reform proposal launched by President Vladimir Putin. The content of forty-two articles was revised, affecting the important features of Russian state and society, from core values and main priorities of state policy to the international obligations and power's organizational structure, and so on. The amendments made relevant adjustments to the country's political system, expanding further the powers of the president, changing the procedure for government's appointment and "zeroing out" the terms of former presidents, hence allowing the President-in-office to stand for two more terms despite the limits on re-election provided for in the original text of the Constitution.

As noted by several observers, the recent constitutional revision was characterized by a series of procedural anomalies and content-related inconsistencies. As regards the procedural aspects, the Russian legislator created an *ad hoc* procedure for the constitutional revision and for the entry into force of the amendments, not provided for by the constitutional provisions contained in articles 135, 136 of the Constitution. Furthermore, the draft law on amendments encompassed such a vast number of issues concerning different subjects that it could hardly be revised all together or without proceeding with a total revision of the original text. As a result, the current version of the Russian Constitution combines the elements based on liberal values and original Russian-specific narratives, thus being eclectic and controversial at some points.

Putin's 'Great reform' had further developments in the implementing legislation elaborated and adopted by Parliament in 2020-2021. However, the complex interrelation between the constitutional and legislative level should be noted: the part of the provisions adopted to the Constitution has been already included in primary legislation before the revision. At the same time, several acts adopted in view of legislative implementation of the 2020 Law on the Amendment went well beyond the scope of amendments, thus introducing a set of normative provisions aimed at complementing the Reform, not simply enacting it.

In this review, we will try to investigate the purposes and the consequences of the 2020 Constitutional Reform, as well as the impact of the following implementing legislation adopted over the last two years.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

On January 15th, 2020, during his address to the nation, the President of the Russian Federation announced a set of amendments to the Constitution. The President also announced the need for a popular vote on the amendments, as the proposed amendments concern substantial changes in the political system and in the work of the executive, legislative and judicial bodies. The same day of the announcement, Vladimir Putin ordered to form a working group to draft proposals for amending the Constitution and approved the lists of its members. The group was composed of 75 politicians, legislators, scholars, and public figures.

The draft amendments to the Constitution have been prepared based on the proposals submitted by the working group. During this work, the list of initial seven points indicated by the President for revision has increased dramatically thanks to the suggestions of the public figures involved in the discussion of the draft. In particular, the Public Chamber has proposed to integrate the draft law with other 18 points.

The following procedure of the draft law adoption within two chambers was extremely fast, considering the relevance of the document. Only three days after the submission of the draft law to the Duma, the draft passed the first reading, while it took less than two months for the deputies to adopt the document definitively. Still, it is important to say that one of the most important amendments regarding the abolishing of the ex-presidents' mandates has been introduced into the text as a last-minute change. Notably, the so-called "Tereshkova clause" was directly integrated into the final version of the draft law bypassing the discussion at first and second reading.

Some days later, the proposal was approved by the Upper Chamber and by the large majority of the regional councils. Subsequently, the

Law was transmitted to the Constitutional Court for an inquiry on the conformity with the core Chapters of the Constitution (Chapters I, II and IX), and the judges confirmed its compliance.

In order to guarantee maximum legitimacy, the President has announced nationwide voting on the reform proposals. The results of the popular vote demonstrated a large support to the maxi-amendment launched by the President, yet it was difficult to understand - due to the impossibility of expressing preferences - whether all the proposals had been received with the same enthusiasm by the citizens.

As regarding the genesis of the proposal, the launch of the Constitutional Reform in 2020 was an unexpected event, since the revision of constitutional norms has been a sort of taboo in Russian politics for a decade. There have been several times when the in-office President Vladimir Putin expressed his negative view on the idea to modify *ad hoc* any constitutional provision. Only in recent years, when the problem of Putin's successor became more evident in view of the 2024 elections, did the idea of abolishing the limit of two consecutive terms for the presidency begin to circulate in the public debate. For a long time, this type of solution was rejected by the Russian authorities, but then it was implemented in 2020. While the latest reform introduced stricter rules for the presidential candidate by setting the absolute limit of two terms, an important derogation was foreseen for former Russian presidents.

Just like in previous times (in 2008, 2014), the recent constitutional revision was also initiated by the President. Considering that since 2003 the pro-president "United Russia" party has held a qualified majority of the seat in Russian Parliament (just enough for the approval of the constitutional amendments), it is not surprising that all presidential initiatives meet no resistance to their enactment. Again, in the case of the 2020 Reform, there was little doubt as to the success of Putin's proposal. The bill, in fact, was approved by Parliament and by the regional councils in a very short time, confirming the situation according to which all the important political actors in Russia are gathered around the figure of the undisputed leader.

The approval of the reform via popular vote gave a further confirmation of the president's everlasting popularity among the Russians. The voting on reform, which lasted for a week between 25th June and 1st July, led to a triumphant victory of the "Yes" with 77.92% of the votes. This level of approval can surely be compared to the level of consensus expressed for Putin's candidacy during the last presidential elections of 2018. The majority of the Russian electorate (52.95%) voted in favor of the constitutional reform, providing popular legitimacy to the changes. Yet, the voting method with the only possibility of a generic 'all-together' approval of the various amendments has transformed this constitutional referendum into a sort of plebiscite for or against the figure of Putin.

As regarding the implementing legislation, most of the draft laws passed by the Duma at the end of 2020 and in March and April of 2021 have been presented by the President. Among these legislative packages, the most relevant presidential bills contained: the amendments to the Constitutional Law on the Constitutional Court, the new version of the Law on Government, the amendments to the Law on Judicial system, the new Law on State Council, changes to the electoral legislation, especially in the part regarding the requirements for public offices candidates or public servants.

The other draft laws discussed in Duma in December of 2021 were presented under the initiative of the two ex-members of the working group on the 2020 Constitutional Reform. Both acts concerned the introduction of the "public power" concept within primary legislation. While the first bill containing changes at the framework law on the organization and functioning of the bodies of federated subjects has been adopted at the end of 2021, the approval of the amendments to the legislation regulating the nature and the activities of self-government bodies is still pending. The original project will probably have to undergo some changes due to the criticism expressed by the different parliamentary groups towards the proposed text, especially regarding the new organizational model for municipalities hypothesized by the authors. But it is very likely that the original design, which provided for a more limited autonomy for the local authorities, will remain unchanged.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The main purpose of the 2020 'Great reform', according to Vladimir Putin, was to improve the organization of the public power in Russia through ensuring "the greater balance between the various branches of power" and "guaranteeing the priority of the Russian Constitution in national legal framework". Thus, it was proposed to restraint the primacy of international law over Russian domestic law, introduce a new procedure for the appointment of the President of the Government, his deputies, and federal ministers, prohibit foreign citizenship for judges, governors, deputies, senators, prime ministers, and ministers, set more stringent requirements for candidates for the office of President, as well as introduce the absolute limit of two presidential terms.

The new proposal also concerned the state-territories relations. In fact, it was proposed to introduce a new concept of 'unified system of public authority' into which local self-government should converge. Therefore, the amendments to the Russian Constitution provided for the reallocation of the federal, regional, and local bodies and their inclusion within the 'unified system', to the detriment of the principle of vertical separation of power and local autonomy (see Article 12 of the Constitution).

The proposal to constitutionalize the equalization of pensions and a rule on the minimum wage included within the presidential proposal was initially seen as a sort of "locomotive" of the reform, but it was quickly overshadowed by other proposed changes. In this respect, the amendment that was not even contained in the original proposal but subsequently came to the fore was certainly the one that "zeroed" ex presidents' mandates, allowing the current Head of State to run for two more presidential terms even after 2024. According to international experts, the matter that this provision applies to two specific persons (actual and one former president) has transformed it into an "*ad hominem* constitutional amendment".

As regards the role of the Constitutional Court, one of the major innovations, however, was represented by the *ex ante* appeal to the constitutional judges issued by the President in order to verify the conformity of the content and procedure of the reform to the immutable cardinal principles enshrined in the 1993 Constitution. The procedure was established by the draft constitutional amendment in derogation

of the constitutional norm and ordinary legislation, as no provision provided for this jurisdiction of the Court in this merit.

On 16 March 2020, the Constitutional Court issued its opinion declaring the amendments conform to Chapters I, II and IX of the Constitution. The judges considered that judicial constitutional control of the proposed amendments, within the meaning of Articles 10, 15, 16, 125 and 136 of the Constitution, may serve as "an appropriate guarantee of the legal force of the provisions on the foundations of the constitutional order of Russia and on fundamental human and citizen's rights and freedoms in the system of constitutional norms". Secondly, the Constitutional Court recalled that a special mechanism for introducing amendments to the Constitution by means of a special amendment law allows – within its permissible limits – to fine-tune separate provisions of Chapters III-VIII without altering the Constitution as a whole. Third, the Constitutional Court observed that the amending law had reaffirmed the procedure for introducing a constitutional amendment in accordance with Article 136 of the Constitution, in conjunction with its Article 108, but additionally provided for an all-Russian vote as a compulsory condition for the entry into force of the proposed amendments. In the Court's view, supplementing the procedure in this way by holding a nationwide vote cannot be considered as denying the prerogative of the Federal Assembly and the legislators of the Russian Federation's constituent entities, because it "fulfills the principle of grassroots democracy", which is one of the most important fundamentals of the constitutional system. As a fourth point, the Constitutional Court found legitimate the new rule on the non-execution of "decisions of interstate bodies adopted on the basis of the provisions of the international treaties of the Russian Federation in an interpretation contrary to the Constitution of the Russian Federation". According to judges, it does not prescribe a repudiation by the Russian Federation of compliance with the international treaties themselves and of the honoring of its international obligations and, accordingly, is not contrary to Article 15 of the Russian Federation Constitution. The Court said that the given mechanism is not intended to establish a repudiation of execution of international treaties and the decisions of interstate court bodies based thereon but rather to devise a constitutionally acceptable means of executing such decisions by the Russian Federation while steadfastly safeguarding the supreme legal authority of the Constitution within the Russian legal system.

Moreover, the Constitutional Court considered that the prerogative given to the Council of Federation to dismiss, on the proposal of the President of the Russian Federation, the Chairman of the Constitutional Court, Deputy Chairman of the Constitutional Court and judges of the Constitutional Court "in the event of conduct by them that discredits the honor and dignity of a judge" may not be considered incompatible with Article 10 of the Constitution, which guarantees the independence of legislative, executive and judicial bodies. Noting that the Constitution of the Russian Federation does not establish a specific procedure for terminating the office of a judge, the Court took into account that "the corresponding procedure involves the President of the Russian Federation and the legislature, and in any case does not permit the unreasoned and unsubstantiated termination of a judge's powers". At the same time, this new mechanism of judges' dismissal was criticized by the Venice Commission as "this makes the Court vulnerable to political pressure". Finally, the Constitutional Court considered legitimate the increase of jurisdiction of the Constitutional judges following the establishment of the preliminary constitutional review, at the request of the President of the Russian Federation. Moreover, the reduction of the judges of the Constitutional Court from 19 to 11 provided for by the reform was also declared in conformity to the Constitution.

The overall opinion of the Constitutional Court regarding the reform was positive, the judges came to the conclusion that the procedure for the entry into force of constitutional amendments is consistent with the Constitution. At the same time, the approach with which the Court assessed the amendments was very formal with a scarcely proactive attitude, as the judges often recalled the wide margins of discretion accorded to the constitutional legislator in the context of the constitutional revision.

IV. LOOKING AHEAD

As regards the expected effects following the entry into force of the new constitutional provisions, several commentators have expressed concerns about a further strengthening of the figure of the President in the already unbalanced configuration of power in Russia. For example, in its interim opinion, the Venice Commission has noted: "Analyzing the substance of the amendments, the Venice Commission concludes that they have disproportionately strengthened the position of the President of the Russian Federation and have done away with some of the checks and balances originally foreseen in the Constitution" (par.182).

Indeed, on the basis of the new amendments, the President obtained new powers, such as the right - in agreement with the Federal Council - to remove from their positions the members of the Constitutional Court and the Supreme Court, the right to appoint and dismiss the Attorney General (both, established by Article 83), the possibility of appointing up to 30 senators, of which 7 senators for life (art. 97), and the prerogative to form a new constitutional body - the Council of State. Moreover, with regard to the legislative *iter*, the President's power of suspensive veto was strengthened and extended to organic laws through the introduction of the preventive control mechanism of the constitutionality of federal and constitutional laws (art. 107-108).

Furthermore, regarding the "President-Government-Duma" relations, although, at first glance, the project seems to propose a redistribution of powers towards the Chambers, *de facto* the dominant position of the President remains untouched by the amendments (for instance, the possibility of the Head of State to unilaterally dismiss the Government provided for in Article 117 results unaltered following the reform). Moreover, the amendments provided for the recognition of the leadership role of the President in relation to the work of ministers and established that the President "directs the activities of the Government" (Article 83).

Generally speaking, Putin's constitutional reform, on the one hand, made adjustments to the Russian "checks and balances" system, creating more complex relations between the bodies, on the other hand, it represents a sort of "update" of the constitutional text. The proposed changes seem therefore to set the results of the Putin two-decade presidency and reflect the traditionalist, sovereign and centralizing trend that took place in the country during these years.

In conclusion, what are the consequences of the approval of this reform for the political system? There are, of course, still many issues to

be resolved on the effective application of some new provisions. For example, the future role of the Council of State, new constitutional body defined as "responsible for the coordinated functioning of state bodies at various levels" (Article 83), is not yet clear. Second, it is unclear how the new provision on the 'unified system of public authority' will affect the functioning of local government and to what extent it will limit the autonomy of the self-governing bodies. Furthermore, some doubts remain on the consequences of the constitutionalizing of the competence of constitutional judges to decide on the enforceability of decisions adopted by interstate bodies (see articles 79 and 125, as amended by the Amendment Law of 14 March 2020). The key issue in this case concerns possible impact of this new mechanism on Russia's compliance with its international obligations.

Still, the bills approved in 2020-2021 by the Russian Parliament in order to implement the Constitutional Reform, some very detailed and others rather poor and vague, introduced new concepts and established new principles, procedures and mechanisms that will now regulate relations between the various bodies. Overall, the legislation implementing the recent constitutional reform has not provided clear answers to the great uncertainties of the future transfer of power in Russia. The mysteries that are still unveiled concern a range of possible scenarios that would open upon the expiry of the current presidential mandate of Vladimir Putin. What, therefore, must be expected in the future for Russia, especially as regards the future position of its undisputed national leader: his re-nomination, his definitive retirement from political life or his permanence on the Russian political scene in another role, let say as senator for life or the head of the State Council? To answer this question, we still should wait.

V. FURTHER READING

Venice Commission, 'Interim opinion on constitutional amendments and the procedure for their adoption' CDL-AD(2021)005

Ben Noble, Nikolay Petrov, 'From Constitution to Law: Implementing the 2020 Russian Constitutional Changes', in Russian Politics, No. 6, 2021

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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 of 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 in 1974, very recently when compared to the majority of continental Europe legal systems, San Marino has adopted the *Dichiarazione dei diritti dei cittadini e dei princìpi fondamentali dell'ordinamento sammarinese* (Declaration of Citizen Rights and of Founding Principles of the Sammarinese Legal System), hereinafter DD. Furthermore, the 2002 reform of the DD has broadened the number of Sammarinese sources, including among the top sources both the European Convention of Human Rights and international covenants protecting rights and freedoms.

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 as well by the 2002 amendment), these constitutional laws have to 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 afterwards.

The very same procedure is provided in Article 17 in order to amend the DD. This article, again introduced by the 2002 amendment, the DD a rigid character, which was previously lacking.

In the year 2021, no amendments to the DD were neither proposed nor approved. Nonetheless, it seems convenient to mention that the Consiglio Grande e Generale passed a constitutional law in December 2021, const. law 1/2021.

Furthermore, the important debate started in 2020 on the necessity for the Sammarinese legal system to undergo a significant constitutional reform in the upcoming years keeps going, even though neither a specific nor a detailed road map has been adopted yet.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Following the September 2020 report by GRECO, the reform of the judiciary became the country's top priority. Although const. law 2/2020 had already started the reform (civil liability regime), it is cost. law 1/2021 that enforces an all-embracing reform.

Indeed, const. law 1/2021, passed by a 2/3 qualified majority by the Consiglio Grande e Generale, strengthens the independence of the judiciary and reshapes the role of the Consiglio Giudiziario (Judiciary Council, the self-governing body of the judiciary), thus repealing qualified law 145/2003.

Moreover, it is convenient to note that const. law 1/2021, when dealing with the civil liability regime of the members of the judiciary as well as the competence of the judges responsible of the civil liability procedure (Giudici per l'azione di responsabilità civile), repeals const. law 144/2003, as amended by const. law 2/2020.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Even though no amendments to the DD have been passed in 2021, it is worth 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. Hence, no provision 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 by the Consiglio Grande e Generale or by an absolute majority vote followed by a popular 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 Collegio Garante della Costituzionalità delle Norme, which is the Sammarinese constitutional court, is one of the major innovations introduced by the 2002 DD reform. 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 as amended in 2002, there was no need for a body like this.

With respect to the sources, the Panel can scrutinize 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 have become constitutional parameters.

A further consideration comes from the membership to the Council of Europe, which closely scrutinizes the implementation of the rule of law in micro-jurisdictions.

When considering the role played by the Collegio Garante in the Sammarinese institutional architecture, despite still being a young court, it plays a mainly counter majoritarian role. Nevertheless, considering the diminutive size of the Sammarinese jurisdiction, concerns persist over a fully independent judiciary. However, as it usually happens in micro-jurisdictions, the majority of the members of the Collegio Garante are Italian citizens.

IV. LOOKING AHEAD

San Marino was bound to start a significant institutional reform in 2021 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 within the Sammarinese institutional tradition. Const. law 1/2021 is the first step in this direction, even though the most significant reforms are expected for 2023, rather than for 2022. The extension of the reform cannot be appreciated yet. San Marino, as all the other continental micro States, tends to modernize gently, in order to respect the principle of institutional continuity that has guided all Sammarinese reforms so far.

Therefore, it seems likely that a series of amendments to the constitutional laws will be put forward; as well amendments to the DD cannot be excluded.

The Slovak Republic

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I. INTRODUCTION

Unsurprisingly, the most significant issue influencing the 2021 constitutional development in Slovakia was the COVID pandemic. The states of emergency and various measures fighting the deadly disease epitomized the entire year. One of the most significant constitutional changes of 2020, mentioned in last year's Slovak report, was the amendment to the Constitutional Statute on the State Emergency of 2002 ("the CSSE").[1] During the peculiar parliamentary session, the Parliament adopted this amendment in the dying seconds of 2020. This change enabled extending the state of emergency over the original 90-day period. Subsequently, the state of emergency declared on November 1, 2020, persisted until May 14, 2021. Summer 2021 was "emergency free". In autumn, the pandemic worsened, and the government declared another state of emergency on November 25. This state of emergency remained in place until February 23, 2022. The total number of "emergency days" in 2020 was 169. Therefore, the government had ample extraordinary constitutional opportunities to re-adjust pandemic measures according to the prevalent COVID mutation.

Interestingly, the government informally ceded most of its decision-making power to the Public Health Office ("PHO"), an executive agency wholly subordinated to the Ministry of Health. Even though the PHO formally issued the pandemic decrees, the decision-making remained firmly in the hands of the government. The government transferred the responsibility for legislating to an institution with medical expertise but with very little influence on the final decisions. The cooperation between these political and expert bodies was far from perfect and usually took too much time. In numerous instances, the adopted rules lacked clarity and were issued late.

This transfer of powers from the government to one of the executive sub-branches was heavily criticized.[2] Aspects of the delegation were challenged before the Slovak Constitutional Court ("SCC"). In PL. ÚS 8/2021, delivered on December 1, 2021, the SCC declared that the formal flaws of such a transfer were constitutionally acceptable. In response to another constitutional challenge, the SCC in PL. ÚS 4/2021 (rendered on December 8, 2021) held that the delegation of regulatory powers via an overly ambiguous statutory provision was substantially limited. In other words, the statutory provision could not delegate unlimited capacity to curb the effects of the pandemic from the government to the executive agency. The regulatory delegation must remain narrowly tailored, especially when the fundamental rights are at stake. Several individual PHO decrees were also constitutionally challenged. The rule by decree influenced the state of emergency periods heavily.

The other crucial constitutional development concerned a failed referendum campaign by the opposition parties to trigger an early election, seemingly due to the inadequate government response in mitigating the pandemic. The referendum initiative gathered enough support but was ultimately found unconstitutional in a high-profile court case with global resonance.[3] In only the second case of an *ex-ante* review of a referendum, the SCC consolidated its earlier case law on the subject and extended its power and reach.[4] In the next section, we will examine this constitutional controversy along with the quantitative and qualitative description of the amendment activity by the Slovak political actors. We conclude the report with a short reflection on future challenges and prospects of constitutional development for 2022.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2021, the Parliament considered 15 constitutional proposals. Out of these 15 constitutional proposals, 12 were constitutional amendments, and three were amendments to stand-alone constitutional acts.[5] The constitutional bills touched on various issues ranging from the conservative policy questions, such as the proposal to increase

1 "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>

2 Max Steuer, "Slovakia's Democracy and the COVID-19 Pandemic: When Executive Communication Fails" (*Verfassungsblog*, 9 March 2021) <https://verfassungsblog.de/slovakias-democracy-and-the-covid-19-pandemic-when-executive-communication-fails/>

3 The case was, for example, used in an amicus brief by Gautam Bhatia in the BBI Case in Kenya. Accessible at: <https://drive.google.com/file/d/1LBxxokm-We3She-pXwivoERVJAfncJHUv/view>; also Gautam Bhatia, "The BBI Case at the Supreme Court of Kenya – Day 1: Some Observations" (*Indian Constitutional Law and Philosophy*, 18 January 2022) <https://indconlawphil.wordpress.com/2022/01/18/the-bbi-case-at-the-supreme-court-of-kenya-day-1-some-observations/>

4 "The People v Their Representatives The Slovak Constitutional Court Blocks Referendum on Early Election" (*Verfassungsblog*, 14 September 2021) <https://verfassungsblog.de/the-people-v-their-representatives/>

5 After the 2020 COVID year, when the Parliament discussed only five constitutional bills, the average submission rate for 2015-2019 came close to 17 bills a year. The most constitutional bills were introduced in 2019 (25). Based on data reported by the Parliament. Accessible at: <https://www.nrsr.sk/web/ Default.aspx?sid=zakony/sslp>

the constitutional protection of the "traditional family" or a positive obligation of the state to compensate for the damages caused by the COVID vaccination, to a proposal to enact a constitutional requirement of the mental fitness for members of government. However, the most recurring topic was the request for an early end of the term of the Parliament. The opposition MPs tried to achieve such termination via the Parliament's decision or by unlocking this option for the people's vote in a referendum. The latter possibility was an apparent response to the SCC's decision PL. ÚS 7/2021, in which the SCC prohibited referendum on such a question without a constitutional amendment.

Ultimately, all constitutional proposals failed in 2021. Interestingly, none of them made it even to the second reading of the legislative process in the Parliament. All were initiated by the opposition MPs and, thus, doomed from the beginning. One of the proposals was withdrawn, and two bills did not fulfil the essential formal criteria for consideration in the Parliament. Therefore, there were no explicit textual alterations of other constitutional statutes in 2021.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As a result of the adoption of no formal constitutional amendment in 2021, the report turns its attention to the significant SCC decisions. Some of them implicitly adjusted and enhanced the Slovak constitutional system. All these decisions were amendments rather than dismemberments of the Slovak constitutional system.

The first decision, *PL ÚS 2/2021*, was rendered on March 3, 2021, in a proceeding that had never been used before the COVID pandemic. Thus, the explanation should start with a more complex overview. The CSSE regulates four types of the state of emergency (the state of crisis, the exceptional state, the state of war, and the war). These four emergencies provide different legal tools in dealing with the circumstances threatening the constitutional order. The most prominent instruments for these purposes are less stringent rules concerning human rights limitations. These temporary "emergency" possibilities allow the executive branch to fight emergencies more effectively. The relevant type of emergency for the COVID pandemic was the state of crisis. The CSSE grants this emergency the least pervasive opportunities to limit human rights. The government has the exclusive power to declare a state of crisis. There is no institutional cooperation requirement. However, Article 129 para 6 of the Constitution allows the SCC to review the declarations of the state of crisis and all ensuing governmental decisions tied to such a declaration. The SCC's review can be initiated only by a limited number of constitutionally relevant actors within an extremely brief deadline (5 days). The SCC must act promptly, as the statutory deadline for its decision is again rigorous (10 days).

For the first time, the (acting) General Prosecutor and the group of MPs constitutionally challenged the governmental declaration of the state of crisis in October 2020. The SCC delivered the decision *PL. ÚS 22/2020* on October 14, 2020. The reviewed order was extraordinarily vague and just one page long. Nevertheless, the SCC held it constitutional. The SCC approved a wide margin of discretion to the government when declaring a state of crisis:

> The government is in a better position to evaluate relevant circumstances and is democratically accountable for this assessment and the consequences of its decision on whether to declare a state of crisis. The role of the Court in this proceeding is to assess the factual grounds and make sure that manifest overreaction of the government did not occur.

Later, under the newly adopted extension mechanism,[6] the very same state of crisis was prolonged several times. In March 2021, the General Prosecutor and the group of the MPs challenged one such extension under the procedure of Article 129 para 6. In *PL. ÚS 2/2021*, rendered on March 17, 2021, the SCC dismissed both petitions and held the governmental measures constitutional. The SCC followed the principal rationale from its previous decision in this proceeding, reiterating that "the government is in a better position to assess the severity of the situation." It held that it only had to evaluate the essential rationality of the measure and "make sure that manifest overreaction of the government did not occur." It added that it "remains suspicious when it reviews the governmental decree on the state of crisis." The SCC also considered the extension mechanism of the state of crisis. It announced that the more the state of crisis extended, the more rigorous the constitutional review would apply to adopted measures. On the other hand, the SCC also appealed to a short (10 days) statutory timeframe of its decision to justify its relatively lenient attitude in reviewing the substance of the contested decree.

These two decisions revealed that the SCC did not want to interfere rigorously with the political branches' emergency decision-making. The SCC did not establish a workable standard for future emergency declarations, such as the proportionality analysis. It seems that the SCC would tolerate almost anything from the government in the future. The threshold of the "manifest overreaction of the government" would be demanding to overstep.

Finally, we turn to the decision *PL. ÚS 7/2021* considering the referendum on an early election.[7] The referendum initiative at the heart of the case sought to end the term of Parliament (and thereby the government) because of the failures in tackling the pandemic.[8] The two largest opposition parties sponsored the initiative. They managed to gather significant popular backing. More than 585,000 people signed the petition to hold the referendum, which is almost double the required threshold. According to Article 95 para 1 of the Constitution, the head of state calls for a referendum based on a petition submitted by no less than 350,000 citizens. This strong popular support showed that the initiative had a broad appeal. Clearly, the opposition parties successfully tapped into a general feeling of discontent with the government's pandemic response and the current state of politics.[9]

There have been two precedents for holding a referendum on an early election. Earlier referenda on snap elections took place

6 For more details on this mechanism see the 2020 Slovak report, p. 257 – 258.

7 This part of the report is based on Simon Drugda, "The People v Their Representatives The Slovak Constitutional Court Blocks Referendum on" (*Verfassungsblog*, 14 September 2021) <https://verfassungsblog.de/the-people-v-their-representatives/>

8 The petition is accessible at: <https://www.referendum2021.sk>

9 Dariusz Kalan "The Rise and Fall of Igor Matovic" (*Foreign Policy*, May 4 2021) <https://foreignpolicy.com/2021/05/04/slovakia-igor-matovic-resignation-coronavirus-pandemic-corruption/>

in 2000 and 2004, but neither had been litigated[10] or successful.[11] Both failed to meet the validity quorum for a referendum under Article 98 para 1 of the Constitution. Despite the two precedents, the scholarly opinion was unclear whether a referendum could constitutionally trigger an early election. That was the reason why the head of state decided to litigate. The Constitution allows the president to submit referendum questions to the SCC for review before calling a referendum.[12] President Zuzana Čaputová initiated the case on May 13, and the SCC had 60 days to review the referendum question "Do you agree with the proposal to shorten the VIII term of the Parliament so that the elections are held within 180 days of the result of this referendum?" for conformity with the Constitution.

There are two types of referenda in Slovakia, compulsory and optional. Under Article 93 of the Constitution, the people must approve or reject the accession or secession from a union with other states in a mandatory referendum. They can also resolve "other important issues of public interest" in an optional vote. There are subject-matter restrictions on what questions can be put up for a vote in an optional referendum – to the exclusion of questions concerning "fundamental rights and freedoms, taxes and duties, or state budget." The SCC had previously decided that these were the sole substantive restrictions. In *PL. ÚS 7/2021,* the SCC departed from its previous case law and extended the subject-matter restrictions by referencing the doctrine of the material core of the Constitution.

The doctrine of material core, developed in an adjacent line of cases on constitutional unamendability, identifies core principles of the Constitution that cannot be modified through an amendment procedure. In a fascinating development, the SCC used the doctrine to limit the power of the people, arguing that when people use referenda, they act as a constituted and not a constitutive power, which is why they cannot break the material core of the Constitution:

> [T]he Constitution characterizes [referendum] as an exercise of the legislative state power (one of the types of constituted powers) directly by citizens, in contrast to the exercise of the very same power by their elected representatives – members of Parliament. The essential point is that in both cases, it is the exercise of the constituted power (not the constitutive power), which is a priori limited by constitutional rules (norms).

The SCC found that a decision adopted in a referendum had the legal force of a constitutional act and was politically, although not legally, binding. Moreover, applying the doctrine of the material core of the Constitution, the SCC found that the challenged referendum contradicted the core principle of the generality of lawmaking, which was a constitutive principle of the rule of law, and the principle of functional separation of powers. First, referenda ought to generate generally binding norms of conduct or teleological norms. The SCC found that the referendum question calling for an early election sought to impermissibly derogate, in a single instance, general constitutional rules on the duration and end of a parliamentary term. The referendum question did not seek to create a general norm of conduct and thus breached the principle of generality. Second, by trying to terminate the parliamentary term in a single instance, the referendum initiative would invade the territory of other branches of the state power that decide individual cases. This referendum would, therefore, breach the core norm of the functional separation of power.

While the SCC found the subject of the proposed referendum unconstitutional, it did not rule out the possibility that a referendum on early elections might become a constitutional rule. The SCC recognized that referenda on early elections were slowly becoming part of the Slovak politic, albeit existing in the shadow of the law. The judges, therefore, implicitly encouraged the amending actors to integrate the referendum "trigger" for calling an early election into the master-text Constitution as a general norm rather than an *ad hoc* practice. The opposition MPs have continued to push for the referendum after the SCC's decision. Most recently, former PM Robert Fico announced that his political party SMER-SD launched another referendum initiative on the subject and began collecting the signatures for the petition.[13] The constitutional permissibility of the referendum will depend to a large extent on what questions the organizers ask and how. The organizers wish to ask the following two questions:

1) Do you agree that the Government of the Slovak Republic should resign without delay?
2) Do you agree that early termination of the parliamentary electoral term can be carried out via a referendum or a resolution of Parliament?

With the second question, Fico and his party seek to codify into law that a referendum may trigger the dissolution of the Parliament and early election. The power to trigger a national election through a popular vote is relatively rare in constitutional design, although referenda can dissolve the legislature in Liechtenstein and Latvia.[14] The SCC, however, seemed willing to accept a popular "recall" of the Parliament into constitutional law. More problematic is the first question, which seeks to resolve a case in a single instance by making the incumbent government resign, and does not create a general norm of conduct. The question thus breaches the principle of generality. If the organizers insist on including the question on the ballot, the referendum will likely be litigated again. It remains to be seen if the SCC allows the first question to proceed. The stated goal of the organizers is to hold the referendum at the time of the municipal elections in October 2022, which could result in a higher turnout and thus increase the likelihood that the referendum will meet the validity threshold.

10 The SCC only has the power to review the subject of a referendum since 2001. Therefore, only the latter of the two instances could have been litigated.

11 The referendum results are only valid if more than one-half of eligible voters participated in the vote and if the majority of participants in the referendum adopted the decision.

12 "Will Slovakia hold another referendum? President has 30 days to decide" (*The Slovak Spectator*, 5 May 2021) <https://spectator.sme.sk/c/22653067/will-slovakia-hold-another-referendum-president-has-30-days-to-decide.html>

13 "Smer-SD Launches Petition for Referendum Aimed at Snap Election" (*TASR*, 10 June 2022) <https://newsnow.tasr.sk/policy/smer-sd-launches-petition-for-referendum-aimed-at-snap-election/>

14 With the temporal exception of a year following and preceding a general election. See Article 14 of the Constitution of Latvia (1922, as revised in 2016). The head of the state also has the power to initiate a referendum on the dissolution of the Parliament in Latvia. A referendum to dissolve the Parliament was used in Latvia for the first time successfully in 2011. Corinne Deloy "The Latvians approve en masse the dissolution of their parliament" (*Foundation Robert Schuman*, 25 July 2011) <https://www.robert-schuman.eu/en/eem/1239-the-latvians-approve-en-masse-the-dissolution-of-their-parliament>

IV. LOOKING AHEAD

While 2021 was relatively uneventful in terms of formal constitutional change, Slovakia experienced interesting new constitutional development through litigation, and this trend seems to continue. However, the Parliament should soon decide the fate of at least one pending constitutional amendment bill. In conclusion, we look at the most critical agenda for the upcoming year.

In May 2022, just at the time of the submission of this report, the SCC decided on one of the pending unamendability cases by rejecting the petition. The case concerned an opposition challenge to a constitutional provision that removed the power of the SCC to review constitutional change. In confronting this challenge to its authority, the SCC opted for a passive-aggressive approach, finding that absent extraordinary circumstances, functional judicial review of constitutional change was not part of the material core of the Slovak Constitution. However, in extreme cases of a fundamental violation that would have the intensity to alter the character of the Slovak Republic as a democratic state based on the rule of law, the SCC would have to intervene as the "constitutional guardian."[15] If the amending actors were to overreach, the interpretation of the SCC's competencies would have to be extensively adapted to ensure the integrity of the founding document. The SCC effectively confirmed its prior case law on the subject of unamendability by holding that it had a reserve power to review constitutional amendments in exceptional circumstances, even if the text of the Constitution says otherwise. This case will be undoubtedly analyzed at home and abroad, and we will report on it in more detail in the upcoming 2022 IRCR report.

In non-judicial developments, the Parliament should soon also debate and vote on the Constitutional Act on the Budgetary Responsibility amendment.[16] We mentioned last year that the amendment was submitted to the Parliament in September 2020, but the political actors have been unable to progress on the bill. The negotiations on the subject between the coalition members have been more complex. The amendment would increase the control power of the Council for the Budgetary Responsibility for the state deficit and provide incentives for the government to keep the public spending sustainable in the long term.

V. FURTHER READING

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Slovenia

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I. INTRODUCTION

In 2021, there was one constitutional change. However, since the adoption of the Slovenian Constitution in 1991, there have been 8 constitutional changes. Among them, the most important are those concerning Slovenia's attitude towards the European Union.

The Slovenian Constitution stipulates a more demanding procedure for its change or supplementation (constitutional revision procedure). Therefore, it is a rigid constitution.

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.

This also happened in the case of the aforementioned constitutional amendment of 2021, when Article 62a was added including the Slovenian sign language in the Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The Act Regulating the Use of Slovenian Sign Language was adopted in 2002[1]. Its purpose was to recognize the right of deaf people to use their language, the Slovenian sign language, and the right to be informed in techniques adapted to it. Recognition of sign language and its use, as well as the recognition of the right to information in techniques adapted for deaf people, should prevent their isolation and enable them to exercise their human rights and fundamental freedoms more equally.

Following the adoption of the Act Regulating the Use of Slovenian Sign Language, in 2013, the National Assembly adopted the Resolution on the National Programme for Language Policy 2014-2018[2]. The mentioned resolution payed special attention to the deaf and to "Slovenian sign language as the first language of the majority of the deaf".

Despite the adopted law and the above-mentioned resolution, an initiative was given in 2018 to place Slovenian sign language in the Slovenian Constitution. The mentioned initiative for the inclusion of the Slovenian sign language in the Constitution was submitted to the President of the Slovenian National Assembly, who supported the initiative. Following this initiative, the Government of the Republic of Slovenia decided to send a proposal to the National Assembly for the entry of Slovenian sign language into the Constitution of the Republic of Slovenia[3].

The proposal to change the constitution, which included sign language in the constitution, was submitted by the government at the initiative of the Association of Deaf and Hard of Hearing Societies of Slovenia, and was also supported by the Association of Deafblind People of Slovenia. In the presentation of their positions, the parliamentary groups expressed satisfaction that they had taken the last step to enshrine the Slovenian sign language in the constitution. They also emphasized the importance of further steps in the exercise of this constitutional right in practice.

Amending the constitution in 2021, Slovenia became the first country which more broadly regulated the language of the deafblind on the constitutional level. By a constitutional law, the constitution was supplemented with the right to use and develop the Slovenian sign language; in this way it is easier for the deaf, hard of hearing and deafblind to exercise equal opportunities.

The Constitution was supplemented by a new Article 62 a, which reads:

> "The free use and development of Slovenian sign language is guaranteed. In the areas of municipalities where the official languages are also Italian or Hungarian, the free use of Italian and Hungarian sign language is guaranteed. The use of these languages and the position of their users is regulated by law. The free use and development of the language of the deafblind is regulated by law."

The placement of Slovenian sign language and the language of the deafblind is a big step towards ensuring equal opportunities and facilitating the integration of deaf, hard of hearing and cochlear implants who are users of Slovenian sign language and deafblind people into society. The ability to communicate is necessary and basic if one wants to function fully. Therefore, it is extremely important that the deaf and

1 Official Gazette RS, No. 96/02.
2 Official Gazette RS, No. 62/13.
3 Priznanje znakovnih jezikov, Primerjalni pregled (PP), Marjana Križaj, Raziskovalno-dokumentacijski sector DZ SRS (Recognition of Sign Languages, Comparative Review (PP), Marjana Križaj, Research and Documentation Sector of the SRS National Assembly), 21. 3. 2019, https://fotogalerija.dz-rs.si/datoteke/Publikacije/Zborniki_RN/2019/Priznanje_znakovnih_jezikov.pdf

deafblind have the opportunity to communicate and thus be included in life. By doing so, they can be an equal member of the community. Communication with the world in the broadest sense is key to social inclusion in society, the articulation of words is the foundation, for example, for social life and cultural and artistic activities.

The explicit broader inclusion of the language of the deafblind in the Slovenian Constitution is a unique achievement at the European and world level. It is now expected that a law will be adopted on the basis of the entry of the language of the deafblind into the Constitution, which will give people with deaf blindness fundamental rights and enable their emancipation.

By adopting this regulation at the constitutional level, Slovenia joined the countries that have regulated sign languages in the constitution such as Austria, Ecuador, Fiji, Finland, Gambia, Hungary, Mozambique, Portugal, South Africa, Kenya, South Sudan, Uganda, Venezuela, Zimbabwe. However, Slovenia is the first country in the European Union to enshrine the right to use the language of the deafblind in its constitution, and the fifth country (besides Austria, Finland, Hungary and Portugal) to enshrine the right to use sign language in its constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Concerning constitutional changes, the Slovenian Constitutional Court is not empowered to review acts on constitutional nature at all. 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 constitution it changes.

The attitude of the Constitutional Court towards the review of this act is rather rigid and self-restraining. The Constitutional Court is also not competent to assess the constitutionality of the procedure for the adoption of a constitutional law changing 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 Slovenia (8) after its adoption in 1991 could otherwise be explained on the one hand as a reflection of respect for the stability of the constitutional text.

V. FURTHER READING

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Spain

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I. INTRODUCTION

No formal amendment of the 1978 Spanish Constitution has taken place in the course of 2021. That has been the constant experience by the Spanish Constitutional system if we take into account that only two amendments have modified the text since its enactment forty-three years ago (Article 13.2 and article 135 of the Spanish Constitution in 1992 and 2011, respectively). Such a reluctance in formally amending the Constitution expresses the inability of the Spanish Constitutional framework to provide solutions for the changes and challenges emerging as time goes by.

However, it might be considered that in 2021 a major change has been introduced to the constitutional interpretation as a consequence of the Covid-19 pandemic and the governmental measures adopted to face up to such a global health problem. The opposition of the Constitutional Court to the way in which the Spanish government and the Spanish Congress outlined the emergency situation in order to deal with the pandemic and the consequences for the definition of the concepts derived from the constitutional text is going to be the main issue developed in this report.

Beside the question of the state of emergency, the pandemic and the restrictions of fundamental rights that the lockdown represented, I will mention 1) the proposed (and thwarted) amendment on article 49 of the Spanish Constitution intending to replace the term 'handicapped' '*disminuido*' by the expression 'people with disabilities' ('*personas con discapacidad*') 2) the development of fundamental rights which, though not regulated by a formal Constitutional amendment, have been recognized by statutes that implement Constitutional provisions and determine the constitutional interpretation and 3) the evolution of one of the main points of conflict recorded within the Spanish constitutional structure which is that one associated to the consequences of the Catalan secessionist attempt in 2017. On the latter issue, no constitutional changes have been coined in 2021 but there have been some events with constitutional relevance that may pave the way for a constitutional reform in the future.

II. PROPOSED AND FAILED CONSTITUTIONAL REFORMS

II.1 THE FORMAL AMENDMENT PROPOSAL AND ITS FAILURE.

As mentioned above, the only formal constitutional amendment attempt recorded within the Spanish Constitutional system in 2021 has been the proposed reform of Article 49 of the Spanish Constitution in order to derogate the term 'handicapped' '*disminuido*' (which was considered an affront) and to introduce within the Constitutional text the definition 'people with disabilities'. The constitutional reform initiative was triggered by the left-coalition government led by the Socialist Pedro Sánchez with the horizon, according to his statements, of ensuring 'non-discrimination and equal opportunities for all' as much as 'to bring inclusion to all areas: education, health and employment'. The amendment sought, on the other hand, to adapt the Spanish Constitution to the United Nations Convention on the Rights of Persons with disabilities concluded in 2006 and ratified by Spain in 2008. However, the right and the far-right represented respectively by the People's Party (*Partido Popular, PP*) and Vox vetoed the constitutional reform within the Spanish Congress (in which, according to Article 167 of the Spanish Constitution, is required, at least, the support of three fifths of the Chamber votes to pass a change on the part of the Constitution concerned). Those conservative and hard liner Spanish nationalistic parties argued that any reform to the Spanish Constitution, even a minor reform such as the one proposed, might be dangerous given the circumstance that Pedro Sánchez's government counted on the parliamentary support of some Catalan and Basque pro-independence parties. Those agents, according to the Spanish right-wing representatives in the Spanish legislature, were tantamount to those that 'wanted to destroy Spain'. In sum, the People's Party and Vox with the refusal to Constitutional change concerning 'people with disabilities' sought to erode the political adversary integrated by the leftist government of the Socialist Party (*Partido Socialista Obrero Espanyol, PSOE*) and the alliance of Communists and Ecologists wrapped up within the party *Podemos*.

Precisely, the Spanish Government President's need for the Catalan pro-independence parties' parliamentary support, and particularly that coming from the Catalan leftist party, *Esquerda Republicana de Catalunya, ERC*) left the door ajar, as we shall further comment, to

establish the so-called 'dialogue table' supposedly in order to negotiate a new constitutional status for Catalonia. Such talks, nevertheless, have not still been redirected to any specific constitutional amendment.

II.2. CHANGES IN THE INTERPRETATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS

Concerning the development of fundamental rights that affect constitutional interpretation three issues shall be mentioned.

First, it should be remarked, as one of the great novelties of 2021, the approval of the Organic Law 3/2021, of March 24, regulating euthanasia. Such a statute configures as an individual right the deliberate ending of a person's life "produced by the express will of the person himself and in order to avoid suffering" (preamble). The preamble maintains that euthanasia connects with the fundamental right to life, physical and moral integrity of the person, human dignity, the superior value of freedom, ideological freedom and conscience, and the right to privacy. The regulation entailed in the mentioned Organic Law 3/2021 develops, thus, the interpretation of Article 15 of the Spanish Constitution (since the right to life proclaimed there must be understood as the right to a "dignified life") and the interpretation of Article 18.1 of the Spanish Constitution as it refers to privacy. According to the statute, euthanasia takes the form of a public provision and relies on causing death "directly and intentionally through a cause-effect relationship" (preamble). The legal concept of euthanasia does not include the non-adoption or interruption of treatments that could prolong life or the use of palliative treatments that hasten death. The Organic Law 3/2021 details the requirements to exercise the right by including two basic conditions: an express request, informed and repeated over time by the patient, and a context of suffering due to an incurable illness or disease that the person experiences as unacceptable and that could not be mitigated by other means. A procedure with several safeguards allows for verification that the requirements are fulfilled and, eventually, concludes by authorizing the death.

The second novelty of 2021 with relevance regarding constitutional interpretation would be embodied by the Statute 19/2021, of December 20 (consolidating in the Spanish legal order the measures temporarily adopted by Decree-Law) on the establishment of a minimal life income. The minimal income is also related to "human dignity" (Article 10.1 of the Spanish Constitution) and attached to the exercise of human rights. The particular Constitutional provision specifically referenced is Article 41 of the Spanish Constitution, that is a subjective right interpreted from the obligation that public authorities have to maintain a "public Social Security system for all citizens" able to guarantee "an adequate social assistance". The minimal income adopted within at the State level would operate as a common ground applicable to all the Autonomous Communities which might provide a particular system of such a social protection.

Finally, the third novelty of 2021 is represented by the enacting of the Organic Law 7/2021, of May 26, on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties (which, in fact, transposes to the Spanish legal system the European Union Directive 2016/680 of the European Parliament and of the Council, of 27 April 2016, on the same matter). Such a regulation introduces some concerns related to data processing within the frame of a criminal investigation and prosecution that might represent a different interpretation on the right to privacy and on the right to an individual's own image as provided by article 18.1 of the Spanish Constitution, let alone the alteration of some boundaries in the use of data processing as provided by article 18.4 of the Spanish Constitution. In sum, the new regulation on habeas data within the frame of a criminal investigation removes the preventive control to establish permanent video surveillance facilities and it does not consider illegitimate interferences affecting the right to privacy or the right to own image as provided by the Statute developing such rights (the Organic Law 1/1982, of 5 May) the "collection, reproduction and processing of personal data" by the security forces" while preventing, detecting investigating or prosecuting criminal offenses and executing criminal sanctions". Rather than excluding the affection towards the rights to privacy and to individual's own images in collecting data within the frame of a criminal investigation it is likely that the mentioned provisions transfer the safeguards protecting those rights from civil law (as was the Organic Law 1/1982, of 5 May) to the criminal procedure (so Azpitarte, 2022, p.161). On the other hand, the Article 24 of the Organic Law 7/2021, of May 26, allows to postpone, to limit, or to omit the information related to the treatment of the data that the affected person had to know. It limits the rights to data access, rectification, cancellation and opposition in preventing "the obstruction of inquiries, investigations or legal proceedings" and in avoiding "harm to the prevention, detection, investigation and prosecution of offenses and execution of criminal sanctions, to protect public security, national security or the rights and liberties of other people". In its turn, Article 46 of the Organic Law 7/2021, of May 26, admits transfers of data to third countries without a decision on adequacy within very general contexts such as protecting vital interests or fundamental rights, safeguarding the legitimate interest of an interested party, or preventing a serious or immediate threat to the public security of any State.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Indeed, one of the most relevant changes within the Spanish Constitutional system has been provided via constitutional adjudication by the Spanish Constitutional Court in occasion of testing the governmental measures designed to face up to the health crises caused by the Covid-19 pandemic. As was the case with several world governments by March 2020, the Spanish government adopted a range of measures in order to deal with the Covid-19 virus expansion which included some restrictions on fundamental rights. The Spanish government opted to pass a Decree declaring the "state of alarm" (Decree 463/2020, of March 14) according to article 116.2 of the Spanish Constitution and the regulatory frame represented by the Organic Law 4/1981, of 1 June, on the alarm, emergency, and siege (martial law) states considering that in the later statute the mention to a context of pandemic had been incardinated in situations related to the "state of alarm".

The gist of the constitutional controversy was determined by the scope of measures that were allowed to be adopted through the declaration of a "state of alarm" and, particularly, if it was possible under such a device to suspend fundamental rights.

The Decree on the declaration of the "state of alarm" was referred to the Spanish Constitutional Court through an appeal of unconstitutionality by a group of fifty MPs of the opposition belonging to the far-right party Vox which, in short, considered that the governmental Decree declaring the "state of alarm" and the subsequent extensions passed by the Spanish Congress were not compatible with articles 55.1 and 116 of the Spanish Constitution since the measures entailed in such provisions represented, in practice, the suspension of fundamental rights and could not be adopted through the "state of alarm" but they would have needed additional safeguards foreseen whether in the "state of emergency" or even in the "state of siege" (martial law). The MPs that lodged the appeal understood that the Decree encroached freedom of movement within the national territory and right to freely chose the place of residence (Article 19 of the Spanish Constitution), the right to freedom and security (Article 17 of the Spanish Constitution) the right to assembly and that of organizing demonstrations in public spaces (Article 21 of the Spanish Constitution) the right to freedom of religion and worship (Article 16.1) and the right not to be convicted or sentenced without previous law (Article 25 of the Spanish Constitution).

The Spanish Constitutional Court issued its judgment on the Decree declaring the "state of alarm" through the Decision 148/2021 of 14 July 2021, in which it assumed some of the arguments of the appeal, particularly those concerning the freedom of movement within the national territory regarding the states of emergency, and declared unconstitutional and void some of the provisions examined. The point was that the provisions of the general lockdown provided by Articles 1, 3 and 5 of the Decree were not a mere limitation of the right to freedom of movements within the national territory but it signified a certain suspension of those fundamental rights that could not be adopted through the "state of alarm". According to the Spanish Constitutional Court, thus, "the restriction appears, more as a «deprivation» or «cessation» of the right, even though it is temporary and admits exceptions, than as a «reduction» of a right or faculty to lesser limits. In other words, the provision does not delimit a right to move freely in a lesser area (personal, spatial, temporal), but rather suspends it at root, in a generalized way, for all "persons", and by any means. The individual ability to circulate «freely» ceases to exist." (Spanish Constitutional Court Decision 148/2021 of 14 de July). Consequently, such a "suspension" of the right to free movement required the additional safeguards provided by another degree of emergency such as those outlined by Articles 116.3 and 116.4 of the Spanish Constitution in connection with article 55.1 of the same text (general suspension of certain fundamental rights) and not by the means provided by the "state of alarm" which do not allow the "cessation" of the right (on the suspension of rights and the "state of alarm" see Álvarez Vélez, 2021, 547-574).

Certainly, the main contribution to the constitutional interpretation shaped by the Spanish Constitutional Court in its Decision 148/2021 of 14 July, 2021, relies in changing the concept of the "state of alarm" envisaged both from Article 116.2 of the Spanish Constitution and the Organic Law 4/1981, of 1 June, on the alarm, emergency and siege (martial law) states clarifying what a "suspension" of a fundamental right is and, somehow, determining what was allowed to pass through "the state of alarm" and, in a different way, what would need the declaration of "state of emergency" or that of the "state of siege" (martial law).

Such a doctrine was in general terms maintained in another judgment issued in 2021 on the emergency measures adopted in occasion of the Covid-19 crisis: The Decision 183/2021 of 27 October 2021 which examined the extension of the "state of alarm" adopted by Decree 926/2020, of 25 October and authorized by the Spanish Congress on October the 29th 2020. The novelty of such a second resolution on the regulations to contain the spread of the pandemic relies on the declaration of unconstitutionality concerning the delegation of the execution of the measures derived from the "state of alarm", from the Spanish government to the regional governments. According to the Constitutional Court, considering that the Spanish government is the responsible body before the Congress on the adoption of the restrictions decided within the pandemic context, the delegation to the governments of the Autonomous Communities on the management of the crises would be tantamount to diverting political responsibility from the central government before the representatives in the legislature at the national level. The Spanish Constitutional Court Decision 183/2021 of 27 October, 2021, would have, in this sense, some reverberations in a more centralized interpretation of the system of allocation of powers between the State's authorities and the regional governments within the frame of an emergency.

To sum it up, the response of the Spanish Constitutional Court to the Covid-19 crisis through the aforementioned decisions of 2021 reveals the role of such a judicial body in transforming constitutional concepts through constitutional interpretation. The Court's contribution (very contested as several dissenting opinions demonstrate) should trigger the legislative activity in order to modify the notion of the "state of alarm" developed in the Organic Law 4/1981, of 1 June, on the alarm, emergency and siege (martial law) states. The only way to replicate the Court's decision would be a formal constitutional amendment but such a scenario, given the above-described reluctance of the political agents to undertake any change of the constitutional text, is not likely to happen. The "state of alarm" would be, at the end of the day, what the Constitutional Court says that it is. In addition, though the fight against Covid-19 and the adoption of emergency measures have been a very pressing issue for all constitutional systems during the last two years, the Spanish Constitutional structure has still more existential challenges to surmount that would deserve a relevant constitutional transformation, as the persistence of a democratic secessionist majority in Catalonia well testifies.

IV. LOOKING AHEAD

One of the main issues that eventually might trigger a constitutional amendment, that of the political status of Catalonia after the secessionist attempt of 2017 is still pending (on the background of such developments see López Bofill, 2019). Both the appointment of the socialist Pedro Sánchez as President of the Spanish government in 2020 and the approval of the 2021 State budget were conditioned by the decisive votes in the Spanish Congress provided by the members of the Catalan pro-independence party *Esquerra Republicana de Catalunya (ERC)*. That party conditioned its parliamentary support to the establishment of negotiations between the Spanish government and the Catalan one in order to outline a constitutional solution for Catalan self-government aspirations. Although representatives of both governments

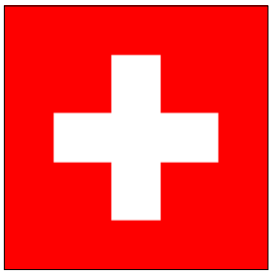
met in September 2021 (they had already met in February 2020), no agreement was reached since negotiation positions were far apart. The Catalan government held that within the negotiation table had to be discussed questions relating to both the Catalan self-determination and the amnesty for all those people, being either from the political staff or from the grass-root movements, that had been involved in the 2017 events (and tried and convicted because of them). However, the Spanish government made clear from the outset that the right to self-determination was not recognized within the Spanish legal system and that, consequently, it was not prone to negotiate any structural constitutional reform grounded on such a principle. Formally, there was no answer either concerning the question of the amnesty but by July 2021 those political and social Catalan leaders convicted for sedition to a decade or more of prison were partially pardoned by the Spanish government and released (only was maintained the penalty of disqualification for office). Nevertheless, such pardons only affected nine people among the political and social leadership that had been in the front row of the (frustrated) Catalan process to independence in 2017 who in 2021 were still serving a prison sentence. It was not extended to those leaders in exile (such as the former Catalan President Carles Puigdemont) nor to the more than two thousand people that whether as officials or as common citizens participated in the pro-independence initiatives.

In short, the talks developed in 2021 between the Spanish and the Catalan governments did not progress towards any specific constitutional measure, though we might predictably state that any transfer of powers to Catalonia should represent a constitutional change whether formal or material.

In a different vein, precisely to block such a reform in order to safeguard a new allocation of powers (that might eventually include the possibility to hold referenda on secession), the Spanish right and far-right have even suggested the possibility to amend the Constitution but in order to centralize powers (by eliminating, for instance, the mention in Article 2 of the Spanish Constitution to the "nationalities and regions" as holders of the right to autonomy). The point here is that despite the circumstance that a future constitutional amendment might concern the Spanish territorial organization it is difficult to envisage if a change of such characteristics might be favorable to the minority nations coexisting within Spain, as the Catalan one, or, instead, might cover the impulse of centralization fostered by the most centralist agents in Spain.

On the other hand, in spite of the scandals that have surrounded the Spanish royal family (in which is included the flight of the King Emeritus Juan Carlos I to the Arab Emirates in Summer 2020), at no moment in 2021 has there been contemplated any constitutional reform proposing the abolition of the monarchy and the transformation of Spain into a Republic. Such a reform would require such overwhelming majorities in an extremely difficult procedure (article 168 of the Spanish Constitution) that it could be stated that, concerning the monarchy, we are before a material "eternity clause". In fact, both the Spanish territorial unity and the preservation of the monarchy may be considered the essence of the Spanish Constitutional architecture in a way that both are almost impossible to modify through formal constitutional changes.

Switzerland



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I. INTRODUCTION

The year 2021 brought some fascinating and some challenging developments to Swiss constitutional law. In addition to formal changes of the Federal Constitution and informal dynamics, the use of optional referenda against federal acts also affected the country's constitutional landscape.[1] First, the constitutional emergency powers of the Federal Council and the Federal Assembly continued to be tested by the *Covid-19 pandemic*. The COVID-19 Act, which provided the legal basis for most of the financial and health measures, was subject to a referendum not once but twice in 2021. Both times, the act, and thus the federal government's coronavirus policy in general, was approved by a clear majority of the Swiss population.[2] Other than that, a referendum to prevent the opening of *marriage to same-sex couples* failed with 61.4 percent voting in favor of same-sex marriage. Prior to the vote, opponents had argued that the Federal Constitution defined marriage as a union between a woman and a man and an opening of marriage to other couples required a constitutional amendment (and a qualified majority) and could not be passed by a simple legislative change of the Civil Code.[3] This account was, however, rejected by most legal experts, in a legal opinion by the Federal Office of Justice and, after lengthy debates, by the majority of parliament.[4]

In the international sphere, the country has maneuvered itself into some difficult impasses over the past year. In climate policy, the revised *CO2 Act*, aiming at reducing the CO2 output effectively by 2030 and enabling Switzerland to meet its climate goals in accordance with the Paris Agreement, was rejected at the ballot box by 51.6 percent. Both voters rejecting (costly) climate measures and voters opposing the act for being too reluctant in implementing strict measures probably contributed to this dead end. It is also concerning that the relations between Switzerland and the EU have reached a similar deadlock. In May 2021, the Federal Council unilaterally ended negotiations about the *EU-Swiss Institutional Framework Agreement* due to what it perceived as fundamental differences.[5] The Federal Council was apparently convinced that the agreement had little chance of being approved in a referendum – and since struggles to come up with a new strategy to deal with institutional matters.[6]

These and other recent developments raised constitutional issues, even if they did not require a constitutional amendment *stricto sensu*. International, constitutional and legislative developments are, however, closely linked and interdependent, especially in Switzerland. This is because international law and federal acts are binding on the judiciary even when they are in conflict with the Federal Constitution. These connections and dependencies are particularly pertinent when constitutional amendments are implemented by the Federal Assembly – as we will show in this report (III). Before we take a closer look at such an example, we will briefly present the constitutional amendments that were put to a vote in the past year (II). Finally, we will address some constitutional challenges that may still come our way (IV).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The Federal Constitution can be revised at any time – and frequently is. A partial revision of the Federal Constitution can be initiated by a popular initiative or by a decree of the Federal Assembly.[7] Any citizen, political party or other collective can launch an initiative by collecting 100,000 signatures within 18 months after the official publication of the initiative. A popular initiative – whatever constitutional amendment it proposes – can only be declared invalid on substantive grounds when it violates mandatory provisions of international law (a validity

1 An optional referendum can be triggered when within 100 days of the official publication of the enactment any 50'000 persons eligible to vote or any eight cantons request it. It is only submitted to a vote of the people.

2 The first referendum was directed against the entry into force of the federal law, the second against a number of amendments that had been made in the meantime, such as the introduction of the much-discussed Covid certificates.

3 Cf. Isabelle Häner and Livio Bundi, 'Ehe für alle und ihre Verfassungsmässigkeit' [6 September 2011] Jusletter, para 35.

4 Federal Office of Justice, 'Ehe für alle – Fragen zur Verfassungsmässigkeit' (7 July 2016) <https://perma.cc/YPY8-YWWQ> accessed 25 June 2022. Cf. also Andreas R. Ziegler, '«Ehe für alle» und Fortpflanzungsmedizin in der Schweiz, Warum die schweizerische Bundesverfassung bereits heute auch gleichgeschlechtlichen Paaren den Zugang zur Fortpflanzungsmedizin garantiert' [8 April 2019] Jusletter.

5 Federal Council, 'No signing of Swiss–EU institutional agreement' (26 May 2021) <https://perma.cc/Z8XV-HBXL> accessed 24 June 2022. Despite the far-reaching implications of this decision, the Federal Constitution, indeed, confers on the Federal Council the authority and responsibility to initiate and terminate international negotiations. Cf. Art. 184(1) Cst.

6 SRF, 'Cassis: Volksnein wäre viel gravierender gewesen als Abbruch' (29 May 2021) <https://perma.cc/AQK7-6BM5> accessed 29 June 2022. According to various opinion polls, however, the question of whether the agreement would actually have stood no chance in a referendum was not as clear-cut as the Federal Council has presented it to be. Cf. Stefan Bühler 'Im Volk besser akzeptiert als in der Politik' NZZ am Sonntag (Zurich, 9 May 2021) 9.

7 Art. 194(1) Cst.

condition which is narrowly interpreted by the Federal Assembly). All initiatives to revise the Federal Constitution, whether triggered by popular initiative or by federal decree, result in a mandatory (automatic) referendum and must be approved by the *majority of the people and the cantons*.[8] The result of the vote is binding on all actors; in case the double majority is reached, the constitutional amendment enters into force on the very day of the referendum.

In 2021, as many as six popular initiatives were put to a vote on the national level, two of them were accepted by the people and the cantons:

- In March 2021, the Swiss people and the cantons approved a popular initiative to *ban face coverings* in public spaces, including restaurants, stores, and public transport. The initiative was launched by a right-wing committee that was already behind the successful initiative to ban minarets in 2009.[9] Then, as now, the initiative aimed to combat a virtually nonexistent problem by mostly appealing to anti-Muslim sentiments. The initiative was approved by a slim majority of 51.2 percent and passed in 20 of 26 cantons.[10] The controversies about the implementation of the new constitutional norm will be discussed in detail below.[11]

- The significant shortage of nurses in the health care system has been a well-known problem for many years. The Swiss Nursing Association had already launched a popular initiative in 2017, the so-called *nursing initiative ("for a strong nursing sector")*, aiming at constitutionally obliging the Confederation and the cantons to tackle the nursing crisis.[12] When the initiative finally came to a vote during the Covid 19 pandemic in November 2021, the people and cantons expressed their support for the nursing sector, signaling that more should be done for nurses and other health workers than just applauding from balconies. The nursing initiative calls on the Confederation and the cantons to overcome the severe shortage of health workers and obliges the authorities to train a sufficient number of nurses in Switzerland. It also requires federal actors to properly value the profession, in particular by guaranteeing better working conditions and adequate salaries. The initiative was accepted by a majority of 61 percent and by all but one cantons. The Confederation, in cooperation with the cantons, is now obliged to implement the new constitutional provision.[13]

- The *justice initiative* proposed that members of the Federal Supreme Court should be chosen by lot rather than by parliament. According to the current constitutional rules, judges of the Federal Supreme Court are elected by parliament for a period of six years, re-election is possible and not limited (except by retirement age). In practice, the highest judges – just like the members of the Federal Council – are appointed according to the strength of the political parties in the Federal Assembly. The idea behind the system is that all relevant political positions should adequately be represented in the Federal Supreme Court, which acts as the final appellate body and interprets the (broadly defined) provisions of the Federal Constitution. Accordingly, the Federal Assembly uses an informal system of proportionate election. The parties nominate judges (and in return demand a percentage of their salary, the so-called mandate tax). As a result, non-party judges stand little to no chance of being elected.[14] With the aim of depoliticizing the highest court and strengthening its independence vis-à-vis parliament and political parties, the initiative proposed to introduce an entirely new system of appointing judges: Candidates should be chosen by a committee of experts based on their professional and personal qualifications and then selected by lot. Furthermore, they should not stand re-election, but remain in office until the age of 70. The initiative was rejected by 68.1 percent of the population and all cantons. Apparently, the Swiss trust their judicial system as it is and value the democratic legitimacy of court decisions – or at least dislike the idea of using lots to elect judges instead.

- Finally, two anti-pesticide initiatives were put to a vote, both aimed at shifting agriculture towards more sustainable and ecological production. One initiative proposed to *ban artificial pesticides* by implementing a national ban within 10 years and phasing out imports of foodstuffs produced with artificial pesticides. The *drinking water initiative* called for modifying the conditions for financial support to the agricultural sector. It proposed that only farmers who comply with a range of environmental conditions should receive direct subsidies from the federal government. Additionally, they should refrain from using pesticides or prophylactic antibiotics regularly or for preventive purposes, and only feed their animals fodder that is produced on their farms. Both initiatives were rejected by 60.6 and 60.7 percent, respectively, and by all but one canton. The initiatives were opposed for being too radical and too costly.

- The *99% initiative* launched by the Young Socialists Switzerland, which would have provided for higher taxation of capital gains above a certain amount, was rejected at the ballot box by 64.9 percent and in all cantons.

Due to the country's federal structure, constitutional changes occur not only on the federal, but also on the cantonal level. The Federal Constitution obliges the cantons to provide for popular initiatives and to allow constitutional change if the majority of citizens so request.[15]

8 Art. 195 Cst.

9 Cf. Lorenz Langer, 'Panacea or Pathetic Fallacy? The Swiss Ban on Minarets' (2010) 43 Vanderbilt Journal of Transnational Law 1.

10 Eva Maria Belser and Simon Mazidi, 'When direct democracy trumps human rights: Unveiling the Swiss "Burqa Ban"' (*ConstitutionNet: Voices from the Field*, 28 March 2021) <https://perma.cc/3R3L-HTSB> accessed 15 June 2022.

11 Art. 10*a* Federal Constitution.

12 Cf. OECD Health Statistics 2021, 'Remuneration of nurses' <https://perma.cc/N5WB-HFTX> accessed 25 June 2022.

13 Art. 117*c* Cst.

14 Cf. Pascal Mahon, 'Judicial Federalism and Constitutional Review in the Swiss Judiciary' in Andreas Ladner et al. (eds), *Swiss Public Administration, Making the State Work Successful* (Springer 2019), 140–142. Cf. GRECO, 'Evaluation Report Switzerland, Fourth Evaluation Round, Corruption prevention in respect of Members of Parliament, Judges and Prosecutors' (2 December 2016) <https://perma.cc/VP24-7YYA> accessed 25 June 2022, paras 98–101.

15 Art. 51(1) Cst.

Constitutional amendments at the cantonal level are frequent and sometimes serve as laboratories to test new political ideas and aspirations. When successful, horizontal or vertical transplants of constitutional ideas often occur. The Canton of Ticino, for instance, has already banned face coverings following a popular initiative. In the Canton of St. Gallen, a similar ban was introduced by a parliamentary proposal to amend a law, which was subject to a referendum. Similar efforts were rejected in other cantons, including Bern (2010), Basel-Stadt (2013), Zurich (2016), and Glarus (2017).[16] In view of this possible cross-fertilization of cantonal constitutional amendments, an amendment in the Canton of Geneva from last year might be worth noting:

- In Geneva, a constitutional amendment was accepted that provides a basis for a law allowing *to force out government members of office*. The proposal was launched following a scandal about a member of the cantonal government who allegedly accepted an undue advantage in connection with a controversial trip while in office in 2015.[17] A recall system at the cantonal level exists in a few cantons since the 19th century, although it differs significantly from canton to canton, and has hardly ever been used. Generally, it intends to remove the entire government from office.[18] The cantonal amendment in Geneva aims at establishing a constitutional mechanism for an individual removal of elected members of the cantonal government. It was accepted by voters with an overwhelming majority of 91.5 percent. The amendment provides for a recall of individual members by a mandatory referendum if notably his or her conduct renders him or her no longer capable of enjoying the confidence of the electorate for the performance of the official duties.[19] In 2022, and inspired by Geneva's solution, the population of the Canton of Aargau accepted by 84.3 percent a popular initiative which introduced a similar recall procedure for officials.[20] In contrast to the Geneva solution, it does not require a popular vote, but merely demands that the cantonal parliament decides on the removal from office in certain cases.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Federal Constitution does not contain unamendable provisions and allows, in the absence of eternity clauses, for all sorts of constitutional amendments. Accordingly, the limits to the total and partial revision of the Federal Constitution are very narrowly defined. A partial revision of the Federal Constitution must respect the *consistency of form*, the *cohesion of subject matter* and comply with the *mandatory provisions of international law*.[21]

The Federal Assembly examines the *validity* of a partial revision of the Federal Constitution. When the text of a popular initiative fails to comply with the requirements, the Federal Assembly declares the initiative to be invalid as a whole or in part.[22] Considering the adage *in dubio pro popolo*, the Federal Assembly adopts a lenient approach. Since the necessary signatures have already been collected when the validity of a popular initiative is reviewed, the Federal Assembly, which is after all a political body (and composed of many members actively supporting the initiative), is hesitant to invalidate a popular initiative.[23] Although a review of the validity should be conducted solely on legal grounds, it is often influenced by political considerations. A declaration of validity (the normal case) or invalidity (an extremely rare case) of a popular initiative cannot be reviewed by the courts. According to the Federal Constitution, acts of the Federal Assembly and the Federal Council cannot be challenged before the Federal Supreme Court;[24] they are final – with the effect that the Swiss constitutional system does not allow for judicial remedies in disputes over political rights at the federal level.

In contrast, amendments of cantonal constitutions must comply with federal and international law (not just mandatory provisions of international law). Cantonal popular initiatives can thus be challenged before the Federal Supreme Court and their legality reviewed. In 2020, for example, the Federal Supreme Court ruled that a popular initiative launched in the Canton of Basel-Stadt and calling for a right to life for non-human primates and to physical and mental integrity could be implemented in compliance with overriding law and was therefore valid.[25] Initially, the cantonal parliament had declared the *primate initiative* invalid because it assumed a violation of federal law.[26] In early 2022, the cantonal population rejected the proposed amendment with an overwhelming majority of 74.7 percent.

Given the limited substantive grounds for the invalidity of federal popular initiatives, new constitutional amendments may contradict older constitutional provisions or violate international obligations. There is an increase in legal frictions, including with regard to human rights, especially when popular initiatives are used as tools for political mobilization, to sideline parliament and to propose (popular or populist) scapegoat legislation at the constitutional level – as they frequently are in recent years.[27] For instances, attempts to introduce a ban on face

16 Federal Council, *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* (FF 2019 2895), 2911.

17 The outcome of the legal dispute is still open. The initial conviction for accepting undue financial advantages was overturned by an appeals court. The case is now pending before the Federal Supreme Court.

18 Uwe Serdült, 'The History of a Dormant Institution: Legal Norms and the Practice of Recall in Switzerland' (2015) 51(2) Representation 161, 163–166.

19 Cf. Art. 115A Constitution of the Canton of Geneva. The amendment will take effect from June 2023.

20 Cf. § 69(6) Constitution of the Canton of Aargau.

21 Art. 139(3) and Art. 194(2) and (3) Cst. The consistency of form requires that a popular initiative is couched exclusively either in the form of a general proposal or of a specific draft provision. The cohesion of subject matter demands that an initiative must have a sufficient nexus or an intrinsic connection between the individual components of the initiative. Thus, it may only address one or several closely interlinked questions. Cf. Art. 75(2) and (3) Federal Act on Political Rights. As an uncodified rule, constitutional amendments must also be feasible. Cf. also Helen Keller and Evin Julia Yesilöz, 'Switzerland' in Luís Roberto Barroso and Richard Albert (eds), *The International Review of Constitutional Reform 2020* (Program on Constitutional Studies at the University of Texas at Austin and the International Forum on the Future of Constitutionalism 2021) 278.

22 Art. 139(3) Cst. and Art. 75(1) Federal Act on Political Rights.

23 Georg Lutz, 'Switzerland: Citizens' Initiatives as a Measure to Control the Political Agenda' in Maija Setälä and Theo Schiller (eds), *Citizen's Initiatives in Europe: Procedures and Consequences of Agenda-Setting by Citizens* (Palgrave Macmillan 2012), 24.

24 Art. 189(4) Cst. Cf. Walter Haller, *The Swiss Constitution in a Comparative Context* (2nd ed, Dike 2016), para 567.

25 Federal Supreme Court decision, BGE 147 I 183.

26 Cf. Charlotte E. Blattner and Raffael Fasel, 'The Swiss Primate Case: How Courts Have Paved the Way for the First Direct Democratic Vote on Animal Rights' (2022) 11(1) Transnational Environmental Law 201, 206–209.

27 Kaspar Ehrenzeller, Christina Müller and Benjamin Schindler, 'Ausgestaltung des Verhüllungsverbots durch den Bundesgesetzgeber, Bemerkungen zum Ge-

coverings in public have repeatedly failed at the federal legislative level. Since there is no popular initiative to amend legislation, the only way left was via a constitutional amendment. In this way, once the popular initiative has been accepted, the Federal Constitution authoritatively obliges parliament to become active in a specific policy area that it has previously refused to tackle. The new Art. 10*a* Cst., oddly enough located in the chapter on fundamental rights, bans face covering in public places or places accessible to the public or where services are offered to anyone wishing to partake of them. In addition, it states that exceptions which should be provided for in an act can only be justified on the grounds of health, safety, weather conditions or local customs.

In general, the authorities deal with intra-constitutional tensions brought about by new constitutional norms (and conflicting with human rights guarantees) by interpreting the Federal Constitution in line with international law and by issuing federal acts that soothe conflicts and do not necessarily fully comply with the initiators' aspirations. Due to the exhaustive list of exceptions, the authorities were confronted with considerable challenges when *implementing* Art. 10*a* Cst. They understood that the exhaustive list was not sufficient to accommodate fundamental rights. In an abstract review of Ticino's legislative ban on face coverings, the Federal Supreme Court already held in 2018 that the cantonal legislature must allow further exceptions to the cantonal ban to ensure freedom of expression, assembly, and economic activity. It further required that the cantonal act must not be exhaustive and that other exceptions must be recognized if the objectives of the regulation were not able to justify the ban.[28] In light of this decision, the authorities when implementing Art. 10*a* Cst. included additional exceptions in the draft legislation to ensure its compatibility with the fundamental rights mentioned in the Federal Supreme Court's Ticino decision. In attempting to strike a balance between the political purpose of the constitutional provision and the preservation of fundamental rights, the authorities had to rely on a somewhat far-fetched interpretation of the constitutional provision.

So far, the compatibility of the ban on face coverings with *religious freedom* has remained underexplored. On the one hand, the Federal Supreme Court in its Ticino decision did not have to address this matter. On the other hand, the political authorities have regularly invoked Strasbourg to justify the compatibility of the ban with international human rights law. This is not convincing in several respects. Even though the ECtHR accepted in *S.A.S. v. France* that the concept of 'living together' could justify a ban,[29] it did so after examining the legislative motives, the distinct French understanding of this concept and of secularism and by referring to the subsidiarity of the convention's control mechanism. Strasbourg's case law on this matter should therefore by no means be understood as a *carte blanche* for bans on face coverings.[30] First, it is doubtful that the concept of 'living together' (unknown, as such, in Switzerland) can serve as a justification for restricting fundamental rights at all. In a more convincing manner, the UN Human Rights Committee held the view that bans justified by this concept were not compatible with the rights and freedoms of others.[31] Second, even assuming that the concept of coexistence could be considered a legitimate objective, one must examine based on the concrete circumstances, whether and to what extent the conditions of 'living together' permit such a prohibition in a particular context and society. In view of the rigid design of Art. 10*a* Cst. and its implementation, which according to the wording does not permit any further exceptions, in particular on the basis of freedom of religion, the legislative implementation of the ban on face coverings would hardly stand up to the proportionality test. This is especially true when one considers that there are barely any women in Switzerland who wear a niqab or a burqa.[32]

Despite these considerations, the Swiss courts will be bound to apply the legislative implementation of the ban on face coverings even if they would conclude that the ban violates fundamental rights of the Federal Constitution. Art. 190 Cst. obliges the Federal Supreme Court and other judicial authorities to apply federal laws and thus *excludes any form of concrete constitutional review* that would lead to the non-application of federal acts. The only means of reviewing federal acts is to invoke the rights under the ECHR. Yet, since the ECtHR defers to the member state by putting forward the subsidiary nature of the control mechanism and by accepting a '[…] far-fetched and vague […]'[33] concept as a justification, Switzerland is going in circles with regards to the ban on face coverings and the effective protection of religious freedom.

As the Federal Constitution tends to give primacy to democratic decisions over the rule of law, the role of the courts in protecting the Federal Constitution is limited at the federal level. Therefore, in reviewing the validity of popular initiatives, in implementing constitutional amendments, and in enacting federal acts, the Federal Assembly has the decisive role in guaranteeing and enforcing constitutional rights. This system of *legislative supremacy* allows for a high degree of political legitimacy, as disagreements over constitutional rights are resolved by political means and through ordinary democratic procedures.[34] At the same time, it involves the risk that individual rights and freedoms are infringed with no judicial remedy at hand. The decision to introduce same-sex marriage through an amendment to the Civil Code was challenged by a referendum and ultimately decided in a democratic way. While the democratic introduction of equality for all couples has been applauded by observers, constitutional scholars frowned at a process involving the message that the majority could also have decided to continue to discriminate against same sex couples. Overall, the system leaves little room for rights protection through courts, and leaves the counter-majoritarian dilemma unsolved.

Contrary to the federal level, these judicial limitations do not exist regarding cantonal law: The Federal Supreme Court may review the validity of popular initiatives and declare those that violate federal or

setzesentwurf des Bundesrats' [28 March 2022] Jusletter, para 17.

28 Federal Supreme Court decision, BGE 144 I 281.

29 *S.A.S. v France* App no 43835/11 (ECHR, 1 July 2014). This was confirmed in the case *Dakir v Belgium* App no 4619/12 (ECHR, 11 July 2017).

30 Benedict Vischer, 'Wie ist das Verhüllungsverbot mit den Grundrechten zu vermitteln? Art. 10a BV im Kontext der Grund- und Menschenrechtsgarantien' [4 April 2022] Jusletter, paras 58–60.

31 *Yaker v France* (17 July 2018) Communication No. 2747/2016 CCPR/C/123/D/2747/2016, para 8.10; *Hebbadj v France* (17 July 2018), Communication No. 2807/2016 CCPR/C/123/D/2807/2016, para 7.10.

32 Cf. Vischer (n 30) paras 61–64. Although about 5.3% of Switzerland's 8.6 million population is Muslim, only twenty to thirty Swiss residents regularly wear a niqab, and there is no record of women in Switzerland wearing a burqa at all. Cf. 'Analyse zur Burka-Debatte in der Schweiz' (*University of Lucerne*, 17 December 2020) <https://perma.cc/J89R-NAWH> accessed 29 June 2022.

33 Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, *S.A.S. v France* App no 43835/11 (ECHR, 1 July 2014), para 5.

34 Cf. Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1346, 1349.

international law invalid. However, once an amendment of a cantonal constitution is accepted, similar gaps in the protection of fundamental rights occur. Cantonal constitutions and their amendments require federal approval. Such approval is given by the Federal Assembly (again applying the principle *in dubio pro populo* and hence deciding in favor of the majority), and its decision cannot be challenged in court. Full constitutional review is therefore only guaranteed when cantonal acts limit human rights. Thus, when implementing amendments to the Federal Constitution, the question of which level is responsible for the implementation (controversially discussed e.g. in the case of the ban on face coverings) is not only a matter of federal power sharing, but also one that has a direct impact on the effective protection of fundamental rights.

IV. LOOKING AHEAD

Constitutional amendments – which can be easily initiated in Switzerland and may serve as a tool of political opposition and sometimes protest mobilization – often involve controversial moral and social issues. Finding a compromise in society in this regard requires, first and foremost, robust democratic institutions that enjoy a high degree of credibility and legitimacy, as well as an active civil society that takes the protection of rights seriously.[35] These actors and institutions, be it the population in voting on popular initiatives, the legislature in implementing constitutional amendments, or the judiciary, albeit with substantial constitutional limitations on its role, will continue to be challenged in the future. Two committees are currently collecting signature for popular initiatives seeking to restrict access to abortion;[36] a third one is under preparation. These initiatives follow a familiar path of protest mobilization as various political proposals in parliament aiming at restricting access to abortion have failed ever since 2014. Presumably, the initiatives (which will not undergo any preventive control of human rights conformity before the vote) are unlikely to find a majority of the people and the cantons. Indirectly, however, they may serve as an efficient form of agenda-setting and as a means to pressure parliament to limit access to abortion.[37] It is therefore critical to respond to these initiatives with a strong and pervasive commitment to individual rights as currently protected under constitutional law.

Finally, from a constitutional perspective, the case of the *KlimaSeniorinnen*, which will be examined by the Grand Chamber of the ECtHR, will draw a great amount of interest. It will most likely be the first case that the ECtHR will hear in the area of climate change.[38] The *KlimaSeniorinnen*, a group of elderly women, allege that Switzerland's failure to take adequate action to combat climate change and reduce domestic emissions exposes them to adverse health effects, possibly even death.[39] They called on the authorities to take all necessary measures until 2030 to achieve the objective of the Paris Agreement. The Federal Supreme Court dismissed the appeal, finding that the group's right to life or respect for private and family life was not sufficiently affected by the alleged failing. It also held that such a matter should not be pursued through the courts but through political means, for which the Swiss system, with its democratic instruments, offered sufficient possibilities.[40] It remains to be seen how the ECtHR will respond to such process-related democratic concerns in the context of climate change.

35 Cf. Waldron (n 34) 1365.

36 Clare O'Dea 'Opinion: Anti-abortion activists in Switzerland are just posturing with latest hollow move' (*The Local*, 11 May 2022) <https://perma.cc/4P-BW-Y9HG> accessed 30 June 2022.

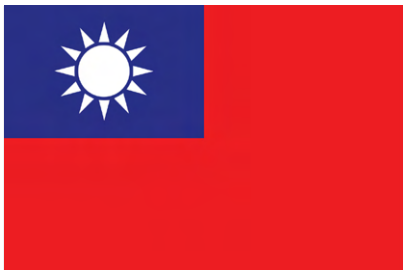
37 Cf. Haller (n 24) para 508.

38 Evelyne Schmid, 'Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case' (*EJIL:Talk!*, 30 April 2022) <https://perma.cc/54MR-TXAW> accessed 29 June 2022.

39 Cf. Helen Keller and Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR' (2022) Nordic Journal of Human Rights.

40 Federal Supreme Court decision, 1C_37/2019 (5 May 2020). Cf. Johannes Reich, 'Bundesgericht, I. öffentlich-rechtliche Abteilung, 1C_37/2019, 5. Mai 2020 [Verein KlimaSeniorinnen Schweiz et al. gegen Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation (UVEK)]' (2020) 121(9) Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBl) 489.

Taiwan



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I. INTRODUCTION

The politics of constitutional reform Taiwan experienced in 2021 was a follow-up to what began in 2020. Constitutional reform was put back on Taiwan's national agenda after President Tsai Ing-wen called on the Legislative Yuan (LY), Taiwan's unicameral parliament, to restart the constitutional amendment process in her second-term inaugural speech. The voting age reform that failed in 2015 was once again considered a top priority, but President Tsai also raised hopes for more to be accomplished this time around. The presidential call for constitutional reform did not go unanswered. By the end of the year 2021, a total of 75 bills of constitutional amendment had been introduced by members of the LY from across the aisle, and the issues addressed ranged from rights to powers. As a first step to launch the legislative process for proposing constitutional amendments, the LY Select Committee on Constitutional Amendments was formed in September 2020. But except for the selection of 5 conveners in May 2021, the Select Committee had remained dormant until January 2022. LY Speaker You Si-kun had long planned to schedule a floor vote on constitutional amendment proposals in late March 2022. The plan was to ensure that, if there will be a constitutional referendum, it could be held in conjunction with the nation-wide local elections scheduled in November 2022. Notwithstanding the multiplicity and complexity of the issues involved, the LY leadership probably saw no need to commence the committee review process sooner than later. In hindsight, the inaction of the Select Committee in 2021 may have foreshadowed the development that only one amendment proposal (on the reform of the voting age and the age of candidacy) managed to pass the LY in March 2022.

Installed in 2005 when the Constitution[1] was lastly amended, Additional Article 12 of the Constitution[2] stipulates the current constitutional amendment rules in Taiwan. Under these rules, Taiwan has one of the most difficult constitutional amendment processes in the world. Only the LY may propose a constitutional amendment. Upon initiation by one-fourth of the members of the LY, a bill of constitutional amendment first must pass the LY by a three-fourths vote with a quorum of three-fourths of LY members, and then be ratified in a constitutional referendum held six months after by an absolute majority of the eligible voters. By setting the threshold for the legislative proposal and that for the popular approval significantly higher than normal, the framers of the 2005 amendments may have sought to lay out a roadmap for a constitutional reform that is more comprehensive and more legitimate than ever before. The sheer stringency of these constitutional amendment rules has not stopped people from even trying to seek formal constitutional change, but their workability has long been in serious doubt in Taiwan.

Under the parliamentary laws and cameral rules of the LY, all bills of constitutional amendment shall be referred to and reviewed by the Select Committee, the 39 seats of which are distributed proportionally among party caucuses. After the recall of LY Member Chen Po-wei in October 2021, the membership of the Select Committee was slightly changed. It came to have 21 members from the Democratic Progressive Party (DPP) Caucus, 14 members from the Kuomintang (KMT) Caucus, 2 members from the Taiwan People's Party (TPP) Caucus, 1 member from the New Power Party (NPP) Caucus, and 1 independent member. Although the Select Committee stayed dormant throughout 2021, there were significant developments in the politics of constitutional reform that took place somewhere else in Taiwan. Above all, it became much clearer, by the end of 2021, where the two major parties (along with the two minor parties) stood on constitutional reform, and how different their reform proposals were.

The rest of this report is organized as follows. Section II discusses the leading bills of constitutional amendment endorsed respectively by the DPP Caucus and the KMT Caucus as the major developments of constitutional reform in the year 2021 in Taiwan. Section III looks into the emerging ideas that attempt to enlist help from the Taiwan Constitutional Court (TCC) to either sidestep or overcome the daunting obstacles for formal constitutional change. Section IV previews the development of constitutional reform in 2022; it also comments on the different scenarios of changing the constitutional status quo of Taiwan in the near future.

1 Taiwan's current Constitution was originally adopted in China in 1947, under the then-ruling Republic of China (hereinafter "ROC") Government. Since 1949, this ROC Constitution has been applied in Taiwan only.

2 Additional Article 12 of the ROC 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."

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Given the partisan composition of the LY and the supermajority requirement for the legislative proposal of constitutional amendment, securing the bipartisan agreement between the two major parties, *i.e.*, the DPP and the KMT, is crucial to the success of constitutional reform in Taiwan. But, instead of working together in the Select Committee and seeking reform consensus in a bipartisan manner at an early stage of the constitutional amendment process, the DPP and the KMT spent most of the year 2021 in working separately on their own reform proposals. By the end of 2021, both managed to introduce bills of constitutional amendment endorsed by their respective caucuses. In addition to showcasing what they each wanted to achieve or bring to the negotiation table, these caucus bills also highlighted the roles the two caucuses played in the politics of constitutional reform: It was the DPP and the KMT caucuses, not the Select Committee or the extra-parliamentary party leadership, that was behind the wheel.

The ascendance of the two major party caucuses as the lead actors in the making of the respective party platforms on constitutional amendment was a notable turn of events in and of itself. Both the DPP and the KMT, after all, have strong party organizations outside the LY, and many political elites who are not members of the LY do want to have a say in what their parties stand for when it comes to constitutional reform. The need to build intra-party consensus for the entire party is even stronger in the case of the DPP, which has controlled not only the parliament, but also the presidency (and the executive branch), since 2016. Under the leadership of President Tsai, who also serves as the DPP Chairperson, the DPP formed a task force on constitutional reform in March 2021. With members representing different parts of the party and a few experts from outside the party, the task force worked out an all-in-one draft bill of constitutional amendment, which, in turn, was adopted by the DPP Central Executive Committee in October 2021.[3] But instead of rubberstamping the draft bill prepared by the party headquarters, the DPP Caucus made a few notable changes to the draft bill before introducing it to the LY in November 2021. These last-minute changes were engineered by the DPP Caucus's long-time Leader Ker Chien-ming, who persuaded the DPP Caucus to override several items the DPP task force adopted over his objections. The fact that the DPP Caucus won such an intra-party turf war revealed not only the political prowess of its leader, but also the hands-off approach President Tsai took in this regard.

The constitutional amendment bill introduced by the DPP Caucus included the following five major proposals: (1) Article 130 of the Constitution be amended to the effect of lowering the voting age from 20 to 18, and the age of candidacy from 23 to 18 except as otherwise provided by law. (2) The Examination Yuan be abolished, and its powers be re-assigned to the Executive Yuan. (3) The Control Yuan be abolished, and its powers to impeach and to audit be re-assigned to the LY; the Auditor General be reorganized as an agency under the LY, and the National Human Rights Commission, which has been affiliated with the Control Yuan since 2020, be reorganized as an independent commission under the President. Proposals (2) and (3) were aimed at implementing the long-time DPP constitutional reform agenda that the much complicated and redundant five-power scheme of the central government be transformed into a much simplified three-power scheme that is commonly found in most modern democracies. (4) To shorten the 4-month presidential transition resulting from the increasingly common practice of holding concurrent parliamentary and presidential elections, the term of the sixteenth President and Vice President, which is supposed to end on May 20, 2028, be adjusted to end on February 29, 2028. (5) The constitutional amendment rules as set forth in Additional Article 12 of the Constitution be revised to require that constitutional amendment be proposed by the LY by a two-thirds vote with a quorum of two-thirds members and be ratified by a majority vote in a constitutional referendum provided that the majority of the eligible voters turn out to vote. By lowering both the thresholds for the legislative and the popular approval of constitutional amendment, proposal (5) was designed to make it less onerous and thereby more likely for Taiwan to revise/amend the Constitution in the future.

Soon after the DPP announced its constitutional reform agenda, the KMT probably felt pressured to respond with a competing agenda of its own. In early November 2021, the KMT Chairperson Chu Li-luan paid a visit to the KMT Caucus to seek agreement on the four major proposals for constitutional amendment the party sought to advance this time. With latitude given by the extra-parliamentary party leadership, the KMT Caucus introduced two bills in December 2021, and the final KMT reform package came to include the following five major proposals: (1) To hold the President more accountable to the LY, the President be obligated to deliver an annual state of the nation address to the LY and hear suggestions from LY members every September. In addition, the President be obligated to present report to the LY and subject to interpellation upon issuing emergency decree or at the request of more than one-thirds of the LY members on matters regarding major policies of national security. This proposal was the addition made by the KMT Caucus. (2) A pre-1997 constitutional arrangement be restored to require that the Premier be appointed by the President with the consent of the LY. (3) The rights of political participation be strengthened through (a) lowering the voting age and the age of candidacy to 18, (b) lowering the age requirement for the Presidential candidates from 40 to 35, and (c) creating a constitutional mandate for absentee voting. (4) Enshrine in the Constitution a policy statement on climate change. (5) Enshrine in the Constitution a policy statement on animal welfare.

Aside from the DPP and the KMT, the Taiwan People's Party (TPP) and the New Power Party (NPP) also hold seats in the LY. Though these two minor parties could not introduce bills of constitutional amendment on their own, their party platforms on constitutional reform were made known to the public. Both the TPP and the NPP, for instance, supported the DPP proposals for the voting age reform, the abolition of the Examination Yuan and the Control Yuan, and the lowering of constitutional amendment thresholds. They also advocated for the reform of the parliamentary electoral system and demanded that a few more rights be enumerated in the Constitution.

3 For the interest of disclosure, Yen-tu Su served as an outside member of the DPP Task Force on Constitutional Reform.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Founded in 1986 as a movement party for profound constitutional change, the DPP has long been a fierce critic of the ROC Constitution, which was enacted in 1947 in China and still embodies a good deal of Chinese-ness even after it had gone through seven rounds of constitutional amendments during 1992-2005. The DPP's ultimate goal has long been to replace the ROC Constitution with a new Constitution of the people, by the people, and for the people of Taiwan. Under the leadership of President Tsai, however, the contemporary DPP chose to forgo many reform initiatives—such as renaming the ROC as (ROC) Taiwan, redefining the Taiwan-China relations as international relations, and replacing the Additional Articles with a total revision of the original text—that would further clarify the ambiguous constitutional identity of Taiwan under the existing Constitution. Instead, its intra-party deliberation this time around had been focused on, and limited to, issues pertaining to good democratic governance. That being said, the DPP did seek to fulfill its long-time pledge for the abolition of the Examination Yuan and the Control Yuan, and this structural reform proposal entails a clear break with the constitutional legacy of Sun Yat-sen, the founding father of the ROC. A TCC Justice once argued that the five-power scheme constitutes a core element of the ROC Constitution, and that any amendments that attempt to abolish the two Yuans would not be constitutionally permissible.[4] It is unlikely that the TCC would ever take such a conservative position when applying its unconstitutional constitutional amendment doctrine, but some KMT lawmakers probably would oppose the abolition of these two Yuans on similar grounds.

Eventually, only the proposal that aims to rewrite Article 130 of the Constitution was passed by the LY with overwhelming bipartisan support. Article 130 of the Constitution provides that any citizen who has attained the age of 20 shall have the right of election and any citizen who has attained the age of 23 shall have the right of being elected.[5] Given that most citizens were illiterate when the Constitution took effect in 1947, these age requirements might be reasonable. Nevertheless, it is no longer suitable in Taiwan with the widespread of public education and the improvement of socioeconomic conditions in the past several decades. Moreover, most democracies around the globe have lowered the voting age to 18. In 2019, for example, the National Assembly of South Korea passed an electoral reform bill lowering the voting age to 18. Before that reform, South Korea was the only OECD member that did not grant voting rights to 18-year-olds.[6] From this perspective, both of these age requirements are outdated, and this constitutional amendment proposal is long overdue. In fact, a similar proposal had been advanced in 2015 but was aborted because the KMT and the DPP couldn't agree on anything else. Notwithstanding the overwhelming cross-partisan legislative support this time, it remains unclear whether the voting age reform proposal will garner enough votes and be ratified in the 2022 constitutional referendum. In view of this uncertainty, scholars have advanced two arguments, trying to work around the amendment threshold.

Firstly, some maintain that the current amendment threshold is too rigid to be constitutional. Therefore, the TCC should nullify the threshold on the ground that it essentially deprives Taiwanese people of the power to revise the constitution. Invalidating a constitutional amendment is not unprecedented in Taiwan. In Interpretation No. 499,[7] for example, the TCC declared the 1999 constitutional amendments unconstitutional. This threshold was installed by the 2005 constitutional amendment, but some provisions of the 2005 constitutional amendments were once challenged as unconstitutional. Although the TCC upheld the disputed 2005 constitutional amendment in Interpretation No. 721,[8] three justices questioned its democratic legitimacy on the ground that the voter turnout was incredibly low.[9] In a similar vein, this argument suggests that the TCC should intervene again and void the amendment threshold. One glaring problem for this argument is that the TCC has upheld the 2005 constitutional amendment in 2014 and is unlikely to overrule its precedent. In addition, even if the TCC would find merit in the too-difficult-to-amend argument, it is questionable whether and how the TCC could bring back to life the 2000 constitutional amendment rules as remedy.

The second argument contends that the voting age could be lowered to 18 by means of legislation. According to this argument, Article 130 aims to *constitutionally* enfranchise citizens who turn 20; it does not intend to prohibit legislators from *statutorily* granting citizens under 20 the right to vote. The Referendum Act, which grants the right of referendum to citizens who are 18 after its revision in 2019,[10] is one example. This argument, however, is dubious because Article 130 of the Constitution does not literally prescribe the minimum age to exercise the right of referendum anyway.

Neither of the two arguments was accepted by the LY, which decided to follow the current constitutional amendment procedure. The fact that only one proposal has been passed is somewhat disappointing because other constitutional issues, such as the amendment threshold and the peculiar five-power central government system, have been widely criticized by constitutional scholars in Taiwan. Unfortunately, those proposals failed to clear the legislature.

IV. LOOKING AHEAD

On March 25, 2022, the legislature approved the voting-age proposal with a 109-0 vote, and the Central Election Commission (CEC) later decided that the referendum is to be held in conjunction with the local elections on November 26. This decision itself was once controversial because in the 2021 referendum, Taiwan voters voted *not* to hold *ordinary* referendums concurrently with national elections, an outcome that was welcomed by the DPP but was opposed by the KMT. The KMT criticized the DPP for flip-flopping on the issue of referendum timing, whereas the DPP retorted that the KMT conflated ordinary referendums with constitutional referendums. The controversy soon subsided,

4 J.Y. Interpretation No. 721 (J. Chen Chun-Sheng, concurring) (2014).
5 Article 130 of the ROC Constitution (1947), available at https://law.judicial.gov.tw/LAWENG//FLAW/dat02.aspx?lsid=FL000001.
6 The Korea Times, 18-year-olds hit the polls for first time in Korea, https://www.koreatimes.co.kr/www/nation/2020/04/356_287952.html.
7 J.Y. Interpretation No. 499 (2000).
8 J.Y. Interpretation No. 721 (2014).
9 At that time, an ad hoc National Assembly was elected to revise the Constitution. But half of the people were unaware of the National Assembly election in 2005 and less than a quarter (23.36 per cent) of the electorate eventually voted in that election.
10 Article 7 of the Referendum Act provides that "Any citizen of the ROC reaching 18 years of age without the commencement of guardianship shall have the right of referendum unless otherwise provided by the Constitution."

because many believed that the constitutional referendum would be doomed to fail due to low voter turnout were it held on a separate date.

Given the consensus on the voting age, it is difficult to think of any other constitutional amendment proposal that is more likely to be adopted. If the proposal fails to pass the amendment threshold in November 2022, the outcome may prove that it is next to impossible to amend the Constitution under the current amendment rules. This perception may have two implications on Taiwan's constitutional development. First, Taiwan may rely on judicial review to stimulate informal constitutional change more frequently, because the channel of formal constitutional change has been proved clogged. It follows that the TCC may be freighted with additional burdens and embroiled into more political battles in the future. Alternatively, constitutional reformers may simply give up revising the Constitution through the arduous procedure. Instead, they may radically seek constitutional change through constitution-making. Ironically, the only procedure that both parties will agree for writing a new constitution may be the current amendment procedure, because the Constitution does not prescribe how to replace itself. Furthermore, given the symbolic meaning of constitution-making, this strategy may affect geopolitical stability in East Asia, as China always sees constitution-making in Taiwan as one form of declaring independence.

By contrast, if this proposal is ratified in the referendum, the ratification by itself proves that it is still possible to revise the Constitution within the system despite the high threshold, so long as the issues are popular enough. This may establish a new mode of constitutional reform that focuses on single subject amendment, aiming to revise the Constitution incrementally. Meanwhile, it may render the option of constitution-making less attractive both because of its political risk and because of the availability of constitutional amendments.

V. FURTHER READING

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Thailand

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I. INTRODUCTION

The year 2021 marked the seventh consecutive year that Thailand had been under the rule of the coup-leader-turned-premier Prayuth Chan-ocha. Taking up the reins of government via a coup in May 2014 when the monarchy and the system of aristocratic privileges had been ardently threatened by emerging republican movements, Prayuth, supported by the alliance of royalist-conservative groups, launched a series of campaigns aimed at reinforcing royal hegemony under Thai-ness (the trinity of Nation-Religion-Monarchy).[1] He had no qualms to resort to heavy-handed measures such as the imposition of lèse-majesté charges to repress pro-democracy movements, including supporters of popular former prime minister (PM), Thaksin Shinawatra. The junta-made 2017 Constitution is part of this strategy to reinvigorate the declining royal hegemony and oligarchic rule by weakening electoral politics and its advocates. Frustrated by an oligarch system set up under the charter and Prayuth's incompetent administration, coupled with the dissolution of the Future Forward Party ('FFP'), the third-largest party in the 2019 general election, many Thais agitated for the reform of the monarchy and a new 'truly-democratic' constitution written by 'the people'. In 2021, two constitutional amendment bills were proposed before Parliament, with the Constitutional Court ('CC') also issuing a landmark decision on monarchy reform in November. These agendas are the main focus of this report.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The 2017 Constitution significantly bolsters royal power and the legitimacy of 'the unelected'. The charter upholds the status of the king as the embodiment of the Thai people who occupy 'a position of revered worship which cannot be violated'.[2] Above all, it literally subjects the internal organization administration of the royal household to the king's absolute discretion,[3] while no longer requiring the Regent to be appointed when the latter is abroad.[4] It also introduced a new voting system – 'Mixed Member Apportionment System' ('MMAS'). Out of 500 MPS, 350 were constituency representatives, with the remaining 150 chosen from a party list. Each vote counts not only for a constituency candidate but also for seats on the party list. The seat calculation system reflects the drafters' skepticism towards majoritarian democracy 'as the aggregated number of constituency votes are used to calculate and therefore 'cap' the maximum number of party-list MPs of each political party'.[5] Besides, the current constitution establishes the junta-appointed Senate of 250 members, with power shared with the House of Representatives in selecting the country's premiere.[6] The Senate also holds the power to approve or disapprove personal appointments of the CC justices and other independent bodies.[7] With the presence of the pro-junta Senate, Prayuth could secure his premiership after the 2019 election, allowing him to morph from a coup leader to a farcically elected premiere. Worse, it bestows a far-reaching cloak of impunity upon coup perpetrators,[8] with post-2017 elected governments required to strictly observe the junta-initiated twenty-year national strategic plan directed towards consolidating elitist oligarchy.[9] The Senate is entrusted to ensure the executive implementation of the twenty-year national plan set out by the junta government.[10]

In August 2020, thousands of young university students and middle-class activists, enraged by the country's post-2014 increasingly aristocratic turn, took to the streets in Bangkok. A three-finger salute adopted from the movie 'the Hunger Games' became a symbol of defiance against aristocracy and authoritarianism. Calling themselves *the People's Party*, protest leaders made several public speeches accusing the current monarch, King Vajiralongkorn (2016-present), of lending its support towards the junta establishment. The protesters ultimately called for the abolition of the country's draconian lèse-majesté law and, more importantly, the constitutional prohibition against lawsuits against the king ('the inviolable status clause').[11] Feeling an immense threat to an aristocratic establishment, the royalist-conservative faction struck back, waging both violent oppression and lawfare against the protesters. Invoking Section 49 of the 2017 Constitution, a pro-military activist later submitted a petition requesting the CC to declare the

1 Björn Dressel, 'When Notions of Legitimacy Conflict: The Case of Thailand' (2010) 38 Politics & Policy 445, 446.
2 Sections 2 and 6.
3 Section 15.
4 Section 16-19.
5 Rawin Leelapatana, 'Thailand's competing notions of constituent power: the making of the 2017 Constitution in the binary-star scenario'; Supatsak Pobsuk, 'Observations on the Thai Election 2019' (*Global South*, 1 April 2019) <https://focusweb.org/observations-on-the-thai-election-2019/> accessed 28 December 2021.
6 Section 272.
7 Sections 204 and Chapter 12.
8 Section 279.
9 Chapter 16.
10 Section 270
11 For details of the proposal see CC decision no. 19/2564, 26.

reform proposal as an attempt to overthrow the Democratic Regime with the King as Head of State ('DRKH') and issue the cessation order. The decision was eventually rendered in November 2021.

Outside the CC, other active citizen-led movements also agitated for the amendment of the 2017 Constitution. Many focused on the amendment of sections on elections of MPs and the selection of Senators in the 2017 Constitution as part of the 'later changes' promise made by the Constitution Drafting Committee before the constitutional referendum in 2016. Several political activists wished to repeat the people's triumph in impelling political liberalization in the 1990s, but the amendment process was not moving as fast as they had hoped. A citizen-initiated constitutional amendment is recognized under Article 256 of the Constitution which stipulates that the amendments can be proposed as a legislative bill with at least 50,000 valid signatures from voting-eligible citizens. The bill will then be deliberated by Parliament in three consecutive debates, each followed by a vote from both Houses before it can proceed on to the next debate. Among the activist groups, the most prominent was the 'Re-Solution', the group founded by Piyabutr Saengkanokkul, the former Secretary-General of FFP, and Parit Wacharasindhu, the nephew of the ex-PM Abhisit Vejjajiva.

Campaigning for 'uprooting the Prayuth regime', the Re-Solution proposed amending the current constitution in four areas.[12] The abolishment of the appointed Senate and effectively the bicameral Parliament stood the first and main agenda of the group. As Parit once pointed out, fully appointed by the junta and bestowed with far-reaching tutelage powers, the Senate is the most reified form of the Prayut system and the continuation of the coup under the cloak of democracy.[13] With the Senate abolished, the amendment bill then stipulated the second amendment on the re-appointment of CC judges and other members of independent bodies. It also abolished the twenty-year national strategic plan. Lastly, the bill proposed adding a new chapter on overriding the impunity afforded to the 2014 coup preparators. The chapter also included new eternity clauses banning judicial recognition of coup makers as the sovereign, with any future coups declared a criminal offense.[14] Having garnered more than 150,000 signatures after six months of campaigning, the Re-Solution proposed the bill before Parliament in mid-November, almost at the same time that the CC delivered its verdict on the reform proposal. On both occasions, the progressives, however, met with disappointment.

On 10 November 2021, the CC declared the reform proposal and speeches calling for the monarchy reform the exercise of the right to political participation to dismantle the DRKH, thus contravening the spirit of the constitution and Thailand's national identity.[15] It also ruled that the protesters' actions potentially provoked 'chaos and cleavage within the nation' and were therefore 'seditious'.[16] The decision significantly reinforces the sacred status of the Thai monarchy, with a legal cloak granted to immunize it from reforms, including meaningful ones. Six days later, the Re-Solution's amendment bill went through sixteen hours of heated debate in Parliament. Despite its endorsement by over 150,000 voters, the amendment bill failed to gain support especially from the junta-appointed Senate and the ruling-government politicians, thus unable to proceed to the second deliberation in the three-stage deliberation process for constitutional amendments.

However, it is hasty to conclude that constitutional reform is made absolutely impossible under the current constitution. Despite the lack of consensus on issues, notably the composition and powers of the Senate and the status of the 2014 junta, there was a shared dissatisfaction over the MMAS. For the pro-junta, the ruling government party, the Palang Pracharath Party ('PPRP'), the system, while being designed to prevent Thaksin-backed parties from gaining majoritarian parliamentary seats, counterproductively benefitted the rise of the youth-led progressive FFP.[17] Though failing to win the majority of votes for constituent MPs, over 6.3 million votes overall enabled the latter to clinch the third largest share of parliamentary seats (83 seats). Political fragmentation induced by the MMAS also meant that the PPRP could only form the government 'by assembling a messy coalition of smaller parties', thus causing blistering political instability and gridlock on many key social and economic policies.[18] The problem of deep-seated political instability was likewise a major concern for the FFP's successor, the Move Forward Party ('MFP'), and pro-democracy activists.[19] With an overlapping consensus, the joint session of the Parliament voted in favor of the amendment by 472 to 33, with 187 abstentions on 10 September 2021.[20] This was one of the rare occasions when the junta-appointed senate votes were not unanimous and 25 senators were absent.

The constitutional amendment promulgated in the Royal Gazette on 21 November 2021 made three major changes to Sections 83, 86, and 91 of the 2017 Constitution. First, the amendment made to section 83 restores the previous two-ballot voting system established by the 1997 Constitution.[21] Second, in Sections 83 and 86, the amendment also increases the number of MPs from 350 to 400 constituencies and reduces the number of party-list MPs from 150 to 100.[22] Third, the method of calculation for party-list MPs is changed based on the dual-ballot system. The amended Section 91 revives a simpler formula from the 1997 Constitution to calculate the number of party-list MPs.[23] This method allocates seats proportionally by taking into account the number of votes nationwide for each party on the second ballot paper. Contrary to the previous method which gave advantages to smaller and newly emerging political parties, this method of calculation is deemed to favor the bigger and established ones. An amendment to the organic law on the election of MPs is also needed to complete this constitutional reform. Currently, the ad hoc committee discusses the issue of the formula and the best possible terms to accommodate both small and

12 'เปิดร่างแก้ไขรัฐธรรมนูญ "ฉบับรื้อระบอบประยุทธ์" เสนอตั้งผู้ตรวจการกองทัพ-ใช้ระบบสภาเดี่ยว' ['Observations on the draft amendment to the constitution "Uprooting the Prayuth regime": proposal for an appointed army inspector and unicameral chamber'] (*BBC Thai*, 6 April 2021) <https://www.bbc.com/thai/thailand-56647403> accessed 1 May 2022.

13 Ibid.

14 Chapter 16 of the draft amendment to the constitution.

15 CC decision no. 19/2564, 26

16 Ibid 27.

17 Chalida Ekvitthayavechnukul, 'Thai Parliament approves election system charter change' (*AP News*, 10 September 2021) < https://apnews.com/article/elections-thailand-constitutions-constitutional-amendments-bangkok-a5f-a157501efd0ad115b8211f59f578a> accessed 4 May 2022.

18 Ibid.

19 'แก้รัฐธรรมนูญ: รัฐสภาให้กลับไปใช้บัตรเลือกตั้งสองใบ 149 ส.ว. โหวตเห็นชอบร่างแก้ไขรัฐธรรมนูญวาระ 3' ['Amending the Constitution: Parliament voted for the return to a two-ballot system. 149 Senators voted in support during the third reading stage' (*BBC Thai*, 10 September 2021) <https://www.bbc.com/thai/thailand-58510872> accessed 4 May 2022.

20 'Report on the joint session of the 6th Parliament meeting' (1st Ordinary session) (The Secretariat of the House of Representatives, 10 September 2021) <https://dl.parliament.go.th/handle/lirt/586316> accessed 4 May 2022.

21 Section 83.

22 Section 83 & 86.

23 Section 91.

big parties in the next elections.[24] Despite changes made in the House of Representatives, with the pro-junta Senate remaining unaltered, it is still highly unlikely that the amendments made to the dual-ballot voting system will matter.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Here, three main points are to be assessed: (a) whether the attempted reforms mentioned in Part II should be designated as legitimate constitutional amendments or as constitutional dismemberments, including whether they conflicted with unamendable rules as enshrined in the text of the 2017 Constitution and (b) how the CC's role in exerting its control over the attempt to revoke the inviolable status clause should be theoretically described. To answer these questions, we must first examine two polemical interpretations of the DRKH which pervade Thailand's constitutional topography.

The 2017 Constitution does not attribute an exact meaning to the DRKH, thus giving rise to its competing interpretations. Arguably, the pro-democracy camp manifestly links this term to liberal values, notably the rule of law, human rights protection, and participatory politics. By contrast, the royalist-conservative elites base their version on the official ideology crafted by the aristocrats in the early 20th century, Thai-ness. Formulated by King Vajiravudh (1910-1925) to inculcate the sense of royalism and patriotism, Thai-ness gives primacy to 'political homogeneity and social stratification under the predominantly Buddhist nation embodied by the righteous monarch' over strict adherence to legality.[25] More importantly, it provides a justification for the elites and the military proclaiming themselves as 'good people' (*Khon Dee*) to play an integral role in '[overseeing] the usual political life of the nation deemed as corrupt and partisan.'[26] The conservative version of the DRKH deems military takeovers as a veto mechanism on threats to overthrow Thai-ness, including excessive demands for political liberalization and the rule of law.[27] Embracing different views on the DRKH, the two factions disagree over what constitutes a legitimate constitutional amendment – an amendment carried out, both substantively and procedurally, in conformity with what each considers as a high-priority value of the state.

Consider the first question, from the perspective of the pro-democracy camp, the revocation of the inviolable status clause and other immunities and benefits bestowed upon the 2014 coup perpetrators enshrined in the 2017 Constitution constitutes a legitimate constitutional amendment as it was endorsed by the true holder of the constituent power – the people. The CC's decision and the Senate's rejection of the Re-Solution's proposed bill thereby betray the will of the people and close the door for political reconciliation.[28] However, for the royalist-conservative faction, these attempts tamper with Thai-ness hegemony. They entailed the loss of royal prestige and deprived the elites and the military of their veto power in politics. Therefore, not only did they 'destroy' Thai-ness hegemony deemed as the present 'core value' of Thailand's constitutional topography, but they also sought to 'replace' it with a new core ideal, not compatible with the Thai local value.[29] By inducing 'transformative changes', they were no longer a constitutional amendment, but a kind of what Richard Albert calls 'constitutional dismemberment'.[30] Ultimately, the main problem in Thailand, we argue, is that there is still no bright-line rule for distinguishing between legitimate constitutional amendments and constitutional dismemberment. For this reason, successful constitutional amendments should pay heed to what Rawin Leelapatana calls 'the binary-star scenario'. Within the binary star system, two stars orbit around a common gravitation, with no star unequivocally prevailing over the other.[31] Nevertheless, the greater the pull of gravity one star attempts to exert, the more the effort as such stirs resisting forces.[32] Clearly, the greater the pro-democracy camp sought to abolish constitutional provisions reserving Thai-ness privileges, the more their effort is prone to be met with veto threats by their royalist-conservative counterpart, thus deepening polarisation between both factions. To succeed, an amendment to the 2017 Constitution, as suggested by that to the MMAS, instead needs to rely on political prudence to avoid 'heavy costs and risks' of overstepping Thai-ness.

To answer the second question, it is useful to turn to Barroso's analysis of the CC's roles in politics. According to Barroso, the CC normally performs three functions, namely 'counter-majoritarian' (i.e., the role in annulling unconstitutional laws, including those contravening democratic principles, passed by the people's representatives), 'representative' (i.e., the role in reflecting current public opinions or attitudes towards any particular issues in its decisions), and 'enlightened' (i.e., the role in pioneering liberalization and social progress).[33] The decision on the monarchy reform proposal nevertheless challenges the thesis thereof to the following. First, given the country's deep-seated polarization, we cannot confidently say that the alliance of pro-democracy networks genuinely represents the majority's will, thus making the counter-majoritarian role irrelevant. Besides, it is dubious whether the role of the Thai CC in the monarchy reform case should be classified as 'representative' as this decision responded to demands by a mere interest group (the royalist-conservative) to the exclusion of the other (the pro-democracy). Lastly, by invalidating the proposal thereof, the Thai CC's decision preserved the fabric of the nation's traditional values rather than advanced its liberalization and democratization. This clearly runs against the 'enlightened' role.

As we can see, Barroso's thesis assumes a stable, entrenched democracy, with a commitment to liberal-democratic values as its prevailing

24 'กมธ. กฎหมายลูกเลือกตั้งเคาะแก้ไพรมารี่แค่เห็นชอบไม่ต้องลงคะแนน' ['The ad hoc committee on the amendment of the organic law accepted meeting for approval only, no voting needed'] (*Infoquest*, 6 May 2022) <https://www.infoquest.co.th/2022/196859> accessed 6 May 2022.

25 Andrew Harding and Rawin Leelapatana, 'Constitution-Making in 21st-Century Thailand: The Continuing Search for a Perfect Constitutional Fit' (2019) 7 CJCL 266, 269.

26 Ibid, 274.

27 Eugénie Mérieau, 'Thailand's Deep State, Royal Power and the Constitutional Court (1997–2015)' (2016) 46 JCA 445, 451.

28 Nontarat Phaicharoen, 'Make Constitution More Democratic' (*Benarnews*, 17 November 2021) < https://www.benarnews.org/english/news/thai/bill-rejected-11172021153250.html> accessed 6 May 2022; 'Outcry over Thai court's sedition declaration' (*UCA News*, 15 November 2021) <https://www.ucanews.com/news/outcry-over-thai-courts-sedition-declaration/94961> accessed 6 May 2022.

29 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 78.

30 Ibid.

31 Rawin Leelapatana and Abdurrachman Satrio Pratomo, 'The Relationship Between a Kelsenian Constitutional Court and an Entrenched National Ideology: Lessons from Thailand and Indonesia' (2020) 14(4) ICL Journal 497, 504.

32 Ibid.

33 Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 AJCL 109, 125-142.

ethos. Its inability to fully address the Thai experience, we argue, is partially rooted in this assumption. The Thai case offers an alternative understanding of the CC's roles in illiberal democracies. At the outset, it is noteworthy that the CC judges in charge of the case were notorious for having close affiliation with the royalist-conservative faction. Some had been appointed directly by the 2014 junta, with others later selected by the junta-handpicked Senate under the 2017 Constitution.[34] This practice undoubtedly turned the CC into agents of the royalist-conservative networks.[35] The role of the Thai CC in the monarchy reform proposal, we suggest, should thereby be described in light of what Khemthong Tonsakulrungruang calls 'reverse abusive constitutionalism'.[36] The CC here applied the concept of constitutional unamendability to entrench the current establishment by labeling attempts to impel its liberalization and democratization as undemocratic.[37]

IV. LOOKING AHEAD

The illiberal interpretation of the concept of unamendability in Thailand continued to hinder the transformative proposed amendments which aim to tackle the heart of the problems in the concept of Thai-ness.[38] Three major movements for constitutional amendments were not all successful, as only one of them survived the heavily polarized politics. Despite having been able to weather the storm in Parliament, the amendment to the dual ballot voting system which secured political consensus still faces challenges from the disadvantaged, minor political parties.

There were two notable attempts to file petitions to the CC to review the amendment to the two-ballot voting system. The first attempt was pursued by the leader of the Thai-Pakdee Party, Warong Dechgitvigrom, who filed a petition to the ombudsman in the hope that it would reach the CC and the judges would dismantle this hasty and reckless parliamentary approval.[39] He asserted that this move would affect his right and liberty, as well as the rights and liberties of other voters. Moreover, Warong claimed that the two-ballot system would facilitate bribery and cripple minor political parties. The CC disagreed with his view and unanimously rejected his petition on the basis that his right and liberty were not violated.[40]

The second effort was made by Rawee Machamadon, the leader of the New Palang Dharma Party. Similarly, Rawee claimed that this amendment completely disregarded minority voters' rights and contravened various principles in the 2017 Constitution.[41] He was adamant that his right as an MP and a member of a small political party had been violated by this change. Once again, the CC rejected the petition and decided that the dual-ballot system has not violated his right and liberty.[42]

These endeavors to halt the restored electoral system are evidence of the dilemma that the 2017 Constitution created. The voting system under the 2017 Constitution was established to prevent the popular and potential pro-democracy winner from creating a strong and stable government and to undermine the power of the legislative.[43] Such a dramatic scene is directed by the conservatives to reinforce the impression of the incompetent, highly polarized, and self-serving politicians,[44] and ultimately, the parliament. Nonetheless, such results benefit none, including the conservative themselves. Inevitably, the COVID-19 pandemic, along with social and economic turmoil, led to public dissatisfaction and resistance which has significantly weakened the support for the coalition government. If the royalist-conservative group wants to set the scene for their next successful election by preventing further resistance from the pro-democracy camp and impeding the FFP's rising political stars from gaining more seats, they must sacrifice some pawns. Seemingly, those political pawns are the small conservative parties.

Despite the futile attempts to stop this amendment in the court, the minor conservative parties can still try to weaken the two-ballot voting system in the ongoing meetings of the ad hoc committee on the amendment of the organic law before their approval in Parliament. If they failed, their survival could be saved by a merger with major parties. Wissanu Krea-ngam, the deputy PM and a leading legal figure from the royalist-conservative camp pointed out that there are still many steps in the procedure to go through before the approval of the organic laws and that the process might be slower than expected.[45] In his view, more petitions to the CC to review this amendment can still be lodged if an interested party formulates the questions differently.[46] Ultimately, even though the constitutional amendment itself was successful, it is yet to be seen whether the tug-of-war in the lower-tier battle will amount to the same result.

34 NCPO Announcement no.48/2557; NCPO Leader Order no.24/2560.

35 Mérieau, 'Thailand's Deep State'.

36 Khemthong Tonsakulrungruang, 'Thailand's unamendability: Politics of two democracies' in Rehan Abeyratne and Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2022) 182.

37 Ibid, 170.

38 Ibid, 169-170.

39 'ร่างรธน. ถึงมือนายกฯ ยื่นศาลตีความ ลกัดเลือกตั้งบัตร 2 ใบ'[The Amendment Bill reached the Prime Minister. Petition filed to the Constitutional Court to end 'the dual-ballot voting system"] (*Than Settakij*, 29 September 2021) <https://www.thansettakij.com/politics/497642> accessed 1 May 2022

40 'ศาลรัฐธรรมนูญตีตกคำร้อง 'หมอวรงค์' ปมสภาลักไก่แก้ รธน. เลือกตั้งบัตร 2 ใบ' [The Constitutional Court rejected Dr. Warong's petition on the amendment on the two-ballot voting system] (*Prachathai*, 8 December 2021) <https://prachatai.com/journal/2021/12/96302> accessed 25 May 2022.

41 '"หมอระวี" บุกร้องศาลรัฐธรรมนูญ ปมบัตรเลือกตั้ง 2 ใบ' ['"Dr. Rawee" filed a case on the dual-ballot voting system to the Constitutional Court'] (*Thai PBS*, 8 April 2022) <https://news.thaipbs.or.th/content/314390> accessed 25 May 2022.

42 'ศาลรัฐธรรมนูญไม่รับคำร้อง "นพ.ระวี" ปมแก้บัตรเลือกตั้ง 2 ใบ' [The Constitutional Court rejected "Dr.Rawee"'s petition on the amendment to create the dual-ballot voting system] (*Thai PBS*, 11 May 2022) <https://news.thaipbs.or.th/content/315417> accessed 23 May 2022.

43 Jacob Ricks, 'Thailand's 2019 Vote: The General's Election' (2019) 92(3) Pacific Affairs 443, 448.

44 Kevin Hewison, 'Thailand: Contestation over elections, sovereignty and representation' (2015) 51 Representation 51, 55.

45 '"วิษณุ" แจง ไม่เชื่อกฎหมายประกาศทันใช้เดือนก.ค.' [Wissanu expressed his disbelief that the organic laws will be promulgated in time for July] (*Siamrat Online*, 12 May 2022) <https://siamrath.co.th/n/347595> accessed 29 May 2022.

46 Ibid.

Turkey

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I. INTRODUCTION

Turkish constitutional history is marked by a great number of revisions. They have mostly taken place under the government of Erdoğan, which alone is responsible for modifying 134 provisions since he took office in 2002. The 2017 revision nevertheless remains the most significant change that the 1982 Constitution has undergone. This revision did indeed introduce a change in the political system, and all these changes were presented at the time as transforming Turkey's parliamentary system into a "presidentialism *alla Turca*." As it transpired, President Erdoğan concentrated the power in his person to such an extent that he was granted titles such as "new Sultan" or "Republican Monarch."[1] The 2017 revision appears so profound that one can speak of an institutional upheaval rather than a revision of the Constitution. For this reason, the 2017 amendment is, in fact, a "constitutional dismemberment" for all intents and purposes.

Since the 2017 revision, there have been no other constitutional revisions, so the year 2021 is not a red-letter year for constitutional lawyers. On the other hand, one can very well mention remarkable developments – which we will further analyze in part III. The developments in question have a direct influence on the value and place of the Constitution in the domestic legal order and speak volumes about the role of the Constitutional Court.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2021 there were no constitutional changes or proposals for constitutional reform; one cannot, therefore, speak of constitutional reforms, constitutional amendments, or dismemberments.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Turkish Constitutional Court is the body responsible for conducting a judicial review of the constitutional amendments and examining them only regarding their form. In 2021 there were no constitutional changes; that is why neither there were judicial review examples for constitutional reforms. Although in 2021 we witnessed a constitutional provision being rendered meaningless, Turkey's withdrawal from the Istanbul Convention, and the inability of the Constitutional Court to safeguard the rights and liberties enshrined in the Constitution.

1. CONSTITUTIONAL PROVISION RENDERED MEANINGLESS

Even though it is not a constitutional revision as such, the non-respect of the binding force of a constitutional provision deserves to be mentioned to highlight the value of the Constitution in the domestic legal order. On December 2, 2021, faced with the persistent non-execution of the Kavala judgment,[2] the Committee of Ministers of the Council of Europe issued a letter of formal notice against Turkey, indicating its intention to refer Turkey to the European Court of Human Rights (ECtHR).[3] The Kavala case illustrates how Turkey does not take seriously the binding force of the judgments of the Court, and the national courts eviscerate Article 90 § 5 of the Constitution of its substance. Turkey is a signatory to the European Convention of Human Rights (ECHR) and admitted the binding force of the judgments of the ECtHR in 1990. Article 90 § 5 of the Constitution sets forth that in the case of a conflict between international agreements concerning fundamental rights and freedoms, and the laws, the provisions of international agreements shall prevail, so this provision means that the rights and principles set out in the Convention and the case-law of the ECtHR are part of domestic law. Therefore, any solution that prioritizes domestic law could engage Turkey's responsibility under international law. This rule is set out in Article 27 of the Vienna Convention and Articles 1 and 46 § 1 of the ECHR. The ECtHR specifies that the judgment which declares a violation imposes on the state concerned a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction but also to choose and execute general and/or individual measures to put an end to the violation and to redress so far as possible the effects. The State Party in question remains free to choose the means by which it will discharge its legal obligation "provided that such means are compatible with the conclusions set out in the Court's judgment." These measures are subject to the supervision of the Committee of Ministers.[4] Sometimes a decision may explicitly

1 Éric M. Ngango Youmbi, 'L'amendement constitutionnel du 21 janvier 2017 en République de Turquie : vers un reflux démocratique?' [2019] 118 (2) Revue française de droit constitutionnel 475-501.

2 ECtHR, *Kavala v. Turkey* App no. 28749/18 (ECtHR, 10 December 2019).

3 CM/ResDH(2021)432.

4 ECtHR, *Scozzari et Giunta v. Italy* App no. 39221/98 and 41963/98 (ECtHR, 13

indicate what is an appropriate measure for the state to fulfill its legal obligation under the Convention. This is precisely what the ECtHR did by ruling in 2019 Osman Kavala's detention contrary to the Convention and demanding his "immediate release." This case concerns the unjustified and arbitrary detention of Osman Kavala, the Turkish entrepreneur, without providing objective evidence. Prosecuted for attempting to overthrow the government, he was acquitted for lack of evidence in February 2020. Still, he was immediately placed in detention again, accused of having sought to destabilize Turkey during the failed coup of 2016. He has been imprisoned since October 18, 2017. In the Kavala judgment, the ECtHR concluded that the applicant's pre-trial detention occurred without evidence giving rise to a reasonable suspicion that he had committed an offense (violation of Article 5 § 1). The Court considered that the detention pursued an ulterior purpose: to silence and deter other human rights defenders (violation of Article 18 in conjunction with Article 5 § 1). Finally, the Court ruled that the time limit of one year and nearly five months set by the Constitutional Court to examine his appeal was not fast enough, given that his freedom was at stake (violation of Article 5 § 4). On February 3, 2022, the Committee of Ministers decided to refer the case to the ECtHR under Article 46 § 4 of the ECHR, a rarely used infringement procedure. On January 17, 2022, the Penal Court of Istanbul refused to release Kavala, and on Avril 25, 2022, the Court sentenced Kavala to aggravated life imprisonment. As this report is written (May 31, 2022), the judgment of the ECtHR has not yet been executed, violating Article 90 § 5 of the Constitution.

2. WITHDRAWAL FROM THE ISTANBUL CONVENTION, A PRESIDENTIAL DECISION IN CONTRADICTION WITH THE CONSTITUTIONAL STRUCTURE

The "Istanbul Convention" (Istanbul Convention Action against violence against women and domestic violence), which opened for signature in Istanbul in 2011 and was ratified at the Grand National Assembly of Turkey in 2012, came into force on August 1, 2014. Turkey is the first country to sign this Convention. Nevertheless, on March 20, 2021, the President of the Republic announced Turkey's withdrawal from the Istanbul Convention by a presidential decision based on an authority granted by a presidential decree.[5] The presidential decree is a rulemaking instrument that the President of Turkey can issue without prior authorization or delegation from the legislature. This rulemaking power was introduced to the Turkish constitutional system with the amendments adopted in 2017. First of all, this decision is in no way compatible with the internationally recognized principles of human rights, the protection of women against violence, and gender equality – to which Turkey has contributed during its formation. This decision marks a clear break with the established legal framework. This is a break with constitutional achievements protecting individuals by expanding their rights and freedoms against the state's and third parties' violations since 2001. It is also a departure from the system of common values set out in the human rights treaties of the Council of Europe, of which Turkey was among the founding states and other international organizations of which it is a member.

Furthermore, Article 5 of the Constitution provides that the fundamental aims and duties of the state are to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and the social state governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence. Therefore, the decision is unconstitutional in that the provision mentioned above establishes the prevention of the deterioration of the human rights situation as an objective and a duty of the state. However, the decision to withdraw amounts to using state powers to weaken the protections afforded to women by law, making it substantially illegal. The decision of withdrawal is unconstitutional not only from a material point of view but also in procedural terms. Under Article 90 § 1 of the Constitution, international agreements are subject to the adoption by the Great National Assembly of Turkey of a law approving ratification. However, the Convention was abrogated by a presidential decision in defiance of the principle of parallelism, which requires procedural consistency for enactment and withdrawal.[6] It should also be noted that Article 104 of the Constitution sets forth that presidential decrees may only be issued on matters pertaining to the executive power and that fundamental rights and freedoms, which should be regulated exclusively by laws, may not be the subject of these decrees. However, the presidential decree on which the presidential decision is based stipulated that international agreements, including those pertaining to fundamental rights and freedoms which should be regulated by laws, may be terminated by a presidential decision. For this reason, both the presidential decree and the presidential decision are unconstitutional.[7] As per the Law of the Council of State, it is possible to bring action against this Presidential Decision No. 3718 before the Council of State. Many civilians, institutions, and organizations filed a lawsuit at the Council of State for the stay of execution and the annulment of the decision.[8] However, as this report is written (May 31, 2022), the cases are still pending before the Council of State.

3. CONSTITUTIONAL COURT UNWILLING TO ASSUME ITS ROLE OF PROTECTING THE RIGHTS AND FREEDOMS

On October 19, 2021, the ECtHR delivered the decision Şorli v. Turkey.[9] The Court stressed the need to bring Article 299 of the Turkish Penal Code into line with Article 10 of the ECHR, which safeguards the freedom of expression. This decision is significant as it has a direct causal link with the constitutional review of Article 299 of the Turkish Penal Code, carried out by the Constitutional Court in 2016, and shows how the Constitutional Court has not assumed its watchdog role of rights and freedoms. Article 299 of the Criminal Code makes it a criminal offense to insult the President, that is to say, "the fact of attributing an act or a fact in a manner likely to undermine his honor, dignity or

July 2000), para. 249.

5 Decision no. 3718 (Official Gazette no.31429, 20 March 2021).

6 ARCL, 'Statement From The Association Of Research On Constitutional Law (Arcl) On The Presidential Decision On The Istanbul Convention' (27 March 2021) <http://anayasader.org/category/basin/> accessed 4 June 2022.

7 *Ibid*.

8 Law no. 2575 (Official Gazette no.17580, 20 January 1982).

9 ECtHR, Şorli *v. Turkey* App no. 42048/19 (ECtHR, 19 October 2021), para. 54.

its prestige," and is sentenced to a penalty of imprisonment for a term of one to four years. However, the vague and indeterminate definition of the offense not only contradicts the principle of legality of offenses and penalties but also creates a risk of abuse. The drastic increase in convictions testifies to the alarming existence of a crime of thought and raises questions about the legitimacy of this limitation on freedom of expression. The offense of insulting the President was already brought before the Turkish Constitutional Court for a constitutional review in 2016. The Court ruled Article 299 constitutional by considering that it had a legitimate aim of protecting the reputation and prestige of the presidency, referring to the neutral and supra-partisan character of the presidential status.[10] This decision of the Court, which contradicts its own case-law[11] concerning the place of the ECHR in Turkish law, undermines legal predictability and certainty. Article 152 of the Constitution prohibits claiming the unconstitutionality concerning the same legal provision until ten years elapse after the decision of the Constitutional Court dismissing the application on its merits. According to the textual interpretation of this provision by the Turkish Constitutional Court, the offense in question cannot be brought before the Court again before 2026. However, judicial activities should not be limited to textual interpretation. According to the purposive interpretation, the Court's 2016 decision was taken during the period when the Constitution provided for a neutral President. However, with the 2017 constitutional revision, the President is the sole holder of executive power and can be a member and leader of a political party.[12] Therefore, the grounds of the previous decision are no longer valid.[13] As for the systematic interpretation, Article 90 of the Constitution should create an exception to the ten-year control prohibition. At the beginning of 2022, members of Parliament from the opposition Republican People's Party (*Cumhuriyet Halk Partisi*, CHP) presented a proposal to repeal Article 299. However, as this report is written (May 31, 2022), the article is still in effect.

IV. LOOKING AHEAD

The presidential and legislative elections of 2023, which are set to take place on the same day since the constitutional revision of 2017, might trigger a series of constitutional changes in Turkey. The parliamentary opposition is considering a major constitutional revision that will transform the government system if it has the necessary majority in Parliament. However, the new electoral law[14] provides for fundamental changes that could be a game-changer concerning the results of the elections. As for the presidential elections, the candidacy of President Erdoğan risks sparking debates concerning its constitutionality.[15]

The Strengthened Parliamentary System is a government system based on parliamentarianism that a coalition of opposition parties[16] developed in Turkey against the Presidential Government System. The objective is to consider an alternative to the current system, which led to individuality and arbitrariness in government and created an authoritarian government by giving the President very broad and uncontrolled powers. Deputy leaders of those parties have reached a consensus on a draft for the manifesto of their conception, which was completed in December 2021. It was signed by the leaders of all the parties involved on February 28, 2022. The manifesto, composed of five main categories, "Introduction, Legislative, Executive, Judiciary, and the Fundamental Principles of the Democratic System," tells us much about the desired objectives. The proposal aims to establish a liberal democratic state of the law in light of the democratic experiences of the world and Turkey. The Strengthened Parliamentary System is envisaged as a system that prevents the individual from being in a "weak" position against the state, allows the individual to define and determine himself, ensures that people are viewed and treated as an end, not a means, where all state institutions are at an equal distance to all citizens without any discrimination, the legislature effectively controls the executive, the government stability is ensured and the executive is accountable before the legislature, the judiciary is fully impartial and independent, the separation of powers is strongly vested, fundamental rights and freedoms are guaranteed, freedom of religion and conscience, freedom of the press, women's rights, children's rights, environmental rights are fully protected, equality, impartiality and merit are ensured in public administration and corruption is effectively fought, the independence of regulatory and supervisory institutions is ensured, higher education institutions are democratized and political authorities have no other purpose than to serve the nation. The Strengthened Parliamentary System aims to create a government system model that complies with the requirements of participatory, liberal, and pluralistic democracy, based on the principle of separation of powers and effective balance and control mechanisms. Based on Turkey's past experiences, the proposal stresses that its purpose is not to weaken the government while enforcing the Assembly and not to weaken the Assembly while strengthening the government. In this system, the individual, fundamental rights and freedoms, and civil society are fortified, the legislature is effective, executive and public administration are made accountable, and guarantees regarding the independence and impartiality of the judiciary are fully founded.

Moreover, the proposal aspires to increase the representative will of the Grand National Assembly of Turkey, which is the heart of the Strengthened Parliamentary System, and to render effective the functions of making laws and supervising the executive. Thus, the proposal plans to ensure that the legislature will be more democratic, effective, and efficient. In addition, the new system intends to secure the budget right of the Assembly. In order to guarantee transparency and honesty in politics, arrangements will be made in political parties and election laws. The Strengthened Parliamentary System will implement an executive body consisting of the President, who is impartial and does not have political responsibility–unlike the actual situation, where the president holds a party affiliation–and of the Council of Ministers, which is the main authorized and responsible wing of the executive and has political responsibility towards the Parliament. The Prime Minister, Ministers, and the Council of Ministers will be strengthened, and measures to ensure government stability will be adopted. The

10 Constitutional Court, E. 2016/186, K. 2016/186, 14 December 2016, para. 20.
11 Constitutional Court, *Sevim Akat Eşki*, B. no. 2013/2187, 19 December 2013, para. 44 ; *Neşe Aslanbay Akbıyık*, B. no. 2014/5836, 16 April 2015, para. 44.
12 Law no. 6771 (Official Gazette no.29976, 11 February 2017).
13 Tolga Şirin, '"Majestelerini incitme" suçu' (2021) T24 <https://t24.com.tr/yazarlar/tolga-sirin/majestelerini-incitme-sucu,32943> accessed 4 June 2022.
14 Law no. 7393 (Official Gazette no.31801, 6 April 2022).
15 Neslihan Çetin, 'Erdogan peut-il se représenter ?' (*La Vie des idées*, 18 January 2022) <https://laviedesidees.fr/Erdogan-peut-il-se-representer.html> accessed 4 June 2022.
16 The Republican People's Party (Cumhuriyet Halk Partisi, CHP), The Good Party (İyi Parti), The Democracy and Progress Party (Demokrasi ve Atılım Partisi, DEVA), The Future Party (Gelecek Partisi), The Felicity Party (Saadet Partisi, SP), The Democrat Party (Demokrat Parti).

Council of Judges and Prosecutors will be restructured to ensure the independence and impartiality of the judiciary and that the judiciary organs work quickly, effectively, and efficiently and make fair decisions. The structures, independence, and democratic legitimacy of high judicial councils and high judicial bodies will be accentuated, and measures will be taken to prevent the intervention of the executive body.

Finally, the goal of the project is to meet the requirements of the rule of law and a pluralist democratic society and to build a democratic Turkey. To this end, according to the manifesto, it is essential to bring domestic law in line with international standards where fundamental rights and freedoms, especially freedom of expression and press, are guaranteed within the framework of international conventions and universal values for all people regardless of language, religion, sect, race, gender, political and social affiliation.

Nevertheless, these parties do not currently have the majority required for a constitutional change. According to Article 175 of the Constitution, Parliament needs a three-fifths majority for the constitutional amendments to be submitted to a referendum for voters' approval. The future of this project that has the potential to overhaul Turkey's system of government depends on the results of the legislative elections which will take place in 2023.

The Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) and the Nationalist Movement Party (*Milliyetçi Hareket Partisi*, MHP), together forming the governing coalition submitted a bill proposing changes in the election law to the Parliament in March 2022. Subsequently, the Republican People's Party brought these changes to the higher judiciary. The Republican People's Party applied to the Constitutional Court demanding the stay of execution of four articles and their annulment. One must look at the arguments put forward in the appeal seeking an annulment to understand the impact of the changes made on future elections. In the Republican People's Party's application to the Constitutional Court, it is emphasized that the formation of provincial and district election boards and the drawing of lots among judges instead of appointment based on seniority are unconstitutional, therefore, must be annulled. Another article that is the subject of the application for annulment relates to the regulation that excludes the President from propaganda bans. Articles 5, 6, and 12 of the Law foresees that, instead of the rule that has been applied since the first years of multi-party life, according to which the chairman and members of provincial and district election boards are determined based on seniority, the new board president and members will be appointed by lot in place of the senior board president and members who currently have a term of office for approximately two years. In addition, the abolition of the election boards, which were formed in January 2022 according to the existing law and which should serve for two years, clearly violates the imperative provisions of the Constitution. According to the Republican People's Party's view, it is envisaged that people who have been made judges because of their organic or indirect ties with the governing Justice and Development Party in recent years will be elected president and members of the election board by lot within a few months so that the upcoming elections will be held on a partisan basis. In this respect, the abolition of the boards, who implement election law and have a mandate of approximately two years, is clearly against the rule in Article 79 that specifies that "Elections shall be held under the general administration and supervision of the judicial organs," the principle of "independence of the courts" in Article 138 and the "security of tenure of judges and public prosecutors" in Article 139 of the Constitution. Another argument that the Republican People's Party advances is that the exemption of the President, who is the party chairman of the Justice and Development Party, from the election bans with Article 11 of the law, is not legitimate and justified in any way and is unconstitutional. The fact that the chairman of a party, who is a candidate but also exercises the executive power alone, is not included in the article regarding the election bans eliminates the possibility of impartial, equal, free, and fair elections and is unacceptable. The repercussions of this law on the election period are yet to be discovered in 2023.

Last but far from least, the debate around the presidential candidacy of Recep Tayyip Erdoğan is particularly impassioned among jurists in Turkey. The crux of the matter is whether he could run for office for the third time while the Constitution sets a two-term limit for the presidency.[17] The premise of the pro-re-election argument, hence, is that the 2017 amendment would be so profound that its legal effects would be equivalent to those of a brand-new constitution. The argument based on the substantial change in the status of the President to explain his re-election holds no water because the amendment is carried out by ignoring the unamendability limits and usurping the constituent power.[18] We will soon discover whether the 2017 amendment of the Constitution can be used to allow the President to hold power illegitimately for another presidential term. In the light of all these elements, it can be argued that the possible controversies or constitutional reform efforts will revolve around the elections of 2023.

V. FURTHER READING

Ibrahim Ö. Kaboğlu, 'Renouvellement De La Constitution En Turquie: Enjeux Et Defis' [2012] 1 (1) Revue de Droit Constitutionnel 67, 84.

Neslihan Çetin, 'Unconstitutional constitutional changes and President's term limit evasion: a series of constitutional frauds in Turkey' (Int'l J. Const. L. Blog, 23 January 2022) <http://www.iconnectblog.com/2022/01/unconstitutional-constitutional-changes-and-presidents-term-limit-evasion-a-series-of-constitutional-frauds-in-turkey/> accessed 4 June 2022.

17 Turkish Constitution, Article 101 para. 2.

18 Neslihan Çetin, 'Unconstitutional constitutional changes and President's term limit evasion: a series of constitutional frauds in Turkey' (Int'l J. Const. L. Blog, 23 January 2022) <http://www.iconnectblog.com/2022/01/unconstitutional-constitutional-changes-and-presidents-term-limit-evasion-a-series-of-constitutional-frauds-in-turkey/> accessed 4 June 2022.

Ukraine

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I. INTRODUCTION

The year 2021 was another year of delaying the finalization of the constitutional reform instigated in 2019 and before. The slowing constitutional process was nonetheless driven by civil society demanding a more systemic approach to constitutional reform, as well as by the deepening conflict between the president and the Constitutional Court of Ukraine (CCU).

In regard to the constitutional reform, the government had four packages of constitutional amendments to be implemented in 2021. The first package aimed at the increase of citizens' rights by adding them to the list of legal subjects with the right for legislative initiative. The second package envisaged the decrease of parliament's membership and higher control of party over the MPs elected through their lists. The third package was to add to the list of exhaustive functions of president, the right to appoint heads of the new anti-corruption institutes. Finally, the fourth package included miscellaneous changes aiming at some minor issues, for example, related to advisory bodies in the parliament or to lawyers' monopoly in courts.

The constitutional process was slowing down in the context of the COVID-19 pandemic-related socio-economic decline, deepening internal political cleavage, and increasing risks of war with Russia. Still, politicians, experts, and civil activists pursued the discussion on the priorities of the constitutional reform in 2021. The unprovoked Russian invasion of Ukraine launched on 24 February 2022 has fully stopped the constitutional process until the end of the war.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2021, the Ukrainian government has considerably slowed down on the constitutional reform. If in 2019 new, Zelensky administration was launching several initiatives in regard with the change of Constitution, and, in 2020, it was still involved into the continuation with the constitutional amendments started in previous years, in 2021, the government has lost its reformist zeal. The constitutional process was driven either by the civil society or by the presidential attempts to increase its political control over the CCU.

President Zelensky, his 'Servant of the People' Party (SPP) and the SPP-led majority in the parliament have initiated a number of amendments of the Constitution of Ukraine in 2019. Some of these initiatives lasted until 2021 and can be divided into four packages:

1. Increase of citizens' rights: the amendments to Article 93 aiming at adding the citizens to the list of those legal subjects who have the right for legislative initiative;[1]
2. Partial decrease of parliament's authority:
   - The amendments to Articles 76 and 77 that are to reduce 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;[2]
   - 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;
3. Partial increase of presidential powers and harmonization of the anti-corruption legislation with the Constitution: the amendments to Article 106 to increase presidential powers in regard with the new anti-corruption institutes established in 2015–19;[3]
4. Miscellaneous corrections:
   - The amendments to Article 85 providing the parliament with the bigger flexibility to create analytical and advisory bodies that would support legislative work of the Verkhovna Rada;4
   - The amendments to Articles 131 and 132 that aim at abolishing the lawyer's monopoly in courts.[5]

The first two and the fourth packages were not pursued and did not lead to the amendment of the Constitution of Ukraine in 2021.

1 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].
2 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]. Together with the amendment of the Article 80 (enforced as of 01.01.2020) that significantly decreased the immunity of Ukrainian MPs, these constitutional changes would make parliament less politically strong than in previous years.
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 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].
5 Draft Law "On Amendments to the Constitution of Ukraine (concerning the abolition of the lawyer's monopoly)" [No. 1013 as of 29.08.2019].

Even though there was a stable pro-presidential one-party majority in the Verkhovna Rada, the presidential initiatives regarding the constitutional changes did not have necessary support (at least 300 MPs out of 450 mandates in the parliament). Also, the conflict between president and CCU — that started yet in 2020 — created additional obstacles for the approval of constitutional amendments in the CCU.

The aims of the third package were partially achieved by the changes of laws, not the Constitution, that defined the work of the National Anticorruption Bureau of Ukraine (NABU). The NABU is one of the most important institutes to fight corruption in Ukraine since 2015; according to the law, its head was appointed by president—a function that was not listed in the exhaustive constitutional description of presidential powers. The Verkhovna Rada of Ukraine (VRU, Ukraine's parliament) approved the law that somewhat resolved the contradictions between the constitution and NABU-related laws in 2021.[6] Still, this act was not enough to ensure presidential control over the NABU and over a newer anticorruption institution—the State Bureau of Investigations—that focused on investigating cases against senior officials and politicians of Ukraine. Thus, the pro-presidential majority initiated constitutional amendments that would keep presidential control over the leadership of these bureaus.[7] The process of the amendments, however, was stalled for the same reasons as for the other packages.

Even though the constitutional reform did not have any achievements in 2021, the legislature and expert community were actively promoting the reform agenda. The VRU has issued at least 55 decisions aiming at harmonization of the legislation and the Constitution of Ukraine.[8] The wider public debate around the constitutional reform and the deepening conflict between president and CCU involved not only MPs and politicians, but also experts and civic activists.[9] These debates resulted with the *Green book of Ukrainian constitutional reform* where the major problems of the Constitution were analyzed and described; the *Green book* was approved by the parliamentary working group on Constitutional amendments in May 2021.[10] It was followed by the president's decree enforcing the *Strategy of judiciary and constitutional court development for 2021–23*, another document manifesting some political will towards the constitutional reform.[11]

Nonetheless, this wider public debate on the reform, as well as the Strategy's approval, did not lead to any decisions regarding the constitutional reform or approval of the already initiated amendments in 2021. And in 2022, with the start of the Russian invasion of Ukraine, the process of constitutional reform was fully stopped: according to the Constitution, it cannot be amended during the war.

The constitutional process was also hindered by the deepening conflict between president and the CCU. In our report on Ukraine's constitutional process in 2020, we described the beginning of this conflict in detail.[12] In 2021, Ukraine entered in the phase in which the CCU work was almost fully blocked due to the presidential decree (as of 29 December 2020) that suspended the CCU chairperson Oleksandr Tupytsky, and due to the CCU ruling (as of 30 December 2020) that the presidential decree was "legally insignificant".[13] Later, president Zelensky continued with signing decrees that undermined the legitimacy of the CCU chairman in February and March 2021; according to president, the tenure of judge Tupytsky and one more CCU judge appointed yet by president Yanukovych (2010–14) "posed a threat to state independence and national security of Ukraine, which violates the Constitution of Ukraine, human and civil rights and freedoms".[14] The CCU responded with appeal to the Supreme Court that has canceled the presidential decree since "President of Ukraine does not have the authority to decide on the dismissal or termination of powers of judges of the Constitutional Court" in July.[15] In the fall of 2021, responding to the call of 49 opposition MPs, the CCU opened hearings of the constitutionality of three presidential decrees that interrupted the court's work. This was followed by president Zelensky to substitute the two CCU judges he dismissed in March and to appoint two other lawyers as judges of the Constitutional Court.[16] Instead, the CCU did not provide the appointees to swear in as the court's members. Even though the CCU was able to decide on many smaller issues during 2021, altogether, it could not meaningfully participate properly in any process of constitutional amendments.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The debates and conflicts described above, as well as growing menace of Russian Federation to the security of Ukraine, were not conducive to constitutional reform in the country.

Out of four packages of the possible constitutional changes, the second package can be regarded as an amendment with the elements of dismemberment. The parliamentary reform envisaging lesser number of MPs and their reduced immunity was long popular among the Ukrainian population. This kind of parliamentary reform demanded

6 Law "On amendments to some laws of Ukraine to bring the status of the National Anticorruption Bureau of Ukraine in line with the requirements of the Constitution of Ukraine" [No. 1810-IX as of 19.10.2021].

7 Resolution of the Verkhovna Rada of Ukraine "On inclusion in the agenda of the fifth session of the Verkhovna Rada of Ukraine of the ninth convocation of the draft law amending Articles 85 and 106 of the Constitution of Ukraine on the procedure for appointment and dismissal of the Director of the National Anti-Corruption Bureau of Ukraine and the Director of the State Bureau of Investigation to the Constitutional Court of Ukraine" [No. 1341-IX as of 16.03.2021].

8 See data of the VRU legal database: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc2_5_1_J?ses=10010&num_s=2&num=&date1=&date2=&name_zp=%EA%EE%ED%F1%F2%E8%F2%F3%F6&out_type=&id=&page=9&zp_cnt=20> accessed 30 May 2022.

9 Reanimation Package of Reforms. (2022). Shcho ne tak iz konstytucijeju? [from Ukr.: What's wrong with the Constitution]. *Constitutional Process in Ukraine* 1(92): 26.

10 See: Center of Political and Legal Reforms, *Zelena knyga konstytucijnoji reformy [from Ukr.: The Green Book of Constitutional Reform]* (Kyiv: CPPR, 2021).

11 Decree of President of Ukraine "On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023" [No. 231/2021 as of 11.06.2021].

12 Mykhailo Minakov and Maryna Stavniichuk, "Constitutional Reform in Ukraine, 2020." Luis Roberto Barroso and Richard Albert (eds.) *The International Review of Constitutional Reform* (Austin: University of Texas Press and the International Forum of the Future of Constitutionalism, 2021) 294-297.

13 "President of Ukraine signed a decree on the suspension of Oleksandr Tupytsky from the post of a judge of the Constitutional Court for a period of two months." President of Ukraine official website, 29 December 2020, <https://bit.ly/3NOsjOc> accessed May 30, 2022; "Regarding the Decree of the President of Ukraine "On removal from office of a judge of the Constitutional Court of Ukraine" of December 29, 2020 Ð 607/2020." CCU official website, 30 December 2020, <https://bit.ly/3GKLRRp> accessed 30 May 2022.

14 Decree of President of Ukraine "On removal from office of a judge of the Constitutional Court of Ukraine" [No. 79/2021 as of 26 February 2021]; Decree of President of Ukraine "On some issues of ensuring the national security of Ukraine" [No. 124/2021 as of 27 March 2021].

15 Decision of The Supreme Court's Administrative Court of Cassation [No. 9901/96/21 as of 14 July 2022].

16 See: Decrees of the President of Ukraine No. 596/2021 and No. 597/2021.

amending the Constitution, which was initiated in 2019, slowed down in 2020, and stopped in 2021.

The Constitution of Ukraine prescribes that the parliament has a bigger formal role in the political system than the president. However, informally, since 2016, presidents played much bigger role in Ukrainian politics. With the rise of President Zelensky's rule where the VRU and the Cabinet were fully controlled by one political group and where the role of the opposition was unprecedentedly small, the distance between political reality and the constitutional model were growing. In 2021, this distance was especially visible in the fact that the center of decision-making has moved to the National Security and Defense (NSDC), while the positions of the VRU, Cabinet of ministers, and the CCU were marginalized.

According to the Constitution (Article 107), the NSDC is an *advisory* entity. Since the fall 2020, the NSDC has become the institute where a selected number of representatives of the executive branch of power prepared political and security decisions enforced by the presidential decrees.[17] Among those decisions were not only those that related to the issues of deteriorating national security, but also to the suspension of political parties and media outlets — something that only courts can decide upon. On several instances the political opposition or media owners could terminate the NSDC and president's decisions, but usually long after these decisions were implemented.

The Constitutional Court of Ukraine was designed in a way that it would resist to the processes which would allow distancing the political and constitutional orders. According to the Part XII of the Constitution, the CCU combines a counter majoritarian role with a representative role. However, in addition to the traditional weaknesses of the CCU — constant strong informal influence of Presidents upon it and the dependence on those actors who would address the CCU to involve it in the reaction on an alleged violation of the Constitution[18] — the Court was hugely dysfunctional in its abilities to participate in the constitutional process in 2021. That year the CCU experienced even bigger political and public pressure than in 2020 and could not provide necessary constitutional control in Ukraine.

IV. LOOKING AHEAD

As the public debate on the constitutional reform, whose results were fixated in the *Green book* and the Strategy of judiciary and constitutional reform, the conflict around the CCU, and growing gap between the political regime and constitutional norms demonstrated, the need for constitutional reform was very big in Ukraine in 2021. Now that the war with Russia represents the existential threat to Ukraine as a sovereign state, the old internal conflicts are not important anymore, and what matters is the settlement of the external military conflict. As soon as the government deals with the Russian invasion of Ukraine, the constitutional and political reforms will be among the key priorities of the national reconstruction.

It will be critical for all political players to reconstruct the political system and the constitutional setup to ensure stable and inclusive development of Ukraine as a liberal democracy, rule of law state, and a member of European family of nations. The future constitutional design of Ukraine will need to take into account the lessons learned during the post-Soviet transit of 1991–2021. Among those lessons: the division of the branches of power must be balanced and institutionally well-guarded; the Constitution needs to have much stronger, proactive, and independent CCU; respect of human rights and rule of law should be central in the new construction of the judiciary, executive and legislative institutions.

V. FURTHER READING

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17 See: Sławomir Matuszak and Piotr Đochowski, "Growing importance of the Security Council in Ukraine," Center for Eastern Studies, <https://www.osw.waw.pl/en/publikacje/analyses/2021-04-01/growing-importance-security-council-ukraine> accessed 30 May 2022; "Ukraine's Security Council and Its Role in Politics and Media", Wilson Center, <https://www.wilsoncenter.org/event/ukraines-security-council-and-its-impact-politics-and-media> accessed 30 May 2022.

18 See: Minakov and Stavniichuk, Op. cit., 296.

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Summaries

The Most Important Developments in Constitutional Reform

BY JURISDICTION

Afghanistan

Since coming into power in Afghanistan, the Taliban has reconceived the country's political structures, transformed the legal system, and dismantled its human rights regime. They have done this not by enacting a new constitution or using widespread amendment packages but through decrees, laws, and unwritten codes, enforced by fear and intimidation.

Argentina

The last reform of the Constitution of the Argentine Republic was in 1994. But in 1999 ("fayt") and in 2016 (schiffrin), the Supreme Court ruled on the unconstitutionality of the reform.

Australia

The most important development in constitutional reform in Australia in 2021 was continued debate on establishing a "First Nations Voice" body to advise Parliament on matters relating to indigenous peoples. A government report recommended that any such body be created by legislation, but there remains strong support for constitutional enshrinement.

Austria

This year has yet again brought many COVID-19 related legislative measures but few constitutional amendments in that regard. Altogether, the constitutional amendments of 2021 cannot be considered particularly significant. The most far-reaching changes concerning a Freedom of Information Act, or an independent Federal Public Prosecutor still remain in the pipeline.

Bangladesh

The attempts to enact a law for appointment in the Election Commission remains the most important development in 2021. In addition, the judiciary has given a restatement of separation of power doctrine, and the law ministry has taken the initiative to identify the discriminatory provisions in the existing legislations.

Bolivia

The Inter-American Court of Human Rights issued an advisory opinion, which concluded that barring unlimited presidential reelection prevented the perpetuation of power in the hands of one person. Therefore, the most relevant reform proposal in 2021 was related to the intention to restore the limits on reelection established in the Constitution.

Bosnia and Herzegovina

In 2021, there was no progress in reaching political agreement on amendments to the BiH Constitution. Members of the Parliamentary Assembly of BiH, as well as party leaders, failed to reach consensus on limited constitutional reform for implementing the judgments of the European Court of Human Rights.

Brazil

Constitutional reform in Brazil is both formally and informally intense, and more so when Brazil's general elections will take place in 2022. Most constitutional amendments of 2021 altered fiscal, budgetary, or electoral rules - some with a clear populist agenda as President Bolsonaro faces potential defeat in his re-election bid.

Canada

In the field of constitutional reforms, 2021 has been a year of considerable developments in Canada. Indeed, there have been three different initiatives to formally amend the Constitution: one in Quebec, one in Saskatchewan, and one in Alberta. There have also been developments regarding the informal evolution of the Constitution.

Cape Verde

This year's political agenda was not marked by the use of the formal procedure of constitutional reform; the Constitutional Court of Cape Verde does 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

Chile's 2021 period was characterized by a very "constitutionalized" political debate, with more than 100 constitutional amendments introduced to Congress and one of them even analyzed by the Constitutional Court. It was specially marked by the Constitutional Convention implementation process, procedural rules, and first substantive discussions.

Colombia

Constitutional Reforms in 2021 established the city of *Medellín* as the District of Science, and sixteen Special Transitory Districts for Peace. As the constitution was modified in 2020, including life imprisonment for children's rapists, the Court concluded that it affected a defining axis of the Chart, and declared the unconstitutionality of the Legislative act.

Croatia

The most important developments were the role of popular involvement in constitutional reform, the interplay of constitutional amendments, and the processes of representative democracy, particularly with regard to constitutional amendments considered "superfluous".

Cuba

The most important developments implemented in terms of constitutional reform during 2021 in Cuba were linked to a profound procedural reform. This was based on several rights recognized in the 2019 Constitution, related to access to justice and the protection of fundamental rights.

Cyprus

2021 has not been a year of remarkable constitutional developments. Nevertheless, the Cypriot legal order is on the verge of a constitutional reform that will affect, if adopted, the judicial architecture and review of constitutionality. The reform is highly contested but its assessment by the Courts is not yet possible.

Czech Republic

Czech Republic enacted the right to defend one's own life or the life of another person with a weapon in accordance with the law. This however, does not bring any actual changes to the Czech law, nor is it capable to become a shield from the EU firearms directive.

Ecuador

In 2021, the Ecuadorian Constitution experienced one modification. A reform was passed by the National Assembly in the second debate with 116 votes. The reform incorporated the number of kilometers of rural roads as an additional criterion to distribute the state's budget among sub-national governments.

El Salvador

The Constitutional Chamber of El Salvador issued a ruling authorizing presidential reelection, even though presidential reelection is forbidden by the Constitution. The prohibition of reform of the presidential term limits is an eternity clause established by Article 248 of the Constitution. I argue that this is a case of constitutional dismemberment.

Finland

Various regulatory measures taken to limit the spread of the COVID-19 pandemic occupied the center stage on the scene of constitutionalism. The pandemic also increased the need to reform the legislation concerning crises and emergency situations. In addition, recent domestic and global developments triggered some constitutional discussions as well.

France

There were not many new developments in France regarding constitutional reforms: two were dropped (the 2019 project, as well as the smaller 2021 project regarding the protection of the environment), two are considered (the newly reelected president's, similar to the 2019 project, as well as a set of reforms regarding the status of Corsica) and one constitutional change has been implemented through a decision of the Constitutional Council.

Georgia

In 2021, because of the intense political crisis, the EU mediated between the parties, which led to the reach of a compromise. It entailed *inter alia* constitutional modifications. The amendment bill was prepared, and Parliament adopted it in the first hearing. However, the ruling party refused to finally adopt it.

Greece

The year 2021 has been mostly viewed as "the year of salvation", where societies found strategies to combat the pandemic for people to get their normal lives back. The most important aspect of this long-term strategy is the authorization of vaccines to prevent Covid-19. From a constitutional perspective, the discussion was focused on the mandatory vaccination debate, possible violation of personal integrity, and the right to consent to medical treatment.

Guatemala

No formal constitutional amendments were approved in 2021 in Guatemala. However, a series of rulings by the Constitutional Court have radically transformed the judicial review in Guatemala and this can be understood as a dismemberment.

Hong Kong

The Chinese Central Authorities amended the Basic Law of the Hong Kong Special Administrative Region in 2021 to improve the systems for electing the Chief Executive and forming the Legislative Council of the Region to ensure that those who administer Hong Kong are patriots.

Hungary

During this year, the Hungarian state functioned in the State of Danger—the controversies were manyfold related to the regulation of special legal orders, new statutory rules were adopted in the revised constitutional environment. Before the 2022 parliamentary elections, intense public discourse emerged on the possibility of enacting a new constitution, and the limits and preconditions of constitutional change.

India

The Constitution (One Hundred and Fifth Amendment) Act in 2021 was a restorative amendment in Indian constitutional history as it paved the way to restore power to the federal constituent States to recognize and provide affirmative action to socially and educationally disadvantaged groups.

Indonesia

The most important development in constitutional reform in Indonesia in the year 2021 includes the proposals to extend the presidential term limit to three periods of five years and to reinstate the 'State Policy Guidelines' (*Garis-Garis Besar Haluan Negara*, GBHN).

Ireland

A referendum to insert a constitutional right to housing has been promised in Ireland. A Housing Commission has been tasked with examining what this constitutional amendment should be. It is difficult to anticipate what it will recommend: a judicially-enforceable right, a housing-based qualification on property rights, or a rhetorical commitment?

Israel

In 2021, the Israeli High Court of Justice delivered three important decisions regarding judicial review of Basic Laws which developed the misuse of constituent power doctrine and the limited authority of the Knesset to undermine the core values of the state as Jewish and Democratic.

Italy

During 2021, several constitutional amendments were subjected to parliamentary examination. The Environmental Reform (which entered into force only in 2022) establishes *inter alia* that the Republic safeguards the environment "also in the interest of future generations". Moreover, another amendment lowers the age for the election of members of the Senate.

Japan

The pandemic has sparked demands for emergency laws, and Russia's invasion of Ukraine has reawakened the Article 9 issue. Whether future developments will lead to constitutional reform, however, is still uncertain.

Jordan

The Constitution of the Hashemite Kingdom of Jordan has been amended this year, 2022. The amendments were surprising for most Jordanians, but it was not born out of a vacuum outside the political, historical, social, and cultural context. Although the Jordanian constitution is a Rigid Constitution regarding the process needed to amend the constitution, the constitution has been amended often lately.

Kazakhstan

Steadily proposed political and constitutional initiatives of President Tokayev, a former UN Deputy Secretary-General, Director-General of the UN Office at Geneva, were mainly directed to ensure public interests and gain recognition and support of people. They covered human rights issues, developing political competitiveness and protection of resources of strategic interests.

Kenya

The Supreme Court of Kenya put an end to a constitutional amendment process on 31st March 2022. The Supreme Court ruled that the Basic Structure Doctrine did not apply in Kenya and that the President could not initiate constitutional reforms through the popular initiative route under Article 257.

Lithuania

The Constitutional Court can fulfil its mission to uphold the values of a state governed by the rule of law only if there is no doubt regarding its decisions, reasoning, and its composition. The detailed constitutional regulation governing the appointment of justices to the Constitutional Court, which is intended to prevent crises in its formation, cannot anticipate all significant circumstances and it must inevitably be adjusted in the absence of an appropriate interpretation by the Constitutional Court.

Malawi

Malawi's major constitutional reform proposal in 2021 was the suggestion to appoint some judges on fixed term contracts. Its importance lies in that this proposal would have substantially weakened the independence of the country's judiciary. Fortunately, it was eventually dropped.

Malta

In 2021, the Maltese Parliament approved three main constitutional amendments. Reforms focused on reducing the role played by the Prime Minister in the appointment of public service officers and on the enhancement of gender equality in the formation of the national parliament. A further proposal on fair trial requirements in proceedings, which may lead to administrative penalties, was ultimately rejected.

Mexico

On March 11, 2021, another constitutional reform adopted by Congress entered into force. This reform amended various provisions of the Constitution and legislation related to the federal judicial power. Unlike the 1994 judicial reform, this constitutional amendment was adopted in the midst of political controversy and criticism.

New Zealand

Judicial recognition that tikanga (MĐori customary law) is a source of law in its own right, and develops independently of common law and statute, is a significant development in constitutional reform that will have long-term consequences for New Zealand constitutional law.

Nigeria

The amendment rules of the Nigerian Constitution have three strong veto players. The effect is that the number of unsuccessful amendments is high, and successful amendments are rarely consequential. This result is a mismatch for the strong popular demand in Nigeria for, especially, radical reform of the federal system and fiscal relations.

Paraguay

The most important development in constitutional reform in Paraguay in 2021 is the consolidation of the jurisprudence of the Supreme Court that suppresses the confirmation processes required before Justices acquire tenure until the age of seventy-five. Two rulings from 2021 may have also altered significant aspects of Paraguay's model of judicial review.

Peru

The constitutional reforms issued were mostly ruled against the Constitution for not following the established procedure. The debate focused on presidential responsibility, change of Congress structure (bicameralism), interaction between government and Congress, and the possibility of total reform of the Constitution. Some laws that interpret Constitutional dispositions have also been approved.

Poland

There has been no formal amendment of the constitution in Poland in 2021, although the previous trend of modifying the constitution informally has been maintained.

Portugal

As already predicted in the 2020 report, it is likely that we will have a constitutional reform in the near future, as there is now a large majority in the Portuguese parliament. The prospective challenges for 2022 derive from major topics and current discussions already underway.

Romania

One Constitution revision proposal is pending, aiming to amend the right to be elected. The discussions on the topic were enhanced in 2021, in the context of the 30th anniversary of the Constitution. The political discourse advanced the idea of "a constitutional reform, which would make the basic law an instrument for modernizing the country." Specific criticisms/proposals were also expressed by politicians and scholars.

Russia

The contribution takes stock of the main features of the 2020 constitutional reform as well as the intense legislative activity that has been carried out in Russia over the past two years to align the primary legislation with the revised constitutional provisions and implement the new constitutional mechanisms.

San Marino

In 2021, 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 1/2021, which strengthens the independence of the judiciary and reshapes the role of the Consiglio Giudiziario (Judiciary Council, the self-governing body of the judiciary).

Slovak Republic

The states of emergency and various measures fighting the COVID pandemic epitomized 2021. This year was relatively uneventful in terms of formal constitutional change. However, Slovakia experienced thought-provoking constitutional development through litigation concerning the constitutionality of a referendum on an early parliamentary election.

Slovenia

There was only one constitutional change in 2021. The Constitution was complemented with the right to use and develop the Slovene sign language (Article 62a). In the areas of Slovenian municipalities where the official languages are also Italian or Hungarian, the free use of Italian and Hungarian sign language is guaranteed. The use of these languages and the position of their users as well as the free use and development of the language of the deafblind is regulated by law.

Spain

The Spanish Constitutional system has experienced in 2021 only one formal (and failed) amendment proposal intending to replace the term "handicapped" by the expression "people with disabilities". A relevant material change has come via judicial adjudication by the Spanish Constitutional Court in examining the measures adopted through the "state of alarm" to fight against the Covid-19 pandemic.

Switzerland

In 2021, the Swiss people and the cantons adopted two amendments to the Federal Constitution. They obliged the Confederation and the cantons to support the nursing sector and approved a ban on face coverings. The ban, once again, illustrates the challenge of dealing with new constitutional norms limiting human rights.

Taiwan

In 2021, both major parties in Taiwan spent most of the year working on their constitutional amendment proposals. Eventually, only the proposal that aimed to lower the voting age requirements was passed by the legislature with bipartisan support. The proposal will be put into a referendum in November 2022.

Thailand

The restoration of the two-ballot voting system was the most important constitutional reform in 2021 in Thailand. It will alleviate political instability entailed by a chaotic coalition of small political parties. The event importantly revealed that overlapping concerns over stability keep hopes for future amendments to the problematic 2017 Constitution alive.

Turkey

The 2017 revision is the most significant and recent change the 1982 Constitution has undergone. Although, in 2021, remarkable developments had impacted the value and place of the Constitution in the domestic legal order and highlighted how the Constitutional Court fulfilled its role.

Ukraine

2021 was another year of delaying the constitutional reform instigated in 2019. The slowing constitutional process was driven by the civil society demanding a more systemic approach to the reform, as well as by the deepening conflict between the President and the Constitutional Court.