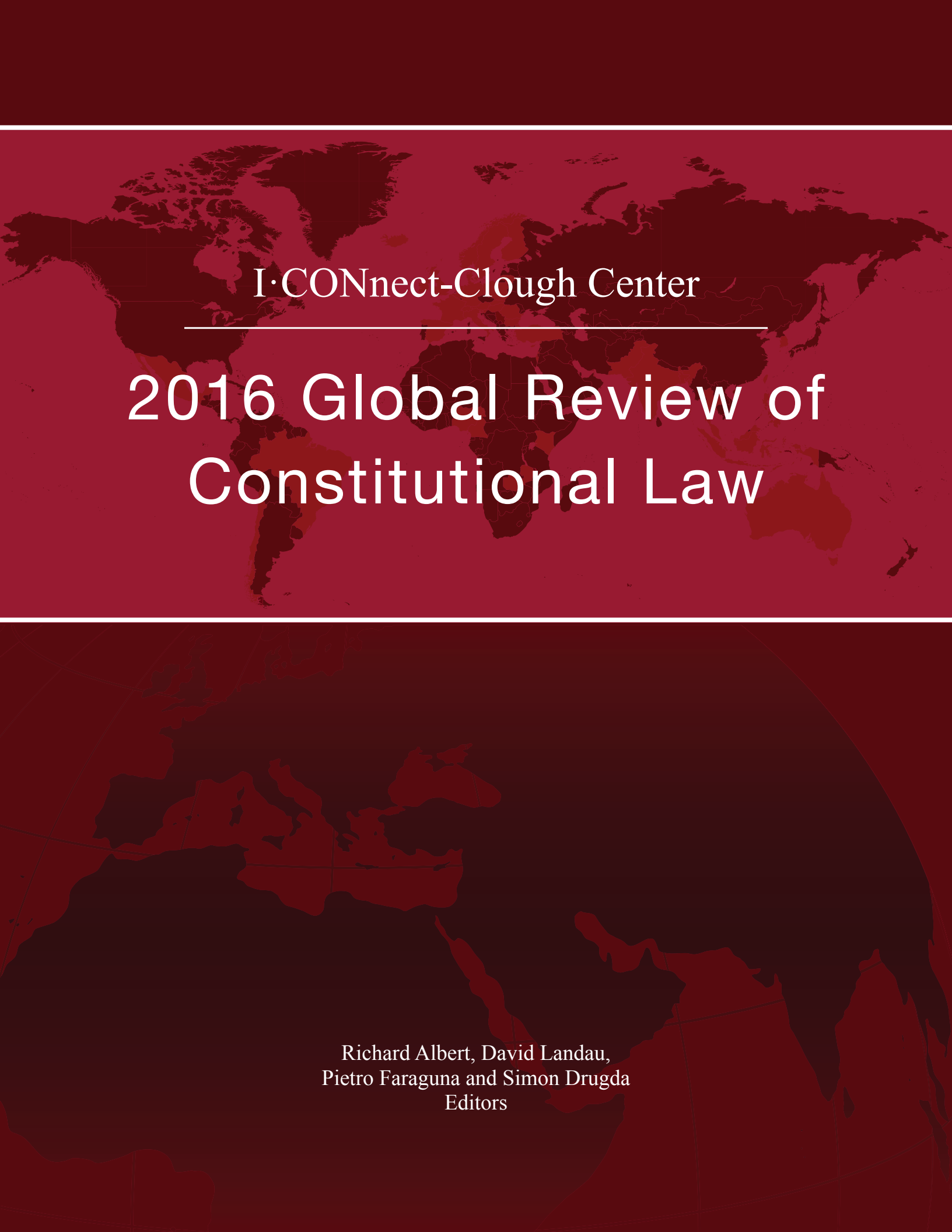

I·CONnect-Clough Center

2016 Global Review of Constitutional Law

Richard Albert, David Landau,
Pietro Faraguna and Simon Drugda
Editors

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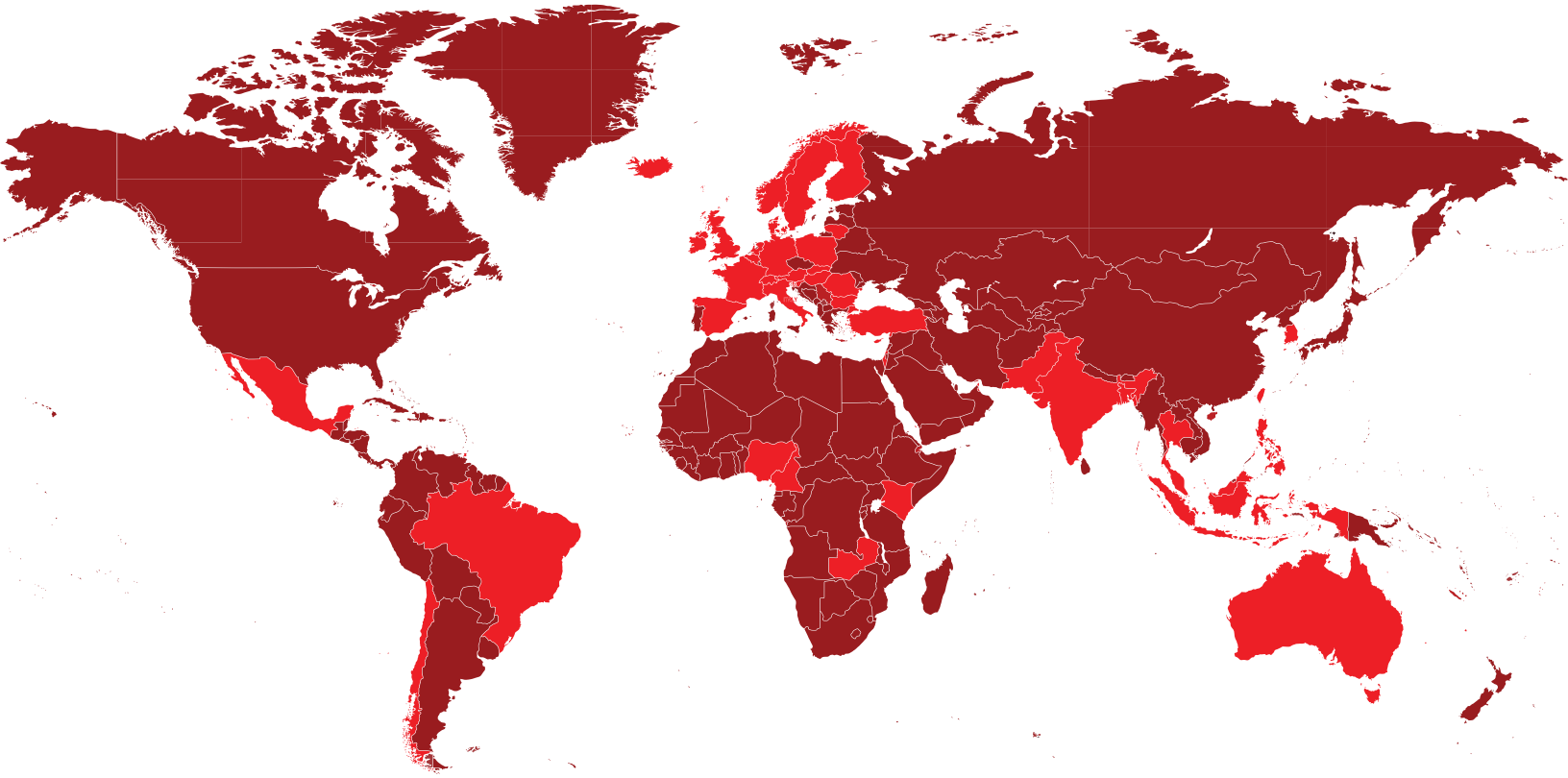


A FIRST-OF-ITS-KIND RESOURCE IN PUBLIC LAW

Richard Albert & David Landau
I·CONnect Founding Co-Editors

2012 marked the birth of I·CONnect, the blog of the *International Journal of Constitutional Law* (I·CON), the leading journal in the field of public law. We hope that in the intervening years readers have found that I·CONnect has fulfilled its mission—to provide succinct, timely, and scholarly commentary on constitutional developments and new academic work from around the world—and been useful a complement to I·CON as a fount for learning in our vast and rapidly-changing field.

This new annual series is the latest innovation at I·CONnect: the annual country reports assembled in this volume embody its core purposes. Presented in a standardized format, the reports give readers a detailed but relatively brief overview of constitutional developments and cases in individual jurisdictions during the past calendar year, in this case 2016. Coverage includes 44 jurisdictions, including not only canonical ones like the Germany, India and the United Kingdom but also much less well-known ones such as Finland, Romania and Zambia. We have carefully selected authors who are academic or judicial experts from their respective jurisdictions—and often the reports are co-authored by both judges and scholars.

We hope the reports in this first-of-its-kind volume offer readers systemic knowledge that, previously, has been limited mainly to local networks rather than a broader readership. By making this information available to the larger field of public law in an easily digestible format, we aim to increase the base of knowledge upon which scholars and judges can draw. We expect to repeat the project every year with new annual reports, and we hope over time that coverage will grow to an even wider range of countries.

We thank Simon Drugda and Pietro Faraguna for their instrumental role in soliciting and editing these reports, and we thank our many distinguished country authors for producing a high-quality and useful product.

We are grateful to the Clough Center for the Study of Constitutional Democracy at Boston College Law School, directed by Vlad Perju, for partnering with us in this project. Since becoming its Director, Vlad Perju has transformed the Clough Center into a leading site in the English-speaking world for the study of constitutions and constitutionalism. We thank him for sharing our vision of the possibilities for this annual volume. We are also extraordinarily grateful to Michelle Muccini of the Clough Center for marshaling her creativity to design this book from cover to cover. She has translated our scholarly content into a beautifully innovative format that has exceeded our every expectation.

Finally, we thank Gráinne de Búrca and Joseph Weiler, Co-Editors-in-Chief of I·CON, for publishing several of these outstanding contributions in the journal itself.

We invite comments and inquiries to either of us via email at contact.iconnect@gmail.com.

A PARTNERSHIP IN SUPPORT OF CONSTITUTIONAL DEMOCRACY

Vlad Perju
Director, Clough Center for the Study of Constitutional Democracy
Professor, Boston College Law School

The Clough Center for the Study of Constitutional Democracy at Boston College is delighted to join I·CONnect in making this outstanding constitutional law resource available to scholars and practitioners around the world. The I·CONnect blog, like its parent International Journal of Constitutional Law (I·CON), have established themselves as indispensable references in comparative constitutional law. This volume, which assembles national reports of developments in constitutional law in 44 jurisdictions, is a new and important step in expanding the horizon of constitutional practice and shaping research in comparative constitutional studies.

The Clough Center's programs and initiatives aim to reinvigorate and reimagine the study of constitutional democracy. By taking a holistic, global, and interdisciplinary approach to constitutional democracy, we seek to foster original research and thoughtful reflection on the promise and challenges of constitutional government in the United States and around the world. The Clough Center regularly welcomes some of the world's most distinguished scholars of constitutionalism and provides a venue for the exploration of topical matters in constitutional thought. More information about the Center's activities, including access to the Clough Archive, are available at http://www.bc.edu/centers/cloughcenter.html.

I am deeply grateful to Professor Richard Albert, a trusted friend and collaborator of the Clough Center, for this partnership with I·CONnect. I am also grateful to Michelle Muccini for her marvelous design work of this e-book.

ABOUT THIS BOOK: ORIGINS, PURPOSE, AND CONTENTS

Pietro Faraguna and Simon Drugda
Global Review Co-Editors

The practical importance of comparative constitutional studies around the world is evident. National high courts increasingly turn to foreign case law in rendering decisions, to draw inspiration or test arguments in tackling a constitutional problem. But the accessibility of reliable sources still presents a vexing issue. Only a small number of courts regularly publishes translations of their decisions, and it is incredibly time-consuming for scholars or judges unfamiliar with a jurisdiction to identify important cases.

This e-book collects "year-in-review" reports on developments in the constitutional law in the year 2016 from 44 jurisdictions, on five continents. The reports were prepared by researchers well versed in their legal system, often in collaboration with a high court judge. We hope to reduce the difficulty of doing comparative work and to facilitate the migration of ideas across the community of constitutional interpreters. These national reports present an accessible overview of the most notable constitutional events in each jurisdiction.

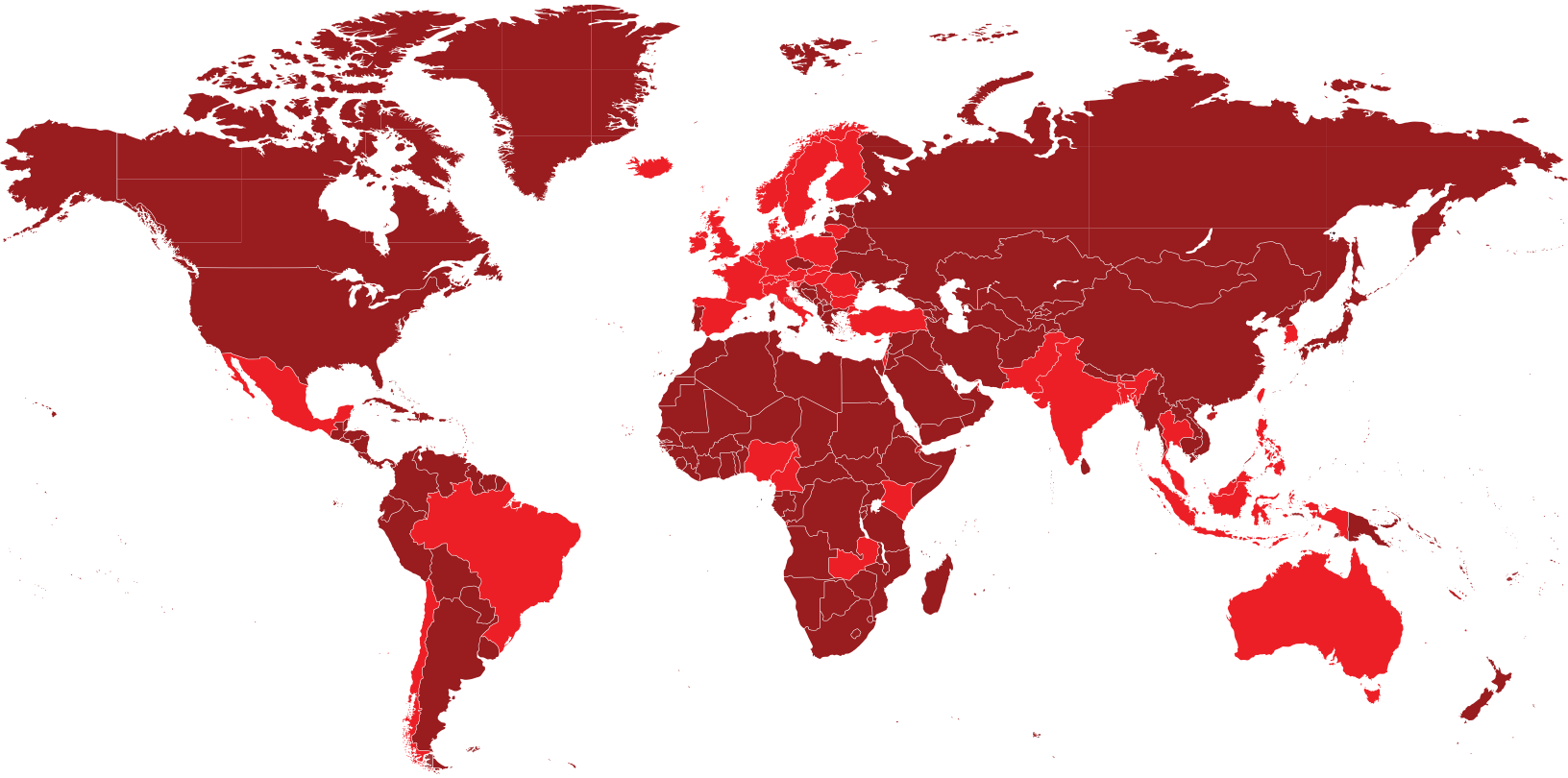
Each report starts with an introduction to the constitution and the high court in a given jurisdiction and then continues with a narrative exposition of up to two significant controversies. This is not always a case-based account and it may examine long-burgeoning constitutional developments that arose prior to 2016. The third section then isolates the year 2016, for which each report gives an overview of selected judgments. The short case notes are divided into sub-sections covering subjects that may include the separation of powers, rights and freedom, as well as foreign, international and/or multilateral relations. Authors conclude with observations on the path of the constitutional development in their jurisdiction or sometimes offer a cautious forecast of the future. This e-book is primarily descriptive and explanatory, although there is inevitably also some critical commentary.

We are thankful to I·CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, which generously supported this project. We are thankful to I·CON and particularly to Gráinne de Burca and Joseph Weiler who offered us the possibility of publishing some of these reports in the journal. We would also like to thank scholars who helped with the review of some of the reports in this e-book, among them Marek Antoš, Timea Drinoczki, and Mihail Vatsov.

This e-book would not exist without the enthusiastic encouragement of Marta Cartabia, vice-President of the Italian Constitutional Court, who supported the idea of this series since the very first national report published in 2016. After this pioneering report, others followed suit, and we soon had ten national reports on developments in constitutional law for the year 2015. A few months later, the number had grown to over 40, with commitments from all around the world. We are indebted to the authors, who tolerated our constant pressure on timekeeping and a level of rigidity involved in the process. They are, after all, the lead voice of the project. We hope that this e-book will mark a successful start of a long collaboration. The project will generate an exciting and lasting resource as the reports accrue in time. Finally, we thank Richard Albert and David Landau for advice and enriching collaboration.

We welcome all comments and suggestions to pfaraguna@luiss.it and simondrugda@gmail.com.

COUNTRY REPORTS



Australia

DEVELOPMENTS IN AUSTRALIAN CONSTITUTIONAL LAW

Anne Carter and Anna Dziedzic, Centre for Comparative Constitutional Studies (CCCS), Melbourne Law School, with assistance from CCCS researchers Artemis Kirkinis, Kalia Laycock-Walsh, and Marcus Roberts

INTRODUCTION

2016 witnessed several relatively uncommon political events in Australia, including a double dissolution election, a public dispute between the nation's two highest Law Officers, and legal proceedings over electoral eligibility and processes. These political developments informed the work of the High Court, which heard cases concerning changes to voting methods, the validity of an Electoral Roll 'suspension period,' and the eligibility of two Senators. The Court's constitutional jurisprudence in 2016 on these and other matters (outlined in Part IV below) confirms that the Court's approach to interpretation remains firmly tied to the text and structure of the Constitution. Outside the judicial realm, debate over constitutional change to recognise Australia's Indigenous peoples continued, but with little consensus as to the scope of the proposal to be put to referendum.

THE CONSTITUTION AND THE COURT

The Australian Constitution was created in 1901 when the colonies established by British settlers came together in a federation. The Constitution provides for a parliamentary system of government, broadly based on the Westminster system. It establishes a federal system in which powers are divided between the Commonwealth and six states.

A distinctive feature of the Australian Constitution is that it does not include a Bill of Rights. Rights are instead protected by the constitutional separation of powers, the common law, and the democratic legislative process. While the Constitution contains a few discrete rights-protective provisions—including trial by jury and compensation on just terms for acquisition of property[1]—hese provisions are not framed or interpreted in the same manner as civil and political rights in other jurisdictions. Certain rights, such as the freedom of political communication, have been implied into the Constitution by the High Court.[2]

The High Court of Australia is the final court of appeal from all federal and state courts. The High Court also has original jurisdiction in constitutional matters[3] (but no capacity to issue advisory opinions) and special jurisdiction to hear electoral disputes.[4] The High Court has the power to invalidate laws that do not comply with the Constitution. The Court comprises seven judges, who are appointed to serve until the age of 70, subject to removal by a special parliamentary procedure.[5] Final hearings before the High Court involve both detailed written submissions and oral argument. Judges may write their own separate judgments and may join with other judges to write joint reasons. Unanimous decisions are relatively rare.

[1] Constitution ss 80, 51(xxxi).
[2] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[3] Constitution ss 75 and 76.
[4] *Commonwealth Electoral Act 1918* (Cth) s 354.
[5] Constitution s 72; *High Court of Australia Act 1979* (Cth) s 5.

DEVELOPMENTS AND CONTROVERSIES IN 2016

High Court Appointments

In 2016, Chief Justice French announced his retirement from the High Court, effective in January 2017, two months short of the mandatory retirement age of 70. As a result, in November 2016, two new appointments to the bench were announced, both of whom were sworn in in early 2017. Justice Susan Kiefel, who was first appointed to the High Court in 2007, was appointed as the Court's 13th Chief Justice. She is the first woman to serve as Chief Justice of the Court. After leaving school at the age of 15, Chief Justice Kiefel completed her studies part-time while working as a legal secretary. Before being appointed to the High Court, she served as a judge on the Queensland Supreme Court and the Federal Court of Australia.

The other appointment to the Court was Justice James Edelman. Originally from Western Australia, Justice Edelman was a Professor at Oxford University and practised at both the Western Australian Bar and the Bar of England and Wales before being appointed to the Supreme Court of Western Australia and then the Federal Court of Australia. Aged just 43, Justice Edelman is one of the youngest justices ever to be appointed and he could potentially sit on the Court until 2044.

The Solicitor-General's Role

2016 witnessed a public and protracted dispute between Australia's first and second Law Officers, the Attorney-General, and the Solicitor-General, respectively. In Australia, the Attorney-General is a member of Parliament and Cabinet, and so holds a largely political office. By contrast, the Solicitor-General is a statutory office-holder who provides legal advice to the government and represents the government in court. While the Solicitor-General has traditionally been considered to be independent of government, the office's close connection to the government creates the potential for tensions between the two offices.

In 2016, these tensions escalated when the Attorney-General issued a Direction to the Solicitor-General requiring that all persons or bodies seeking an opinion from the Solicitor-General first obtain written consent from the Attorney-General. The Direction changed the previous protocol and raised concerns that it would restrict access to the Solicitor-General's advice.

The 2016 Direction sparked a public dispute between the Solicitor-General, Mr Justin Gleeson SC, and the Attorney-General, Senator George Brandis QC. This led to an inquiry before a Senate Committee into the nature and scope of consultations that had occurred prior to the making of the Direction. The Committee, which reported in November 2016, recommended that the Senate disallow the Direction and that the Attorney-General be censured for misleading Parliament. Prior to this report, in late October 2016 Mr Gleeson resigned, citing a breakdown in trust and confidence between the two Law Officers. A new Solicitor-General was appointed in December 2016.

Federal Elections

Prorogation and Double Dissolution

2016 also witnessed a relatively rare double dissolution federal election, which was engineered by the government's utilisation of two constitutional provisions.

Under the Constitution, the House of Representatives (lower house) sits for a three-year term, whereas Members of the Senate (upper house) sit for six-year terms, with elections for half of the seats every three years. As such, at an ordinary election, all House of Representative seats, but only half of the Senate seats, are vacated. Section 57 of the Constitution provides for a double dissolution election, whereby both Houses of Parliament are dissolved and all seats vacated, as part of the process to resolve deadlocks between the two Houses on proposed laws.

The 44th Parliament of Australia was elected in 2013. The Liberal-National Coalition held a majority of seats in the House of Representatives but did not command a majority in the Senate. In 2015, the government introduced industrial relations legislation that was passed by the House of Representatives but rejected by the Senate. The House of Representatives again considered the Bill and returned it to the Senate, but due to the timing of the parliamentary sittings and the need to pass the budget, there was insufficient time for the Senate to reconsider the Bill before the deadline for a double dissolution.[6] The government did not have the numbers in the Senate to reschedule the sittings and so the Governor-General, acting on the advice of the Prime Minister, prorogued Parliament on 15 April 2016 and summoned it to sit again on Monday 18 April 2016. This prorogation, while within the Constitution, was unusual. Prior to 2016, the Parliament has been prorogued and recalled only 28 times, and not once since 1977.

At the new sittings, the Senate again rejected the Bill and on 9 May 2016, the Governor-General dissolved both Houses of Parliament. The election held on 2 July 2016 saw the Coalition returned to government with a reduced majority in the House of Representatives and a minority of seats in the Senate, meaning that a group of minor parties and independents continue to hold the balance of power in the Senate.

Disputes over Eligibility

Following the July 2016, election disputes arose over the eligibility of two Senators: Senator Bob Day and Senator Rob Culleton. In both matters, the Senate referred questions to the High Court, sitting as the Court of Disputed Returns. Section 44 of the Constitution provides for certain circumstances in which a person shall be 'incapable of being chosen or of sitting as a senator or a member of the House of Representatives.' These include a person who 'has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under a law of the Com-

[6] Constitution s 57 provides that a double dissolution cannot take place in the six months prior to the end of the House of Representatives' three year-term. As such, the latest day in 2016 on which a double dissolution could occur was 11 May 2016.

monwealth or of a State by imprisonment for one year or longer' (s 44(ii)), and a person who 'has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth…' (s 44(v)).

The dispute about Mr Culleton's election concerned s 44(ii). At the time of the election he had been convicted of larceny in the Local Court of New South Wales, but the conviction was annulled after the election. The High Court heard the matter in December 2016 and in February 2017 held that Mr Culleton was incapable of being elected as a Senator.

The dispute about Mr Day's election concerned s 44(v) and arose out of the arrangements for the lease by the Commonwealth of his electoral office at a property in which his family trust held an interest. In April 2017, the High Court held that Mr Day was incapable of being elected as a Senator because of his indirect pecuniary interest arising from the lease agreement with the Commonwealth.

Constitutional Recognition of Indigenous Australians

The Australian Constitution currently includes no reference to the Indigenous peoples of Australia. Express references to 'aboriginal people' were removed from the original text of the Constitution in 1967, but provisions that permit the Commonwealth Parliament to 'make laws for the people of any race' (s 51(xxvi)) and a defunct provision that contemplates disqualification from voting on the basis of race (s 25) remain.

There is a long history of advocacy for constitutional change to recognise Indigenous peoples and to better protect and promote Indigenous rights. Unlike other settler states, Australia has no treaty arrangements with Indigenous peoples and no substantive equality provision in the Constitution itself. The current process for constitutional change began in 2010 when the leaders of the two major political parties made commitments to work towards recognition. 2016 saw developments around the process for, and substance of, any constitutional amendment. Although there is notional cross-party support for recognition there has to-date been little consensus on the detail.

In relation to process, political leaders had initially proposed a referendum for May 2017, the 50th anniversary of the landmark 1967 referendum. In 2016, this timeframe was extended to permit greater discussions, including the first of 12 Indigenous-only dialogues. A date for the referendum is yet to be settled.

Also yet to be settled is the substance of the proposed amendments. Two distinct approaches to recognition have emerged. The first approach is largely symbolic.[7] It would insert references to Indigenous peoples and their culture and history in the preamble (which is not legally binding), repeal the defunct s 25 of the Constitution, and reword the 'races' power in s 51(xxvi). The second approach supplements symbolic constitutional statements with new substantive rights and procedures, such as a constitutional prohibition on racial discrimination; a representative Indigenous advisory body; protection for Indigenous land rights; and entrenched treaty-making powers.[8]

The Australian Constitution is notoriously difficult to amend.[9] As such, the challenge is to develop proposed amendments which meet the needs and aspirations of Indigenous peoples and are likely to attract the required support at referendum. Frustrated by the limitations of constitutional recognition, there were renewed calls in 2016 among Indigenous peoples for treaties. While treaties do not necessarily involve formal amendments to the text of the Constitution, they are seen as a powerful expression of Indigenous sovereignty and self-determination and a form of constitutional recognition that acknowledges Indigenous peoples as peoples or nations.[10]

MAJOR CASES

In 2016, the High Court handed down 53 judgments covering criminal appeals; taxation, migration, and competition cases under federal legislation; and a range of civil matters arising under federal and state jurisdictions. The focus of this report is the six judgments that raised constitutional issues.

Legislative Power

Plaintiff M68/2015 v Minister for Immigration and Border Protection [2016] HCA 1 (3 February 2016)

This case challenged the lawfulness of Australia's arrangements for dealing with asylum seekers. These include offshore processing arrangements, under which people who arrive in Australia by boat without a valid visa and seek asylum are transferred to detention centres in Nauru and Papua New Guinea. Australia's asylum seeker policies, which have included mandatory detention on- and offshore, have been the subject of considerable political controversy over the last 15 years and the High Court has examined these policies on a number of occasions. Due to the absence of a constitutional Bill of Rights, the Court approaches these issues through the lens of limitations on Commonwealth legislative power and the separation of powers.

The plaintiff was a woman from Bangladesh whose boat was intercepted in Australian waters, and she was transferred to Nauru. While in Australia to receive medical treatment for her pregnancy, she commenced proceedings in the High Court, seeking orders to prevent the government from returning her to Nauru. The plaintiff argued that

[7] E.g. Damien Freeman and Julian Leeser, 'The Australian Declaration of Recognition: A new proposal for recognising Indigenous Australians' (2014).

[8] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015.

[9] Constitution s 128 provides that a constitutional amendment requires the support of a majority of voters in a majority of states at a referendum.

[10] See *Indigenous Law Bulletin* (2016) vol 8(24), special edition on Constitutional Recognition http://www.ilc.unsw.edu.au/publications/indigenous-law-bulletin-824.

her detention was unlawful because it was not authorised by a valid Commonwealth law. The case focused first on whether there was a head of federal legislative power to support the legislation authorising her detention, and secondly, whether the law infringed the principle that detention requires an exercise of judicial (rather than executive) power, except in specific circumstances (called the 'Lim principle' after the case in which it was established[11]).

By a majority of 6:1, the High Court upheld the validity of the legislation. The majority held that the detention legislation was supported by the Commonwealth's power to make laws with respect to aliens[12] and/or the external affairs power.[13] On the issue of executive detention, four judges held that the plaintiff was not detained by the Australian government but rather by the Nauru government, meaning that the Lim principle was not engaged. While the remaining three judges held that the plaintiff was, as a matter of substance, detained on Nauru by Australia, two of these judges (Bell and Gageler JJ) concluded that the detention in this case did not require an exercise of judicial rather than executive power.

Justice Gordon was the sole dissenting judge, holding that the detention was unlawful. She held that the separation of judicial power under the Constitution requires exceptional reasons to justify a law that permits executive detention without judicial order, and that there were no such exceptional reasons in this case.

Following this decision, the Australian government resumed transferring asylum seekers to Nauru, where 380 people, including 45 children, were detained as of December 2016.[14]

Rights and Freedoms

Right to vote: Murphy v Electoral Commissioner [2016] HCA 36 (5 September 2016)

This case concerned the validity of provisions of the Commonwealth Electoral Act 1918, which prevented the Electoral Commissioner from amending or updating the Electoral Roll during a 'suspension period' before the polling date. The plaintiffs argued that the suspension period was contrary to the requirement in ss 7 and 24 of the Constitution that Members of Parliament be 'directly chosen by the people'. In particular, the plaintiffs argued that the law was invalid unless the disqualification was for a 'substantial reason'. Underpinning the plaintiffs' case was the argument that technological advances and the availability of resources meant there was no substantial reason to suspend the rolls from seven days after the date of the issue of the writs for the election.

All judges of the Court rejected the challenge and held that the impugned provisions were valid. A majority of the Court (French CJ and Bell J, Keane J, and Gordon J) held that the plaintiffs had not established that the provisions amounted to a 'burden' on the constitutional mandate of popular choice. All members of the Court agreed that even if there was a relevant burden, that burden was justified by a substantial reason: the orderly conduct of elections, which would produce efficiency and certainty. Various judgments emphasised that limitations on voting prior to an election were longstanding and so did not diminish the constitutional requirement of popular choice.

The major division in the Court's reasoning concerned the test to determine whether a burden could be justified by a substantial reason. Justice Kiefel followed the approach that had been developed in the 2015 case of McCloy v New South Wales[15] and applied a proportionality test to determine the validity of the impugned provisions. The other six members of the Court rejected a McCloy-style structured proportionality test in the present context. For instance, French CJ and Bell J considered that proportionality testing would invite the Court to undertake a 'hypothetical exercise of improved legislative design', and that this was 'inapposite in this case'. Most forcefully, Gageler J rejected the use of a 'structured and prescriptive' form of proportionality reasoning in the Australian context.

Right to vote: Day v Australian Elector Officer (SA) [2016] HCA 20 (13 May 2016)

This case was a different challenge to electoral legislation, this time to amendments to the Commonwealth Electoral Act 1918 that changed the voting requirements for members of the Senate. The new law provided that an elector could vote either 'above the line', by numbering at least six party or group tickets in order of preference, or 'below the line', by numbering at least 12 individual candidates in order of preference. (Previously there had been a requirement to number all of the candidates if voting 'below the line'.)

The plaintiffs made three principal arguments:

- The amendments provided for two different voting methods and so were contrary to the requirement in s 9 of the Constitution that there be only one method.
- The method of voting above the line for a party or group contravened the requirement in s 7 that senators be 'directly chosen by the people'.
- The new ballot paper was misleading, and was therefore a burden on the implied freedom of political communication.

[11] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[12] Constitution, s 51(xxix).

[13] Constitution, s 51(xix).

[14] Australian Government Department of Immigration and Border Security, *Immigration Detention and Community Statistics* (31 December 2016) https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention, p 4.

[15] *McCloy v New South Wales* (2015) 257 CLR 178.

The High Court unanimously dismissed the application. The Court held that the purpose of s 9 is to provide for a uniform method of electing Senators, and that the term 'method' can accommodate multiple ways of voting. The Court further held that s 7 prohibits the election of senators by an intermediary, such as an electoral college, but that this was not the effect of the new law. Finally, the Court held that the ballot paper was not misleading and it correctly stated the requirements of the Electoral Act.

Trial by jury: Alqudsi v The Queen [2016] HCA 24 (15 June 2016)

Section 80 of the Constitution requires that 'trial on indictment of any offence against any law of the Commonwealth shall be by jury'.

The accused was standing trial for Commonwealth offences relating to supporting persons to enter Syria with intent to engage in armed hostilities. The trial was being conducted by the Supreme Court of the State of New South Wales. Alqudsi sought that his trial be heard by judge alone, as is permitted under New South Wales legislation.[16]

A majority of six judges of the High Court (French CJ dissenting) followed previous authority in holding that where Commonwealth legislation determines that there is a trial on indictment, the accused cannot waive trial by jury. The majority rejected the argument, put by the Commonwealth and several States, that the purpose of s 80 of the Constitution is to preserve the public interest, which in this case required the trial to be heard by a judge alone. In doing so, the judges upheld the clear terms of s 80 while emphasising that there are mechanisms to ensure that jury trials are conducted fairly and in the public interest.

Acquisition of property on just terms: Cunningham v Commonwealth [2016] HCA 39 (12 October 2016)

In 2012, the Commonwealth Parliament amended parliamentary entitlements for former Members of Parliament (MPs), reducing their superannuation and travel entitlements. Four former MPs challenged the amendments in the High Court, arguing that the amendments amounted to an acquisition of property by the Commonwealth otherwise than on just terms contrary to s 51(xxxi) of the Constitution. The High Court upheld the amendments, with a majority holding that the entitlements were statutory rights that were inherently liable to variations, and as such the amendments should not be regarded as an acquisition of property.

Federal Division of Powers

Bell Group NV (in liq) v Western Australia [2016] HCA 21 (16 May 2016)

Section 109 of the Constitution provides that in the event of an inconsistency between Commonwealth and State laws, the Commonwealth law will prevail.

In this case, the Western Australian Parliament had enacted the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 ('Bell Act') to establish an authority to deal with the dissolution and administration of the property of a group of related companies, all in liquidation. The authority was given absolute discretion to determine the property and liabilities of the companies.

The High Court held that the Bell Act was invalid because it was inconsistent with provisions of Commonwealth taxation legislation. In purporting to give power to the authority to pool property and deal with it at 'its absolute discretion', the Bell Act detracted from the rights of the Commonwealth Commissioner for Taxation under Commonwealth tax legislation to have an assessment of the existence, quantification, and recovery of taxation liabilities. The Court declared the Bell Act invalid in its entirety, because it presented a package of interrelated provisions, making severance of only those parts inconsistent with Commonwealth legislation difficult and likely ineffective.

CONCLUSION

Looking forward to 2017, it is likely that the repercussions of the constitutional developments of 2016 will continue to be felt. The Court's reasoning in the Day case may provide grounds to challenge the eligibility of other MPs, which may potentially lead to changes in the composition of Parliament. In terms of the High Court's constitutional jurisprudence, one of the major issues to be resolved in 2017 is the status of proportionality review. Following the 2016 decision in Murphy v Electoral Commissioner there is a question mark over the future of proportionality in Australian constitutional law, and this issue will be squarely before the Court in an upcoming challenge to Tasmania's anti-protest laws.[17] Finally, 2017 will see continued debate about constitutional recognition of Indigenous peoples, including the prospect of treaties, as Australians rethink the political and legal relationships between governments and Indigenous peoples.

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[16] *Criminal Procedure Act 1986* (NSW) ss 132(1)–132(6).

[17] *Brown v Tasmania is set down for hearing in May 2017.*

Austria

DEVELOPMENTS IN AUSTRIAN CONSTITUTIONAL LAW

Konrad Lachmayer, Professor of Public and European Law at the Sigmund Freud University in Vienna; Ingrid Siess-Scherz, Judge at the Austrian Constitutional Court

INTRODUCTION

The year 2016 was dominated by the Austrian presidential elections, which were closer than ever before. The drama levels were increased when the Constitutional Court annulled the result of the run-off election (the first time this had happened in Austrian constitutional history). In the end, the (relatively) clear majority achieved against the Freedom Party candidate in the rescheduled election in December 2016 concluded an eventful year in politics.

Besides these core constitutional developments, it is worth mentioning that the role of the Constitutional Court is changing, with the Court´s competences having been extended in the last few years. In 2014, it gained the competence to review the procedures of the parliamentary investigative committee,[1] which led to important case law in 2015. Meanwhile, since it had not been possible in the traditional Austrian constitutional framework for an individual to file a constitutional complaint against a judgment of an ordinary court, a new kind of legal protection was introduced in 2013,[2] giving parties in civil or criminal law cases at ordinary courts the possibility to file a constitutional complaint against the statutory provisions applied by the ordinary court of first instance; the Constitutional Court can now review the constitutionality of the respective provisions at the request of a party and not only at the request of the court. The scope of this access to the Constitutional Court was significantly increased by the Constitutional Court in 2016.[3]

THE CONSTITUTION AND THE COURT[4]

The Austrian Constitution provides three supreme courts which are in theory equal, though distinguishable from one another in their functions: the Constitutional Court, the Administrative Court and the Supreme Court.[5] The Constitutional Court deals with abstract and concrete judicial review of statutes and all other constitutional questions. The Administrative Court considers the conformity of administrative acts with regard to the statutory provisions, while the Supreme Court is the highest court of appeal within the system of ordinary courts. The equality between the courts is demonstrated by the lack of the provision of a constitution complaint (Verfassungsbeschwerde) for individuals. An individual does not have the possibility to file a complaint against the decisions of the Administrative Court or the Supreme Court at the Constitutional Court.[6]

The Austrian Constitutional Court consists of a President, a Vice-president and 12 ad-

[1] See the new Article 138b Austrian Constitution (Federal Law Gazette I 2014/101).

[2] See the amended Article 139 and 140 Austrian Constitution (Federal Law Gazette I 2013/114).

[3] See Part V.

[4] This part is based on the following paper: Konrad Lachmayer, 'The Austrian Constitutional Court', in: András Jakab / Arthur Dyevre / Giulio Itzcovich (eds.), Comparative Constitutional Reasoning (CUP, Cambridge 2017) 75-114.

[5] Manfred Stelzer, *The Constitution of the Republic of Austria. A Contextual Analysis* (Hart Publishing, 2011) 190-205.

[6] The detailed interrelation between the different supreme courts is very complex.

ditional judges.[7] All judges are appointed by the Federal President of Austria, who is bound in his appointments by the proposals of different bodies. The President, the Vice-president and six members of the Court are proposed by the Federal Government. The appointment of the other six members is based on proposals of Parliament (three from each chamber).[8] The term of office lasts until the judges reach the age of 70.[9] The current 12 members come from the fields of administration, the courts, the universities and solicitors' practices. Judges, lawyers, and university professors continue to exercise their professions, whereas civil servants in the public administration have to be granted leave.

In the deliberation process of the Court, the President is not entitled to vote except in cases of tie votes, when the President has the decisive vote. Regarding gender diversity, the Constitutional Court is still male-dominated; so far, there have only been male. Since 2003, the Constitutional Court has had its first female Vice-president.[10] Currently, 4 (out of 12) judges at the Court are female.

The Austrian Court system has to be seen in the context of the European justice system, especially the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). The Austrian Constitutional Court engaged in EU law from the moment Austria joined the EU in 1995 and has a very open attitude towards EU law.[11] This includes its willingness to refer questions to the CJEU for a preliminary ruling[12] and the recent decision of the Constitutional Court including the EU's Charter of Fundamental Rights in the human rights review procedure.[13] The European Convention on Human Rights (ECHR) is formally part of Austrian constitutional law since 1958, although it was only elevated to constitutional rank by the constitutional legislator in 1964. This formal constitutional framework led to case law of the Constitutional Court which is heavily involved with the ECHR and the case law of the ECtHR.[14]

The Austrian Constitutional Court has a broad variety of competences, and these have increased over the decades.[15] The most important competences are the decision-making power in competence conflict,[16] the review of acts of Parliament[17] and the review of judgments of the administrative courts of first instance with regard to human rights violations.[18] Further competences include rulings in financial conflicts with the federation or state entities, the review of the legality of administrative ordinances, the review of elections or the decision on the constitutional responsibility of the highest authorities of the state.

The workload of the Court has increased steadily. While the Constitutional Court decided 694 cases in 1981, it decided 3,898 cases in 2016.[19] These 3,898 decisions included 184 positive and 233 negative judgments, 338 refusals on formal grounds, 1,318 rejections (because no constitutional question was concerned) and a further 1,825 decisions (regarding legal aid, cessations of the procedure, etc.). With regard to the different competences of the Constitutional Court, 3,144 cases involved the review of human rights violations, including 1,670 asylum cases. The number of conflict of competence cases was very small in comparison (3 cases). The average length of proceedings was 143 days, or 78 days in asylum cases.

The Court has its own website,[20] which not only provides information about the judges but also publishes upcoming oral hearings, recent judgments and an annual report of the Court. It provides legal texts, gives information on court procedures and answers frequently asked questions, including those concerning legal aid. All judgments since the 1980s are available in German on the website of the Austrian Legal Informatics System (Rechtsinformationssystem).[21] English translations of Constitutional Court cases are still very rare.[22]

[7] Art. 147 para. 1 Austrian Constitution.

[8] The first chamber is the National Council (*Nationalrat);* the second chamber is the Federal Council (*Bundesrat*). The political importance of the second chamber is quite minor in Austria. Although under Austrian law hearings are not mandatory, it has become a practice that both chambers hold hearings before they propose a candidate.

[9] Art. 147 para. 6 Austrian Constitution.

[10] https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/brigitte_bierlein.en.html.

[11] VfSlg 14.390/1995; VfSlg 14.863/1997; VfSlg 14.886/1997; VfSlg 15.427/2000; VfSlg 17.967/2006; VfSlg 19.499/2011; VfSlg 19.632/2012.

[12] See the recent decision taken by the Constitutional Court on 28 November 2012, G-47/12 et al (questions for a preliminary ruling with regard to the data retention directive) – see in English: https://www.vfgh.gv.at/downloads/vorabentscheidungsvorlagen/Vorlage_VRDspeicherung_G_47-12_EN_4.4.2017.pdf.

[13] See VfGH 14.03.2013, U 466/11, U 1836/11 – available in English at https://www.vfgh.gv.at/downloads/grundrechtecharta_english_u466-11.pdf.

[14] See e.g. Konrad Lachmayer, 'The Austrian approach towards European human rights', VfGH 14 March 2012, U 466/11 et al (2013) Vienna Journal on International Constitutional Law 105-107.

[15] See Ronald Faber, 'The Austrian Constitutional Court – An Overview' (2008) 2 ICL-Journal 49-53; Christoph Bezemek, 'A Kelsenian model of constitutional adjudication. The Austrian Constitutional Court' (2012) 67 Zeitschrift für Öffentliches Recht 115-128; Manfred Stelzer, The Constitution of the Republic of Austria. A Contextual Analysis (Hart Publishing, 2011) 197-204.

[16] Art. 138 Austrian Constitution.

[17] Art. 140 Austrian Constitution.

[18] Art. 144 Austrian Constitution.

[19] See the annual report of the Constitutional Court, available at www.vfgh.gv.at.

[20] www.vfgh.gv.at/.

[21] www.ris.bka.gv.at/vfgh/.

[22] In 2016, the Constitutional Court published one judgment in English: VfGH 1.07.2016, W I/2016 (run-off election); and in three cases summaries in English were provided: VfGH 13.12.2016, G 494/2015 (no right to a judicial determination of paternity), 15.10.2016, G 7/2016 (hunt on private landholdings), 15.03.2016, E 1477/2015 (assisted suicide); see also the *Bulletin of Constitutional Case-Law*, published by the Venice Commission (http://www.venice.coe.int/WebForms/

The Austrian Constitutional Court has gained new review functions in recent years. In the case law of 2016, the new constitutional complaint after a judgment of first instance by an ordinary court played a crucial role. On the one hand, the Constitutional Court was confronted with the statutory limitations in certain areas of law to access to the Constitutional Court. On the other hand, the Constitutional Court itself had to concretise the procedural conditions which the applicants have to fulfill before filing a constitutional complaint.

Parliament concretised in the Constitutional Court Act the concept of a constitutional complaint from parties in ordinary courts against statutory provisions. Based on the possibility laid down in the relevant provision of the Austrian Constitution to exclude a review of certain areas of law, the Constitutional Court Act prohibited for example insolvency proceedings, proceedings regarding lease cancellations, etc., primarily for reasons of procedural efficiency.[23] The Constitutional Court declared such exceptions to the access to constitutional justice in most of the cases to be unconstitutional.[24] In the case about rental agreements,[25] the Court argued that procedural efficiency is in itself not a sufficient justification for an exception to access to constitutional justice. The Constitutional Court emphasised that the legal dispute is of existentia[l] importance for some tenants. Only in the case of the Austrian Enforcement Regulation[26] did the Constitutional Court accept that the urgency of the proceedings of the ordinary court is crucial. In another case, the Constitutional Court stated that the restriction of the constitutional complaints with regard to the party which appeals before the ordinary court is unconstitutional and this has to be opened up to other parties of the court proceedings.[27]

Although in these cases the Constitutional Court reduced the obstacles to access to the Constitutional Court with regard to substantive and formal limitations, the Court itself created major formal requirements which have to be considered by the complainant. As the Constitutional Court is bound by the complaint, the constitutional complaint has to apply which words of a statutory provision have to be eliminated. This application has to be appropriate to eliminate the unconstitutionality. While the remaining part of the statutory provision has to have a comprehensible content, other provisions with an inseparable link have to be considered and the application should not be too narrow.[28] Thus, it is quite a challenge to file an adequate constitutional complaint.

The consequence of the new competences of the Constitutional Court is that the Court will review civil and criminal law to a much greater extent than has so far been the case. Many new constitutional complaints can be expected. Most of them will be rejected because of the strict formal requirements of the Constitutional Court. Moreover, many of the permitted appeals are dismissed on substantive grounds. This, however, does not reduce the importance of this new form of constitutional complaint.

A prominent example of the relevance of the new proceedings involves tenancy law.[29] The Austrian concept of tenancy law is very complex and includes various particularities. The concrete case in question concerned the limitations of the possibility for a higher rent because of the advantageous location of the rented property. This concept was considered in legal literature as a clear example of a violation of the right to equal treatment and a violation of the principle of reasonableness. The Constitutional Court, however, accepted the governmental justification for reasons of social justice and clarified that the tenancy law cannot be considered as unconstitutional in that regard.

To conclude the introductory overview of the Austrian Constitutional Court activity, it may be noted that a significant case load of the Constitutional Court is related to asylum cases. The reason is not only to be found in the increased number of migrants (related to the migration crisis in 2015) but is also linked to the organisational framework of legal protection in asylum cases. In the last few years, the Constitutional Court has in particular had to deal with many asylum cases with regard to a constitutional amendment in the year 2008, which restricted the access of asylum seekers to the (supreme) Administrative Court. With the establishment of the administrative court of first instance in the year 2014 and the possibility to address – again – the (supreme) Administrative Court, the extraordinarily high workload was reduced, at least to a certain extent: in 2012, 2,770 incoming cases out of 4,643 concerned asylum seekers; in 2016, the total number of incoming cases was 3,920 and 1,726 concerned asylum seekers. This reduction is significantly related to the new organisational framework.

The Constitutional Court especially reviews asylum cases in the context of Art. 8 ECHR, Art. 3 ECHR or with regard to arbitrariness in the asylum proceedings. A concrete example of a relevant judgment in asylum relates to the concept of so-called legal advisors in asylum proceedings.[30] The Constitutional Court declared that the limitation of the involvement of these legal advisors to certain asylum proceedings violates the principle of equal treatment of foreigners.

pages/?p=02_02_Bulletins). The *Vienna Journal on International Constitutional Law* also regularly provides summaries of judgments of the Austrian Constitutional Court in English. See http://icl-journal.com/.

[23] See Section 62a para. 1 Constitutional Court Act.

[24] See VfGH 14.06.2016, G 72/2016; 14.06.2016, G 645/2015; 26.09.2016, G 244/2016; 29.11.2016, G 370/2016 et al.

[25] VfGH 25.02.2016, G 541/2015.

[26] VfGH 08.03.2016, G 537/2015 et al.

[27] VfGH 02.07.2016, G 95/2016; 03.10.2016, G 254/2016 et al.

[28] VfGH 05.10.2016, G 435/2015 et al.

[29] VfGH 12.10.2016, G 673/2015.

[30] VfGH 09.03.2016, G 447-449/2015.

DEVELOPMENTS AND CONTROVERSIES IN 2016

Annulment of the run-off election for the federal presidency (VfGH 1.07.2016, W I 6/2016)[31]

Politically speaking, the most significant judgment concerned the run-off election for the federal presidency. The Austrian presidential election was annulled by the Austrian Constitutional Court on July 1, 2016. The run-off vote revealed new political dimensions: the candidates of the two traditional parties (Conservatives and Social Democrats) did not even reach the run-off ballot, with the political candidates from the opposition parties[32] succeeding in the first round. The run-off vote was held on May 22, 2016. No result had ever been so close in a presidential run-off election: only 30,863 votes separated the two candidates out of a total of 4.4 million votes cast. Until then, a member of the Green Party had never won the presidential elections in Austria, or had a presidential election ever been annulled.

The Austrian Constitutional Court annulled the result primarily due to the violation of formal rules of the Federal Presidential Elections Act. The formal rules are intended to prevent violations of the principles of democratic elections. The Constitutional Court recalled that legal provisions on elections aiming at preventing abuse or manipulation must be applied strictly in accordance with their wording. Therefore, the opening of the ballots and the counting of votes must be performed by the election board as a collegiate body, i.e., in the presence of all members of the board duly invited to take part in the board meeting. The Constitutional Court traditionally applies a very restrictive approach when election results are being contested with regard to the violation of these principles. However, the Court only takes violations into consideration if they could have had an influence on the election result. To clarify this criterion, the Court looks at the overall number of votes which might have been affected by the violation and at the difference between the numbers of votes gained by the two candidates.

The Court held an extended hearing involving many heads of District Election Boards in a way that had never occurred before in any procedures of the Constitutional Court. The hearing included 90 witnesses. The Court identified formal violations and rejected the argument that it is necessary to find concrete manipulations, maintaining that it is only necessary to identify formal violations which create the potential for manipulation.

The re-vote in the election should have taken place on October 2, 2016. Due to damaged envelopes for the postal votes (caused by a production error that led to improperly sealed envelopes), the re-vote had to be postponed. As the parliamentary statute concerning the election of the Federal President did not consider the possibility of postponing the elections and it was already clear that the damaged envelopes would lead to an annulment of the re-vote, Parliament amended the relevant Act of Parliament to postpone the elections to December 4, 2016. The Austrian presidential crisis of 2016, which had never been perceived as such, was finally over.

MAJOR CASES

The core activity of the Constitutional Court involves case law in the context of rights and freedoms. Fundamental rights protection creates the greatest workload of the Court. The dynamics in rights case law is high. Three judgments from 2016 can be used to illustrate current themes of discussion both at the Court and, more generally, in the Austrian public debate. The first case refers to assisted suicide (1.), the second to paternity suits (2.) and the third to the prohibition of begging (3.). Although in all three cases the Constitutional Court did not declare any provision to be unconstitutional, they characterise how the Court approaches sensitive cases in human rights (broad political leeway) and how the Court differentiates its case law.

Prohibition of the association 'Last resource – Association for self-determined death' does not violate constitutional rights (VfGH 15.03.2016, E 1477/2015)

The State Police Directorate of Vienna prohibited the establishment of an association called "Last resource – Association for self-determined death". The police authority assumed a violation of Section 78 of the Criminal Code, which prohibits assisted suicide. Based on Section 12 of the Association Act, it is possible to ban unlawful associations. The founders of the association finally filed a constitutional complaint at the Constitutional Court with regard to Art. 11 ECHR. Moreover, they claimed that Section 78 of the Criminal Code was unconstitutional.

The Court dismissed the claim by arguing that the legislator has a wide margin of appreciation to define criminal acts or the unlawful aspect of crimes. With regard to Art. 8 and 14 ECHR, the Court referred to the case law of the ECtHR,[33] which does not raise any concerns as for the prohibition of assisted suicide. The Court concluded that the banning of the association, which potentially supports assisted suicide, is therefore lawful and does not violate Art. 11 ECHR.

No (automatic) right to a (judicial) determination of paternity (VfGH 13.12.2016, G 494/2015)

The applicant was an alleged biological father who tried to gain judicial determination of paternity to establish contact with the child. The mother of the child had left the applicant before the birth of the baby and married another man. As the child was born in a marriage, the husband became the legal father of the child by presumption of the Civil Code, even though both the applicant and the mother assumed that the applicant is the biological father of the child. The request to determine paternity might, however, only

[31] The following part is based on Konrad Lachmayer, 'The Austrian Presidential Crisis 2016', Int'l J. Const. L. Blog, Dec. 9, 2016, at: http://www.iconnectblog.com/2016/12/the-austrian-presidential-crisis.

[32] Candidate supported by the Green Party and candidate nominated by the Freedom Party.

[33] ECtHR 29.42002, *Pretty*, Appl. 2346/02.

be promoted by the child itself. The biological father tried to establish contact with the child by a court judgment. Although it was quite clear that the applicant was the biological father, the ordinary court denied the right of the father to contact the child because the determination of paternity was not clarified and the father was understood as a third person according to Section 188 para. 2 of the Civil Code. The father tried to challenge this section at the Constitutional Court according to Art. 8 ECHR and Art. 7 and 24 CFR.

The Constitutional Court dismissed the application. With reference to the ECtHR[34] case law, the Court argued that Art. 8 ECHR was applicable, but that the Austrian limitations (with regard to Section 188 para. 2 of the Civil Code) were justified. The Court referred again to the case law of the ECtHR[35] and stated that the ordinary courts first have to clarify if the contact with the biological father would serve the child's well-being; only as a second step would the court address the question of judicial determination of the paternity. The Court concluded that Art. 8 ECHR does not go so far as to allow the (alleged) biological father to interfere with an intact family in any case.[36] The legislator did not exceed its margin of appreciation.

Constitutional Limitations of the Prohibition of Begging (VfGH 14.10.2016, E 552/2016)

A recurring theme in the case law of the Constitutional Court concerns the constitutional limitation of begging.[37] Statutory acts of state parliaments (Landtage) prohibit begging in local communities. In a leading case, the Constitutional Court annulled a provision of the state of Salzburg in 2012,[38] which established an absolute prohibition of begging in public places, thus also including "silent" begging (in contrast to aggressive begging). The Court decided that in respect of begging, Art. 8 ECHR is not applicable, but that an absolute prohibition of begging violates Art. 10 ECHR. Since then, the Court has decided various cases on the prohibition of begging in different states (Länder).[39]

In 2016, the Constitutional Court was also engaged in a "prohibition of begging" case.[40] The town of Dornbirn (in the state of Vorarlberg) issued an administrative ordinance that prohibited begging at a local Christmas market. The Constitutional Court dismissed the constitutional complaints as the state provision considered the case law of the Constitutional Court. In an important part of the judgment, the Court stated, however, that even silent begging could be prohibited under certain circumstances (involving expected concrete and disruptive effects on community life). The local community had to prove in each case that such a disruptive effect was present and this had to be accepted by the Constitutional Court.

CONCLUSION

Setting aside the case of the presidential election, the year 2016 can be considered as a rather typical year for the Constitutional Court. The Court embraced its new competences concerning the constitutional complaint against statutory provisions applied by ordinary courts in civil and criminal law proceedings. The Court is still busy with asylum cases, although the overall case load has been reduced. With regard to human rights cases, the Court has continued its established case law.

The year 2017 already promises interesting case law in the context of the principle of equal treatment regarding e-cigarettes,[41] electronic cars[42] and private schools.[43] Democracy will be concerned when it comes to the funding of political parties[44] and tax privileges for political parties. Important judgments will be made regarding the authorisation of important infrastructural projects, especially in the context of the extension of Vienna International Airport. Moreover, the Constitutional Court will be further concerned with questions of social justice in the context of tenancy law.[45]

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[34] See ECtHR 15.9.2011, *Schneider*, Appl. 17080/07; 25.11.2003, *Pini*, Appl. 78028/01 and 78030/01; EGMR 29.6.1999, *Nylund*, Appl. 27110/95; 1.6.2004, *Lebbink*, Appl. 45582/99.

[35] See ECtHR 21.12.2010, Anayo, Appl 20578/07; 15.9.2011, *Schneider*, Appl. 17080/07; 2.12.2014, Adebowale, Appl. 546/10.

[36] Again with reference to the ECtHR 22.3.2012, Kautzor, Appl.23338/09; 22.3.2012, Ahrens, Appl. 45071/09.

[37] The case law started in 2007: VfGH 05.12.2007, V 41/07.

[38] VfGH 30.06.2012, G 155/10.

[39] VfGH 30.06.2012, G 118/11; 06.12.2012, G 64/11; 01.10.2013, B 1208/2012.

[40] VfGH 14.10.2016, E 552/2016.

[41] VfGH 14.3.2017, G 164/2017.

[42] VfGH 23.02.2017, E 70/2017.

[43] VfGH 15.03.2017, G 394/2016.

[44] VfGH 2.03.2017, G 364/2016.

[45] The Constitutional Court already decided on certain questions of tenancy law in 2016 (VfGH 12.10.2016, G 673/2015), but will have to deal with further, even more fundamental questions of tenancy law in 2017.

Bangladesh

DEVELOPMENTS IN BANGLADESHI CONSTITUTIONAL LAW

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INTRODUCTION

In Bangladesh, the year 2016 was a significant year of judicial activities, with the higher judiciary playing an active role against arbitrary executive decisions. At times, however, the court remained conservative or reticent on issues like the freedom of religion or the secular identity of the nation. The High Court Division declared the 16th constitutional amendment unconstitutional. This and a few other decisions received mixed reactions from civil society, rights-activists, and politicians. This paper reviews three most significant 2016 decisions in some detail while briefly covering a few other decisions on human rights that might prove impactful and consequential. The paper begins with a short introduction to Bangladesh's Constitution and the Supreme Court and then turns to some remarkable constitutional decisions that may broadly be categorized into the clusters of separation of powers and rights and freedoms.

THE CONSTITUTION AND THE COURT

The Constitution of the People's Republic of Bangladesh ('the Constitution') was adopted on November 4, 1972 and came into effect on December 16, 1972. The Constitution stands on four 'fundamental' principles—secularism, democracy, socialism, and nationalism. These fundamental cores had been subjected to changes many times. Curiously, alongside the principle of secularism, the Constitution currently recognizes 'Islam' as the state religion, albeit guaranteeing the 'peaceful enjoyment' of other religions (art. 2A). The Constitution entrenches the principle of constitutional supremacy (art. 7), recognises the value of the rule of law, human dignity and human rights, and sets out the goal of social justice. It contains a set of state policy principles which are in effect an index of social rights. Declared to be judicially non-enforceable, these principles are nevertheless 'fundamental' in the governance of the State, lawmaking, and legal/constitutional interpretations (art. 8). Importantly, the Constitution has entrenched an enforceable bill of rights that are called 'fundamental rights'.

The Constitution establishes a parliamentary form of responsible government headed by the Prime Minister, establishes the separation of powers that is based on the notion of checks and balances, and incorporates the basic principles of judicial independence.

The higher judiciary is composed of the Supreme Court of Bangladesh, which has two divisions, the High Court Division and the Appellate Division. The eleven-member Appellate Division hears appeals from any order, judgment, and decree of the High Court Division (HCD). The Chief Justice of Bangladesh, with a wide range of constitutional administrative powers over the management of the Supreme Court, sits in the Appellate Division and is appointed by the President. In case of the appointment of associate justices, the President has to act upon the advice of the Prime Minister and to consult the Supreme Court. In practice, however, it is the executive or, to be more precise, the Prime Minister who appoints all judges of the Supreme Court including the Chief Justice. Judges have a secure tenure, serving on the court until the age of sixty-seven.

The Constitution uniquely places the Supreme Court as its guardian, ensuring its functional independence and the authority to enforce the Constitution. Specifically, the

HCD has jurisdiction to enforce fundamental rights through appropriate 'directions or orders' as well to enforce legal obligations and remedy legal breaches (arts. 44 & 102). The Court's judicial review power extends not only over administrative actions but also over legislations and constitutional amendments. Before the 16th amendment decision of the HCD that is now subject to an appeal, the Appellate Division invalidated 5th, 7th, 8th, and 13th amendments with finality, and urged for the restoration of core features of the founding constitution of 1972.

DEVELOPMENTS AND CONTROVERSIES IN 2016

Two decisions, detailed below, were particularly controversial: first was the case in which the HCD declared unlawful the restoration of the old parliamentary process of removal of judges, and second was the instance when it abruptly dismissed a challenge to Islam's state religion status. Moreover, throughout 2016, there remained a tension between the top judiciary and the executive with particular regard to the Supreme Court's insistence that the government issue regulations for the control, disciplining, and terms of conditions of services of judges in the junior judiciary in line with principles of judicial independence. In a rolling review,[1] the Appellate Division is extending off-and-on the timeframe for the government to notify such regulations. Earlier, the Appellate Division recommended certain amendments to the proposed by-law to regulate the conduct and discipline of officials of the junior judiciary. In a tactical defiance, the government let the court know that the President did not think that such a notification was necessary. The controversy and the tug-of-war between the top court and the government on the independence of the lower judiciary are not yet over.[2]

MAJOR CASES

In this part, we focus on three important decisions of the Supreme Court from the year 2016. The first case is a landmark decision by the Appellate Division concerning arbitrary arrests and abusive remand of suspects. The other two decisions are by the HCD, which are controversial decisions in a sense and have high political implications.

Bangladesh v. Bangladesh Legal Aid and Services Trust (BLAST)[3]

This appeal by the government arose from HCD's judgment of April 2003,[4] in which that court issued a set of guidelines to be followed by the police and magistrates with regard to arrests without warrant, detention in police custody, and interrogation of suspects. On May 24, 2016, the Appellate Division rejected the appeal and largely endorsed the guidelines earlier issued by the HCD.

Arbitrary arrests or detention and the use of torture in police custody for the extraction of confessions or for other unlawful gains have been rampant in Bangladesh, despite that the Constitution guarantees procedural and substantive safeguards for the arrestees or suspects of crimes and prohibits torture. The history of this liberty-protective decision dates to July 1998 when a young university student, Rubel, died in police custody within hours after his arrest by police on the suspicion of committing crimes. Rubel's death was caused by severe torture while in custody. Section 54 of the Criminal Procedure Code of 1898 authorizes the police to arrest any person without warrant if the police-officer reasonably suspects that person to be involved in any cognizable offence.[5] Following the most shocking death of Rubel in police custody, a legal rights organization, BLAST, brought a public interest litigation seeking court directives with a view to preventing arbitrary arrests and custodial torture in the future. Eventually, the HCD issued a 15-point guideline in 2003, clearly delimiting the power of the police to arrest without warrant and the discretion and authority of the magistrates to remand an arrestee to police custody.

On appeal, the Appellate Division largely upheld the HCD's guidelines, which can be termed as Bangladesh's Miranda-safeguards, and asked the relevant authorities to comply. Most notable of the guidelines are that the police are now required to disclose identity when making an arrest, prepare a memorandum of arrest, inform the relatives or friends of the arrest, and to take the arrestee to a medical doctor in the event of any injury during arrest. The guidelines also require the magistrates to initiate legal proceedings against the concerned police-officer in case she or he is found to have breached the law.

It goes without saying that the rationale of this decision is embroiled in the principle of the rule of law. The court thought that being the 'guardian' of the Constitution, it could not keep quiet in the face of rampant violation of fundamental rights of citizens by law-enforcing agencies. Moreover, it placed special focus on the constitutional right to life and the notion of due process, and reaffirmed that the right to life includes a right to live with human dignity. When developing its reasoning, the court also revealed a sensitization about the disadvantaged citizens' inability to seek remedies against police brutalities and abusive arrests. Appreciably, it relied on comparative decisions and cited Bangladesh's international obligations to derive and buttress decisional reasoning when issuing the binding guidelines. In the context of ever-escalating international terrorism and the State's need to suppress it, the court held that if the need to preserve the state security can be fulfilled by any other reasonable means, a law restrictive of personal liberty would be unreasonable within the meaning of constitutional rights and principles.[6]

[1] Rooted in the so-called judicial intendance case, *Secretary, Ministry of Finance v. Md. Masdar Hossain* (1999) 52 DLR (AD) 82.

[2] Details are available at: http://www.thedailystar.net/frontpage/rules-lower-court-judges-sc-says-president-misinformed-1329352/.

[3] 8 SCOB [2016] AD 1 (judgment of May 24, 2016). SCOB= Supreme Court Online Bulletin.

[4] *BLAST v. Bangladesh* (2003) 55 DLR (HCD) 363.

[5] Cognizable offence means an offence for which a police-officer may under any law arrest without warrant.

[6] Above note 3, para. 114.

It is hoped that the Appellate Division's guidelines vis-à-vis arrests and detention in police custody will contribute towards ending the vice of impunity for torture and abuses by law enforcement agencies.

Sirajul Islam Chowdhury and others v Bangladesh, Writ Petition No. 1834 of 1988 (State Religion Challenge)

On March 28, 2016, the High Court Division summarily dismissed a 28-year-old constitutional petition challenging Islam as the state religion. The court said that the petitioners lacked any standing to litigate, but it did not hold any hearing at all.[7] Things, however, are not as simple as they might appear. The challenge goes much deeper into the question of ever 'contested' national identity as well as the core of the judicial role discourse vis-à-vis moral, political, and religious disputes in a transitioning or divided society.

Bangladesh's Independence Constitution adopted the principle of secularism as a connotational core. In the late 1970s, the first military regime abandoned secularism and installed into the Constitution the principle of absolute faith in Allah. The second military regime introduced Islam as the state religion. Relinquishment of secularism and the embracement of political Islam by the military regimes were challenged by some eminent citizens and civil society organizations. Moreover, the lawyers too began a movement against the demolition of the State's secular identity. They feared discrimination against minorities and women, and lodged in 1988 three challenges against the state religion provision, article 2A of the Constitution, incorporated through the 8th amendment to the Constitution.[8] The 8th amendment brought forth another change; it decentralized the HCD into six regional benches, which too was challenged at the same time. The challenge to the judicial-decentralization part of the 8th amendment was successful in 1989 and gave birth to the doctrine of an unconstitutional constitutional amendment in Bangladesh.[9] In contrast, the challenge to the state religion part of the 8th amendment remained undecided, partially due to an unfavorable political environment despite the country's transition to democracy in 1991.

When the party that led Bangladesh's independence movement came to power for the second time in the post-democratic transition era and promised the revival of the lost secular identity, the surviving petitioners thought it wise to revitalize their petition. When the 15th amendment (2011) revived the principle of secularism but did not strike out the state religion clause, the petitioners added a supplementary challenge to the 15th amendment too. The HCD showed initial willingness to hear the challenge and appointed amici curiae. As the petitioners' counsels were preparing to argue the case, the court on March 28, 2016 rather abruptly dismissed the petition reasoning that the petitioners lacked a standing. This argument of the lack of locus standi gave a shock and sheer surprise to the legal community, because the notion of public interest litigation that allows any public-interested citizen to challenge any gross breach of the Constitution became firmly established. As such, although a detailed judgment has not yet become available, it would not be unfair to critique the court's rejection of the state religion challenge as somewhat unprincipled and incompatible with its own jurisprudence of abstract 'public interest judicial review'.

Undoubtedly, whether state religion and secularism can go hand in hand under a constitutional order is a novel issue. In the wake of Parliament's deliberate choice for such a curious solution in a Muslim-majority country and given the local political specificities, especially the fact that the incumbent government's opposition introduced Islam to the Constitution, the petition seemingly posed some challenges for the court. In addition to the jurisprudential challenges noted, there was another political problem of an acute nature. The time announced for the hearing of the petition turned out to be extremely politically sensitive. Militancy, terrorism, and religious intolerance began to rise sharply. Several secular-minded intellectuals and Internet blog writers had already been killed by extremists. In such a background context, several religious groups commenced demonstrations against the case challenging Islam as the state religion, condemning the petitioners as atheists. They also threatened that the case would trigger disturbances. Another Islamist group 'requested' the Court to reject the petition and met with the Chief Justice in the morning of the day of the hearing.

A question remains whether these events influenced the court's decision. The court certainly did not endorse, nor did it reject, Islam's constitutional status. It indeed decided not to decide the case involving the status of Islam under the Constitution. For this, the technical ground of locus standi might have appealed to the court as a tool. The approach, however, is not that simple and it begs certain questions. To what extent was the court free to make its own value judgment? Or, did the court skirt its jurisdictional inability to deal with a hard issue such as the legality of Islam's constitutional status?[10]

Asaduzzaman Siddiqui v. Bangladesh (parliamentary removal of judges)[11]

On 25 May 2016, the HCD in a 2 to 1 decision invalidated the 16th amendment (2014) that restored verbatim an original constitutional provision regarding the removal of the Supreme Court judges, a system that was absent from 1974 to 2014.

Bangladesh's original Constitution provided for the removal of Supreme Court judges by an order of the President pursuant to a resolution of Parliament passed by a two-thirds

[7] Maher Sattar and Ellen Barry, 'In 2 Minutes, Bangladesh Rejects 28-Year-Old Challenge to Islam's Role', *New York Times,* March 28, 2016. Available at: http://www.nytimes.com/2016/03/29/world/asia/bangladesh-court-islam-state-religion.html.

[8] Writ Petition No. 1834 of 1988. The other two challenges were WP No. 1330 of 1988 and WP No. 1177 of 1988.

[9] *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (Special) 1 (decision of the Appellate Division).

[10] For a commentary on this decision, see Hoque, Ridwanul (2016), *Constitutional Challenge to the State Religion Status of Islam in Bangladesh: Back to Square One?*, Int'l J. Const. L. Blog, May 27, 2016, at: http://www.iconnectblog.com/2016/05/islam-in-bangladesh.

[11] *Advocate Asaduzzaman Siddiqui v. Bangladesh*, Writ Petition No. 9989 of 2014, judgment May 5, 2016.

majority and only on the ground of proved misbehavior or incapacity (art 96(2)). Before this provision was ever tested, the 4th amendment; (1975) had done away with this system, making the judges removable without any legal process that is, merely by an order of the President. In August 1975, the Constitution itself was thwarted, and a lingering period of extra-constitutional regimes installed. The first military regime extra-constitutionally amended the judicial removal clause to introduce a peer-driven removal process, which was later affirmed by the 5th amendment (1979). The new system made the judges removable by the President upon the recommendation of the Supreme Judicial Council (hereafter SJC), composed of the Chief Justice and the two most senior judges of the Appellate Division. In the meantime, the court also invalidated the 5th amendment but initially kept intact the system of the SJC. When the 16th amendment was enacted reviving the system of parliamentary removal of the judges, it was challenged on the principle ground that the removal system was incompatible with the notions of judicial independence and separation of powers.

The HCD proceeded with the undisputed premise that the independence of the judiciary is an essential feature of the Bangladeshi Constitution ('basic structure') impervious to a constitutional amendment. The main rationale for the invalidation of the 16th amendment was that it created an opportunity for Parliament to exert pressure on the judges. The court took into consideration the existing political culture in Bangladesh and the fact that, because of the anti-defection rule in art. 70 of the Constitution, members of Parliament would be unable to freely exercise their minds when deciding on a proposal to remove a judge.

It seems that the court took too seriously the possibility of abuse of the restored original constitutional provisions regarding the removal of judges. In doing so, it lost sight of the fact that Parliament cannot in fact resolve to remove a judge unless there is a positive finding of proved incapacity or misconduct of the concerned judge. It was for an act of Parliament to detail the legal mechanism to investigate and prove the allegations of misbehaviour by any judge. For this purpose, a peer-trial process can be installed, and in fact a law to that effect was in the making when the HCD was hearing the case.

Undeniably, independence of the judiciary is a basic structural norm of the Constitution of Bangladesh, and the judicial removal process is what lies at the core of this normative concept. There is, however, no set formula for maintaining judicial independence when establishing the judges' removal procedure. In contrast, means and processes of ensuring judicial independence are indeed society-specific and so is the judicial removal process, provided that the basics of judicial independence are kept intact. In this case, the HCD engaged in an exercise of choosing which mode of judicial removal is more suitable for Bangladesh, a political choice that belongs to the people through their elected representatives. Both the system of Supreme Judicial Council and the parliamentary process of judicial removal are constitutional if there is an objective legal standard to measure and prove allegations of misconduct or incapacity of the concerned judge.

Eventually, the 16th amendment decision by the HCD led to the marginalization—indeed defiance—of the constituent power of the founding people of Bangladesh who chose the parliamentary model of judicial removal. Least attractive was the court's rebuttal of the argument that they lacked power to invalidate a provision of the Constitution originally enacted, arguing that the re-introduction of the original form of art. 96(2) was an exercise of 'derivative' constituent power which it had power to assess and pronounce unconstitutional. That this was a folly is clear from the court's apprehension of the probable abuse of the parliamentary removal of Supreme Court judges. A glimpse of this fallacy can be seen in the court's own polemic statement that 'the poking of the nose of the Parliament into the removal process of the Judges' is violative of the doctrine of separation of powers and that '[t]he rule of law will certainly get a serious jolt by the Sixteenth Amendment [that] [i]n fact […] is hanging like a Sword of Damocles over the heads of the Judges of the Supreme Court of Bangladesh'.[12]

In effect, the court's 16th amendment verdict is an affront to the separation of powers. Despite the firm footing of the doctrine of basic structure in Bangladesh, the court clearly lacks, it is argued, power to invalidate an original provision of the Constitution even if that is what an amicus curiae termed 'unsuitable, outdated, [and] obsolete' in the Bangladeshi context.[13] How can an original provision of the Constitution, restored verbatim after some years of abeyance, be unconstitutional merely because the judges 'think' the provision might in the future be abused? In the background history of the 16th amendment as well as in the challenge thereof loomed a relationship chasm, some three years before this verdict, between Parliament and the executive on the one hand and the judiciary on the other. Whatever be the political motive behind a constitutional amendment, a clearly lawful amendment cannot be struck out by a judicial decision based on extremely feeble, shallow reasons.

Other significant cases: Slum dwellers' right to housing & the safe environment

In the old tradition of issuing proactive decisions in the protection of slum dwellers in Dhaka (Bangladesh's homeless community), the Appellate Division on January 31, 2016 upheld the HCD's prohibitive injunction on eviction of dwellers from Kalyanpur slum in Dhaka. Following a petition filed by Ain o Salish Kendra, Coalition for Urban Poor, and two slum dwellers, the HCD on January 21 issued the injunction restraining the government from evicting this suffering community from their ghettos for three months.[14] While judicial orders such as this could not earlier protect the slum dwellers in the long run, judicial activism of this sort provides some

[12] *Ibid.*, at pp. 144-145.

[13] *Ibid.*, argument of Mr. Amir-Ul Islam, at p. 135.

[14] For details, visit: http://www.thedailystar.net/city/sc-upholds-hc-injunction-eviction-dwellers-210625 (retrieved on April 10, 2017).

measure of temporary relief to the slum dwellers who have no place to call home.

In another lingering proceeding lodged by an environmental organization, the HCD on June 16 ordered the relocation of some 154 tanneries from the City of Dhaka to a nearby suburb, Savar. Both divisions of the Supreme Court were quite tough on the need to move these polluting industries out, and saddled a heavy compensation in the event of default. The industry owners resorted to many tactics to delay such relocation. When the government in compliance with the court order cut off utility services to the tanneries, they finally moved to the designated suburban industrial zone. This instance of judicial activism was surely for the preservation of the environment and public health. An unintended consequence, however, was that some 50,000 workers lost their jobs at least for months. The court, however, had the issue of their protection in mind, though. It first lessened and then waived the amount of fine for the default of the tannery owners, and ordered redirecting of such amounts to the welfare and rehabilitation of the workers instead.[15]

CONCLUSION

As the above judgments of the Bangladeshi Supreme Court in 2016 show, the court remained an important institution of constitutional politics and governance. The kind of tension that was seen between the organs of the State is in fact inevitable in a democracy. It however remains to be seen how the apex court of the country manages to negotiate, shape, and decide the unresolved issues in the future in regard to the principle of judicial independence and the process of removing judges. Accordingly, a challenging time seems to lie ahead for the court vis-à-vis the issue of legality of an original provision of the Constitution concerning the removal of judges. It will have to strike a delicate balance between institutional legitimacy and capacity and the higher normativity of the founding constitutional principles.

In 2016, the Bangladeshi higher judiciary dealt with the extremely complex issue of the constitutionality of Islam's state religion status. As said, the court's decision to not decide such issues as state religion or the principle of secularism was unprincipled, and arguably reveals its institutional fragility to an external volatile environment. And, when judged in the backdrop of current unstable constitutionalism, the court's decisions in the areas of personal liberty, rights of the most hapless sections of the people in society, and multi-pronged environmental issues, its activism and the role in 2016 seem pragmatic and promising.

[15] A report is available at: http://www.theindependentbd.com/arcprint/details/83525/2017-03-03, and http://www.thedailystar.net/city/doe-collect-tk-1cr-14-industries-damaging-buriganga-1277317 (retrieved on April 10, 2017).

Belgium

DEVELOPMENTS IN BELGIAN CONSTITUTIONAL LAW

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INTRODUCTION

First, this contribution presents the Belgian Constitutional Court and its activities in 2016. Second, it discusses two constitutional controversies that were at the center of much political and media attention, namely the separation of powers and the refugee crisis as well as the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada. Finally, we deliver an overview of the main cases before the Constitutional Court for the past year that can be of interest to an international audience. We divide the cases into the following categories: the Belgian Constitution in Europe and the world; separation of powers; justice and order; and ethical issues and hot topics.

THE CONSTITUTION AND THE COURT

Belgium has embarked on a process of federalisation since the 1970s. The transformation of the unitary Belgian state into a federal state led to a multiplication of legislative bodies. The creation of federated entities—regions and communities—empowered to adopt rules with the same legal effect as acts of Federal Parliament resulted in the possibility of conflicts between legislative acts. Therefore, the original mission of the Constitutional Court was to supervise the observance of the constitutional division of powers between the federal state, the communities and the regions. In the following decades, the competence of the Court gradually extended to constitutional rights and freedoms.

Now that the division of powers between the federated entities and the federal state is well established, competence conflicts only represent a small portion of the case law (4% of the judgments in 2016). The majority of cases in 2016 concerned infringements of the principle of equality and non-discrimination, for historical reasons still the most invoked principle before the Court (52%), followed by review of compliance with the fundamental socioeconomic rights in Article 23 of the Constitution (11%), the tax guarantees in Articles 170 and 172 (8%), the property rights of Article 16 (5%), the legality principle in criminal matters of Articles 12 and 14 (4%) and the right to private and family life of Article 22 (4%).

The Court assumes that the fundamental rights under Title II of the Constitution and those enshrined in international conventions are inextricably linked. It is, therefore, unavoidable that the provisions under Title II are interpreted in conjunction with the provisions concerning similar fundamental rights in international treaties. As a result, the case law of the European Court of Human Rights (ECtHR) has a considerable influence on the case law of the Constitutional Court, which considers itself to be bound by the provisions of the European Convention on Human Rights (ECHR) as interpreted by the ECtHR. Moreover, the case law of the Court of Justice of the European Union (CJEU) is also regularly reflected in the jurisprudence of the Constitutional Court.

A case may be brought before the Constitutional Court by an action for annulment or a reference for a preliminary ruling. A party may demand suspension of the challenged legislative act along with the action for annulment, or in the course of the proceedings.

An action for annulment may be brought by the various governments, presidents of parliaments (at the request of two-thirds of MPs) and any natural or legal person who has a justifiable interest in the annulment. In 2016, two institutional parties and 72 individual applicants brought a case before the Court. An action for annulment must, as a rule, be brought within six months of the official publication of the challenged act. If an action for annulment is well founded, the Court will annul all or part of the challenged provisions (29 times in 2016) while (provisionally) maintaining the effects of the act (three times) if necessary. If an action for annulment is dismissed (on 19 occasions in 2016), the judgment shall be binding on the courts with respect to the points of law settled by the judgment. The Court declared annulment appeals inadmissible in four other judgments (out of a total of 52).

An action for annulment does not suspend the effect of the challenged act. To prevent the challenged norm from causing irrevocable prejudice in the period between the introduction of the action and the judgment of the Court, the Court may— at applicant's request and in exceptional circumstances—order the suspension of the challenged norm pending a meritorious decision. In 2016, the Court ordered suspension in three cases. Such an action for suspension must be brought within three months following the official publication of the challenged norm.

If a party to a dispute invokes the infringement of its fundamental rights guaranteed in Title II "The Belgians and Their Rights" or by the Articles 143 (1), 170, 172 and 191 of the Constitution by a legislative act, lower courts must in principle refer a question for a preliminary ruling to the Constitutional Court. Most of the preliminary questions were referred by the Courts of First Instance (51), followed by the Courts of Appeal (25), the Labour Courts (10) and the Labour Tribunals (10). Incidentally, the highest courts also referred some questions, namely eight times for the Council of State and on six occasions for the Court of Cassation. Infringement was found in 36% of these cases, whereas no infringement was found on 64 occasions (58% of the cases). In other judgments, the Court held that the question does not need an answer, referred the case back to the court of law, declared itself incompetent or declared the question inadmissible.

In 2016, the Court delivered 170 judgments and handled 207 cases in total. The discrepancy between the number of treated and completed cases and the number of judgments is due to joined cases. Moreover, proceedings are sometimes terminated by a court order that, for example, grants the discontinuance of the action. Conversely, it occurs that the Court gives an interlocutory ruling or a provisional ruling while the case is still pending. This takes place when the Court refers a case to the CJEU for a preliminary ruling.

The Constitutional Court ruled six times on a request for suspension, 52 judgments concerned actions for annulment, 110 judgments concerned references for preliminary rulings and there were two requests for interpretation. Therefore, most judgments were preliminary rulings (65%) while actions for annulment represented 31% and requests for suspension represented 4% in 2016.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The separation of powers and the refugee crisis

Since October 2016, Belgium has had a fierce debate about the separation of powers related to the "refugee crisis." The controversy started when a Syrian family asked for a humanitarian visa via the Belgian embassy in Beirut for a short stay in Belgium to be able to seek asylum. The applicants invoked Article 3 ECHR, which prohibits inhuman or degrading treatment. The Belgian Immigration Service, which falls under the authority of the Secretary of State for Asylum and Migration, Theo Francken, denied the request, but was faced with a suspension of its decision by the Council for Alien Law Litigation (CALL)[1] and with the injunction to take a new decision within 48 hours due to an insufficient reasoning regarding the risk of inhuman or degrading treatment. This judgment was followed by two other suspensions by the CALL[2] due to insufficient reasoning, as the rejection decision was three times almost identical. The third time, even though issuing a visa is a discretionary decision of the competent administrative authority, the judge imposed the Secretary of State to issue a visa. This judgment elicited Francken and his party N-VA to launch an advertising campaign attacking the "unworldly judges" for their alleged judicial activism. He filed an appeal in cassation before the Council of State, as well as an appeal of the judgment of the President of the Francophone Brussels Court of First Instance[3] that imposed a coercive fine related to the obligation to issue the visa. Francken firmly refused to issue the visa and to pay the fine.

These actions led to severe criticism, amongst others of the High Council of Justice, stating that the Secretary of State refused to comply with the separation of powers and undermined the rule of law. In another case,[4] the CALL referred for a preliminary ruling to the CJEU concerning the request for a humanitarian visa through an embassy. Several other countries and the European Commission joined the case. The Advocate-General advised the CJEU to hold that a EU Member State is obliged to issue a visa on humanitarian grounds if, given the circumstances, there are serious motives to believe that a refusal would directly lead to the applicant being

[1] Judgment no. 175.973 of 7 October 2016

[2] Judgments no. 176.363 of 14 October 2016 and no. 176.577 of 20 October 2016

[3] Judgment no. 16/3438/B of 25 October 2015

[4] Judgment no. 179.108 of 8 December 2016

subjected to torture or inhuman or degrading treatment by withholding a legal action to exercise the right to request international protection in that Member State.[5]

CETA

In October 2016, the world was wondering how the Minister-President of the Walloon Region, on his own, was able to postpone the signing of the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada. Treaty-making power in Belgium is allocated according to the principle in foro interno, in foro externo, established by Article 167 of the Constitution. Community and Region Governments have the power to enter treaties that exclusively relate to matters falling within their jurisdiction. As regards "mixed treaties" such as CETA, treaty-making power is shared with the federal authorities. After a period of power-play and some minor adjustments, the Walloon Government conceded, which allowed CETA to be signed.

MAJOR CASES

The Belgian Constitution in Europe and the World

In 2016, the Constitutional Court continued to show great openness towards international and European law; in particular, the ECHR and EU Law. References were made to the jurisprudence of the ECtHR in 46 cases and the case law of the CJEU in 19 cases. References to other sources of international law can be found in 29 cases. Based on the CILFIT case law, the Court ruled in 5 cases that there was no need to refer for a preliminary ruling to the CJEU.

Judgment No. 62/2016 – Treaty on Stability – Demand for Annulment – Admissibility – Primacy of EU Law – National Identity

The 2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union is an intergovernmental agreement between 25 EU Member States to reinforce budget discipline of euro area governments following the sovereign debt crisis in 2010. The Constitutional Court had to decide on the admissibility of a demand for annulment of various acts of the Federal and the Flemish Parliaments approving the Treaty and implementing its Article 3 (1). A number of citizens and non-profit organizations asserted that the strict budgetary objectives established in the fiscal compact would lead to the authorities no longer being able to fulfill their constitutional obligations in terms of fundamental social rights (Article 23 of the Constitution).

The fact that austerity measures can be imposed on the basis of the Treaty is, according to the judgment, not sufficient to demonstrate a proper individualized connection between the personal situation of the applicants and the disputed provisions. They could only be affected directly and unfavorably by measures intended to achieve those budgetary objectives. In the Court's view, having an interest as a citizen or a person who has the right to vote is likewise not sufficient because the challenged acts have no direct effect on the right to vote. Nonetheless, the Court considered whether the challenged acts interfered with any other aspect of the democratic rule of law which would be so essential that its protection is in the interest of all citizens. Parliament is indeed the only constitutional body empowered to not only approve the annual budgets but also to set medium-term budgetary objectives. It can enter into such commitments by way of a treaty. When parliamentarians do approve a treaty, however, they may not violate constitutional guarantees. Although the Stability Pact makes provision for detailed targets and deficit reduction, it leaves national parliaments entirely at liberty as to how they draw up and approve budgets.

The Stability Pact does not merely create an inflexible budgetary framework; it also entrusts certain powers to the EU institutions, which is permitted by the Constitution (Article 34). However, for the first time, the Court asserted that "under no circumstances can there be any discriminatory violation of the national identity contained in the basic political and constitutional structures or of the fundamental values of protection that the Constitution affords to any person." The disputed acts, however, do not interfere with any aspect of the democratic rule of law which would be so essential that its protection is in the interest of all citizens. Consequently, none of the applicants had an interest to the degree required for them to seek the annulment of the challenged acts and the annulment appeals were declared inadmissible.

Separation of Powers

Judgment No. 153/2016 – Administrative Courts – Administrative Loop – Independence and impartiality of the judiciary

In judgments no. 103/2015,[6] 74/2014 and 152/2015, the Constitutional Court reviewed the constitutionality of the so-called "administrative loops" of the (federal) Council of State and the (Flemish) Council for Permit Disputes and the High Enforcement Council for the Environment. This legal instrument enables the administrative judge to give an administrative authority in an interim judgment the possibility to rectify an irregularity in the contested administrative act. It aims to contribute to the timely final adjudication of disputes. According to the Court, the initial design of the loop provided the administrative judges the possibility to express their viewpoint regarding the outcome of the dispute while the application of the loop could not lead to a (rectified) decision with an altered content. As a result, the administrative loop puts pressure on the separation of powers and in a discriminatory way violates the principle of impartiality and independence of the judiciary. According to the Court, the administrative judge intervenes in the determination of the content of a discretionary administrative act, which is a task of the administrative authorities.

On 1 December 2016, however, the Constitutional Court dismissed the appeal against the Decree of 3 July 2015, which granted the above-mentioned two Flemish administrative courts a redesigned administrative loop for formal and substantive illegalities. The judge can now offer the defending party the possibility to rectify the unlawfulness by

[5] C-638/16 PPU

[6] *See* English version at http://www.const-court.be/public/e/2015/2015-103e.pdf

adopting a new rectified administrative act of which the content can be altered. In contrast to the previous loops, the judge only holds whether the unlawfulness could be rectified and no longer needs to rule on the content of the administrative act. The Constitutional Court rejected all arguments of the applicant and held that the contested provision is constitutional. The Court, inter alia, ruled that there is no longer a violation of the independence and impartiality of the judge.

Justice and Order

Judgment No. 83/2016 – Criminal Procedure Code – Out of Court Settlement – Insufficient Judicial Review

Article 216bis, § 2 of the Criminal Procedure Code, as introduced by the Act of 14 April 2011 and modified by the Acts of 11 July 2011 and 5 February 2016, considerably enlarged the possibility for public prosecutors to settle criminal cases out of court. Such a settlement also became possible when the case was already pending before the criminal court or was already judged in the first instance, as long as there was no final judgment on appeal, and provided that the victims have been compensated properly. The Constitutional Court judged that insofar as the public prosecutor can settle a case that is under instruction of an investigating judge without an effective judicial review of the proposed settlement, the provision is incompatible with Articles 10 and 11 of the Constitution in conjunction with the right to a fair trial and the principle of independence of the judiciary, guaranteed by Article 151 of the Constitution, Article 6 (1) ECHR and Article 14 (1) ICCPR. As the settlements concerned cases pending before the criminal (trial) judge in the first instance or appeal, the judicial review limited to the formal conditions of the settlement was insufficient and thus violated the same provisions and principles. The Court decided to uphold the legal effects of the unconstitutional provision until the date of publication of the judgment in the official journal.

Judgment No. 108/2016 – Police Databases – Privacy – Supervision

The Act of 18 March 2014 provides a comprehensive legal framework for the various databases of the federal and local police in Belgium. The Act identifies the various databases, the data that they may or must contain in view of administrative or judicial policing, their management, the use of these data, the measures taken to protect privacy and abuse, their access and supervision, and their interaction with the judiciary and other law enforcement bodies. In a lengthy judgment counting 141 pages, the Court came to the conclusion that, considered as a whole, sufficient measures have been taken to avoid any non-justified interference in the right to privacy guaranteed by Article 22 of the Constitution, Article 8 ECHR, Article 17 ICCPR and Articles 7 and 8 EU Charter of Fundamental Rights, after a detailed analysis of the relevant ECtHR case law. Nonetheless, the Court imposed a restrictive interpretation of several provisions. Only one provision was partially annulled, namely concerning the composition of the body supervising the observance of the law by the various police departments. As the number of police members can exceed the number of independent external experts and members of the judiciary or members representing the Privacy Commission, the Court opined that the Act does not offer sufficient guarantees for effective and independent supervision. The legislator has been ordered to amend this provision before the end of 2017.

Ethical Issues and Hot Topics

Judgment No. 2/2016 – Freedom of Choice Regarding a Child's Surname – Equality between Men and Women

In 2014, the federal legislature amended the Civil Code to establish the autonomy of choice and equality between men and women regarding the way in which surnames are passed on to children. The new provision enabled parents to choose between the father's surname, the mother's surname or a double-barrelled surname made up of these two surnames in the order determined by the couple. It also stated that if the parents disagreed on the choice of the child's surname or if they do not make a choice, the father's surname would be assigned to the child. The latter provision was challenged before the Constitutional Court.

The Court first held that the right to pass on one's surname cannot be regarded as a fundamental right. It noted the legislature's choice to give preference to the parents' freedom of choice and considered it justified for Parliament to determine the surname in cases of disagreement or the absence of choice, as it is important to establish a child's surname at birth in a simple, swift and uniform way. However, the reasons for giving precedence to the father's surname in these cases—tradition and a desire to make gradual progress—do not justify the differential treatment between the parents solely on the basis of their sex. Indeed, the disputed provision gave the father a veto right when deciding on the child's surname. Therefore, the Court found a violation of the principle of equality (Article 10 of the Constitution) and annulled the disputed provision.

Judgment No. 18/2016 – Filiation – Right to Challenge Paternity – Right to Know One's Descent

In a controversial case involving the former King of Belgium, the Constitutional Court confirmed, once more, with reference to the case law of the ECtHR, that in legal proceedings to determine filiation, the universal right to know one's descent must in principle take precedence over the interests of family peace and legal certainty of family ties. Therefore, Article 318 of the Civil Code is incompatible with the right to respect for private life (Article 22 of the Constitution, read in conjunction with Article 8 ECHR) insofar as it bars a challenge to paternity when the child has been treated as the child of his legal father, a situation known as "de facto status" (possession d'état), and insofar as it forbids a child over the age of 22 to challenge the paternity of his mother's husband more than one year after he discovered that the man is not his father. Any other ruling would prevent the courts from taking the interests of all parties concerned into account. The lift of this double bar permitted Delphine Boël to challenge the paternity of her mother's husband before the Court of First Instance in excess of both limits and to bring a paternity suit against her supposed biological father, the former King of Belgium.

Judgment No. 72/2016[7] *– Combat of Discrimination – Sexism – Clear Definition – Freedom of Expression*

In 2014, Belgium became the only country in the world to introduce a criminal provision prohibiting sexism in the public space. The provision was challenged before the Constitutional Court for violating the principle of legality in criminal matters, as it allegedly did not define the offense of "sexism" in sufficiently clear and accurate terms. It allegedly also violated the freedom of expression (Article 19 of the Constitution). The Court held that even if the definition of sexism is not sufficiently precise in scope or in content, the requirement that the criminalized acts and gestures must have resulted in a serious infringement of the dignity of the person leaves the courts sufficient indications as to the scope of the contested provision. Indeed, it is inherent to the criminal court's mission to determine whether particular behavior falls within the scope of criminal law on a case by case basis.

The Court further acknowledged that the contested Act interfered with a person's right to freedom of expression. However, as equality between men and women is one of the fundamental values of a democratic society, the Act serves a legitimate aim. Moreover, the necessity of the Act in a democratic society does not depend on its effectiveness, measured in terms of its application by the courts and sentences passed. Indeed, the Act may also have an educational and preventive effect. Lastly, given the fact that the Act requires a special intent and a serious infringement of the dignity of specific persons, it cannot be considered disproportionate. The Court, therefore, upheld the "Sexism Act."

CONCLUSION

The success rate of appeals before the Constitutional Court was quite high in 2016. From the Court's foundation in 1985 until 2015, actions for annulment were successful in 28% of the cases in the sense that they resulted in a total or partial annulment.[8] In 2016, the Court annulled the challenged provisions in 56% of the cases. Until 2015, preliminary rulings had an average success rate of 32%; the rate was 36% in 2016. Last year, the Court ordered three suspensions (50%), which is considerably more than the 10% average from the past. The cases discussed in section IV of course only show a partial picture of the Court's case law.

[7] *See* English version http://www.const-court.be/public/e/2016/2016-072e.pdf

[8] *See* L. Lavrysen, J. Theunis, J. Goossens, P. Cannoot and V. Meerschaert, *Developments in Belgian Constitutional Law: The Year 2015 in Review*, Int'l J. Const. L. Blog, October 12, 2016, http://www.iconnectblog.com/2016/10/developments-in-belgian-constitutional-law-the-year-2015-in-review

Brazil

DEVELOPMENTS IN BRAZILIAN CONSTITUTIONAL LAW

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INTRODUCTION

Developments in Brazilian Constitutional Law in the year 2016 were shaped by deepening economic, political, and social turmoil, and by the repercussions of investigations into widespread corruption implicating high-profile political actors and leading companies.

In politics, we went through a traumatic impeachment trial against President Rousseff; the speaker of the Lower House was removed from office and later arrested on corruption charges; and the speaker of the Senate has been indicted on charges of embezzlement and removed from the presidential line of succession. Hundreds of political figures from diverse political parties are currently under investigation for graft, money laundering, and other crimes, mostly within "Car Wash Operation".

In the economic field, Brazil has been facing a severe recession, with a shrinking GDP, rising unemployment, and the hemorrhaging of public finances. The fiscal crisis has had a major impact on the member states' economies, many of which have been struggling to meet their payrolls and maintain essential public services. In the social realm, the widespread popular discontent with and cynicism toward the political class, coupled with the fear of impending setbacks to the protection of social rights, gave rise to people's protests and to the "Occupy Schools" movement led by students nationwide.

It would be naive to assume that the storm would not hit the Supreme Court. If, in Brazil, there was already a tendency toward the judicialization of politics, in times of crisis this inclination has become even more clear. Throughout the year, the Court was called upon to intervene in several core political, economic, and social controversies. Taking the position as arbiter of national disputes, it was nonetheless thrust into the heart of the crisis.

THE CONSTITUTION AND THE COURT

The Brazilian Supreme Federal Court (STF), the apex court of the country's judiciary, comprises 11 justices, appointed by the President of the Republic and confirmed by the absolute majority of the Federal Senate. The justices have life tenure and are subject to mandatory retirement at age 75.

The STF has primary responsibility for safeguarding the Constitution. Brazil's 1988 Constitution adopts a hybrid or mixed system of judicial review, which combines aspects of both the American and European models. From America, we derived a concrete and diffuse form of review: every judge or court has the authority to adjudicate on claims of constitutional violation in a case. The constitutional issues raised in the various courts can ultimately be brought before the STF through "extraordinary appeals" (RE), whereby the Court examines if the appealed decision violates the Constitution. Extraordi-

nary appeals account for the vast majority of cases heard by the STF (in 2016, about 82% of the total number of decisions).

From Europe, we adopted abstract and concentrated control, allowing for the possibility of bringing direct constitutional lawsuits before the Supreme Court, in which the constitutionality of a statute is discussed in the abstract (i.e. regardless of a pending case). There are multiple instruments of abstract review in Brazil, such as the direct action of unconstitutionality (ADI), the declaratory action of constitutionality (ADC), and the claim of non-compliance with a fundamental precept (ADPF), with ample legal standing (e.g. these actions may be initiated by the President, the Head of the Federal Prosecutor's Office, any political party, the Bar Association, etc.). Nonetheless, direct actions represent a very small fraction of the Court's decisions (in 2016, less than 0.5% of the rulings).

The STF also enjoys broad jurisdiction to review other appeals and direct proceedings not necessarily involving constitutional matters. For example, the Court is competent to try the President of the Republic, the Vice-President, members of the National Congress, the Tribunal's own justices, and the Head of the Federal Prosecutor's Office on charges of common criminal offenses; to settle federal conflicts; and to decide extradition requests from foreign States. Regarding the President's impeachment process, the Supreme Court's Chief Justice presides over the trial session at the Senate.

The cases brought before the STF are randomly assigned to justices by lot through an automated system. The Tribunal ordinarily convenes in plenary sessions (with full attendance) twice a week, and in panel sessions (there are two panels of five justices each, excepting the Chief Justice) once a week. The plenary sessions are presided over by the Chief Justice, who has the power to set the Court's agenda.

The decision-making process is external and aggregative. The justices deliberate and vote in public plenary sessions that are broadcast on live TV, without any previous in-camera conference among them. Decisions are reached by an aggregative procedure in which the justices sequentially read their own opinions during the Court's sessions; all of the opinions are later published, adopting the seriatim model. Thus, generally, there is no "opinion of the court".[1] This is why the Court's justices are commonly identified as "11 islands", who operate in a rather individualistic manner and with low levels of cooperation. The "11 islands" are also identified by the number of unilateral/monocratic decisions. In 2016, only 12% of all cases were decided collectively, either in plenary or panel sessions, while 88% of the decisions were issued by a single justice.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The increased role of the STF in matters of strong political impact gained momentum in 2016. This is most notably exemplified by the Court's role during the impeachment of then President Dilma Rousseff. In December 2015, it established some central procedural rules Congress needed to follow (ADPF 378). That decision was confirmed by the Court in March 2016 when the last appeal was rejected, thereby annulling the deliberations taken thus far in the Lower House.

While the STF somehow confirmed precedent based on the impeachment case of former President Collor judged in 1992 (MS 21564), it did not wade into the discussion of whether President Rousseff's alleged crime of fiscal irresponsibility could be interpreted as a crime of malversation, a condition for impeachment according to the Constitution. Three main reactions have emerged therefrom. First, by limiting its consideration mostly to the procedural rules, some argued that the STF washed its hands of the situation and let the political arena decide, solely on political grounds, the destiny of an elected president, thus deviating from its constitutional duty to protect the presidential regime and contributing to a sophisticated form of coup d'état. For others, conversely, by annulling the deliberations taken so far in Congress based on a claimed breach of the constitutional rules of impeachment, the STF overstepped the boundaries of its constitutional role and thereby entered a dispute that was inherently political and protected by the interna corporis doctrine. Finally, some have agreed with the STF's behavior, arguing that its role was merely to mediate the conflict and guarantee procedural fairness; in their view, the STF rightfully left the merits to be decided by Congress.

During the impeachment trial, despite being continuously challenged, the STF held fast to its position of safeguarding the procedural rules, and did not wade into the merits of the case. What in principle seemed an attitude of self-restraint, though, would be contradicted by some unilateral decisions with substantial political impact, which raised doubts as to whether they were politically motivated. For example, in March, one of the justices, in a unilateral decision, barred former President Lula from becoming President Rousseff's Chief of Staff on grounds that the appointment simply sought to circumvent the lower court judge's issuance of a preventive arrest warrant against him (MS 34070). This decision was never scrutinized by the Court, but it was considerably influential on the course of the impeachment trial.

Another controversy arose from the "Car Wash Operation" involving several key players in Congress. Due to its deep political impact, the timing of decision-making raised several debates on how it could have influenced the impeachment trial. For instance, the Head of the Federal Prosecutor's Office filed a lawsuit on graft charges against Eduardo Cunha, then Speaker of the Lower House, in December 2015 (AC 4070). Since Mr. Cunha was a decisive player in launching the impeachment trial in Congress, some have argued that if the STF had decided the case immediately after charges were filed against him, things would have unfolded differently. Yet, the STF only decided to oust him from office in May 2016, after the Lower House had already authorized the impeachment procedure. While, for some, this was a politically biased strategy, for

[1] Only more recently, in the most prominent cases, did the STF begin to formulate a statement that represents the majority opinion.

others, ousting the House Speaker signified a serious encroachment on the powers of Congress.

In December, another justice would further test the boundaries of law and politics when he, also through a unilateral decision, issued a preliminary order to remove Senate President Renan Calheiros from office based on embezzlement charges (ADPF 402). This decision was overturned by the Court the next week, but it could not help but reveal how the STF had transformed itself in 2016. Challenged by all sides of the political spectrum, it became a prominent example of what Hirschl calls "the judicialization of mega-politics".[2] After all, it was at best unexpected to have a Supreme Court involved in such sensitive political matters as the fate of the heads of the Executive, Lower House, and Senate in one single year.

MAJOR CASES

Separation of powers

Proceedings in the impeachment trial of President Rousseff (ADPF 378-ED, decided 03/16/2016)

In March, the STF rejected the final appeal on a case originating from a Claim of Non-Compliance with a Fundamental Precept, which discussed how the impeachment proceedings should take place in Congress. There were many doubts about this proceeding, because the 1988 Constitution regulates it only very briefly and Law 1079, which defines the crimes of malversation and the procedural rules for the impeachment trial, was enacted in 1950. Moreover, although there was already a Supreme Court precedent regarding President Collor's impeachment in 1992, some relevant issues remained unanswered and the political and legal context had changed a great deal since then.

The plenary session to decide the merits of the case took place in December of 2015. Following Justice Luís Roberto Barroso's opinion, the majority of the Court reaffirmed the precedent set during President Collor's impeachment. The decision focused on the following rules: (i) every deliberation in impeachment proceedings should be based on openly-cast votes; (ii) the special impeachment committee should be proportionally composed in accordance with the party leadership; and (iii) the Senate has the final say on the impeachment proceedings, while the Lower House has only the power to authorize the impeachment trial by the Senate. As a result, the STF invalidated the previous election of the special impeachment committee that was established by secret ballot.

From this trial on, the Court acted with increasing self-restraint. On April 15, in an extraordinary hearing held just two days before the Lower House was to vote to authorize Rousseff's impeachment trial before the Senate, the 11 Justices gathered to decide claims filed by the government and other parties that attempted to suspend the impeachment proceedings. The motions questioned the congressional voting procedures and the scope and validity of the impeachment bid. During the session, which lasted more than seven hours, the STF rejected all claims and studiously avoided the merits of the impeachment, emphasizing that it lacked jurisdiction over interna corporis acts and that it was the sole responsibility of Congress to decide whether President Rousseff had committed the alleged crime of malversation.

Annulment of the appointment of minister by President Rousseff (MS 34.070, interim measure granted 03/18/2016)

In March, an interim ruling issued by a single Justice suspended former President Lula's appointment as Rousseff's Chief of Staff. The rapporteur, Justice Gilmar Mendes, considered that Lula's appointment was aimed solely at preventing lower court judge Sérgio Moro from issuing a preventive arrest warrant against him, as ministers are tried directly by the STF per the 1988 Constitution. Justice Mendes based his decision on a wiretapped private conversation between President Rousseff and Lula, leaked to the press by the lower court judge, which allegedly provided proof of the misuse of the cabinet appointment to avoid prosecution. Later, the STF ruled that both the wiretap and its release to the press were illegal. However, Justice Mendes's unilateral decision was never examined by the Plenary.

Lower House speaker suspended from office (AC 4070, decided 05/05/2016)

In May, the STF voted unanimously to approve a request by the Head of the Federal Prosecutor's Office to suspend the speaker of the Lower House, Mr. Eduardo Cunha, from his duties as deputy and house speaker for obstructing a criminal investigation against him. The justices upheld an injunction issued hours before by Mr. Teori Zavascki, the justice presiding over the "Car Wash Operation" who was recently killed in a tragic plane crash. To justify the decision to remove Cunha from speakership, Justice Zavascki also considered that the congressman was indicted by the Court on graft charges in March and, therefore, could not hold office in the line of presidential succession.

Defendants in criminal proceedings shall not occupy posts in the presidential line of succession (ADPF 402, injunction order decided 12/07/2016)

Brazil's 1988 Constitution provides that the speakers of the Lower House and the Senate are the first and second authorities in the line of succession to exercise presidential authority in the event of a dual (temporary or permanent) vacancy of the presidential and the vice-presidential offices. In the Claim of Non-Compliance with a Fundamental Precept 402, it was argued that, if the authorities in the presidential line of succession are indicted by the STF, they must be removed from the post, given that the Constitution provides that the President shall be suspended from his duties if a criminal complaint against him or her is received by the STF. As the trial got underway, six justices voiced their opinions in favor of the claim, stating that defendants in criminal proceedings before the Court should step down from their positions in the line of succession. The trial was suspended at a request for further examination of the case.

[2] Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11 ARPS 93.

Based on that majority opinion, the rapporteur of the case, Justice Marco Aurélio, in a unilateral decision, issued a preliminary order to remove Senate President Renan Calheiros from his post, just after he was indicted by the Court on charges of misusing public funds. However, the Senate resisted the ruling. Two days later, the STF, by a 6-3 vote, overturned the injunction, deciding that, although Senator Calheiros should be removed from the presidential line of succession, he could remain Senate President.

Rights and freedoms

Enforcement of criminal sentences after first appellate ruling (HC 126.292, decided 02/17/2016)

In a decision on a writ of habeas corpus, the STF held that defendants who have their prison sentence affirmed on appeal can serve time before all appeals have been exhausted and a final decision is issued. This ruling overturned the Court's precedent, set in 2009, which stated that the constitutional principle of the presumption of innocence prevented anyone from being arrested until an unappealable criminal sentence is issued. The previous understanding was considered by most justices to be an impunity loophole, as the Brazilian criminal system is fraught with statutes of limitations and an excessive number of appeals.

According to Justice Teori Zavascki's opinion, joined by six other justices, a criminal conviction may be enforced provisionally even if an appeal to superior courts is still pending, since such courts are not allowed to revisit matters of fact and evidence, and such extraordinary appeals do not suspend the enforcement of sentences. Other members of the Court also adopted pragmatic arguments. Justice Luís Roberto Barroso, for instance, stated that the enforcement of criminal sentences after the first appellate ruling is necessary to ensure the credibility of the criminal justice system, as it not only helps put an end to lawyers' dilatory tactics but also reduces selectivity (since white-collar criminals were seldom arrested) and the sense of impunity in society. The dissenting opinions argued, however, that this shift would disrupt the guarantee of the presumption of innocence and raised concerns about the already overcrowded prisons. Shortly thereafter, the Plenary of the Court twice reaffirmed the habeas decision, which is now binding upon every court.[3]

Unconstitutionality of the incidence of the crime of abortion in cases of abortion during the first trimester of pregnancy (HC 124.306, decided 11/29/2016)

The First Panel of the Court ordered the release from pretrial detention of a doctor and employees of a clandestine abortion clinic who had been arrested for the practice of the crimes of abortion and conspiracy to commit crimes. The order of habeas corpus was granted on two grounds. First, the original pre-trial detention did not meet the legal requirements. Second, as per Justice Luís Roberto Barroso's opinion, which was joined by the majority of the members of the First Panel, the criminalization of the voluntary termination of pregnancy carried out during the first trimester violates several fundamental rights of women (such as their reproductive rights, autonomy, physical and psychological integrity, and right to gender equality), as well as disproportionately harms poor women, who are forced to resort to precarious clandestine clinics, which offer high risks of injury, mutilation, and death.

Moreover, Justice Barroso stated that the treatment of abortion as a crime also violates the principle of proportionality since: (i) it constitutes an unsuitable measure by which to protect the life of the unborn, as criminalization does not have a relevant impact on the number of abortions practiced in the country; (ii) it is possible for the State to avoid the occurrence of abortions by more effective and less harmful measures than criminalization, such as sexual education, distribution of contraceptives, and support for women who wish to carry the pregnancy to term; and (iii) the measure is disproportional in the narrow sense, as it produces social costs (public health problems and deaths) that clearly outweigh its benefits.

Despite not decriminalizing abortion nor setting a binding legal precedent, the ruling does indicate that at least some of the Court justices are ready take a further step to guarantee women's reproductive rights.

Rodeo sport of "vaquejada" and animal rights (ADI 4983, decided 10/06/2016)

The Court's Plenary, by a close vote of 6-5, struck down as unconstitutional a law aimed at acknowledging "vaquejada", in which cowboys on horseback chase a bull across an arena and attempt to pull it to the ground by twisting and pulling its tail as a rodeo sport and cultural practice. Based on several technical reports, the majority opined that "vaquejada" inflicts needless suffering on animals in violation of the Constitution's prohibition of animal cruelty. Although the STF has not explicitly recognized that animals are entitled to fundamental rights, it has certainly granted animals "a peculiar dignity" and "the moral right not to be subjected to cruelty". The dissenting justices argued that "vaquejada" is a constitutionally protected cultural practice that does not necessarily impose cruel treatment on the bull. The ruling sparked angry reactions among practitioners and supporters, and a backlash has begun, as Congress already passed a law that recognized "vaquejada" as part of Brazil's intangible cultural heritage, and is making every effort to approve a constitutional amendment overruling the decision.

Health rights litigation (ADI 5501-MC, decided 05/19/2016)

Health rights litigation was a recurring issue on the Court's agenda in 2016. In May, the STF examined the constitutionality of a law that authorized the production and distribution of a compound that is hailed by some as a miracle cancer cure, despite both a dearth of clinical tests proving its safety and efficacy as well as a lack of regulatory approval by the Brazilian Health Surveillance Agency (ANVISA). The "cancer pill" was first developed by a chemist at the University of São Paulo and illegally distributed to patients. When the university cut off its distribution and shut down the lab, lower courts began granting orders for the university administra-

[3] *See* STF, ADC 43-MC; ARE 964246-RG.

tion to provide the pill to hundreds of persons with terminal cancer. Next, responding to popular pressure, Congress passed a bill to legalize use of the untested pill. Less than a month later, however, the STF's majority granted an injunction to suspend the effectiveness of the law. The Court held that the legalization of the untested compound violates the constitutional duty to safeguard the people's health and the separation of powers.

In September, the STF has begun to review two extraordinary appeals (REs 566471 and 657718) which generate a broader debate on the impacts of strong individual litigation of health rights on frustrating inequities in health service delivery and disrupting public policies. In these cases, the Court will decide whether the courts can compel the State to provide access to high-cost drugs that are not listed on the public health system and to drugs not approved by ANVISA. The rapporteur, Mr. Marco Aurélio, considered that the State has a duty to supply high-cost medicines for patients who are unable to pay for them, regardless of their cost, but voted against providing access to unregistered drugs. The other two justices who had already cast their votes, Justices Barroso and Fachin, dissented. They opined that the judicial distribution of drugs not covered by the official list exacerbates inequities within the healthcare system, and thus proposed criteria to make this case the exception.

Public servants' pay cuts during strikes (RE 693456-RG, decided 10/27/2016)
The 1988 Constitution provides for the right of public servants to strike, but it left the matter to be enacted into law by the Legislature. Almost 30 years after the Constitution took effect, the law had still not been passed. In 2007, the Court itself addressed the matter and ordered that the law dealing with private sector strikes be extended to public servants, by analogy, until Congress decides to pass a law for public servants. Up to the present day, however, the Congress has failed to pass such a law.

In view of the multiplications of strikes during 2016, the Court discussed the constitutionality of pay cuts during public servant strikes. By a 6-4 vote, the Plenary decided that the public administration should reduce the strikers' salaries unless the strike is motivated by the illegal conduct of the State. The Court accepted, however, an agreement to compensate the days off during the strike by working extra hours. The four dissenting justices understood that the pay cuts cannot be unilaterally determined by the public administration; rather, they must depend on a previous court ruling declaring the illegality of the strike.

Foreign, international, and/or multilateral relations

Statute of limitation for crimes against humanity (Ext 1362, decided 11/09/2016)
The STF, by a narrow 6-5 vote, rejected Argentina's request to extradite an Argentinian citizen accused of kidnapping and murdering leftist political activists during the military regime. Although the Tribunal agreed with the applicant State that those acts were crimes against humanity, the majority opinion held that they are subject to statutes of limitation under Brazilian law, as the country has not signed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

CONCLUSION

In 2016, the STF was thrust into the political turmoil that has engulfed the country, and one conclusion is inevitable: the Court has found itself in a starring role, one that is possibly unparalleled by any other democratic period in Brazil's history. Matters of substantial political impact, moral disagreement, and social rights, for instance, have increasingly been subject to its scrutiny. Naturally, the Court's skyrocketing influence has led to more clashes with the political realm. Moreover, the Court's increasing purview has also highlighted some of the STF's longstanding flaws, such as its justices' unbalanced powers and inability to deliver an "opinion of the Court". Much work still remains for the STF to engineer an optimal design for decision-making, but, if there is one lesson to be learned from 2016, it is that the comparative constitutional law field should pay more attention to the developments of the Brazilian Supreme Court.

Bulgaria

DEVELOPMENTS IN BULGARIAN CONSTITUTIONAL LAW

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INTRODUCTION

Background and Creation of the Court

The Bulgarian Constitutional Court (BCC) was established under the Constitution of 13 July 1991, which was adopted after the fall of the communist regime.1 The previous three fundamental laws of the country—i.e. the 1879 Constitution adopted after the liberation from the Ottoman Empire and the two communist constitutions from 1947 and 1971, respectively—did not include a constitutional tribunal or any form of extra-parliamentary constitutional control. The drafters of the 1991 constitution almost unanimously decided to introduce a Kelsenian model of centralised judicial review, exercised exclusively by a specialised tribunal. The new institution was modeled after its German, Austrian, Italian and Spanish counterparts.

Characteristics of the Court

The Court consists of 12 judges who are appointed, for a non-renewable period of nine years, in equal parts by the National Assembly, the President, and at a meeting of the judges of the Supreme Court of Cassation (SCC) and the Supreme Administrative Court (SAC). All types of rulings of the Court require a majority of more than half, i.e. seven or more, of the votes of all judges.2 The Court has the competence to provide binding interpretations of the Constitution to adjudicate upon disputes between the main state institutions; to rule on the congruence between domestic law (including the Constitution) and international law and treaties, to which Bulgaria is party; and to exercise constitutional control (judicial review) of legislation and acts of the President. The latter function encompasses the protection of the constitutional rights and liberties of citizens against encroachments on the part of the Legislator and the President.3

The Court exercises a posteriori concentrated review, which is abstract in nature since it concerns the constitutionality of the legislative or presidential act in general and not its concrete application.4 Unconstitutionality decisions of the Court invalidate such acts with ex nunc binding force. All decisions of the Court are final and binding on all public bodies and persons. The Court does not have the competence to review acts by the other branches of the executive apart from the President, such as, for example, ministerial orders and regulations, and administrative acts. The constitutional review of such non-legislative normative acts is entrusted upon the SAC.

Seizing Subjects

The abstract referral procedure can be triggered by one-fifth of all deputies of the National Assembly, the President, the Council

[1] A Constitutional Court Act was passed on 16 August 1991 and the Court was constituted on 3 October 1991.

[2] This provision has stirred controversies in cases where judges were split in 6:6 or even in 6:5 votes in favour of a constitutionality challenge. In such cases, the challenge would fail due to the lack of a seventh vote, despite the fact that a simple majority of the judges supported the challenge.

[3] Most of the fundamental rights of citizens are listed in Chapter 2 of the Constitution.

[4] The only instance where the Court exercises *a priori* judicial review is when ruling on the constitutionality of international treaties concluded by the executive prior to their ratification, Art 149.1.4.

of Ministers, the SCC, the SAC, or the Prosecutor General. Lower courts cannot invoke the jurisdiction of the Court. When confronted with the unconstitutionality of an applicable norm in concrete cases, they may notify the corresponding Supreme Court, which, in turn, may request the BCC to rule on the constitutionality of the norm.

There is no individual constitutional complaint mechanism or actio popularis and the BCC cannot act ex officio. In light of the restricted individual access to constitutional adjudication in 2006, the Office of the National Ombudsman, which was established in 2004, was included in the list of seizing subjects. Since 2015, the Supreme Attorneys Council can also challenge the constitutionality of formal statutes which infringe on human rights and freedoms.

Until the end of 2016, the BCC was seized 490 times and delivered 363 judgments. Most referrals were filed by deputies of the National Assembly. The Office of the Ombudsman filed 26 applications and the Supreme Attorneys Council has not yet exercised its newly introduced referral right. Since the beginning of the 2000s, the output of the Court has visibly decreased and now stands at around 10 decisions per year.

Brief Overview of the Court's History

The BCC played a key role in the Bulgarian political discourse in the first decade of the democratic transition. The 1990s were marked by the antagonism between the two main political forces in the country, the Bulgarian Socialist Party (BSP) and the Union of the Democratic Forces (UDF). BSP attempted to retain control over the state apparatus whilst the UDF, founded by rehabilitated dissidents, pursued a pro-Western and anti-Soviet agenda. Against this binary parliamentary setting, the BCC was often instrumentalised by the parliamentary minority as a tool for exerting constitutional checks and balances over the majority and the government, and for challenging legislation. Due to the fact that UDF and BSP were alternating in assuming the minoritarian position in the Parliament, the Court managed to remain largely untainted by political affiliation and to defend its independence.

In its first decision, the Court upheld the constitutionality of a highly contested political party, established soon after the end of communism to represent the interests of the previously persecuted Bulgarian ethnic Turkish minority.[5] The judgment played a crucial role in the reconciliation of the different constitutional interests present in Bulgaria's multiethnic society and thus sent a clear sign of departure from totalitarianism. This decision of the Court was followed by a number of judgments dedicated to the political process and to the separation of powers. This helped establish the democratic, parliamentary character of the new Bulgarian Republic, and contributed to the demarcation of the responsibilities of the President, the Parliament, and the Executive.
Moreover, the Court hindered a number of governmental attempts to tamper with the independence of the judiciary. These played out against the background of the lingering legal tradition of the authoritarian regime, which used to subject the exercise of judicial power to the unadulterated and arbitrary will of the communist party.

The BCC also upheld a number of laws related to the restitution of property expropriated and nationalised by the totalitarian government. Many lustration laws which attempted to ostracise ex-communists from political and public life, however, were struck down by the Court on equality grounds. The Court's jurisprudence of the court has been ambiguous to the issue of opening the files of the communist State Security Agency.

Although mainly preoccupied with political disputes, the Court delivered a number of important judgments in the area of constitutional rights and liberties. Most of them concerned freedom of speech and the media, as well as property rights in the context of restitution. The jurisprudence of the Court on other human rights issues has been rather scarce. Although the Bulgarian government has been widely criticised for its discriminatory practices against certain minorities (such as Roma) and socially vulnerable groups (such as persons with disabilities and delinquent youth), very few cases before the BCC have dealt with such issues. The Court also upheld the limitations of what can be considered the Bulgarian affirmative action provision, which allows for the privileged treatment of certain social groups, such as disabled persons, but explicitly prohibits "positive" or "reversed" discrimination on the ground of race and gender.[6]

The Court's popularity and activism, however, seems to have waned in the 2000s. A possible explanation might lie in the dilution of the binary character of Bulgarian parliamentarism, incurred by the emergence of new centrist political actors. Since the beginning of the 2000s, the most important decisions of the BCC have been in the area of judicial reform: the Court has blocked efforts to make the prosecutorial office a part of the executive branch (at present it is part of the judiciary) by arguing that this would require a very cumbersome constitutional amendment procedure through a Grand National Assembly (GNA). According to this procedure, in order to amend some essential parts of the Constitution (as the form of government, for instance), it is necessary to gather qualified majorities of at least two-thirds in an "ordinary" Parliament, and then dissolve it and call new elections for GNA with the purpose of adopting the suggested amendment. The BCC read the "form of government" provision of the constitution very broadly and included in its meaning the positioning of the prosecutorial office as well. At present, many see the lack of accountability of the Prosecutor General as a main problem of the judicial system. Critics argue that the BCC has contributed to this situation.

[5] Decision 4/1992, case number 1/1991. It must be noted, however, that the unconstitutionality challenge failed only due to the lack of a 7th vote. 6:5 judges voted for the unconstitutionality of the party.

[6] Decision 14/92, case number 14/92.

DEVELOPMENTS AND CONTROVERSIES IN 2016

A constitutional controversy from the first years of the Court's existence concerned the judicial review of legislation adopted before the creation of the Court. According to paragraph 3 of the Transitional and Concluding Provisions to the Constitution, only laws passed after the entry into force of the 1991 Constitution are subjected to the jurisdiction of the Court. The Court ascertained that it had no jurisdiction over pre-existing legislation which was no longer in force after 13 July 1991.[7] There was ambiguity, however, with regard to its jurisdiction over legislation which remained in force after that date. Initially, the Court proclaimed that it would not exercise constitutionality control in such cases and that the ordinary judiciary could disapply such unconstitutional legislation in concrete cases with inter partes binding force (admissibility definitions in cases 1/1991 and 11/1992). Moreover, the Court found that only the National Assembly had the competence to repeal such legislation with erga omnes binding force within three years after the adoption of the new Constitution.

This regulation, however, stirred legal uncertainty in light of the potential scenario of regular courts not ascertaining their competence to define whether a persisting law was unconstitutional. In recognition of this uncertainty and the failure of the National Assembly to address the constitutionality of a number of controversial laws inherited from the communist regime within the three-year period, the Court changed its jurisprudence on the matter, proclaiming that the scope of its review powers would also encompass pre-existing laws (admissibility definition in case 31/1995). The controversy was thus resolved by the BCC.

An unresolved constitutional controversy stems from a provision (Art 5.2) stipulating that the Constitution shall apply directly. Art 150 of the Constitution states that only the BCC can invalidate legislation. However, it is unclear whether ordinary courts can disapply unconstitutional laws with inter partes binding force. The Statute on the Normative Acts seems to imply that ordinary courts might have such competence. Several BCC judges have also expressed the view that all courts can and should disapply unconstitutional laws in concrete cases. This, however, often fails to happen in practice due to the lack of explicit procedural regulation.

Another constitutional ambiguity is related to the ex nunc binding force of the Court's decisions. This raises questions with regard to the status and applicability of legislation for the period between its entry into force (or the entry into force of the 1991 Constitution in the case of pre-existing laws) and the unconstitutionality decision of the Court, which annuls this legislation. A situation in which only an amendment of an already existing norm is declared unconstitutional can prove to be particularly problematic. The constitutional provision seems to suggest two possible interpretations in such cases. On the one hand, it could be argued that an unconstitutionality ruling of the amendment automatically restores the validity of the original norm in its pre-amendment form. An alternative line of argumentation, however, would be that such an unconstitutionality ruling would create a lacuna in the legal order by virtue of the fact that the legislator repealed the old norm and the BCC invalidated the one intended to replace it. In its jurisprudence (Decision 22/1995), the CC opted for the former proposition and held that an unconstitutionality finding restores the original norm. This, however, has been a matter of academic debate.

MAJOR DECISIONS

In 2016, the Court was seized 17 times. It delivered a total of 10 judgments. The most important ones are considered below.

Political System and Separation of Powers

Decision 9/2016, case number 8/2016 (filed by the President)

In this case, the BCC declared three of the six questions for a referendum scheduled by the National Assembly to be unconstitutional. The referendum was a popular initiative which was started by a TV talk show and gathered 600,000 signatures—an enormous number by Bulgarian standards. The President challenged the decision of Parliament to hold the referendum. The most important of the three questions deemed to be unconstitutional was the reduction of the number of MPs in the National Assembly from 240 to 120. The BCC argued that such a reduction would substantially affect the powers of the Parliament and could therefore be considered a change of the "form of government". In Bulgaria, such a change, however, would require a Grand National Assembly (GNA). Since referendums by law cannot be held on questions within the competence of the GNA, the challenged referendum could not lead to the reduction of the number of MPs.

In its decision, the BCC used a very expansive notion of "form of government". In the Bulgarian constitutional doctrine, the concept of "form of government" traditionally refers to whether the republic is parliamentary, presidential, semi-presidential, etc. In its jurisprudence on judicial independence, however, the BCC has started to interpret this notion more broadly by including concrete features of the current form of government, such as the exact balance of prerogatives among the state powers. In this case, the Court went as far as to include the number of MPs within this definition.

[7] Decision 12/1992, case number 7/1994.This practice of the Court constituted a problem with regard to state acts in application of such expired laws, which, however, were never officially repealed by the new democratic regime. A famous case concerns the verdicts of the revolutionary tribunal created by the communist regime after it took power in 1944. The so called "People's Court" is notorious for its arbitrary mass trials, which were aimed at eradicating the political opposition after the communist *coup d'etat*. The Constitutional Court found that it had no temporal jurisdiction over the law which created the People's Court since its mandate expired in 1945. Therefore, many convicts of the People's Court were never granted official exoneration from their trumped-up crimes.

Following a similar logic, the BCC invalidated a question on whether the regional directors of police should be directly elected. The judges held that the appointment of directors is a prerogative of the Executive, insofar as direct election has the capacity to affect the balance of powers and therefore requires a GNA.

The third invalidated question related to the possibility of electronic voting. A referendum on this question had already been carried out and although its turnout failed to pass the legal threshold for binding referendums, the Parliament deliberated to introduce electronic voting once the technical possibilities had been explored. Mainly because of that, the BCC held that another referendum on the same issue would undermine the principle of legal certainty and thus the rule of law. Also, it would force the Parliament to disrespect its own lawful decisions, which would constitute a violation of the constitutional status of the legislature.

The referendum was ultimately carried out on the three other questions which were upheld by the BCC. These dealt with the character of the electoral system and mandatory voting. The organisers of the referendum bitterly attacked the BCC and the President for trying to "obstruct the will of the people".

Decision 6/2016 from 14 June 2016, case number 1/2016

This case stemmed from the biggest banking crisis in the country since 1997—the 2014 bankruptcy of the Corporate Commercial Bank, the fourth biggest bank in the country. The closure of the bank ultimately led to the resignation of the government and pre-term elections. In this case, the BCC was asked to assess the constitutionality of the law on bankruptcy, according to which only the Prosecutors and the bank syndics (officials appointed by public bodies to be in charge of the insolvent bank) are entitled to judicially challenge the decision to declare the bank insolvent. Shareholders and the owners of the bank were not entitled to appeal this decision, which—as argued by the challengers from the Supreme Court of Cassation—violated their rights and the principle of the rule of law.

The BCC rejected these claims by stating that the declaration of a bank in insolvency is a very specialised procedure in which the interests of depositors are paramount. The Court held that its power to review decisions of specialised bodies is limited in such cases, and although the judges saw flaws in the law, they deferred to the judgment of the legislature. The challengers' claims of lack of legal protection and violation of the equality of arms principle were also rejected on these grounds. All in all, the BCC declined to protect the rights of the owners and shareholders in this controversial judgment on the basis of the extraordinary character of the situation, which implied greater deference to the discretion of political and expert bodies.

Decision 3/2016 from 8 March 2016, case number 6/2015

In the area of healthcare rights, the BCC has been traditionally deferential to the legislature. In this case, however, the judges overruled a relatively central element of a healthcare reform proposed by the government. The reform aimed at introducing two distinct tiers of public medical services. Under the first tier, supposed to cover the most common and most serious medical conditions, all citizens would have instant access to services as guaranteed by their standard healthcare insurance. For the second tier, they would either have to enter a waiting list or pay an additional amount of money in order to gain immediate access to healthcare. The judges agreed that the Parliament had the right to introduce such a reform. The BCC found, however, that it was for the Minister of Healthcare to define the services under the two tiers. The Court argued that the Constitution required that such decisions needed to be taken only through the passage of parliamentary legislation and not by an administrative normative act because they affect inalienable rights. As to other aspects of the healthcare reform, the Court again showed a considerable deference to the will of the legislator.[8]

Rights and Freedoms

Decision 11/2016 from 4 October 2016, case number 7/2016

In a concrete referral from 28 April 2016, the SAC challenged the procedural lack of an appeal mechanism against juvenile detention orders. This constituted a possible violation of the Constitution, which requires judicial control to be exercised over the legality of any detention. In support of its application, the SAC invoked the judgment in the A and others v. Bulgaria case where the ECtHR held Bulgaria in violation of the ECHR for not providing a legal remedy for detainees to judicially appeal juvenile detention orders.[9]

The BCC proclaimed that the Prosecutor's Office, which authorises juvenile detentions, belonged to the judiciary so that, strictly speaking, a judicial body was involved in the detention process. Notwithstanding this finding, the Court qualified detention orders by the Prosecution as individual administrative acts which are challengeable before the regular courts. Although the challenged norm did not explicitly mention an appeal mechanism, the Court ruled that such remedy was implied in the constitutional order on the grounds mentioned above. The contested norm was thus declared not to be unconstitutional. The Court explained that ECtHR's opposite finding was related to the fact that the Bulgarian Government, in its role as defendant in the A. and others v. Bulgaria case, had argued mistakenly that detentions could not be judicially appealed, while in fact, the constitutional order implicitly allowed such challenges before the ordinary courts.

This decision raises several concerns with regard to the legal regime of juvenile detention in Bulgaria. On the one hand, the Prosecutor's Office, when exercising its detention authority, is considered part of the judiciary and thus exempted from additional judicial scrutiny under article 30.3 of the Constitution. At the same time, however, juvenile detention acts of the Prosecutor are considered ordinary administrative acts, which are individually challengeable under Art 120.

[8] See decision 8/2016, case 9/2015.

[9] ECtHR, *A. and Others v. Bulgaria*, no. 51776/08, 29 November 2011.

The Office of the Prosecutor thus seems to act in a twofold capacity, both as part of the judiciary and as a regular administrative body. This not only raises concerns with regard to the separation of powers doctrine but also creates legal uncertainty for individuals confronting detention orders in light of the lack of an explicitly regulated procedure for appeal. Whilst the BCC seems positive about the presence of sufficient guarantees for the judicial review of juvenile detention and the constitutional conformity of its legal regulation, regular courts seem to continue to incorrectly reject such challenges. In January 2017, the ECtHR once again found Bulgaria in violation of the ECHR for the lack of appeal mechanisms in juvenile detention procedures in a case almost identical to A and others v. Bulgaria.[10] There also seems to be a striking divergence between the BCC's position and the Ministry of Justice. The latter, in clear contradiction to the BCC's ruling, admitted in both ECtHR cases that juvenile detention acts of the Prosecutor are not administrative acts and thus cannot be challenged in the courts.

Decision 10/2016 from 29 September 2016, case number 3/2016

Later in 2016, the Office of the Ombudsman challenged a law which ordered the losing party of a judicial trial to compensate the legal representation expenses of the winning litigant. According to the contested norms, state institutions, tradespersons, and legal persons could claim expenses for legal counselors, notwithstanding the fact that legal counselors are not paid on an ad hoc basis but within an employment contract. The Office of the Ombudsman argued that this arrangement privileged legal persons and state institutions to the detriment of private citizens, since only the former would regularly have employed legal counselors. Therefore, private citizens would be less likely to claim such expenses and benefit from the challenged provision. The Ombudsman thus claimed a violation of the rule of law principle.

The BCC, however, proclaimed that this principle should be interpreted narrowly in order to prevent its use as a sweeping clause. Moreover, the Court justified the differential treatment of private and legal persons by claiming that the latter would be put at a disadvantage if they were not allowed to claim legal counseling expenses simply due to their separate contractual relationship with the counselor. Therefore, the challenge failed.

Decision 7/2016 from 21 June 2016, case number 8/2015

On 21 June 2016, the President challenged the constitutionality of two norms, which regulated the eligibility criteria for obtaining a license to access and deal with classified information. Such license is issued by the National Information Security Commission (NISC), a State agency, and must be obtained by civil servants as a condition for exercising jobs dealing with classified information, such as certain jobs related to the military or public service. The challenged norms stipulated that the issuance of such a license had to be denied by the NISC if the applicants in the procedure of issuing this document were involved in criminal proceedings. Such license rejection would bar the concerned person from accessing classified information and would thus effectively prevent her from exercising a job which requires such access. The law allowed for the rejection to be appealed within seven days, otherwise the concerned person would be barred from holding a position related to classified information for a period of one to three years. The President's Office argued that these provisions treated accused persons as convicted criminals and were thus in violation of the constitutional presumption of innocence. Moreover, the Office challenged the constitutionality of the seven-day preclusion period, since no verdict on the guilt or innocence of the accused could be expected in such a short time.

The Court held that the opening of a criminal investigation manifested sufficient probability of the criminal liability of the applicants concerned. Therefore, the restriction of their access to sensitive classified information was found to be proportionate to the legitimate aim of the protection of national security. However, the Court agreed with the President's argument that the seven-day preclusion period was disproportionate. Therefore, it upheld the norm but nullified the preclusion provision.

Decision 5/2016 from 12 May 2016, case number 2/2016

Several months later, a similar provision was to be challenged by the SAC. The contested norm ordered that civil servants be suspended from their occupation and prohibited to work if accused of criminal malpractice. The latter were also excluded from the social security system until the delivery of the verdict. The SAC judges held this norm in violation of both the constitutionally guaranteed right to work and the presumption of innocence. They argued that such treatment was disproportionate given that even convicted criminals were allowed to deliver paid work while civil servants were denied this right without a verdict. The Court agreed with the SAC's arguments and declared the norm unconstitutional. However, the BCC did not engage with the alleged violation of the invoked concrete constitutional rights. Instead, it referred to the sweeping clause of a general violation of the rule of law principle.

In a somewhat contradictory fashion, later in the year (in decision 10/2016 on case 3/2016, discussed above) the Court advocated for a narrow interpretation of the rule of law principle in order to discourage its use as a sweeping clause in constitutionality challenges.

[10] ECtHR, *I.P. v. Bulgaria*, no. 72936/14, 19 January 2017.

Cameroon

DEVELOPMENTS IN CAMEROONIAN CONSTITUTIONAL LAW

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INTRODUCTION

The most significant constitutional event in Cameroon in 2016 was the peaceful protests, demonstrations, and sit-in strikes which were initiated by Common Law Lawyers and Teachers' Trade Unions which has paralysed all official activities in the two Anglophone regions of Cameroon since October 2016 and led to a military intervention which has resulted in many deaths, injuries, and the detention of numerous citizens. The present crisis is no surprise to even the most casual observer of the Cameroonian political scene. In fact, Cameroon's apparent political stability belies deep-seated centrifugal forces of fragmentation which have only been kept dormant by repressive authoritarian governmental structures and systems which successfully defied the so-called 'third wave of democratisation' that swept through Africa in the 1990s. Whilst almost all African countries underwent substantial constitutional reforms, the token reforms that took place in Cameroon in 1996 hardly provided any foundation for constitutionalism to take root.

This report mainly focuses on the political and constitutional crisis that exploded in 2016. However, to understand this crisis, it is necessary to briefly look at the complex constitutional history of Cameroon. In fact, the 1996 Constitution which operates today in Cameroon is a paradox that in many respects reflects the history of the country. The second part of this report will briefly provide a background constitutional history of the country, the third part will highlight the present constitutional crisis and the final part will reflect on how the present challenges can be overcome.

THE CONSTITUTIONAL SYSTEM

Although Cameroon is a German creation, it is the Portuguese who are considered to be the first Europeans who arrived on the country's coast in the 1500s. Germany established a colony in Cameroon in July 1884 and this was confirmed at the Congress of Berlin in 1884–1885.[1]

Generally speaking, Cameroon's constitutional history can be said to have gone through three main periods.

The first period is that of the German protectorate that lasted from 1884 until 1916. The German period ended when their military forces in Cameroon were finally defeated during the First World War by a combined British and French expeditionary force. The second period is marked by the French and British rule that lasted until independence in 1961. The third period covers all developments that have taken place since independence and the reunification of the British and French administered portions of the country to form what is now known as the Republic of Cameroon.

Germany practically lost its control over Cameroon during the First World War when its last stronghold on the territory at Mora fell on 20 February 1916. On 4 March 1916, the two victors finally initialled an agreement

[1] See generally, HR Rudin, *Germans in the Cameroons 1884–1914: A Case Study in Modern Imperialism* (New Haven, Yale University Press, 1938) and SG Ardener, *Eye-Witnesses to the Annexation of Cameroon, 1883–1887* (Buea, Government Press, 1968).

that formally partitioned Cameroon into two unequal parts, with the French taking almost four-fifths of the territory. This was confirmed in Article 119 of the Treaty of Versailles and under Articles 22 and 23 of the League of Nations Covenant. The division of Cameroon between Britain and France provided the basis for the establishment of two distinct and often conflicting cultural, political, and legal traditions that have had and continue to have a profound effect on the country today, particularly its constitutional law.

The British sector consisted of two narrow non-contiguous strips of territory (called Northern Cameroons and Southern Cameroons), which they administered as an integral part of its Nigerian colony. After the British Government announced in 1958 that Nigeria would become independent on 1 October 1960 and the French Government also announced that French Cameroon would become independent on 1 January 1960, it became necessary to determine the future of Southern Cameroons and Northern Cameroons. Under the supervision of the United Nations, plebiscites were organised in Southern and Northern Cameroons in which the people of both territories were given the option of gaining independence by either staying with Nigeria or re-uniting with the Republic of Cameroon. Northern Cameroons voted in favour of remaining with Nigeria whilst Southern Cameroons voted in favour of re-uniting with the Republic of Cameroon, which had already gained independence on 1 October 1960.

After the plebiscite in Southern Cameroons, its leaders tried to negotiate a new constitutional arrangement with President Ahidjo of the Republic of Cameroon, based on a relatively loose and decentralised federation in which they hoped to protect their language, culture, and legal and educational systems. However, since they were now fully committed to reunification with an already independent Republic of Cameroon, the negotiating position of the Southern Cameroons representatives was quite weak. Ahidjo was under no pressure to make anything more than token concessions and only felt obliged to amend the 1960 Constitution by an annexure called 'transitional and special dispositions'. What became the Federal Constitution of the Federal Republic of Cameroon was nothing more than a law revising the Republic of Cameroon's Constitution of 4 March 1960 and provided for a two state federation. However, it was a highly centralised system in which most of the powers were retained by the federal government. The seeds for a perception of a design to eliminate Anglophone peculiarities were sown.

The threats to the elimination of the Anglophone identity within the country were reinforced when on 2 June 1972 a new Constitution was introduced, and without regard to article 47 of the 1961 Federal Constitution which prohibited this, the federal system was abolished and replaced with a unitary system that was officially known as the 'United Republic of Cameroon'. This marked the end of the highly centralised federal system of government that bore a resemblance to a federation only in name. When, in 1984, the President by Law No 84/001 abolished the appellation 'United Republic of Cameroon' and replaced it with 'Republic of Cameroon', this was seen by many Anglophone Cameroonians as removing one of the last symbolic vestiges of the 1961 reunification of the two distinct communities.

After pressure brought to bear by the Social Democratic Front (SDF), a party formed by an Anglophone, John Fru Ndi, the Cameroon Government reluctantly followed the post–1990 wave of constitutional renewals on the African continent by revising its 1972 Constitution in 1996. The expectation was that it would provide a solid foundation for promoting constitutionalism by enhancing democracy, good governance, and respect for human rights. Unlike most post-1990 African constitutions, the 1996 Constitution did nothing more than reinforce much of the underlying philosophy of the original 1972 Constitution as well as many of its underlying principles.[2] There are a number of factors that attest to this.

First, the pre-1996 highly centralised autocratic state system, under which the President had extensive powers, was reinforced while the normally limited powers of the legislature were further curtailed. The dominance of the President was strengthened, with extensive powers that enable him to appoint and dismiss at his pleasure the Prime Minister and cabinet members, judges, generals, provincial governors, prefects, and the heads of parastatals. He can also approve or veto newly enacted laws, declare a state of emergency, and authorise public expenditure. Although there were many innovations, these have been largely ineffective in promoting democratic and accountable governance. For example, the introduction of bicameralism, with a Senate to act as a second chamber to the National Assembly, is significantly compromised by the fact that these bodies are largely subservient to the executive and have little power to initiate or influence the content of legislation.

Second, although the amended Constitution purported to introduce, for the first time, what it terms 'judicial power', this is largely ineffective because of the President's unlimited powers to appoint and dismiss judges. The contemplated Constitutional Council, which is supposed to have some powers of judicial review, has never been established and in any case can hardly operate effectively because it is supposed to be composed essentially of government nominees, has mainly powers of abstract review, and can only entertain matters referred to it by the government and other political elites.

[2] See, for example, Charles Manga Fombad, 'Post 1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism', in AG Nhema and PT Zeleza, *The Resolution of African Conflicts* (OSSREA & James Currey, Oxford, 2008) 179–199; Charles Manga Fombad, 'Cameroon's Constitutional Conundrum: Reconciling Unity with Diversity', in Kenyan Section of the International Commission of Jurists; and Konrad Adenauer Stiftung, *Ethnicity, Human Rights and Constitutionalism in Africa* (Kenyan Section of the International Commission of Jurists, Nairobi, 2008) 121–156.

Third, on the very critical issue of accommodating the diverse ethnic, language and cultural groups, a form of decentralisation was provided which essentially concentrates powers in the centre, with the possibility for some sort of de-concentration of powers through the creation of regional and local authorities, but the obscure language used leaves the implementation of these provisions entirely at the discretion of the President of the Republic. Not only does he have the right to decide when, if at all, the regional and local authorities will be created, but also has the power to determine their powers and can dissolve them and dismiss their officials when he deems it proper.

Cameroon's bilingual and bi-cultural nature, one of its greatest sources of pride, has turned out to be its most enduring contradiction. The Anglophone community, who make up about 20 percent of the total population and occupy about 9 percent of the total land surface, have since reunification in 1961 been suspicious of Francophone domination. A perception of Anglophone marginalisation and a deliberate government policy of absorption and assimilation combined with the elimination of Anglophone particularities looms large and goes deep. To many of them, the straw that broke the camel's back came in 1992 when a skeptical Supreme Court, whilst acknowledging gross irregularities in the presidential elections, still proceeded to declare Biya the winner in an election which many, including international observers, felt Ni Fru Ndi, an Anglophone, had won. This, more than anything else, reinforced the long-standing Anglophone feelings that no matter their merits, they are destined to play second fiddle to Francophones. Many analysts agree that Anglophones have had a pretty hard time being both Anglophones and Cameroonians.

Most analysis summarises the so-called Anglophone communities' grievances under three main themes.[3] The first is economic. Anglophones point to the relative economic underdevelopment of their two provinces as compared to the other eight since 1961. The case is particularly poignant for the Anglophone South West region, which in many respects is not only the country's breadbasket in terms of agricultural produce but is the main source of the country's oil wealth. This has led to a feeling that the two regions are a mere appendage, useful for their resources but not for its people.[4]

The second contentious issue centers around what is seen as a deliberate policy of "de-identification" of Anglophones from their separate and distinct heritage and "persona" through a careful process of "Gallicising" all aspects of social, economic, and educational life to conform to French models. Both President Ahidjo and his successor, Paul Biya (who has been in power since 1982) in resolutely pursuing their policies of "national unity and integration", have seen the persistence of Anglophone "particularisms" as an obstacle to national unity and development. Thus, Biya has firmly rejected what he terms as the "collection and juxtaposition of our diversities".[5] It has come as a shock to Anglophones that having agreed to join a bilingual union in which inherited colonial differences in language and institutions were to be respected and creatively integrated into a new collective national experience, their way of life has now been suppressed and they are being compelled to adopt the dominant Francophone way of life.[6] Thus, the cynical aphorism, "bilingualism in French". The intensity of this "de-culturalisation" has made it hard for an Anglophone to confidently assert himself, especially because this has been marked by derogatory references to them as "les Biafrais" (that is, Biafrans, evoking memories of the Nigerian civil war) and "les ennémis dans la maison" (the enemies within the house),[7] and their demands for federalism has consistently been dismissed as evidence of lack of patriotism and a smokescreen for secession.

Finally, the loss of the very limited regional autonomy in 1972 has been followed by the relegation of Anglophone leaders to inferior and inconsequential roles in the national decision-making process (Kofele-Kale,1986). Various studies have shown that Anglophones have been consistently under-represented in ministerial as well as senior and middle level positions in the administration, the military, and parastatals. The elevation of an Anglophone to the essentially honorific position of Prime Minister in 1992 has been seen as a ploy to neutralise the popular SDF.

Analysts may well debate the extent of these grievances but their existence is a palpable fact. The uneasy co-existence of the Anglophones and Francophones has led one writer to posit that Cameroon is "two different countries in one".[8] Frustrated by the intran-

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[3] See generally, JF Bayart, 'The Neutralisation of Anglophone Cameroon,' in R Joseph (ed.) *Gaullist Africa: Cameroon under Ahmadou Ahidjo* (1968); J Benjamin, *Les Camerounais Occidentaux: La Minorité dans un état Bicommunitaire* (1972); A Mukong (ed.), *The Case for Southern Cameroons* (1990); P Konings & B Nyamjoh, 'The Anglophone Problem in Cameroon' (1997) 35 Journal of Modern African Studies; E Lyombe, 'The English-Language Press and the "Anglophone Problem" in Cameroon: Group Identity, Culture and the Politics of Nostalgia', http://findarticles.com/p/articles/mi_qa3821/ai_n9173452/print

[4] J Derrick, 'Cameroon: One Party, Many Parties and the State' (1992) 22 African Insight 165.

[5] In his book, *Communal Liberalism* (1987) 26-30. VJ Ngoh, 'The Origin of the Marginalization of Former Southern Cameroonians (Anglophones), 1961-1966: An Historical Analysis' (1999) accessible at http://findarticles.com/p/articles/mi_qa3821/is_199904/ai_n8835936/print; FB Nyamnjoh, 'Cameroon: A Country United by Ethnic Ambition and Difference' (1999) 98 African Affairs 101.

[6] See, Kofele-Kale 'Ethnicity, Regionalism, and Political Power: A Post-mortem of Ahidjo's Cameroon' in M Shatzberg & I Zartman (eds.), *The Political Economy of Cameroon* (1986).

[7] See generally, D Eyoh, 'Conflicting Narratives of Anglophone Protest and the Politics of Identity in Cameroon' (1998) 16 Journal of Contemporary African Studies 249; J Derrick "Cameroon: One Party, Many Parties and the State' (1992) 22 African Insight 165; J Takougang, 'The Post-Ahidjo Era in Cameroon: Continuity and Change' (1996) 10 Journal of Third World Studies 268-302; and A Mbembe, 'Epilogue. Crise de Légitimité, Restoration Autoritaire et Déliquescence de L'Etat' in P Geschière & P Konings (eds.) *Pathways to Accumulation in Cameroon* (1993).

[8] Azevedo (ed.), *Cameroon and Chad in Historical Contemporary Perspectives* (1988), at p. 48.

sigence of the regime and galvanised by the generalised hardship in which most analysts agree Anglophones have suffered more than any other group, an alarming number of pressure groups have sprang up since the First All Anglophone Conference (AAC 1) was held in Buea in 1993. Moderate demands pursued by some of them, such as the Cameroon Anglophone Movement (CAM), now Southern Cameroons Restoration Movement (SCARM), and the Southern Cameroons National Council (SCNC), for a return to the federation have now been brushed aside by emerging radical factions such as the Ambazonia, the Southern Cameroons Liberation Front, and the Free West Cameroon Movement, which advocate outright secession by use of arms if necessary.

An opportunity was missed to lay this long festering Anglophone problem to rest during the 1996 constitutional amendment process. With rising agitation in the Anglophone community, President Paul Biya, in January 1999, for the first time admitted, albeit in dismissive fashion, that an Anglophone problem existed, and was only prepared to say that it was promoted by a handful of hotheads and vandals.

On the whole, the 1996 Constitution remains a controversial document, not only because of the perception that it was imposed, but also because it is technically an inferior document to the one it purports to amend, and is less liberal and progressive. There was lack of adequate consultation, especially of the Anglophone community. Even the limited form of decentralisation that it espouses has hardly been implemented with any conviction. It is against this background of years of frustration that the Anglophone communities in the North West and South West regions took to the streets in October 2016.

THE POLITICAL AND CONSTITUTIONAL CRISIS OF 2016

The protests started in mid-October 2016 when the lawyers in the two Anglophone regions started a protest action against the domination of the judiciary by Francophones whom they allege have little or no knowledge or training in the common law. In a document prepared by the SDF, which since the 1990s has been the main opposition party in the country, and was the party that initiated the street protests of the 1990s which forced the government to reintroduce multi-partyism, the extent of Francophone domination of the judiciary was laid bare.[9] This was followed a few weeks later by a strike led by the Confederation of Anglophone Teachers' Trade Unions and the Teachers' Association of Cameroon. This has led to the closure of all schools in the two Anglophone regions. The teachers complain that French speaking and trained teachers had been deployed into the two Anglophone regions to teach subjects in French to children who do not understand the language. They also complain that competitive public examinations to gain admission into professional schools in the country are poorly translated from French to English and make it difficult for Anglophones to gain admission into these schools. They also allege that many of the lecturers and heads of departments in the two universities in the region were Francophones. The other population came out in support because most of the senior administrative positions in the two regions were held by Francophones.

By December 2016, daily activities in the Anglophone regions had come to a halt because of the general strike and demonstrations demanding a return to the two-state federation. The government's response was to immediately deploy troops all over the two regions and in many places street demonstrations were violently suppressed resulting in the deaths of many demonstrators and the detention of many more. In his traditional 31 December New Year speech, President Biya, as in the past, pretended that there is no 'Anglophone problem', and argued that the strikes and demonstrations were promoted by the 'acts of a group of manipulated and exploited extremist rioters'.[10] He reiterated his determination to defend the unity of the country. The protests have continued into 2017 and the government's reaction has been to send in more armed troops against the unarmed protesters. Many have lost their lives, and most of their leaders, including parliamentarians, have been arrested and transferred to detention centres outside the two regions. Many of those arrested are now being tried by a military tribunal for treason and a myriad of other offences against the state. The international media has been barred from reporting on the violence and in January 2017 telephone and internet links within and from the two regions were blocked.

LOOKING BEYOND THE CRISIS AND CONSTITUTIONALISM IN CAMEROON

It is clear from the preceding discussion that the constitutional and political crisis that started in Cameroon was predictable. In spite of the complex nature of the problem, and in the light of post-1990 constitutional developments in Africa, three observations can be made.

First, a return to a two-state federation or even secession, which most of the strikers and demonstrators are now advocating for, will not solve the deep-seated problems that Anglophones face in Cameroon. An effective asymmetrical decentralisation of powers which recognises and protects the spe-

[9] A 'Position statement of the SDF members of the National Assembly of Anglophone extraction,' signed by 15 members of the SDF in Yaoundé on 16 November 2016, provided the following evidence of what it referred to as the flooding of the Common law system by magistrates trained in the Civil law system: i) 58 of the 148 magistrates (39.2%) are Francophones trained in the civil law, ii) 54 of the 89 lawyers (60.7%) in the legal department in the South West Region are Francophones, iii) 20 of the 50 magistrates (40%) working in the Buea bench and legal department are Francophones, iv) 28 of the 30 bailiffs (93.2%) appointed to the two regions are Francophones, 67 of the 128 magistrates (52.3%) working in the North West Region are Francophones, and 64 of the 97 (65.9%) magistrates working in the legal department of the North West Region are Francophones.

[10] The continuous refusal against all logic to recognise the so-called Angophone problem and the firm belief by the ruling clique that they can use force to suppress the demonstrations is driving many moderate Anglophones into the extremist camp of those who think the only way to solve the problem is by secession. Some of these pro-secession groups, such as the Southern Cameroons Youth League, the Southern Cameroons National Council, and the Ambazonia Movement, are gaining supporters and becoming more militant by the day.

cial interests of the Anglophone community seems to be the only way forward. Second, the resort to violent suppression of unarmed demonstrators in order to impose the will of the ruling elites will certainly restore some order but can, at best, only provide an uneasy peace. As the number of unarmed demonstrators killed by the army increases and the government continues to deny that there is a problem, the real risk of anger and frustration forcing people to resort to terrorism will increase. A respected former Francophone minister, who had worked as a governor in the Anglophone regions, has warned of this turning into a 'new Boko Haram.'[11] Finally, the current crisis is an excellent illustration of a defective decentralisation design that has done nothing more than hand over absolute power to a small clique.

Cameroon has reached a critical cross-road. The bi-cultural character of the country is not only a historical fact but a daily reality that cannot be ignored or wished away. As Robert Robertson rightly points out, 'the creation of effective strategies to handle the reality of human diversity is one of humanity's most pressing challenges, as recent wars, ethnic cleansing, genocides and the restless tides of refugees and displaced persons demonstrate'.[12] Solving Cameroon's present predicament needs an urgent solution at the heart of which is a new credible decentralised framework in which all citizens of the country have a stake. There is the need to make the Anglophone community feel Anglophone and Cameroonian. There is no longer any sense in pretending that there is no Anglophone problem. Nor can it be simplified further as an Anglophone versus Francophone problem. It is more of a political problem created by the ruling elites with entrenched interest in preserving a 'divide and rule' policy.

It can be argued that a credible decentralisation design can address these problems. This will, however, need a fundamental revision of the present obsolete and dysfunctional Constitution. In doing this, a leaf can be borrowed from the Canadian experience where the French-speaking Quebec province that had been agitating for secession from the rest of Canada signed the Meech Lake Agreement, which could have paved the way for a major amendment to the Canadian constitution until it failed to be ratified. Section 2(1)(b) of this Constitutional Amendment Act proposed to recognise, inter alia, 'that Quebec constitutes within Canada a distinct society'. This provision also proposed to recognise 'that the existence of French-speaking Canadians…and English speaking Canadians…constitute a fundamental characteristic of Canada.' An even closer example to emulate is the Nigerian 'federal character' principle, which was first constitutionally entrenched in the 1979 constitution and is backed by the Federal Character Commission (FCC). This Federal Executive body established by the Federal Character Establishment Act No 34 of 1996 implements and enforces the federal character principle which ensures fairness and equity in the distribution of public posts and socio-economic infrastructures among the various federating units of the Federal Republic of Nigeria. This body also ensures that appointments to public service institutions fairly reflect the linguistic, ethnic, religious, and geographic diversity of the country.

In the light of the above, it is contended that the only way to resolve the present political crisis in Cameroon in a peaceful and sustainable manner that addresses the perception of Anglophone marginalisation and exclusion from the benefits of the nations' resources and accommodate the secessionist threats is to design an asymmetrical decentralised system which recognises the two distinct cultures in the country. One of the critical features of such a framework is the constitutional entrenchment and protection of a bi-cultural principle which recognises the two inherited cultures based on dynamic equity. A fundamental aspect of the bi-cultural principle must be a requirement that all institutions, laws, policies, practices, and appointments to public posts must comply with the bi-cultural character of the country. A national commission must be established under the Constitution to supervise the implementation and enforcement of this principle. There is thus need for a constitutionally entrenched and legally enforceable framework that recognises and protects the two distinct cultures on an equitable basis. A constitutionally entrenched 'regional character principle' is needed to ensure equity and prevent nepotism and any feelings of exclusion and marginalisation. Ultimately, as in many conflict situations, a carefully designed decentralisation framework offers the best way to deal with the Cameroonian crisis than the militarily imposed peace sought by the ruling political elites.

[11] See, David Abouem à Tchoyi, 'Cameroun – Opinion: Le problème Anglophone pourrait devenir le noveau Boko Haram,' http://www.cameroon-info.net/article/cameroun-opinion-le-probleme-anglophone-pourrait-devenir-le-nouveau-boko-haram-278841.html (accessed in February 2017). In fact, the Boko Haram insurgency in the northern part of Cameroon and Nigeria is a reminder of the dangers of exclusion and marginalisation, whether perceived or actual.

[12] In, *The Three Waves of Globalization: A History of a Developing Global Consciousness* (Fernwood Publishing and Zed Books 2003), 13.

Commonwealth Caribbean

DEVELOPMENTS IN CARIBBEAN CONSTITUTIONAL LAW

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INTRODUCTION

Elections in the Commonwealth Caribbean are often held up as a vital sign of the region's commitment to democracy. In the 50 odd years since Jamaica and Trinidad and Tobago became the first countries in the region to attain independence, successive governments across the region have respected the outcomes of elections, peacefully surrendering power to their successors and, in the process, satisfying Huffington's 'two-turnover test' for democracy.[1] 2016 was no exception, witnessing the orderly transfer of power in Jamaica and St Lucia, following general elections in February and May 2016, respectively. In both cases, the respective Prime Ministers exercised the discretion vested in them to recommend the dissolution of Parliament[2] and called a general election before it was constitutionally due (one year early in the case of Jamaica and 10 months early in the case of St. Lucia), presumably because they reckoned that this was their best chance of securing electoral victory. However, both Prime Ministers badly misjudged the mood of their voters as they were both swept from power by the opposition.[3]

2016 also witnessed one of the most significant constitutional referendums to be held in the region since independence as voters in Grenada were asked to vote on seven separate Constitution (Amendment) Bills, which sought variously to: limit the number of terms of office a Prime Minister can serve; enhance the integrity of the electoral process; guarantee gender equality; and vest ultimate legal sovereignty in a regional appellate court, the Caribbean Court of Justice (CCJ), to replace the Judicial Committee of the Privy Council (JCPC).[4] In an outcome that surprised many in the region, including the Government of Grenada, which had been carefully laying the groundwork for this referendum for many years beforehand, not one of the seven Constitution (Amendment) Bills attracted the two-thirds majority of voters that was needed to amend the Constitution.[5] Indeed, not one of the seven Bills managed to secure even a simple majority of the voters in the referendum. The Government of St Kitts was, however, more successful in implementing reform of its constitution by securing the successful passage of legislation to limit the maximum number of terms of office that a Prime Minister can serve to two (one less than the number of terms that had been proposed and rejected in the Grenada referendum).[6]

Elsewhere in the region, Barbados and Guyana celebrated the 50th anniversary of their attainment of independence from the former colonial power, Britain. Constitutional links to Britain within the region, however, remain strong for the reasons discussed in more detail below.

[1] Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991).

[2] Though, formally, it is the Governor General as the Queen's representative who dissolves Parliament, the convention is that the Governor General must act in accordance with the advice of the Prime Minister. See, for example, section 31(1) Constitution Jamaica.

[3] See http://jamaica-elections.com/general/2016/results/resultsummary.php accessed 15 February 2017 and http://www.electoral.gov.lc/past-results/election-night-results-2016 accessed 15 February 2017.

[4] For further information about the Bills see http://grenadaconstitutionreform.com/#Bills accessed 15 February 2017.

[5] http://nowgrenada.com/2016/11/results-grenada-constitution-referendum/ accessed 15 February 2017.

[6] http://antiguaobserver.com/government-keeping-its-term-limit-promise/ accessed 15 February 2017.

THE CONSTITUTION AND THE COURT

The Commonwealth Caribbean is in the highly unusual position of having not one, but two Constitutional Courts; the JCPC, which is the final appellate court for the majority of countries in the region; and the CCJ, which is the final appellate court for four countries in the region—Barbados, Belize, Dominica and Guyana. This is a major disappointment for the CCJ's supporters. When it was originally conceived, it was intended that the CCJ would serve as the final appellate court for the entire region. This would not only increase access to justice for the region's citizens by making it cheaper and more convenient to bring an appeal before a local court rather than a court located 4000 miles away in London, but would also, it was hoped, enable the judges of the CCJ, being citizens of the communities in which they served, to develop a distinctively Caribbean constitutional jurisprudence.[7]

As noted above, these arguments were not, however, enough to convince the voters in Grenada to support a Constitution Amendment Bill, which would have given effect to the appellate jurisdiction of the CCJ. In the event, just over 40% of those voting supported the amendment.[8] This is a major blow for the CCJ since several other countries in the region require the support of a majority of voters in a referendum in order to amend their Constitution to give effect to its appellate jurisdiction of the CCJ.[9] Since independence, only one Government has managed to secure the support of a majority of voters in a referendum for constitutional reform, and that was the Government of Guyana in 1980 in a referendum that was widely believed to have been rigged.[10] It is notable that the Government of Antigua and Barbuda postponed a planned referendum on whether to ratify the appellate jurisdiction of the CCJ to this year to allow for greater public education on the issue,[11] while the Government of St Lucia recently sought and succeeded in obtaining an order of the Eastern Caribbean Court of Appeal correcting a draftsman's error in the Constitution to enable the amendment of the Constitution to replace the JCPC with the CCJ without the need for a referendum on the issue.[12]

DEVELOPMENTS AND CONTROVERSIES IN 2016

Apart from the issue of abolishing the right of appeal to the CCJ and the criminalisation of homosexuality (discussed further below), the other main constitutional controversy in the region in 2016 concerned the question of whether to abandon constitutional monarchy in favour of a non-executive presidential republicanism.

The new Prime Minister of Jamaica, Andrew Holness of the Jamaica Labour Party, for example, has vowed to introduce legislation in the current session of Parliament to amend the Constitution by replacing the Queen with a non-executive President as the head of state.[13] In this he can reasonably expect to enjoy the support of the opposition People's National Party (PNP) as the Bill passes through Parliament since this is exactly what the PNP had themselves promised to do when taking office back in 2011.[14] However, the support of the opposition, though vital if the Government is to secure the two-thirds majority it needs in both Houses of Parliament, will not be enough in and of itself; removing the Queen will involve an amendment of one of the Constitution's 'specially entrenched' provisions and will, therefore, require, in addition, the approval of a majority of Jamaica's citizens in a referendum.[15]

In Barbados, the ruling Democratic Labour Party announced plans to introduce legislation to replace the Queen to coincide with the 50th anniversary of Barbados's independence in November 2016,16 but that date passed without the necessary legislation being enacted by Parliament.

Though the Constitutional reform Commission of Grenada originally recommended asking voters in the referendum to support an amendment of the Constitution to replace the Queen with a non-executive President, the recommendation was not accepted by the Government. Instead voters were asked to support a Constitution (Amendment) Bill which would have entitled public officials to swear allegiance to the state of Grenada instead of the Crown, but even this relatively modest reform was rejected by a majority of voters in the referendum.[17]

MAJOR CASES

Two of the most significant cases in the region in 2016, touching upon rights and freedoms, involved challenge to laws governing homosexuality: *Orozco v AG Belize*[18] and *Tomlinson v State of Belize* and *Tomlinson v State of Trinidad and Tobago*.[19]

[7] See, for example, D Simmons, 'The Caribbean Court of Justice' (2005) 29 Nova Law Review 169.

[8] (n5).

[9] These include, in addition to Grenada, Antigua and Barbuda, The Bahamas, St Kitts and Nevis, St Vincent and The Grenadines and, arguably, Jamaica. See D O'Brien, *Constitutional Law Systems of the Commonwealth Caribbean* (Hart Publishing 2014) 219.

[10] See RW James and HA Lutchman, *Law and the Political Environment in Guyana,* (Institute of Development Studies University of Guyana, 1984) 61.

[11] http://today.caricom.org/2016/08/31/antigua-and-barbuda-ccj-referendum-set-for-next-year/ accessed 15 February 2017.

[12] See judgment of Eastern Caribbean Supreme Court of Appeal *In the Matter of the Attorney General's Reference* SLUHCVAP2012/0018, 26 May 2013.

[13] R Crilly, 'Jamaica Unveils Plans to Ditch Queen as Head of State' *The Telegraph* (16 April 2016).

[14] See http://www.bbc.co.uk/news/world-latin-america-16449969 accessed 15 February 2017.

[15] Constitution of Jamaica, section 49(3).

[16] T Brooks-Pollock, 'Barbados Wants to Ditch the Queen on the 50th Anniversary of its Independence' *The Independent.* http://www.independent.co.uk/news/world/americas/barbados-wants-to-ditch-the-queen-on-the-50th-anniversary-of-its-independence-a6772571.html accessed 15 February 2017.

[17] (n4).

[18] In the Supreme Court of Belize, Claim No. 668 of 2010. Judgment 10 August 2016 (unreported).

[19] Caribbean Court of Justice CCJ Application No. OA 1 of 2013 and CCJ Application No. OA 2 of 2013. Judgment 10 June 2016 (unreported).

How homosexuality is treated by the law is an issue which has aroused huge controversy across the region ever since it became apparent, following the judgment of the European Court of Human Rights (ECtHR), in *Dudgeon v UK*,[20] that laws which criminalise homosexual acts between consenting adults are repugnant to international human rights norms. Since, with one exception (Trinidad and Tobago), the Bills of Rights to be found in the region's constitutions were modelled on the European Convention on Human Rights (ECHR),[21] *Dudgeon* opened up the possibility that local laws which criminalised homosexuality could equally be liable to constitutional challenge and, worse still, that the recognition of equal constitutional status for homosexuals could lead, eventually, to the legalisation of 'gay marriage.'

Criminal Law; Sexual Orientation

The first case which I will consider is *Orozco v AG Belize*, which involved a challenge to the constitutionality of s.53 of the Belize Criminal Code, which made 'carnal intercourse against the order of nature with any person or animal' a criminal offence liable to ten years imprisonment. Though there was no known statutory or clear judicial definition of the terms 'carnal intercourse' or 'against the order of nature', it was agreed on both sides that it included intercourse between consenting adult males.

The constitutional significance of the case locally, regionally, and internationally, is highlighted by the interested parties that were given leave to join in the proceedings. On behalf of the Claimant, these included: the Commonwealth Lawyers Association, the Human Dignity Trust, the International Commission of Jurists and UNIBAM, a regional NGO campaigning on behalf of LGBT rights. On behalf of the Defendant, these included: the Roman Catholic Church of Belize, the Belize Church of England and the Belize Evangelical Association of Churches. The stage was thus set for a constitutional showdown between various local and international NGOs determined to eradicate discrimination against homosexuals, and religious organisations in Belize equally determined to maintain the criminalisation of homosexuality.

The principal issues in the case that fell to be decided were as follows: whether the claimant had standing to bring these proceedings; whether section 53 violated his right to human dignity pursuant to section 3 of the Constitution, his right to privacy pursuant to section 14(1) and his right to non-discrimination pursuant to s16; and, finally, whether the limitations of these rights provided for by section 9(2) of the Constitution, such as the protection of public health or morality, justified the retention of section 53.

On the issue of standing it was argued on behalf of the defendants that because the Claimant had never been prosecuted for an offence under section 53 he did not possess the necessary standing to bring the claim pursuant to section 20(1) of the Constitution, which requires that those who seek a constitutional remedy must show that one of the provisions of sections 3 to 19 of the Constitution 'has been or is likely to be contravened in relation to him.' Referring to the judgment of the ECtHR in Dudgeon on the self-same issue, the Court was, however, satisfied that on the basis of the evidence presented to the Court that prosecutions under section 53, though rare, were still brought from time to time. The claimant was thus perpetually at risk of being prosecuted and, therefore, had the requisite standing to bring the proceedings.

In searching for the meaning of human dignity under section 3 (c) of the Constitution, which the Court regarded as a concept which was central to the fundamental rights and freedoms set out elsewhere in Chapter II of the Constitution, the Court had regard to the definition offered by the *Canadian Supreme Court in Law v Canada* (Minister of Employment and Immigration,[22] which held that human dignity means that 'an individual or group feels self-respect and self-worth': this is harmed 'when individuals and groups are marginalized, ignored or devalued, but is enhanced 'when laws recognise the full pace of all individuals and groups within society.' The Court also had regard to the jurisprudence of the Constitutional Court of South Africa which, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[23] had held that the common law offence of sodomy was unconstitutional because it was a palpable invasion of the right of gay men to dignity which requires: 'us to acknowledge the value and work of all individuals as members of society.' Finding itself in agreement with these decisions, the Court concluded that section 53 violated the Claimant's right to recognition of his human dignity.

Following the decision of the ECtHR in *Dudgeon*, the Court also had no hesitation in holding that section 53 violated the right to privacy. While section 53 may be gender neutral on its face, it was discriminatory in its effect upon homosexuals and, therefore, violated the Claimant's right to equal protection of the law pursuant to section 6(1), and not to be subject to laws that were discriminatory either in themselves or in their effect pursuant to section 16(1). In the case of the latter, the Court extended the meaning of 'sex', as one of the protected categories under section 16(3), to include sexual orientation. In support of this expansion of the protected categories under section 16(3), the Court invoked the decision of the United Nations Human Rights Council (UNHRC), which had held in *Toonen v Australia* that the word 'sex' in Articles 2 and 26 of the International Covenant of Civil and Political Rights (ICCPR) included 'sexual orientation'.[24] Since Belize had acceded to the ICCPR two years

[20] (App No 7525/76) (1982) 4 EHRR 149.

[21] See C Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press, 2007).

[22] [1999] 1 SCR 497.

[23] [1999] (1) SA 6.

[24] Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/448/1992.

subsequent to *Toonen* it was presumed that it 'tacitly embraced the interpretation rendered by the UNHCR'.[25]

Like the ECHR, the Constitution of Belize permits the limitation by the State of the rights it guarantees if the limitation can be shown to be for the purpose of some legitimate aim, such as public health or public morality. Since the Court was persuaded that the existence of section 53 was damaging the fight against HIV/AIDS, the Defendants were obliged to fall back on the argument that section 53 was justified in the interest of public morality. However, while the Court accepted that the views expressed by the various religious organisations with regard to the immorality of homosexuality were representative of the majority of the Christian community 'and perhaps the population of Belize', the Court determined that this was not enough in itself to justify the limitation. From the perspective of legal principle, the Court held that it could not act upon the prevailing majority views. There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated. Since no evidence had been presented as to the likelihood of such harm, the limitations imposed by section 53 could not be justified.

In concluding that section 53 violated the claimant's rights dignity, equality, privacy and non-discrimination, the Court proceeded to apply the modifications clause to be found in section 134(1), which provided for laws existing at the time of independence, such as section 53, to continue in force subject to 'such modifications as may be necessary to bring them into conformity with this Constitution.' This meant reading down section 53 to exclude consensual private sexual acts between adults by adding the following sentence: 'This section shall not apply to consensual acts between adults in private.'

In a compendium of decisions of Constitutional Courts and international human rights tribunals regarding the incompatibility with human rights norms of laws that criminalise homosexuality, the judgment of the Belize Supreme Court in *Orozco* would appear fairly unremarkable. However, in the context of the Commonwealth Caribbean it is groundbreaking, not only because it is the first judgment of a national court at any level anywhere in the region to recognise that the criminalisation of homosexuality is repugnant to human right norms, but also because the judgment flies in the face of widespread opposition across the entire region to the decriminalisation of homosexuality. The impact of the judgment elsewhere in the region is, however, limited by the fact that several constitutions in the region include savings clauses that immunise pre-independence laws, such as laws that criminalise homosexuality, from constitutional challenge on the grounds that such laws violate the fundamental rights and freedoms guaranteed by the constitution. For example, section 26(8) of the Constitution of Jamaica, which is typical of such clauses, provides that:

> Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter, and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.[26]

The decision in *Orozoco* could not, as a consequence of these savings clauses, have been delivered by the Supreme Courts of Jamaica, Trinidad and Tobago, Barbados or the Bahamas. Notwithstanding the existence of such savings clauses, however, an alternative means of challenging laws that discriminate against homosexuals was essayed by the Claimant in the second case to consider.

Immigration; Sexual Orientation

In *Tomlinson v State of Belize* and *Tomlinson v State of Trinidad and Tobago*, the Claimant mounted a challenge to immigrations laws in Belize and Trinidad and Tobago in proceedings before the CCJ, exercising its original jurisdiction to interpret and apply the Revised Treaty of Chaguaramas (RTC), which is the governing treaty of the Caribbean Community and Common market (CARICOM) and the Caribbean Single Market and Economy.

By Article 46 RTC, 'skilled' Community nationals have the right to seek employment in another Member State. This right is amplified by a 2007 Decision of the Conference of the Heads of Government of CARICOM, which grants CARICOM nationals an automatic right to enter another Member State for up to six months, subject to the rights of Member States to refuse entry to 'undesirable persons.' By Article 7 RTC, discrimination on the grounds of nationality only shall be prohibited.

The claimant, an LGTB activist, in which capacity he regularly travelled throughout the Caribbean region seeking to eliminate stigma and discrimination based on sexual orientation, contended that his rights under Articles 7 and 46 together with his right under the 2007 Conference Decision were being violated by the Immigration Acts of Belize and Trinidad and Tobago, respectively. Section 5 of the Immigration Act of Belize prohibits entry to 'any prostitute or homosexual or any person who may be living or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour. Section 8 of the Immigration Act of Trinidad and Tobago is in almost identical terms, prohibiting entry to 'prostitutes, homosexuals or persons living on the earnings of prostitutes or homosexuals.'

In determining whether or not the existence of such laws breached the States' obligations under the RTC, the CCJ was guided by the following four principles derived from the jurisprudence of international tribunals. First, there is no general rule that the enactment of legislation which conflicts with a State's treaty obligations necessarily constitutes a breach of that obligation: much depends on whether and how the legislation, however interpreted, is applied. Second, in construing domestic legislation, an international is engaged in establishing the meaning of national law 'as factual elements of state

[25] [94].

[26] Similar clauses are to be found in the Constitutions of Trinidad and Tobago, Barbados and the Bahamas.

practice' in order to check whether these factual elements constitute a breach by the State. This meant that other relevant aspects of State practice, such as administrative acts of the State, must also be taken into account. Third, while an international tribunal will give considerable deference to views of domestic courts on the meaning of its own laws it may itself, in appropriate circumstances, select the interpretation that it considers most in conformity with the law. Fourth, the burden of proving that the legislation breaches the State's obligation lies upon the Claimant. This was always going to be a heavy burden for the Claimant to discharge since he had entered both Belize and Trinidad and Tobago on a number of occasion and had never been denied entry because of his homosexuality.

So far as Belize was concerned, the CCJ accepted the Government's contention that a literal interpretation of section 5 of the Immigration Act should be avoided and that section 5 should instead be interpreted as targeting not homosexuals generally, but rather those persons who 'may be living on or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour.' In the CCJ's view, this was the most plausible interpretation, and was supported by evidence of administrative practice in Belize, which was not to refuse entry to persons based solely on their sexual orientation. Such an interpretation was also in accordance with Belize's obligations under s64(1) of the Interpretation Act, which provides that in ascertaining the meaning of any provision of an Act, regard must be had inter alia to 'any provision' of the RTC and 'community instruments issued under the RTC', such as the 2007 Conference Decision.

So far as Trinidad and Tobago was concerned, the position was slightly different insofar it was conceded by the Government's lawyers that section 8 of the Immigration Act classified homosexuals as prohibited persons and, therefore, on its face prohibited the Claimant's entry. However, in the CCJ's view this was not definitive. The domestic courts of Trinidad and Tobago had never pronounced on the meaning of section 8(1) and there was a sacrosanct rule that in common law jurisdictions such as Trinidad and Tobago statutory provisions should, if at all possible, be interpreted as compliant with the State's treaty obligations.[27] In this respect there were a host of human rights materials which would support the domestic courts of Trinidad and Tobago to take a more liberal approach to the interpretation of section 8 than the one conceded by the Government's lawyers. These included the United Nations Human Rights Covenant and the American Declaration of the Rights and Duties of Man, both of which recognise the human dignity of every person, as well as the ICCPR, which by Article 2 prohibits discrimination based on sexual orientation and which by Article 26 guarantees equality before the law.[28] The preamble to the Constitution of Trinidad and Tobago also affirms that the country is founded on the dignity of the human persons, while section 4 of the Constitution guarantees the right of the individual to equality before the law, and the right of the individual to respect for his private and family life. In addition, the CCJ had regard to the actual practice and policy of the Immigration Division of Trinidad and Tobago, which does not bar entry to homosexuals. In all these circumstances the CCJ concluded that the Claimant had not been able to demonstrate that he had been prejudiced in respect of the enjoyment of his right to free movement to the extent required under the RTC.

It is disappointing that the CCJ effectively condoned the existence of laws which, on their face at least, not only permit, but actively mandate discrimination on the basis of homosexuality. However, the CCJ's acknowledgment that such laws were in breach of Trinidad and Tobago's international obligations as well as its domestic constitutional obligations will be welcomed by LGBT campaigners in the region as a further step along their arduous journey towards achieving equal rights for gays and lesbians in the region.

CONCLUSION

If there is one theme which links the various constitutional events that have taken place in the region in 2016 it is the struggle of these former British colonies to reconcile their status as sovereign independent states with their colonial past. This is present in the controversy surrounding the replacement of the Queen as head of state by a non-executive President and in the controversy surrounding the replacement of the JCPC with the CCJ. It is also present in the failure of the Government of Grenada to secure the necessary two-thirds majority in a referendum required to amend its Constitution. The inclusion of such an impossibly high threshold was a colonial legacy included in the independence Constitution with the intention of preserving in perpetuity the system of government inherited from the former colonial power.[29] Even the laws which criminalise homosexuality that were the subject of constitutional challenge in Orozco were based on a Criminal Code introduced in Belize (then British Honduras) in 1888. The survival of such laws elsewhere in the region owes much to the saving clauses included in a number of the region's independence constitutions which immunise existing laws against constitutional challenge even if they violate the fundamental rights and freedoms which these constitutions purport to guarantee. Some fifty odd years after independence, the region's struggle against colonialism continues.

[27] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116.

[28] *Toonen* (n24).

[29] See D O'Brien, 'Formal Amendment Rules and Constitutional Endurance: the Strange Case of the Commonwealth Caribbean' in Richard Albert, Xenophon Contiades an Alkmene Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, forthcoming 2017).

Chile

DEVELOPMENTS IN CHILEAN CONSTITUTIONAL LAW

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INTRODUCTION

This report aims to introduce the Chilean Constitutional Court (*Tribunal Constitucional de Chile* – hereinafter, the "CC") and to identify the landmark cases it decided in 2016. We do not refer to all the CC's decisions. Instead, we focus on cases that were politically salient or were landmark cases from a doctrinal perspective, and which involved the CC's constitutional review power to strike down legislation, or deny the application—on constitutional grounds—of a legal provision in a concrete case. Because we need to be brief, we focus on the main aspects of the majority decisions, and we ignore dissenting opinions and concurrences. The selected cases that we show in this report are examples of a broader trend of judicial empowerment, that has situated the CC as a key actor in the Chilean constitutional system.

The relevant literature typically assumes that the CC's power has increased because of the 2005 constitutional amendment. That amendment gave the CC important new judicial review powers and changed the CC's justices' appointment mechanisms. After the implementation of these modifications, scholars have noticed that the CC's dissenting opinion rate has increased,[1] that there was a shift from a judicial career profile to an academic profile of the justices,[2] and that the CC became less deferential to the legislator.[3] It is thus uncontroversial to say that the CC has notably increased its influence in the past few years.

Although the main purpose of this report is to introduce the CC and to describe these selected cases of 2016, we also use the selected cases as examples that illustrate the fact that the CC is becoming an increasingly consequential actor. Its influence is not only explained by the importance of its decisions in specific cases, but also because of the impact those decisions produce among legislators, importing to Chile the idea of "constitutional dialogue" to reaffirm the CC's authority in interpreting the Constitution, and the power of the legislative branch to reform the Constitution as a reaction to the CC's decisions. Even though we cannot fully demonstrate this claim by only examining a selection of 2016 cases, we show examples that support the CC's consequential character, and we explore one case that illustrates how the CC understands the "constitutional dialogue" idea.

Although this is not the place to comment on the future of the CC, the reader should be aware that the CC is currently functioning in a politically complex context. A group of people has been demanding a constitutional replacement since 2011, and President Bachelet has consequently initiated a constitution-making process that will not come to an end during her administration. Within the numerous topics that are part of this

[1] Lydia B Tiede, 'The Political Determinants of Judicial Dissent. Evidence from the Chilean Constitutional Tribunal' [2015] European Political Science Review 1.

[2] Diego Pardow and Sergio Verdugo, 'El Tribunal Constitucional Chileno Y La Reforma de 2005. Un Enroque Entre Jueces de Carrera Y Académicos' (2015) XXVIII Revista de Derecho (Valdivia) 123.

[3] Royce Carroll and Lydia Tiede, 'Judicial Behavior on the Chilean Constitutional Tribunal' (2011) 8 Journal of Empirical Legal Studies 856.

constitution-making debate, the CC's preventive (ex-ante) judicial power and the CC's justices' appointment mechanisms have been put into question.

THE CONSTITUTION AND THE COURT

The Chilean CC was first created in 1970 through a reform to the 1925 Constitution intended to establish an arbiter who could protect the legislative powers of the President.[4] The CC closed its doors after the events of 1973. The 1980 Constitution—enacted during the Pinochet regime—reestablished the CC with a new institutional design.

In addition to a few ancillary powers, the 1980 Constitution gave the CC an ex-ante—or preventive—judicial review power over legislation. At the same time, the Supreme Court had a weak ex-post judicial review power, which allowed the Court to deny the applicability (*inaplicabilidad*) of specific pieces of legislation that conflicted with the Constitution. The Supreme Court's decisions in this matter lacked formal precedential effect, so judges could still use and apply the unconstitutional legal provision in other cases. The CC was not authorized to review legislative norms after their promulgation. The CC could review legislation when the President, either House of the Congress, the Senate, or a fourth of the members of the House or the Senate submitted a petition to the CC before its promulgation. The CC could also review legislation in an ex-ante procedure when the subject matter of the specific legislative bill was "organic"—the Constitution provides a list of "organic" matters, generally associated with the regulation of key institutions such as the Congress and the Electoral Court. The CC could also review administrative regulations enacted by the President, but the deadline to submit the case to the CC was only for thirty days after the official gazette (*Diario Oficial*) published the regulation.

The 1981-2005 CC played a modest role in the constitutional system, and it was conceived as a deferential court,[5] although there were exceptional rulings with important consequences.[6] Also, the CC decided interbranch conflicts that helped to define the President's regulatory powers.[7] Between 1981 and 2005, the CC ruled, on average, nearly 18 decisions per year.[8] This number changed drastically after the 2005 constitutional reform. Between 2005 and 2014, the CC released an average of 109 decisions per year.

The 2005 reform was the result of a broad political agreement between President Lagos's administration and the opposition. It was intended to put an end to the transition to democracy by eliminating the so-called "authoritarian enclaves," such as the powers of the National Security Council and the existence of non-elected Senators. The 2005 reform was also an opportunity to modify many of the 1980 Constitution's institutional arrangements. Regarding the CC, the 2005 reform changed the appointment mechanisms and the tenure of the justices, who now serve for a non-renewable nine-year term. The President appoints three judges to the CC, each House of the Congress appoints two judges, and the Supreme Court appoints three judges, for a total of ten CC judges.

Following the 2005 reform, the CC kept the powers that the original 1980 Constitution established, and was granted new ones. Among the new powers, the reform transferred the Supreme Court's ex-post judicial review power (*inaplicabilidad*) to the CC,[9] and added an abstract power to eliminate specific legislative provisions when the CC justices achieve a supermajority of eight (out of ten) judicial votes.[10] While legal practitioners broadly use the *inaplicabilidad* mechanism, the ex-post abstract judicial review power is rarely used, arguably because the ex-post abstract review power requires a high judicial supermajority.[11]

In 2016, the CC released 91 decisions and dismissed 103 cases by enacting *inadmisibilidad* resolutions. The CC enacts *inadmisibilidad* resolutions when the claim has a procedural or formal flaw that prevents the CC from processing the case. 58 out of the 91 decisions were inaplicabilidad cases, and there was only one ruling about an ex-post

[4] About the creation of the CC, and particularly about its power to declare the inapplicability of legal provisions, see the explanation by Iván Aróstica, 'Sanciones Y Restricciones Administrativas En Un Entorno de Leyes Compendiosas' (2016) 9 Derecho Público Iberoamericano 13, 20–26. About the 1970 CC, see Enrique Silva C., *El Tribunal Constitucional de Chile (1971-1973)*, vol 38 (second edition (2008), Cuadernos del Tribunal Constitucional 1977); Sergio Verdugo, 'Birth and Decay of the Chilean Constitutional Tribunal (1970–1973). The Irony of a Wrong Electoral Prediction' (2017) 15 International Journal of Constitutional Law.

[5] Javier Couso, 'The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2001' (2003) 10 Democratization 70, 76. Javier Couso, 'Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970-2010' (2011) 89 Texas Law Review 1517, 1533–1534.

[6] See, for example, the CC decisions regarding the implementation of a competitive plebiscite and the establishment of the Electoral Court. See, for instance, Eugenio Valenzuela, *Contribución Del Tribunal Constitucional a La Institucionalización Democrática*, vol 30 (Tribunal Constitucional 2003).

[7] Druscilla L Scribner, 'Distributing Political Power: The Constitutional Tribunal in Post-Authoritarian Chile' in Diana Kapiszewski, Gordon Silverstein, and Robert A Kagan (eds), Consequential Courts. Judicial Roles in Global Perspective (Cambridge University Press 2013).

[8] We took all the statistics quoted here and below from http://www.tribunalconstitucional.cl/estadisticas [accessed in March 2017].

[9] There was a relative scholarly consensus regarding the Supreme Court's performance in using the *inaplicabilidad. Scholars found that the Supreme Court formalism and deferential attitude prevented it from developing a relevant jurisprudence, failing in its function.* See, for instance, Gastón Gómez, 'La Jurisdicción Constitucional: Funcionamiento de La Acción O Recurso de Inaplicabilidad, Crónica de Un Fracaso' (2003) 3 Foro Constitucional Iberoamericano.

[10] An examination of this topic is provided by Marisol Peña, 'Inaplicabilidad por inconstitucionalidad: reciente jurisprudencia del tribunal constitucional chileno' (2008) Estudios en homenaje a Héctor Fix-Zamudio, 727-731.

[11] The *inaplicabilidad claim can be filed by private parties that are involved in another judicial procedure of any other court, or by any judge that is hearing a case where she is supposed to apply a legal provision that could be contrary to the Constitution. Within the inaplicabilidad, the CC's jurisdiction consists of reviewing whether an application of the contested legal provision violates the Constitution or not. If the CC declares that the legal provision should be used, the case goes back to the court where the case initiated, and that court is obliged to solve the case without using the specific legal provision that the CC ruled unconstitutional.*

abstract judicial review claim (STC 2800). That ruling rejected the claim. The rest of the docket consisted of rulings regarding ex-ante review of organic laws (29), two cases of conflicts of jurisdiction, and one claim against a legislative bill.

It is important to take into account that the CC and the Supreme Court have respected each others' powers of interpretation. Nonetheless, we should keep in mind that the CC recently released a statement declaring that the CC is the only court with the power to declare the unconstitutionality of a legal provision, including the legal provisions that were promulgated before the enactment of the Constitution (*leyes preconstitucionales*).[12]

DEVELOPMENTS AND CONTROVERSIES IN 2016

The "Labor Reform" case (STC 3016)

The "Labor Reform" case is arguably the most politically salient case of 2016. The case involved a labor reform promoted by President Bachelet. The reform aimed at strengthening the powers of the unions. President Bachelet presented the legislative bill and, during the legislative debates, a group of legislators from the opposition opposed Bachelet's project on constitutional grounds. This group of legislators asked the CC to declare the unconstitutionality of parts of the legislative project.

The CC, using its ex-ante power of judicial review, partially accepted the legislators' claim, and struck down specific provisions of the bill. The CC stated that labor negotiating between employers and unions are, of course, legally allowed. However, those negotiations should proceed without violating the constitutional right of individual workers to negotiate separately, contained in the freedoms of association (Article 19, Nº 15) and labor (Article 19, Nº 16). The most controversial rule that the CC struck down using this rationale was the prohibition for employees and groups of employees to directly bargain the terms of their contracts with employers, forcing them to engage in the labor negotiation only within the representation of the respective union.

Per the CC, the unions' monopoly over collective labor bargaining violated the employees' labor freedom (Article 19, Nº 16) and freedom of association (Article 15, Nº 15), because—under Bachelet's bill—the mere existence of a union would prevent the employees from bargaining with their corresponding employer directly. The rule also violated the right to create a union (Article 19, Nº 19), which the CC considers as a negative liberty that protects individual employees' autonomy, and the right not to be discriminated (Article 19, Nº 2).

It is worth noticing that, in the decision, the CC included normative justifications for its ex-ante judicial review power. It pointed out that the CC exercised that power in several occasions under different presidential administrations, that the power dates from the 1970 constitutional amendment to the 1925 Constitution, that legislators can reform the Constitution when they achieve the pertinent supermajority, and that there is no such thing as a neutral constitution.

The CC as a key actor of constitutional dialogue (STC 2907)

The CC has not only influenced legislators' actions within the cases that motivate its decisions. Sometimes the consequences of the CC's decisions go beyond the case and serve as a key reason for legislators to initiate a bill or to reinforce an existing statute, creating a dialogue between the CC and the legislative branch. The following case is an example of this dialogue.

A salmon company called "Salmones Multiexport S.A." asked the CC to order the Supreme Court not to apply a rule that imposed a duty to release information regarding the company's use of antibiotics in their salmons—the Supreme Court has not yet released a final decision on this case. Under the specific statute, the company was required to give the information to the Chilean administrative regulator (SERNAPESCA), but the company disagreed with the rule that allowed SERNAPESCA to give the information to other parties or even share the information publicly. "Salmones Multiexport" argued that the information had a commercial value and that the company's industrial property rights protected its secrecy.

The CC declared that the challenged legal provisions should be inapplicable to the case because of the limits that Article 8 of the Constitution impose against rules of transparency and publicity. In its decision, the CC invoked prior decisions that interpreted Article 8 in a similar way, and explicitly invoked the idea of "constitutional dialogue" to claim that its constitutional interpretation can be overruled by constitutional reform—which in Chile requires a legislative supermajority of 3/5 or 2/3 of both chambers of Congress, depending on the chapter of the Constitution to be amended. The CC elaborated the idea of "constitutional dialogue" by quoting a legislative bill that Congress is currently discussing (Boletín 8805-07), which aims to reform the Constitution by recognizing and including an explicit right to access public information. The project intended to reform the Constitution as a reaction to a set of past CC decisions that recognize the limits of Article 8 (STC 634/2007, 1990/2012, 2246/2012, 2153/2013, and 2379/2013). According to the CC: "Even though the Tribunal has a relevant say in matters of constitutionality, the Congress always has the last word, in the sense that the Congress can reform the Constitution to incorporate what it believes right. The only way to overrule the CC's interpretation is by reforming the Constitution." (STC 2907, consideration XXVIII).

[12] This is relevant, because in the past some scholars argued that any court could recognize that a legal rule enacted before the Constitution was derogated by the Constitution. However, because the derogation of these kinds of legal rules requires an examination of their compatibility with the Constitution, the CC is the only court that can execute this power. See the CC's statement here: http://www.tribunalconstitucional.cl/wp/wp-content/uploads/Conclusiones-II-Jornada-de-Reflexi%C3%B3n-TC.pdf [accessed in April 2017]. Notice that the CC's statement was not a formal judicial decision but a special document enacted by the CC and authored by the unanimity of the CC.

The idea of constitutional dialogue has been discussed before among some Chilean academics,[13] and other cases in the past also connect to this idea. However, this is the first time that a court explicitly invokes it. This idea is consistent with the Congress' legislative practices (in this case, the constitutional reform that the Congress is currently discussing), and reaffirms the interpretative authority of the CC over the Constitution and the consequential character of the CC itself.

MAJOR CASES

The "Emilia Law" case (STC 2983)

The "Emilia Law" case was an inaplicabilidad case. The questioned legal provision is part of the "Emilia Law," a statute that severely punishes with jail all impaired drivers (under the influence of alcohol) who crash and, as a result, kill or injure a person. The name of the statute is due to Emilia Silva, who died because of a car crash by an impaired driver. Her death was publicly used to push for bipartisan approval of the Emilia Law in 2014. Under the Emilia Law, prosecutors and criminal judges have investigated and punished many infractions and crimes with severity, sometimes under high media attention. This severity triggered a number of due process and proportionality allegations against the Emilia Law. In the CC's decision (STC 2983), the CC signaled its doctrine in a landmark ruling.

The criminal court (the *Tribunal Oral en lo Penal de San Antonio*) found that Mr. Rojas, the defendant in the criminal case, was guilty of crashing and killing the victim after disregarding a "stop signal." Moreover, Mr. Rojas did not help the victim, avoided informing the authorities, and refused to take a medical exam to determine if he was under the influence of alcohol.

During the process before the Valparaíso's Court of Appeals (*Corte de Apelaciones de Valparaíso*), Mr. Rojas's defender filed a petition to the CC and challenged a set of rules that, taken together, would result in a severe punishment for Mr. Rojas.[14] One of these rules (Article 196 ter) stated that an impaired driver who crashes and kills the victim should spend at least a year in prison. According to this rule, all pertinent benefits or alternative punishments—e.g., a judicial authorization to leave prison during daytime—should be postponed and cannot be applied before the driver has spent a year in jail.

The CC decided to partially grant Mr. Rojas's petition by rejecting the challenge against most of the rules except that of Article 196 ter. The CC declared that that provision was disproportionate and unequal. To postpone the application of an alternative punishment to Mr. Rojas, and to make him stay in prison for a year, deviates from the goal of the state's power to punish, which is to help the individual to be reincorporated to society.

The decision was politically incorrect, and it attracted the attention of the media, public opinion and politicians, all of which expected the CC to reaffirm that impaired drivers should be treated severely. However, it is important to point out that the case's issue was not to evaluate Mr. Rojas' behavior or to judge the severity of the punishment. Instead, the legal issue was whether a person should be prevented from pursuing an alternative punishment for at least a year, even if that person fulfills the general requirements. Thus, the CC did not criticize the new legislative penalization in abstract terms.

Consequently, the Valparaíso's Court of Appeals followed the CC's ruling and allowed Mr. Rojas not to fulfill its punishment in prison. From a legal perspective, the case contributed to a better understanding of the application of constitutional standards in criminal law cases.

The "Cascadas" case (STC 2922)

According to the Chilean financial regulator (the SVS), the "Cascadas case" dealt with a high-profile financial scandal that took place in Chile in 2014. The case is still pending a decision from the corresponding civil judge (Santiago's 16th Civil Court). The SVS declared that a group of people used a form of pyramid scheme to illicitly trade companies' shares to acquire the control of a group of corporations. The SVS penalized the infractions using a rule that allows the agency to establish a fine that could get to 30% of the value of the irregular operation. One of the businessmen involved filed a legal action against the agency and, within that procedure, brought the case to the CC.

The CC declared the inapplicability of the rule allowing the agency to establish such a fine. The CC did not question legal violations that supposedly took place (that is part of the civil judge's jurisdiction, and the CC cannot address that issue), but evaluated the constitutionality of the possible application of the rule that establishes the fine. The CC argued that said rule violated the principle of proportionality, as it did not establish sufficient standards to calculate the amount of the fine in an objective way, in practice allowing the agency to establish an unreasonable, unjustifiable, and unfair punishment. The rule infringed equality (Article 19, Nº 2) and the right to a fair and rational administrative procedure (Article 19, Nº 3). If the civil judge decides that there were legal violations (that judge has not yet released a final decision), that judge would not be able to use the rule that was declared inapplicable to sanction the businessmen involved.

This case, along with the next one, confirms a consistent jurisprudence that aims to limit the power of administrative agencies to penalize private actors.

The "Colhue 2" case (STC 2946)

A Chilean environmental agency (the so-called *Comisión de Evaluación del Medio Ambiente de la Región del Libertador General Bernardo O'Higgins*) sanctioned Colhue S.A., a company that was operating an organic waste management center, for five infractions against environmental regulations. Colhue filed an administrative petition to get the fine reversed and later submitted

[13] One of us has promoted it in: Sergio Verdugo, 'La Discusión Democrática Sobre La Revisión Judicial de Las Leyes. Diseño Institucional Y Modelos Constitucionales' (2013) 40 Revista Chilena de Derecho 181.

[14] During the Valparaíso Court of Appeals process, the defender asked the Court to void the criminal court's decision (*recurso de nulidad*). The Valparaíso Court decided the case *in January 2017.*

the case to the corresponding court. Both the administrative and judicial actions were rejected. Colhue appealed to the Rancagua's Court of Appeals (*Corte de Apelaciones de Rancagua*) and, during the appeal process, asked the CC to declare that the rules governing the administrative procedure that led to the fine be inapplicable because they violated the Constitution. If the rules regulating the procedure were declared unconstitutional by the CC, then the Rancagua Court of Appeals would not be able to use those rules to decide the case against Colhue.

The CC declared that the challenged legal provision did not sufficiently describe the behavior to be penalized by the administrative agency. This lack of precision allowed the agency to qualify as an infraction a behavior Colhue could not predict that was illegal. Moreover, the challenged rule authorized the agency to establish a fine without providing a criterion for calculating the amount of money to be paid—the rule only contained a maximum. Thus, the agency could use its power to establish fines in an unpredictable and disproportionate way. The challenged rule violated the due process elements of *tipicidad* and proportionality. *Tipicidad* is a constitutional requirement (Article 19, Nº 3) that requires legislative statutes to describe the illegal behavior and the penalty with precision, so that individuals can effectively avoid committing an infraction. *Tipicidad* is traditionally considered to be a requirement for criminal statutes, but the CC has extended this requirement for administrative regulations that aim to penalize individuals with fines. The Constitution's purpose is to protect individuals against the state's power to punish (*potestas puniendi* or *ius puniendi*) and, in this regard, the distinction between criminal law and administrative law is not relevant.

Although the Rancagua Court of Appeals has not yet released a final decision on this case, its jurisdiction would be limited by the CC's ruling because it would not be able to use the legal provision declared inapplicable to justify its final decision. The CC's inapplicability decision is important because it confirms that administrative regulations should follow the requirements that the Constitution establishes for criminal law, and provides some specific criteria regarding the tipicidad and proportionality principles.

CONCLUSION

In this report, we have shown five selected cases that illustrate how the CC is becoming an increasingly consequential actor in the Chilean constitutional system. The first case shows how the CC can affect an important legislative reform in a politically complex scenario while the second is an example of "constitutional dialogue" in its Chilean version, and how that idea (which includes legislative practices) reaffirms the CC's interpretative authority. The case regarding constitutional dialogue is probably the most interesting case for scholars working on comparative constitutional law.

In the other three cases, the CC challenges legal provisions and orders not to apply them to the specific case. In the three cases, the state tries to punish an individual (or a firm) using its *ius puniendi* (the power to punish) in a way that violates the Constitution. According to the CC's doctrine, the constitutional limits of the ius puniendi do not only operate against the state in criminal cases but also against administrative agencies imposing fines.

Cyprus

DEVELOPMENTS IN CYPRIOT CONSTITUTIONAL LAW

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INTRODUCTION

Cypriot constitutional law[1] has been simultaneously reflective of and respondive to the structural uneasiness[2] in our constitutional arrangements after the collapse[3] of the political compromise between the Greek and Turkish Cypriot communities.[4] Since 1964, the Supreme Court has provided a leeway for the continuing existence of a functional State on the basis of the law of necessity.5 Constitutional adjudication in Cyprus, therefore, must be considered in terms unique to the anomalous situation that emerged after 1964. The Supreme Court has offered scholars some paramount examples of the application of the law of necessity over the years; for example, as a device to enable the creation of constitutional organs.6 The retort to law of necessity remains the underlying theme of much constitutional adjudication concerning both the functioning of State organs and the content of constitutional norms.

The year 2016 was no exception. The Supreme Court has revisited such fundamental structural issues as the form of the establishment of the administrative court. At the same time, the Court examined issues relating to the content of constitutional norms on the right to privacy and separation of powers. The Court for a time examined the application of constitutional provisions enabling the dismissal of an independent officer of the Republic, the Deputy Attorney-General, who has the same status and protection as judges of the Supreme Court itself.

This report argues that issues of constitutional law remain directly connected to the application of the law of necessity when it comes to State organs, procedure, and content of. The key to understanding this idiosyncrasy of Cypriot constitutional law is to realize the deep and continuous presence of the Rule of Law and the judicial commitment in safeguarding constitutional law as it is formulated under the law of necessity. That is a difficult balancing exercise given the broadness and the potential force of the law of necessity that has nonetheless been placed within a constitutional State rather than outside.[7]

THE CONSTITUTION AND THE COURT

It is useful to first undertake a brief exegesis of the development of the legal order of the Republic of Cyprus. The classic distinction between "Constitution" and "constitutional

[1] A. Loizou, *The Constitution of the Republic of Cyprus* (Nicosia, Cyprus, 2001); C. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas, 2015); C. Tornaritis, *Cyprus and Its Constitutional and Other Problems* (Nicosia, 2nd ed., 1980); S. Papasavvas, *La justice constitutionnelle à Chypre* (Economica, 1998); C. Paraskeva, *Cypriot Constitutional Law: Fundamental Rights and Freedoms* (Nomiki Vivliothiki, 2015).

[2] Described by De Smith as being conceived "by a constitutionalist and a mathematician in nightmarish dialogue": S.A. De Smith, *The New Commonwealth and Its Constitutions* (London, Stevens, 1964), p. 284.

[3] P. Polyviou, *Cyprus on the Edge. A Study in Constitutional Survival* (Nicosia, 2013), pp. 5-26.

[4] On the historical aspect see S. Kyriakides, *Cyprus: Constitutionalism and Crisis Government* (University of Pennsylvania Press, 1969); P. Polyviou, *Cyprus: The Tragedy and the Challenge* (Washington, D.C.: American Hellenic Institute, 1975).

[5] See *The A-G of the Republic v. Mustafa Ibrahim* [1964] CLR 195. See P. Polyviou, *Ibrahim: The Doctrine of Necessity and the Republic of Cyprus* (Nicosia, 2015).

[6] Kombos, *supra* n.1, pp. 173-238.

[7] See Kombos, *supra* n.1, pp. 216-228; Polyviou, *supra* n. 6.

law" is especially relevant to Cyprus because the 1960 Constitution must be read in the light of the law of necessity for a full picture. The law of necessity offers the pillar that has sustained the Constitution since 1964.

The Constitution of the Republic of Cyprus was at one time the source of problems that paralyzed the State.[8] The process of decolonization and the transfer of power to a newly formed independent State were wholly decided by Greece and Turkey in the absence of the people and in the physical absence of the legally responsible entity, which was at that moment the colonial power (United Kingdom). The right of self-determination and more importantly the right to exercise primary constitutive power found no expression in the case of Cyprus. This pathology removed from the Constitution one of its fundamental functional attributes: its symbolic status.

The Cypriot Constitution was designed to serve as a compromise between the two communities. It created an independent State, where the rights of the minority were entrenched in a manner and scale that would ensure their effective participation in governance at all levels and in every instance. To attain this objective, the three interested States (Greece, Turkey, and Great Britain) were given extraordinary powers of intervention in case of an arrant constitutional anomaly.

Moreover, the formation of the independent State was designed with a dangerous underestimation about the stability of its nature and functionality (or lack of it). The result of the Constitution-making process was a lengthy, detailed, rigid, and permanent Constitution that has two principles at its epicenter: protected bi-communalism and an encumbered system of multiple checks and balances to ensure that the status quo remains intact. The Constitution "attempted to ensure that both communities would participate fully in the political decision-making process of the island,"[9] yet "a communal distrust permeates the constitutional arrangements"[10] that take the form of a rigid bi-communalism that underpins the vast majority of the provisions of the Constitution ranging from the actual division of competences to the structure of the State.

In terms of the judiciary, the Supreme Constitutional Court was to be composed of three members, a Turkish Cypriot, a Greek Cypriot, and a presiding non-Cypriot (article 133(1)) that would cast the deciding vote.[11] The same institutional "logic" also applied to the High Court entrusted with the appellate jurisdiction over civil and criminal matters (articles 155 and 156), composed of two Greek Cypriots, a Turkish Cypriot, and a presiding non-Cypriot judge with two votes in cases of deadlock (article 153(1)).

From the very beginning, the Republic of Cyprus faced the danger of constitutional paralysis. The apogee of the difficulties was reached when the State budget was in effect vetoed by the required separate Turkish-Cypriot majority in the House of Representatives for reasons other than the intended protection from discriminatory taxation of the minority. A perfect constitutional storm had formed: the Constitution became a tool to paralyze the State; the amendment process was severely restricted, since there could be no recourse to the people with the majority rule excluded; and there was always the permanency of the system that the three foreign guarantor States were tasked to ensure. Specifically, constitutional amendment was possible through a separate community 2/3 majority in the House of Representatives pursuant to article 182 of the Constitution, but in Annex III there is a list of 48 articles that cannot be amended (out of 199 in total; only article 23 relates to a fundamental human right, that of property). These provisions, of a crucial bulk, are essentially eternal clauses; they include every article embedded in bi-communalism. The deadlock led President Makarios to *propose* 13 amendments to the Constitution that were rejected by Turkey.[12]

After a period of tension and armed confrontation between the two communities, the Turkish-Cypriots withdrew from the government, thus rendering the executive, legislative, and judicial branch incapable of taking any decision whatsoever. The emerging cul-de-sac finally made any constitutional amendment impossible and excluded resorting to the people's pouvoir constituent since the majority rule could not apply. An existential dilemma was created, as a corollary: to follow the letter of the Constitution or to resort to the only constitutional alternative that would enable the functioning of the State until a political compromise was reached. This development, dangerous for the survival of the Republic, led to the introduction of legislation (*Law 33/64*) adopted by the House of Representatives in the absence of Turkish-Cypriots members.

The decision in *Mustafa Ibrahim* then had as its backdrop the constitutionality of the *Administration of Justice (Miscellaneous Provisions) Law 1964 (Law 33/64)*.[13] The legislation merged two constitutionally provided for appellate courts (Supreme Constitutional Court and High Court) into a new five-member Court, the Supreme Court.[14] Their merging of competences was accompanied by an alteration of the composition formula. The new Supreme Court was to consist of only Cypriot judges, given the withdrawal of the foreign judges and a vast majority of Turkish-Cypriot judges.

[8] Tornaritis, *supra* n.1, pp. 54-66.

[9] M. Stavsky, "The Doctrine of State Necessity in Pakistan" (1983) 16 *Cornell Int'l L.J.* 341, p. 356.

[10] S.A. De Smith, *The New Commonwealth and Its Constitutions* (London, Stevens, 1964), p. 284.

[11] C. Kombos, "The Judiciary in Federal Systems," in A. Krispi and A. Constantinides, *The Cypriot Problem in Evolution* (Athens: Sakkoulas 2010), pp. 81-113.

[12] Emphasis added. Note that the amendment proposals were just invitation to negotiation and were not a unilateral act of imposed amendment. See Tornaritis, *supra* n. 1, pp. 67-73.

[13] *The A-G of the Republic v. Mustafa Ibrahim* [1964] CLR 195.

[14] See articles 133-165 Constitution.

The three Greek Cypriot members of the Supreme Constitutional Court invoked in the Ibrahim judgment the doctrine of necessity to justify the establishment of the new court. In their separate concurring opinions, the judges highlighted the extant emergency in Cyprus and the threat to the survival of the State.[15] In an attempt to summarize the three opinions, the broader findings converged on the following points: the Constitution did not expect a constitutional crisis that could endangered the existence of the State, thus lacking any provisions to effectively deal with the situation; a declaration of a state of emergency provided for in article 183 of the Constitution would not have sufficed to address the problematic situation, yet the deployment of the law of necessity was a product of the imposed and rigid Constitution; the law of necessity was thereby integral to the Constitution, implied in article 179 that designates the Constitution as the supreme source of law; the law of necessity was of an intra-constitutional nature; and the Court was, therefore, obliged to give a ruling and could not deny exercise of its jurisdiction.[16]

The decision in *Ibrahim* had established that the requirements for the law of necessity include: the existence of an urgent and unavoidable need or exceptional threat to the existence of the State that can be objectively established; no other alternative; the measures adopted are proportionate to the need; the deployed measures are temporary and apply for as long as the emergency exists; the legality of such measures is subject to judicial scrutiny; and the burden of proof is placed on the side invoking the doctrine of necessity. Therefore, the doctrine is to be used as a measure of last constitutional resort and as such only in extreme circumstances. The doctrine demands a narrow judicial approach, but intense scrutiny.

It is within this context that any analysis of constitutional developments in Cyprus must take place, considering that the law of necessity is present every time that the Supreme Court exercises its jurisdiction and can be further inherent in the nature of a case.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The Supreme Court for the first time examined the application of the constitutional provisions enabling the dismissal of an independent officer of the Republic, namely the Deputy Attorney-General.[17] Such an official enjoys the status and constitutional protection identical to that afforded to judges of the Supreme Court.[18] The provisions relevant to this case required that a "judge of the High Court may be dismissed on the ground of misconduct" by a special composition of "a Council consisting of the President of the Supreme Constitutional Court as Chairman and the Greek and the Turkish judge of the Supreme Constitutional Court as members." It became apparent that the law of necessity applied to reformulate the relevant Council, which had been impossible to function since 1964. The application for the dismissal from office was filed by the Attorney-General against the Deputy after his statements in a press conference. The Deputy, in his remarks, dismissed the initiation of a criminal investigation into alleged corruption.[19] Moreover, he made accusations to the effect that it was the Attorney-General who acted in a corrupt manner, without producing evidence. This saga provided the background for a constitutional crisis that was unprecedented in Cyprus.

It was the first time that an application for the dismissal of a public official enjoying constitutional protection identical to that afforded to judges of the High Court was brought before the Court by the Attorney-General,[20] although there was a procedural regulation for the dismissal of lower court judges, which had been applied in at least one case in the past.[21] The Court issued a procedural regulation just after the application for dismissal against the Deputy Attorney-General, which was also to regulate all pending applications for the dismissal of public officials.[22] The Court held that retroactivity in this instance was for the benefit of the Deputy Attorney-General since his legal rights were not affected, and the Court could have regulated the matter in an ad hoc manner even in the absence of the regulation.[23] It also held that the lack of compliance of the filed application with the now established procedure in terms of relevant documentation could not be fatal to the process. The discrepancies were not deemed to be substantive procedural defects.[24]

Second, the Court had to provide a definition of the key term "misconduct" and decide on the burden of proof and the required legal prerequisites for such a procedure. Namely, whether a procedure for dismissal followed criminal or administrative law burden of proof. The Court held that misconduct includes actions outside the exercise of the public office and it means "behavior that is

[15] *The A-G of the Republic v. Mustafa Ibrahim* [1964] CLR 195, pp. 201-2.

[16] For full analysis see Kombos, *supra* n.1, pp. 151-72.

[17] *Application by Attorney-General for the Dismissal of Deputy Attorney-General,* Application 1/2015, 24th September 2015; *Application by Andreas Tryfwnos*, Application 1/2016, 30th January 2017.

[18] Articles 112 & 153, Constitution. Note that these provisions refer to the High Court that was substituted, as was the Supreme Constitutional Court, by the new Supreme Court through *The Administration of Justice (Miscellaneous Provisions) Law 1964 (Law 33/64)*.

[19] The conduct suspect of corruption was found by an independent criminal investigator.

[20] A previous application was filed by an individual against the then Attorney-General and was dismissed by the Supreme Court on procedural grounds, namely erroneous filing of the application and lack of a specific procedural regulation: *Papasavvas v. Attorney-General* (2003) 3 CLR 115.

[21] There was a previous instance where a judge of the Industrial Disputes Tribunal had been dismissed (Case *Kamenou,* 19/9/2006) where the Court applied Procedural Regulation no.3 of 2003 that related to the dismissal proceedings against judges of the lower courts.

[22] *Procedural Regulation regarding the jurisdiction of the* Supreme Council of *20/5/2015*, published in the Official Gazette on 22/5/2015.

[23] *Application by Attorney-General for the Dismissal of Deputy Attorney-General,* Application 1/2015, 27th May 2015 (intermediate decision).

[24] *Ibid.*

so bad, so reprehensible that is, as to make the person who is accountable for this, unable to continue to perform the duties of his office or creates reasonable doubts to others, objectively judging, as to the suitability of the person to exercise the duties of the office with honesty, fairness and for the public interest."[25] The burden of proof was found to be on the person filing the application and the criterion for establishing misconduct was objective. The procedure is disciplinary in nature and not within the realm of criminal law, therefore the element of mens rea does not apply.[26]

Third, the Court could only approve or dismiss the application. The only available sanction in the event of approval was an immediate dismissal from office, which limits the discretion available to the Court. It held that any finding of misconduct must be the result of intense judicial scrutiny and subject to the principle of proportionality. The Court concluded the Deputy Attorney-General acted in a totally inappropriate manner that amounted to misconduct under article 153 of the Constitution. The Court ordered an immediate dismissal of the Deputy office, and subsequently and in separate criminal proceedings, a criminal court found him guilty of corruption and imposed a custodial sentence that is now a matter of appeal before the Supreme Court.[27]

As an aside, there was also a Supreme Court decision in 2016 in a case of a private individual who filed an application for the dismissal of the Attorney-General from office on the basis of the newly introduced procedural regulation of 2015.[28] The Court held that the applicant did not have locus standi as the Constitution does not provide for private applications and any interpretation to that effect would amount to an introduction of actio popularis. The Court stated in obiter dictum that the President of the Republic could have standing to file such an application so that the Attorney-General is legally accountable.

MAJOR CASES

The Supreme Court exercised administrative jurisdiction on the basis of the law of necessity and through *Law 33/64* that was preserved under article 146 of the Constitution for the Supreme Constitutional Court, until the establishment of the Administrative Court.[29] [B]ut the latter Court caused concerns: whether the new specialized court is constitutional;[30] whether the law of necessity ceased to exist; and whether the Supreme and Administrative Courts are compatible. The Administrative Court held that the law of necessity continues to apply. But the heavy workload of the Supreme Court, delays in the administration of justice, and binding EU law obligations necessitated the establishment of the new Court. Needless to say, this reasoning is suspect because there were arguably other solutions available to a backlog. The decision also impacts the rationale of the law of necessity.

Separation of Powers

The Supreme Court also considered two of separation of powers cases in 2016 concerning a challenge to primary and secondary legislation regulating Sunday trading hours.[31] In the first case,[32] the House of Representatives passed into law a private member's Bill[33] that amended existing legislation on the matter of Sunday trading hours (*Laws 155(I)/2006, 68(I)/2007, 6(I)/2011, and 36(I)/2015*). The effect of the Law was that shops remained closed on Sundays unless they could satisfy requirements on the basis of location, the size of a shop, and type of commercial activity. The President of the Republic referred the Law in question to the Supreme Court for a review pursuant to article 140 of the Constitution. The Court considered the case in relation to the principle of separation of powers and articles 25 and 28 of the Constitution that guarantee the right to practice any profession or to carry on any occupation, trade, and business and the principle of equality, respectively. The Supreme Court held that although the legislature has the exclusive authority to legislate on all matters under article 61 of the Constitution, legislation must be compatible with the principle of separation of powers that is diffused and implied in the Constitution. The Court focused on the nature of the matter regulated by the relevant Law and found that its content has its center of gravity in the executive branch rather than in the legislative. The reason was that the nature of the regulated activity was akin to administrative action applicable in individualized cases and as such pertained exclusively to the executive branch. The Court, therefore, found the Law unconstitutional.

Immediately afterward, the House of Representatives rejected regulations, in the form of secondary legislation issued by the executive, which enabled the opening of shops on Sundays. The President made use of article 139 of the Constitution relating to the recourse in any matter relating to a conflict or contest of power or competence between the House of Representatives and the President. The regulations do not require Presidential signature, therefore the use of the primary procedure that is a reference for examination of constitutionality under article 140 of the Constitution was not a constitutionally available option. The argument was that since the Supreme Court had ruled on the matter in Reference 1/2015 and found that the legislature acted in breach of the principle of separation of powers, then as a corollary, the legislature was preempted from rejecting

[25] *Application by Attorney-General for the Dismissal of Deputy Attorney-General,* Application 1/2015, 24th September 2015 (decision on the merits).
[26] *Ibid.*
[27] Case Number 9208/15, *Erotokritou et al.* 8th February 2017.
[28] *Application by Andreas Tryfwnos*, Application 1/2016, 30th January 2017.
[29] 8th Amendment of the Constitution (Law 130(I)/2015).
[30] *Charalambides et al. v. Republic* (Case 1814/12), 8th October 2016 (Administrative Court).
[31] *President of the Republic v. House of Representatives,* Case 1695/2015, 28th March 2016.
[32] *President of the Republic v. House of Representatives,* Reference 01/2015, 3rd December 2015.
[33] *Law on the Regulation of the Shops (amending) (no.4) of 2015.*

secondary legislation in which the will of the executive on the same matter. Put differently, the legislature was preempted from interfering with the exercise of the executive power on the matter of shopping hours on Sundays. Nonetheless, the Court rejected the application by the President because it was submitted after the deadline of the thirty days that the Constitution requires in article 139 (4). The outcome is that the issue of Sunday trading remains to date without regulation given the fact that the legislature has no competence and the executive can only intervene through secondary legislation that the legislature rejects.

Human Rights

The Supreme Court further examined a criminal appeal involving the right to privacy. The right to privacy is protected in Cyprus under article 15 of the Constitution and article 8 of the ECHR. The case concerned an alleged entrapment of the accused by the prosecuting authority in criminal proceedings for exercising the profession of real estate agent without a license, in violation of *Law 71(I)/2010*.[34] A representative of the prosecuting authority was standing outside the offices of the accused and looking at window advertisements of properties when an employee approached him and asked if he could offer him assistance. The representative indicated that he was interested in purchasing an apartment, gave a false name, did not disclose his identity, and only subsequently revealed that he was there to investigate complaints against the accused for violation of the relevant legislation. The Court held that such actions did not amount to entrapment given the fact that the criminal offense was already adequately proved by the maintenance of a professional establishment that advertised the offering of services of real estate agency. The right to privacy includes professional premises but is limited by the public interest to prevent crime provided that any such action is proportionate. What is interesting in this case is that the Court reached the preceding conclusions after discussing in detail numerous decisions from other jurisdictions,[35] thus confirming the long tradition of openness and "catholicity"36 of the Cypriot legal system especially as regards the definition of the content of fundamental rights[37]

CONCLUSION

Before 2016, the Supreme Court examined numerous issues directly related to the economic crisis, including pay cuts and the bail-in for all unsecured deposits in the two main Cypriot commercial banks. In 2016, constitutional adjudication in Cyprus seems to have returned to normality with the Court having to examine constitutional matters that primarily concerned general application of the Constitution in economically "neutral" issues. This return to normality is, however, subject to the qualification that Cypriot constitutional law remains either directly or indirectly the product of a constitutionally abnormal context due to the doctrine of necessity. But adherence to the rule of law and the strict interpretation of the conditions governing the application of the law of necessity remain important. The Supreme Court will soon deliver judgment in 12 references concerning the principle of separation of powers in the year 2017. The framework for constitutional adjudication has been defined, and it remains to be seen how the Courts will react.

[34] *Cyprus Real Estate Agents Association v. Berriman Properties et al.* Criminal Appeal 127/14, 8th July 2016.

[35] Eight decisions of the ECtHR and English Courts as well as two references to academic writings: *Teixeira de Castro v. Portugal* (1998) 4 BHRC 533; *Saunders v. United Kingdom* [1997] 23 EHRR 313; *Niemietz v. Germany*, Appl. No. 13710/88, 16.12.1992; *R. v. Loosely* (2001) 4 All E.R. 897; *Edwards and others v. The UK*, Application No. 39647/98 και 40461/98, 27.10.2004; *Gammon (Hong Kong) Ltd v. A.G.* (1984) 1 All E.R. 347; ***T**he Statue of Liberty* (1968) 2 All E.R. 195.

[36] Defined as "the capacity to draw from different sources" by Lord Justice Laws, "The Common Law and Europe," *Hamlyn Lecture* 27/11/2013, available at http://www.nottingham.ac.uk/hrlc/documents/specialevents/laws-lj-speech-hamlyn-lecture-2013.pdf, p. 2.

[37] C. Kombos, *The Impact of EU Law on Cypriot Public Law* (Sakkoulas, 2015), pp. 1-6, 33-46.

Czech Republic

DEVELOPMENTS IN CZECH CONSTITUTIONAL LAW

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INTRODUCTION

Last year was constitutionally rich in the Czech Republic. The process of gradual replacement of Justices of the Constitutional Court (hereinafter "the Court"), which lasted for several years, was completed and thus all current Justices have been appointed by President Zeman. Both constitutional scholars and the general public impatiently awaited several of the Court's decisions. We analyze four of them below. But it was not just the case-law of the Court that mattered. There were controversies of constitutional relevance which became points of wide public debate. We chose one of them for further analysis in part III of this report: a draft bill to constitutionally acknowledge the people's right to bear arms.

THE CONSTITUTION AND THE COURT

Where in the world have they established the first constitutional court as a sole specialized judicial institution to review laws vis-à-vis their conformity with the constitution? There is a dispute on the correct answer to this question between Austria and countries of the former Czechoslovakia. Both Austrians and Czechs like to argue that their constitutional court was the first one. Both are right in a way. Czechs were first on paper. It was the Czechoslovak Constitution of 29 February 1920 which, as the first constitution in the world, established a constitutional court in the meaning specified above. But the Austrian Constitutional Court founded by the Austrian Constitution of 1 October 1920 started working earlier than the Czechoslovak one.[1]

Sadly, the work of the Czechoslovak Constitutional Court had been interrupted during the Nazi occupation of our country and subsequent communist regime. We had to wait until 1992, when the Federal Constitutional Court started working again. But it did not last long because, at the end of that year, it was clear that Czechs and Slovaks would "get divorced" peacefully. The Czech Constitution, which came into force on 1 January 1993, is regarded as a follow-up to the 1920 Czechoslovak Constitution in terms of values and constitutional traditions. Therefore, it came as no surprise that it included a strong constitutional court.

The Court has the power to review the constitutionality of statutes. It also reviews sub-statutory regulations. The Court's third important review-of-constitutionality competence concerns treaties before their ratification. The Court had an opportunity to exercise this competence twice in the past. Both cases concerned the Lisbon Treaty.

Does the Court have the power to annul constitutional statutes? Constitutional scholars are not in total agreement on this

[1] See English excerpts from Tomáš Langášek, *Ústavní soud Československé republiky a jeho osudy v letech 1920-1948 (Constitutional Court of the Czechoslovak Republic and its fortunes in years 1920-1948)* (Vydavatelství a nakladatelství Aleš Čeněk, 2011) available at Usoud.cz, "Constitutional court of the Czechoslovak republic and its fortunes in years 1920-1948" (*Usoud.cz*, 2015) http://www.usoud.cz/en/constitutional-court-of-the-czechoslovak-republic-and-its-fortunes-in-years-1920-1948/ accessed 8 January 2017.

topic. It is the classic dilemma of what to do in case of unconstitutional constitutional amendments. The Court had to address this issue only once so far. In the *Melčák* case (judgment no. Pl. ÚS 27/09 of 10. 9. 2009), it derogated a statute which was, in its form, a constitutional one. It was an *ad hoc* constitutional statute on shortening the fifth electoral period of the House of Deputies. The Parliament did not intend to follow the constitutionally foreseen mechanism on the dissolution of the House. And it enacted a constitutional statute by which it shortened its actual term of office. But one of the deputies disagreed and filed a constitutional complaint. The Court observed, simply put, that this statute did not satisfy the necessary criteria to qualify as a statute, not setting a generally applicable rule of law. In the Court's view, this "statute" amounted to a one-time "rupture" in the Constitution, circumventing the provisions contained in the Constitution appropriate for the situation at hand. For these reasons, the Court, whose task is to protect constitutionality, had to annul it.

The absolute majority of the Court's work covers decision-making on individual constitutional complaints. On average, the Court receives 4.000 of them every year. Moreover, the 15-member Court had managed to decide nearly the same number of cases in the past two years. In 2016, the Court found a constitutional violation in nearly 200 cases. In these cases, the Court had to annul decisions of ordinary courts and return the case to them for a new decision.

In addition to these oft-used competences, the Court has several others, e.g. to protect the self-governing regions against unlawful interferences of the state with its right to self-government; to resolve certain electoral matters; or to decide on the impeachment of the President. The Czech Constitution counts on the Court to be an effective protector of constitutionality. For that reason, the Constitution entrusted the Court with necessary competences, making it a key constitutional actor.

The Constitution originally established a rather typical parliamentary form of government with the slightly stronger role of President, tailored to fit Václav Havel. The executive used to be fully dependent on the Parliament. The Government can only exist as long as it retains the confidence of the Parliament's House of Deputies. And both houses of the Parliament (i.e. including members of the Parliament's Senate) used to elect the President. But in 2012, the Constitution was amended, introducing direct election of the President. Since there was no persuasive constitutional reason for such a change, it was most likely a result of controversies linked to the way the presidential election was carried out in the Parliament.

This change was criticized by many constitutional lawyers as non-systemic and destabilizing for the constitutional system. Former Prime Minister of Czechoslovakia and former President of the Parliament's Senate Petr Pithart once wrote that the direct election of the President is like "semtex" put in the bedrock of our Constitution.[2] Given the fact that the Czech Republic is a parliamentary republic, providing the President with strong legitimacy deriving from the people creates tensions (similar to so-called cohabitation known from other constitutional systems) between the President on the one hand and Parliament and Government on the other. The Constitution itself says that the Government is the highest body of the executive power. That is why most important President's actions within the executive power must be countersigned by the Prime Minister or a member of the Government designated by him. This, however, does not fit the expectations related to a directly elected President, who needs to appeal to voters and to achieve political goals set by electoral agenda.

The presidency of Miloš Zeman proves Petr Pithart was right. The current President "stretches" his competences in contradiction with their meaning and purpose in our constitutional system. This resulted in several political conflicts (appointment of Prime Minister Rusnok against a counter-majority in the Parliament which led to his Government's failure in a vote of confidence; rejection to appoint professors nominated by their universities for professorship, etc.). Despite the "scratches" it has suffered lately, the Constitution has not "exploded," yet. And luckily, it keeps deflecting the democratic backslide experienced by Poland and Hungary.

DEVELOPMENTS AND CONTROVERSIES IN 2016

One certainly cannot argue that there was no constitutional controversy to speak of in 2016. The absolute majority of them concerned the executive. One might even argue that the executive has been in the form of constitutional transition since the 2012 changes concerning the position of the President. Many of the controversies demonstrated this "off-stage transition," reshaping roles of key executive players—the Government and the President.

Just to name some of the controversies, the President became a defendant in a civil defamation case because he said publicly that the late Ferdinand Peroutka, one of the most prominent Czech writers and publicists of the 20th century, wrote an article admiring Adolf Hitler, calling him "a gentleman." This case led to many questions concerning the liability of the President for false statements. Who should be liable in such cases, the President himself or the state?[3] There was another controversy closely related to the President. More than 60 deputies came up with a draft bill to re-criminalize defamation of the President. One might question whether this draft bill goes against our constitutional traditions in the protection of free speech or not.

One more controversy we would like to mention briefly concerns our Minister of Finance Andrej Babiš. He happens to be a

[2] Petr Pithart, "Semtex položený do základů - Přímá volba prezidenta a její rizika v českém prostředí (ENG: Semtex in the Bedrock - Direct Election of the President and Its Dangers in Czech Setting)" (Pithart.cz, 20 February 2012) http://www.pithart.cz/archiv_textu_detail.pp?id=518 accessed 27 January 2017.

[3] The court of the first instance and the appellate court so far concluded that the state is liable for speech made by the President in his official capacity. The case is pending before the Supreme Court.

multimillionaire. And he owns several of the most prominent Czech media and one of the major business corporations. In 2016, Parliament passed a law on conflicts of interest (labeled as "Lex Babiš") which prohibits active politicians from owning media and limits their ability to engage in business activities (for example, their companies are not eligible for state subsidies). It will be an often-raised question even in 2017 whether such a regulation conforms to the constitution or not.

From all the possible options, we chose one particular 2016 controversy for further analysis – the idea to constitutionally entrench the right to possess and bear arms to protect the country. In accordance with the draft bill, there should be a new provision in the Constitutional Act on State's Security reading: *The Citizens of the Czech Republic have a right to obtain, possess and bear arms and ammunition in order to protect lives, health, and property, and to take part in securing domestic order, security and protection of territorial integrity, sovereignty and democratic foundations of the Czech Republic. Conditions and details are set by a statute.*

This draft bill left many startled. It is not easy to grasp what led the Ministry of Interior to come up with such a piece of legislation. Why amend our constitutional order with a new constitutional right resembling the 2nd Amendment to the U.S. Constitution?

And why have it in the Constitutional Act on State's Security? There are no other constitutional rights in this act whatsoever. Ministry of Interior noted that in the wake of terrorist attacks in Europe, it is much more effective for the ordinary citizens who have a gun permit to act and protect themselves and fellow citizens against terror. The Ministry observed that the possibility of finishing a terrorist attack is much lower if there is an active and timely defense, not necessarily carried out by security forces.

The problem with this draft bill is that it does not seem to be legally necessary. The sub-constitutional law already allows what the Ministry of Interior would like the Parliament to legislate. Classic criminal law concepts of self-defense and emergency provide sufficient regulation for the cases the Ministry of Interior intends to address. Why adopt such a constitutional amendment in a pretty peaceful "heart of Europe," then? Some argue that it might be a reaction to the EU's intentions to limit gun rights. Or that it might be an easy attempt by the Interior Minister to gain political points. One way or the other, we do not think that this draft bill is consistent with European constitutional traditions. There is no "pressing social need" to introduce such a constitutionally protected right. It is already, in substance, sufficiently set in sub-constitutional law. Nevertheless, the draft bill remains in the legislative process. And despite heavy criticism, the Czech Republic may become the first EU country to constitutionally recognize its own version of the "right to bear arms."

IV. MAJOR CASES

In this part of the report, we briefly discuss four major cases of the Court. We chose these four because, in our opinion, they are the most relevant from the comparative point of view. Two of them are plenary judgments. In these two, the Court reviewed the constitutionality of an enacted law. The remaining two are judgments on individual constitutional complaints. Discussion of the selected cases follows in their chronological order.

LGBTQ Rights (judgment no. Pl. ÚS 7/15 of 14. 6. 2016)

In this judgment,[4] the Court granted the motion of the Prague Municipal Court for the annulment of Section 13 (2) of the Act on Registered Partnership ("the Act"). This provision precluded the adoption of a child to persons living in a registered partnership. The crux of the case was that the Civil Code allows adoption by a single person. But the Act explicitly precluded that such a person lives in a registered partnership. The law took the possibility to adopt a child away for those who entered registered partnership. The Court came to the conclusion that the law violated the right to human dignity. It held in the judgment that the Act excluded a specific group of people, who merely enter registered partnership, from the enjoyment of a right. And it made them *de facto* "second class citizens." In the Court's view, the law implied registered partners' inferiority. And apparently, even an inability to take care of children properly.

As we wrote elsewhere,[5] we endorse the verdict. But the Court's reasoning is not convincing. Initially, the Court worked with the right to private and family life in conjunction with the prohibition of discrimination. But this line of argumentation was unexpectedly left out. The Court surprisingly twisted the reasoning to the protection of human dignity. This U-turn was probably motivated by the Court's conservative definition of family. In the Court's view, the family is not a social construct. It is primarily a biological one covering only the cohabitation of parents with their children, and other forms of cohabitation emulating the biological parental ties (e.g. adoption, foster care, etc.). These passages of the judgment are in sharp contradiction with the understanding of family life in the case-law of the European Court of Human Rights (hereinafter "ECtHR"). It accepts that stable relationships of same-sex couples fall within the notion of "family life." The Court made no attempt to make a distinction of the case from the Strasbourg case-law. It probably did not intend to provide any foundations for future cases concerning LGBTQ rights (such as second-parent adoption). For these reasons, we are afraid that the judgment is actually more of a loss for the LGBTQ community than a win.

[4] The full text of the judgment in English is available here: http://www.usoud.cz/en/decisions/20160614-pl-us-715-civil-partnership-as-preclusion-to-individual-adoption-of-a-child/.

[5] Zdeněk Červínek and Martin Kopa, "Czech Constitutional Court: Czech Law Forbidding Registered Partners to Adopt Children is Unconstitutional But Is the Judgment *Really* Good News for LGBTQ?" (Int'l J. Const L. Blog, 29 July 2016) http://www.iconnectblog.com/2016/07/czech-constitutional-court-czech-law-forbidding-registered-partners-to-adopt-children-is-unconstitutional-but-is-the-judgment-really-good-news-for-lgbtq accessed 27 January 2017.

IV. 2. Freedom of Expression of Judges and Their Political Activities (case no. I. ÚS 2617/15 of 5. 9. 2016)

The applicant is a judge. He owns a cottage in a little village. There were municipal elections, and he entered the pre-election campaign. He personally made and distributed leaflets describing his personal view on the elections, the political parties taking part in them, and their individual candidates. After the elections, he wrote an article in a local magazine to address the election results and possible coalition alternatives. He also speculated who could become the village's mayor. The President of the Prague Municipal Court, where the applicant served as a judge, filed a disciplinary action against him. And the Disciplinary Chamber of the Supreme Administrative Court found that he had endangered judicial dignity and abused his judicial position to pursue his private interests. But the Disciplinary Chamber did not impose any disciplinary sanction.

The applicant filed a constitutional complaint against this decision. He argued that his freedom of expression had been breached. The Court made it clear that judges do enjoy the freedom of expression, but it referred to the case-law of ECtHR to stress that judges have special duties of loyalty and discretion. They are necessary prerequisites for the proper and effective functioning of the independent and impartial judiciary which enjoys public trust.

The Court observed that the duty of discretion is important because of our historical experience with the communist regime. It is vital for the judges to stay as far away from the political competition as possible. Judges should comment on politics with restraint. It is always necessary to determine whether the judge's expression contradicted the values of a democratic legal order. Or whether it violated the public trust in the independence and impartiality of the judiciary. Judges must abide by these rules even in private life. But specific circumstances of their expression matter. One needs to be stricter if a judge specifically points out that he or she is a judge. The same applies if the expression is made to a group of people who know that the person talking to them is a judge. On the other hand, expressions of judges concerning administration and organization of the judiciary enjoy a high level of protection. In this particular case, the Court concluded that the applicant failed to observe his duty of discretion. In the leaflets, he explicitly stated that he was a judge and specifically supported a political party. He strongly entered the public debate by publishing an article in local media which was linked to his judicial position. Therefore, he actively, openly, and excessively entered the political competition. The Court considered that wrong. It found no violation of the applicant's freedom of expression.

IV. 3. Admission of Legal Trainees with Foreign Legal Education to the Bar (case no. II. ÚS 443/16 of 25. 10. 2016)

The applicant obtained his law degree from Jagiellonian University in Krakow. But he wanted to practice law in the Czech Republic. He requested the Czech Bar Association (hereinafter "CBA") to register him in the register of legal trainees. But the CBA declined to do so. Czech law provides that graduates of foreign law schools may be registered if 1) their law degree is recognized as equivalent to the Czech one by the Ministry of Education, and 2) the contents and the scope of their law degree corresponds to a Czech law degree. In the CBA's view, the applicant did not satisfy the second condition, because he only knew Polish law.

The applicant sued CBA. He requested the Court to order CBA to register him. But even the ordinary courts thought that he had no right to be registered. Courts did not agree with the applicant that his right to be admitted to the Czech Bar results from EU law. They argued that the case-law of the Court of Justice of the EU (hereinafter "ECJ") provides member states with a large room to maneuver in recognition of foreign law degrees.

The applicant filed a constitutional complaint. The Court ruled in his favor. It found a violation of the freedom to choose an occupation. It is not only theoretical knowledge of the law—law on the books—that counts. Lawyers also need to possess practical experience and skills. In the Court's interpretation of the ECJ's case-law, domestic authorities should not take account of only the diplomas or the certificates of one's education they should also consider their practical experience. In addition, the Court observed that Jagiellonian is the no. 1 law school in Poland. And generally, Polish legal education, including the development of clinical legal education there, serves as a "golden standard" for legal education in Europe.

The Court found the perspective of CBA to be too narrow. Despite not having been formally admitted to the Czech Bar, the applicant had practiced law for many years. His law degree was a high-quality one. The Court added that it was the business of a legal trainee's supervisor, whom she hires as a trainee. It is the Bar exam where a trainee must prove his knowledge and skills. Therefore it was not proportionate to reject the applicant's registration. The Court found that the rejection did not meet the criterion of necessity as the second stage of proportionality assessment. There was one option which would fulfill the aim pursued by the CBA (safeguarding the quality of legal services), and at the same time, it would be less restrictive to the applicant's right: to register him and let him practice under the supervision of an attorney-trainer, who would be responsible for everything the trainee does.

IV. 4. The Right to Privacy and Access to Information in Communist Secret Service Archives (case no. Pl. ÚS 3/14 of 20. 12. 2016)

It is an important part of the transition to democracy to allow the public access to the documents produced by law enforcement of the former totalitarian regime. In the Czech Republic, this access is granted by Act on Archives (hereinafter "Archive Law"). It provides that, unlike other archive documents, the access to archives of totalitarian police cannot be prevented by the people whose personal data are contained in those materials. One such person sued the Czech Republic for compensation of immaterial harm caused by granting access to archive materials to a journalist. The case arrived before the Supreme Court, which came to a conclusion that the relevant provision of Archive Law is a disproportionate limitation to privacy. And it referred the case to the Court.

The Court decided that the law at hand was fully compatible with the Constitution. According to the Court, there is a significant difference between granting access to personal data contained in archive documents and their publication. When the law grants public access to the archive documents, it does not automatically allow their publication. Even repeated individual access by different people to archive documents is not the same as their publication since it represents a significantly lesser limitation of the right to privacy of persons whose personal data are at stake. According to the Court, this difference was clear also in the case decided by the Supreme Court, where the publication of the information gathered in the archives was stopped after the affected person refused to give their consent to it. Mere access of the journalist to the archive documents could not cause defamation since the information was not made public and thus could not affect the reputation of the affected person.

The decision of the Court is very important for drawing a clear line between individual access to information and their publication. In this way, the public is guaranteed "the right to know" without automatic destruction of one's reputation. This principle is applicable in several areas besides archives, like freedom of information, investigative journalism, and others.

Seven judges concurred with the majority reasoning, stating that the unlimited access to archives of the Communist Secret Service, although in the form of individual requests, would be a disproportionate limitation of privacy. However, according to the minority opinion, there is a special provision in Act on Access to Archives of the Communist Secret Service which is applicable and grants at least a moderate level of protection to individuals whose personal information is contained in the archives.

CONCLUSION

The two mentioned cases reviewing the constitutionality of legislation serve as evidence of the growing importance of ordinary courts in judicial review. Both cases were referred to the Court by other courts. In 2015 and 2016 combined, ordinary courts asked the Court to review the constitutionality of applied law in 20 cases, many of which have not been decided yet.

In all four discussed cases, the Court has protected the constituent values of the Czech Republic—equality, freedom, and democracy. All four cases also have significant overlap with other situations, especially based on more general considerations made by the Court.

Considering the latest developments in Poland and Hungary, we appreciate that the Court retained its independence and a moderate level of activism, preserving its position as the most important safeguard of democracy and the rule of law in the Czech Republic. Even though many acts of the current president Miloš Zeman were very controversial, the timely and balanced appointment of judges of the Court was one of his most positive achievements.

Finland

DEVELOPMENTS IN FINNISH CONSTITUTIONAL LAW

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INTRODUCTION

The year 2016 was unprecedented, even tumultuous, in terms of constitutional law and human rights in Finland. Several reasons – immigration with the flood of asylum applications,[1] the country's economic problems and problems related to the quality of law-making and the desire by the sitting Government to catch up with the 'reform debt' as much as possible in the current electoral term—coalesced to explain constitutional turbulence during 2016.

In addition, some legislative proposals by the Government deliberately tested the extreme limits of the Constitution and human rights treaties, particularly in the field of asylum legislation, where the Government wanted to diminish Finland's (alleged) appeal to asylum seekers. Such a 'race-to-the-bottom' is in contrast to an earlier approach by the Finnish legislature that has even involved efforts to bend the domestic implementation of EU law to secure the effective protection of fundamental and human rights.[2]

This report provides an overview of practice by the Constitutional Law Committee of Parliament and the case law of the highest courts: the Supreme Court and the Supreme Administrative Court. The necessity to take notice of the Constitutional Law Committee alongside the Courts owes to the existence of a pluralist system of constitutional review in which the primary role is played by abstract *ex ante* review of legislation by the Committee whereas concrete *ex post* review by the Courts assumes a secondary role.

THE CONSTITUTION AND THE PLURALIST MODEL OF CONSTITUTIONAL REVIEW WITH A LIMITED ROLE FOR COURTS

The Constitution of Finland (Act No. 731/1999)[3] entered into force on 1 March 2000. The contemporary state of Finnish constitutionalism is characterized by multifaceted interplay and tension between constitutional tradition revolving around legislative supremacy and the understanding of democracy as majority rule, on the one hand, and tendencies towards rights-based review of legislation and commitments to Europeanization and internationalism, on the other[4]

For a long time, courts had a marginal role on the Finnish scene of constitutionalism, including the prohibition of judicial review of the Acts of Parliament for their compatibility with the Constitution. Such traditional features have increasingly been challenged

[1] A total of 5,657 persons (2015: 32,476) applied for asylum in Finland in 2016. However, appeals against negative asylum decisions by the Immigration Service started really pending before courts – the Administrative Court of Helsinki and the Supreme Administrative Court – in 2016. For statistics regarding asylum applications, see http://www.migri.fi/for_the_media/bulletins/press_releases/press_releases/1/0/finnish_immigration_service_s_statistics_for_2016_record_number_of_decisions_71665.

[2] Tuomas Ojanen, 'The European Arrest Warrant in the Midnight Sun. The Implementation and Application of the EAW in Finland.' In: Guild E, Marin L (eds) *Still Not Resolved? Constitutional Issues of the European Arrest Warrant*, (2009), Wolf Legal Publishers, 143.

[3] Unofficial translation of the Constitution of Finland, including amendments up to 1112/2011, available in English at https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf.

[4] Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' [2011] 9 Intl J Cons L 505.

since the late 1980s by the incorporation of the European Convention on Human Rights (ECHR) in 1990, the accession to the European Union (EU) in 1995, as well as several constitutional reforms between 1995 and 2011, most notably the reform of the domestic system for the protection of constitutional rights in 1995.[5] As a result of the reform, the catalogue of fundamental rights in Chapter 2 of the Constitution is comprehensive, setting out a range of economic, social, cultural and 'third-generation' rights alongside more traditional civil and political rights. Rights are granted to *everyone*, with an exception only with regard to freedom of movement (Sect. 9) and certain electoral rights (Sect. 14). The domestic standard of rights protection is intended to ascend to a high level as international human rights treaties are 'only' supposed to set out the minimum standard of protection. This doctrinal premise has even compromised the maximal implementation of certain EU legal measures in the 2000s.[6]

The constitutional tradition emphasizing the sovereignty of Parliament resulted already during the first decades after Finland's independency in 1917 in abstract *ex ante* constitutional review of legislation by a political body consisting of members of Parliament, the Constitutional Law Committee. Currently, the mandate of the Committee is prescribed by Section 74 of the Constitution as follows: '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.'

In 2016, the Committee issued 67 Opinions on legislative proposals or other matters, including proposals for EU measures. The Opinions by the Committee are regarded as *de facto* binding and they essentially determine the proper legislative procedure of a given legislative proposal, i.e. whether the proposal may be enacted in accordance with the ordinary legislative procedure through a majority of the votes cast or whether it should be enacted through a qualified procedure for constitutional enactments due to its conflict with the Constitution. As the attempt is to avoid the use of exceptive enactments and to guarantee the effective protection of fundamental and human rights, the Committee often demands changes to legislative proposals so as to achieve harmony with the Constitution and human rights obligations binding upon Finland.

Up until the entry into force of the current Constitution in 2000, courts were not allowed to review the constitutionality of parliamentary legislation although the Constitutional Law Committee had well earlier started emphasizing the obligation of courts and authorities to interpret legislation in harmony with the Constitution and human rights treaties.[7] Moreover, international human rights treaties and EU membership empowered all courts to review the harmony of Finnish law, including the Constitution in the case of EU law, with human rights and EU law.

Hence, the time was ripe to abandon the prohibition of constitutional review by courts in 2000 by enacting Section 106 of the Constitution that obliges courts to give primacy to the Constitution in cases in which the court finds the application of an Act of Parliament to be in *evident* conflict with the Constitution. Section 106 is not intended to tilt the constitutional scale from the Constitutional Law Committee towards courts. Instead, Section 106 amounts to a form of *weak judicial review* that combines the abstract *ex ante* constitutional review of legislation by the Committee with the concrete *ex post* judicial review by the courts. In this model, the *ex ante* constitutional review by the Committee is still supposed to remain the primary form of review, whereas judicial review under Section 106 is designed to plug loopholes left in the abstract *ex ante* review of the constitutionality of Government bills, inasmuch as unforeseen constitutional problems would arise in applying the law by the courts in particular cases. Therefore, the Opinions of the Committee are of great significance for the purposes of this report alongside the case law of the courts.

DEVELOPMENTS AND CONTROVERSIES IN 2016

During year 2016, the Government gave to Parliament several bills that aroused spirited constitutional and political debate in Parliament, the media and civil society.[8] Some bills pertaining to asylum and immigration legislation even tested deliberately the limits of constitutional law and human rights as the Government expressly wanted to diminish the country's appeal for asylum seekers by its bills. Beyond immigration, other outstanding themes before the Constitutional Law Committee were legislative proposals or other matters pertaining to security,[9] retrogression of economic and social rights,[10] as well as privacy and data protection rights.[11]

The outcome was that several bills ran into constitutional difficulties before the Constitutional Law Committee. The Committee presented various critical constitutional remarks on several bills and, in a smaller number of cases, required changes to be made to achieve harmony between the Constitution and human rights obligations and the bill to be considered in accordance with the ordinary legislative procedure. The Committee also criticised on various occasions the quality of drafting, the lack of fundamental

[5] Tuomas Ojanen, 'From Constitutional Periphery Toward the Center-Transformation of Judicial Review in Finland' [2009] Nordisk tidsskrift for menneskerettigheter 194. For an early account, see Martin Scheinin, *Ihmisoikeudet Suomen oikeudessa* (Human Rights in Finnish Law) (Suomalainen Lakimiesyhdistys 1991).

[6] Tuomas Ojanen, 'The European Arrest Warrant in the Midnight Sun. The Implementation and Application of the EAW in Finland' in Guild E, Marin L (eds), *Still Not Resolved? Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers 2009).

[7] See e.g. Constitutional Law Committee Opinion 2/1990.

[8] http://www.finnishnews.fi/politics/finnish-government-said-to-flagrantly-disregard-the-constitution-serious-allegations-by-chancellor-of-justice/.

[9] E.g. Constitutional Law Committee Opinions 20/2016, 22/2016 and 37/2016.

[10] Constitutional Law Committee Opinions 58/2016 and 59/2016.

[11] Constitutional Law Committee Opinions 13/2016, 28/2016, 29/2016, 33/3016 and 34/2016.

rights impact assessments[12] and the constitutionally defective justification for the bills. For instance, the Committee stressed that the aim of trying to make Finland less attractive for asylum seekers was not a constitutionally legitimate aim for weakening the rights of asylum seekers or the social benefits or social security of immigrants.[13]

In December, the Chancellor of Justice stirred up public debate over the quality of drafting by estimating that an unusually high number of legislative proposals with constitutional problems had been presented to the Parliament.[14] He also revealed that in some cases his recommendations for addressing the constitutional problems had been ignored. While concurring with the Government that the resources of ministries had become scarce, the Chancellor of Justice stated that referring to time constraints and political pressure as justifications for scrapping the principles of good law-making is illegitimate. The Government promised to address the problems of law-making and the Prime Minister presented an announcement to Parliament on law-making by the Government in February 2017.

Opinion of 55/2016 by the Constitutional Law Committee – *discriminatory nature of unemployed immigrants' integration assistance*

In Government Bill 169/2016, it was proposed that an unemployed immigrant would, instead of receiving unemployment assistance, be entitled to an integration assistance amounting to 90 percent of unemployment assistance. The Committee considered the proposal from the point of view of the principle of equality and prohibition of discrimination as well as the right to basic subsistence in the event of unemployment, both protected by the Constitution. In its Opinion 55/2016, the Committee found that creating a parallel system for immigrants would not in itself be in conflict with the prohibition of discrimination (Sect. 6 of the Constitution). However, the Committee considered the proposal to be discriminatory since the level of integration assistance would have been lower than assistance provided for other unemployed persons. Unemployed immigrants would consequently be treated differently on the grounds of their origin, i.e. immigration status, which Sect 6 expressly prohibits.

The Committee noted that austerity measures may be justified in times of economic distress. However, the aim of providing savings for the public sector could not in this case justify limiting equality before the law. Furthermore, the Committee did not deem credible the suggestion of the Government bill that lowering basic subsistence would contribute to the integration of immigrants. The means were thus not suitable for achieving the aim. Following the Opinion of the Committee, the Government bill was withdrawn. The case raised considerable attention and criticism about the quality of law-making.

Opinions 24/2016, PeVL 43/2016 and PeVL 48/2016 of the Constitutional Law Committee – *weakening legal protection of asylum seekers*

The Aliens Act of 2004 (Act No. 301/2004) was amended several times in 2016. The amendments were based on the Government action plan on asylum policy, the central aims of which include stopping the 'uncontrolled flow of asylum seekers into our country.'15 Firstly, humanitarian protection—an additional category guaranteeing protection for those who do not qualify as refugees or receivers of subsidiary protection—was removed.16 Second, protection under the law was weakened in several ways.[17] Third, criteria for family reunification were tightened by broadening the application of the requirement for means of support.[18] This amendment affects especially children and other persons in a vulnerable position. Fourthly, a new interim measure, designated residence, was introduced.[19]

The Committee proposed several changes that improved asylum seekers' legal status, especially that of unaccompanied minor asylum seekers. Concerning protection under the law, the Committee required in its Opinion 24/2016 that an unaccompanied minor asylum seeker be automatically offered legal aid; originally, it was proposed that legal aid for asylum seekers, even for children, be provided in the asylum interview only if exceptionally weighty reasons existed. Regarding designated residence of children, the Committee required in its Opinion 48/2016 that the maximum duration be shortened, conditions for deciding how many times a day the person has to report be added and the last resort nature of detention be underlined.

Even though the Committee accepted the legislative amendments and many of the improvements proposed by the Committee were conducted, the compatibility of some of the amendments with human rights obligations still remains questionable, especially to the extent that the tightening of the criteria for family reunification is concerned. Legal protection, too, was weakened in many ways, and it is questionable whether amendments to legal protection amount to such a considerable retrogression that the amendments are in conflict with the Constitution and human rights.

Immigration matters in the Supreme Administrative Court

Due to the increased number of asylum applications and the Government's tightened immigration policy, the Supreme Administrative Court adjudicated an exceptionally high

[12] E.g. Constitutional Law Committee Opinions 34/2016 and 43/2016.

[13] E.g. Constitutional Law Committee Opinion 55/2016.

[14] E.g. http://www.helsinkitimes.fi/finland/finland-news/domestic/14420-chancellor-of-justice-government-s-draft-bills-beset-with-constitutional-problems.html.

[15] Government action plan on asylum policy (8 December 2015), available in English at http://valtioneuvosto.fi/documents/10184/1058456/Hallituksen_turvapaikkapoliittinen_toimenpideohjelma_08122015+EN.pdf/3e555cc4-ab01-46af-9cd4-138b2ac5bad0.

[16] Government Bill 2/2016.

[17] Government Bill 32/2016.

[18] Government Bill 43/2016.

[19] Government Bill 133/2016.

number of immigration matters.[20] The Court referred several cases back to the Immigration Service. In *KHO:2016:53*, the Court found that the principle of non-refoulement prevented the transfer of an asylum seeker to Hungary, where he had been registered. According to Regulation 604/2013 (Dublin III), Hungary was primarily responsible for examining the asylum application. The court compared the case law of the Court of Justice of the EU (CJEU)[21] and the European Court of Human Rights (ECtHR)[22] to national case law in other EU member states concerning transfers to Hungary under Dublin III and to recent country information. The court concluded that particularly vulnerable persons cannot be transferred to Hungary due to problems in reception conditions. X had arrived in Hungary through Serbia, which Hungary considered to be a safe country. There was a possibility of X being returned from Hungary to Serbia and further to Afghanistan without having his asylum application examined.

In *KHO:2016:81*, the Court could not exclude the possibility that an Iranian asylum seeker's apostasy from Islam could cause a need for international protection as prescribed in the Aliens Act. In *KHO:2016:155*, the Court assessed whether Z had secure means of support, which are required for issuing a residence permit unless otherwise provided. The Court relied on the Family Reunification Directive (2003/86/EC) and the case law of the CJEU.[23] The Court noted that authorization of family reunification is the general rule and the State's power to require evidence of stable and regular resources must be applied narrowly. In *KHO:2016:194*, the Court assessed whether the applicant, a Sunni Muslim, should receive subsidiary protection instead of being returned to Baghdad. The Court reviewed several country reports on Iraq[24] and referred to the case law of the ECtHR on the definition of 'a serious and individual threat'[25] and to the case law of the CJEU[26] interpreting the Qualification Directive (2011/95/EU). The Court concluded that there were substantial grounds for believing that the applicant, if returned to Baghdad, would face a real risk of being subjected to serious harm as a result of indiscriminate violence.

MAJOR CASES

Opinion 1/2016 of the Constitutional Law Committee – *State Forest Enterprise and Sami land rights*

Act on State Forest Enterprise (Act No. 234/2016) was fully amended in 2016. State Forest Enterprise is operating in the administrative sector of the Ministry of Agriculture and Forestry. The Constitutional Law Committee pointed out in its Opinion 1/2016 that Sami rights are not mentioned in the government bill even though the proposal affects the rights of the Sami. According to Section 17 of the Constitution, the Sami, as an indigenous people, have the right to maintain and develop their own language and culture. Section 17 guarantees the practice of traditional Sami livelihoods such as reindeer herding. The Committee noted that the Government bill—unlike a previous Government bill on the same issue—contained neither a section on the Sami domicile area nor a prohibition of retrogression of the Sami culture, and that international human rights obligations support the inclusion of such provisions. However, the Committee concluded that the Act can be passed in accordance with the ordinary legislative procedure. The enactment of the new Act was criticised for violating Sami rights.

Opinions 2/2016, 28/2016 and 33/2016 of the Constitutional Law Committee – *non-discrimination, privacy and EUCFR*

The Constitutional Law Committee reviewed several proposals for EU measures on privacy and referred in this context to the Charter of Fundamental Rights of the EU (EUCFR). In its Opinion 2/2016 on Government Communication 1/2016 on the proposal for a Regulation of the European Parliament and of the Council amending the Schengen borders code, the Committee noted that the proposal had an impact on certain rights protected in the EUCFR: the respect for private and family life (Art 7), protection of personal data (Art 8), as well as freedom of movement and of residence (Art 45). The Committee found that the proposal fundamentally changes treatment of EU citizens (and to a certain extent that of non-EU citizens) on the borders of the EU. Border checks as such were not considered problematic. However, the Committee noted the importance of prohibition of discrimination (Art 20 and 21 EUCFR) leading to a ban of ethnic profiling. Checks should be conducted based on an individual risk assessment.

In its Opinion 28/2016 on Government Communication 22/2016 on the proposal for a Regulation of the European Parliament and of the Council (smart borders) and Opinion 33/2016 on the Government Communication 30/2016 on the European Commission proposal for a Regulation of the European Parliament and of the Council (Eurodac), the Committee noted that both systems interfere with the right to privacy and protection of personal data. In the Committee's view, attention should be paid to CJEU cases Digital Rights Ireland and Schrems[27] as well as future case law of the CJEU. These cases indicate that need for safeguards is all the greater where personal data is subjected to

[20] Immigration matters were the largest type of matter in the Supreme Administrative Court (38% out of all incoming matters).

[21] C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013]; C-695/15 *PPU-Mirza* [2016].

[22] *Halimi v Austria and Italy* App no 53852/11 (ECtHR 18 June 2013); *Mohammed Hussein v Netherlands and Italy* App no 27725/10 (ECtHR 2 April 2013); *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014); *Mohammadi v Austria* App no 71932/12 (ECtHR 3 July 2014).

[23] C-356/11 and C-357/11 *O et al* [2012]; C-358/14 *Mimoun Khachab* [2016].

[24] Reports by the UNHCR, human rights NGOs and foreign offices or immigration authorities in the UK, the US and Sweden.

[25] *J.K. et al v Sweden* App no 59166/12 (ECtHR, 23 August 2016); *A.A.M. v Sweden* App no 68519/10 (ECtHR, 3 April 2014); *S.A. v Sweden* App no 66523/10 (ECtHR, 27 June 2013); *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011).

[26] C-465/07 *Elgafaji* [2009]; C-285/12 *Diakité* [2014].

[27] C-293/12 *Digital Rights Ireland* [2014]; C-362/14 *Schrems* [2015].

automatic processing and where there is a significant risk of unlawful access to that data. The Committee held that the most central question is related to registering of biometric identifiers.

Opinion 9/2016 of the Constitutional Law Committee – *no acceptable justifications for increasing fine levels were presented*

In Government Bill 1/2016, it was proposed that levels of day fines and summary penal fees be increased. This, as the Committee noted, interferes with the right to property. The aim of the amendment was to increase revenues of the State. The Committee found that acceptable justifications for increasing fine levels from the point of view of the fundamental rights system were not presented even though they would have been required, especially from the perspective of criminal law.

KKO:2016:20 – *Compensation for a violation of human rights and fundamental rights*

In *KKO:2016:20*, the Supreme Court considered whether the applicant was entitled to compensation due to violations of his fundamental and human rights. A's residence permit application had been rejected, and consequently A had been deported. The decisions had been based on the opinion of the Finnish Security Intelligence Service, the grounds of which had been treated as classified information. The Supreme Court noted that the Administrative Court should have familiarised itself with the grounds of the opinion. The Supreme Court referred to the case law of the ECtHR on the interpretation of article 13 of the ECHR and concluded that A's human rights, in particular the right to an effective remedy, had been violated. The Supreme Court held that A should receive compensation for the violation of his fundamental and human rights.

KKO:2016:24 and KKO:2016:25 – *Legality of non-medical male circumcision*

Finland does not have legislation on non-medical male circumcision. In 2016, the Supreme Court attempted to draw guidelines regarding the assessment of the justification of male child circumcision. The Court stated that it was unfortunate that there is no legislation governing non-medical male circumcision in Finland nor explicit guidelines emanating from international conventions binding on Finland or from the case law of the ECtHR. In the Supreme Court's opinion, the question of non-medical male circumcision cannot be covered comprehensively by court decisions in individual cases. Instead, thorough evaluation in a legislative drafting process would be required, taking also into account possible penal sanctions.

KHO:2016:180 – *Primacy of the Constitution and applicability of the EUCFR*

In *KHO:2016:180*, the Supreme Administrative Court assessed whether the Charter of Fundamental Rights of the European Union (EUCFR) was applicable and whether there was an evident conflict (Sect. 106 of the Constitution) between an Act of Parliament and the Constitution. A surtax of 6 percent had been imposed on C's pension income above 45.000 euros. In his appeal, C submitted that the applied provisions of the Tax Income Act (Act No. 1535/1992) violated the prohibition of discrimination on grounds of age under EU law and the Finnish Non-Discrimination Act (Act No. 21/2004) and therefore were in evident conflict with Section 6 of the Constitution on equality before the law. The Court requested the Court of Justice of the EU (ECJ) to give a preliminary ruling on the applicability of EU law on non-discrimination.[28] The ECJ found that EU law, including the EUCFR, was not applicable in the case. The Supreme Administrative Court noted that that provisions regarding the surtax on pension income were at least partly based on person's age. However, the Court found that the provisions had a legitimate aim, namely funding of welfare services and economic stability, and that imposing a higher tax rate on those with high income can be justified, in particular in times of economic hardship. The provisions of Tax Income Act were thus not in evident conflict with the Constitution.

CONCLUSION

Constitutional turbulence will most likely continue during 2017. Currently, several working groups appointed by the Government are preparing legislation regarding civil and military intelligence, including their legal and parliamentary oversight. In October 2016, the working group of the Ministry of Justice gave its report on the necessity to amend the provisions on the secrecy of confidential communications laid down in the Constitution for the purpose of allowing legislation on civil and military intelligence. The working group assessed that the Constitution does not allow to enact by ordinary legislation such limitations to the secrecy of confidential communications that would authorize to obtain civil and military intelligence on serious threats necessary for national security. Hence, the working group proposed a constitutional amendment to be made. The proposal has raised a great deal of debate which will probably amplify when the other working groups will finish their respective work during spring 2017. Constitutionally interesting times ahead.

[28] In 2016, the Supreme Administrative Court submitted five requests for preliminary rulings. The Supreme Court submitted three requests.

France

DEVELOPMENTS IN FRENCH CONSTITUTIONAL LAW

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INTRODUCTION

2016 was an important year for the French Conseil constitutionnel. From an organic viewpoint, one third of its members were renewed. From a substantive viewpoint, the new bench had to face the consequences of the continuing application of the state of emergency that has been in force since November 2015. In the 113 rulings it handed down, the Conseil made use of all the jurisdictional techniques it has developed over the years in order to control the activities of a Parliament that was, despite a socialist majority in the National Assembly, highly divided.

THE CONSTITUTION AND THE COURT

The drafters of the 1958 Constitution meant to introduce crucial changes regarding the way the Constitution was made binding on public authorities. According to Michel Debré, "The creation of the Conseil constitutionnel manifests the will to subordinate the law, that is to say the will of Parliament, to the superior rule laid down by the Constitution. It is neither in the spirit of the parliamentary system, nor in the French tradition, to give judges, that is to say to give every litigant, the right to question the value of the law. The project has therefore devised a special institution that can only be set in motion by four authorities: the President of the Republic, the Prime Minister and the Presidents of the Houses of Parliament. To this Conseil other assignments were given, including the review of Parliament's standing orders, and the litigation related to contested elections, in order to avoid the scandal of partisan invalidations. The Constitution thus created a weapon against the deviation of the parliamentary system."[1]

The Conseil consists of the former Presidents of the Republic and nine appointed members, serving non-renewable terms of nine years. One-third of them are appointed every three years. Three, among whom is the President of the Conseil, are appointed by the President of the Republic, three by the President of the National Assembly, and three by the President of the Senate. The Parliament's commissions are allowed to veto a nomination with a supermajority of three-fifths. In March 2016, three new members were appointed to the Conseil, among whom its President, Laurent Fabius, is the former Minister of Foreign Affairs.

The Conseil's most significant function in the French statute-centred (*légicentriste*) context is that of reviewing the constitutionality of legislation. The standard of constitutional review is not limited to the constitutional text strictly understood. Since the 70-39 DC and the (more famous) 71-44 DC rulings, it has grown into a wider "constitutionality block" consisting of the Preamble to the Constitution, the Declaration of the Rights of Man and of the Citizen (1789), the Preamble to the Constitution of 1946, the Charter for the Environment, and several unwritten "fundamental principles acknowledged in the

[1] For a general overview, see O Duhamel and G Tusseau, *Droit constitutionnel et institutions politiques* (4th ed Le Seuil 2016)

laws of the Republic," principles, and objectives having constitutional value (eg the fight against tax evasion, the protection of the public order, and the pluralism of ideas, thoughts, and opinions). As a consequence, both civil and political "first generation" rights and social "second generation" rights have been constitutionalised.

The constitutionality of organic acts and of the standing orders of the two Houses of Parliament are mandatorily controlled by the Conseil before they come into force. Other, ordinary statutes may be referred to the Conseil constitutionnel. Until the constitutional amendment of 2008, this facultative *ex ante* review was the only procedure to assess the validity of a statute. Moreover, only constitutional authorities could require this control. From 1958 to 1974, the President of the Republic, the Prime Minister, the President of the National Assembly, and the President of the Senate were the only authorities who enjoyed this prerogative. In 1974, 60 deputies and 60 senators were also entitled to require constitutional review. Granting this right to the opposition resulted in more numerous *saisines*, and considerably developed constitutional justice. In these cases, the Conseil has one month, which can be shortened to eight days, to hand down its decision. If the Conseil concludes that the text is constitutional, it can be promulgated and come into force. If it is declared unconstitutional, in totality or in part, it cannot. In the case of a partial invalidity, the provisions that can be severed from the unconstitutional ones can be promulgated. The Conseil controls that Parliament respects its own competence and does not encroach on the organic legislator's jurisdiction nor grant too much discretionary power to other legal actors, and that the procedure following which the text has been adopted is the correct one. It also controls the content of the text, and mostly that human rights are respected.[2] In the latter case, the Conseil has been adamant that "the Constitution does not confer on the Conseil Constitutionnel a general or particular discretion identical to that of Parliament" (74-54 DC ruling). As a consequence, it mostly quashes a statute when the balance between constitutional concerns results in an irrational or disproportionate curtailment of one of them. This general attitude of self-restraint contributes to alleviate possible accusations of '*gouvernement des juges*' (government by the judges).

Although commonly said to be satisfactory, this system has remained problematic. Indeed, ordinary judges are allowed, on the request of ordinary litigants, to set aside a statute that does not comply with an international norm, whereas the Conseil constitutionnel, which enjoys a monopoly to quash a statute for its incompatibility with the Constitution, can only do so before it is promulgated and only at the request of a few political actors. Once a statute has escaped this control, its constitutionality can never be questioned. This changed in 2008, when the "priority preliminary ruling on the issue of constitutionality" (*question prioritaire de constitutionnalité*—QPC) was established. Concretely, "If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'Etat or by the Cour de Cassation to the Conseil constitutionnel" (article 61-1 of the Constitution). The litigant who wants to invoke the unconstitutionality of a statute needs to prove that the statute applies to the suit, that it has never been declared constitutional by the Conseil constitutionnel (or, if that is the case, that the circumstances have changed; see eg 2010-14/22 QPC ruling), and that the question is not devoid of any seriousness. If the judge is satisfied that these cumulative conditions are met, they immediately transfer the file to the relevant Supreme Court, which acts as a second filter for the demand. Once the question has been transferred, the Conseil has three months to decide following a truly adversarial procedure and after a public oral hearing. Consequently, as of 1 January 2017, 603 QPC decisions had been handed down. In this case of *ex post* review, a declaration of unconstitutionality results in the derogation of the pre-existing norm. The latter is cancelled for the future, and the Conseil is allowed to postpone the effects of the derogation it pronounces.

DEVELOPMENTS AND CONTROVERSIES IN 2016

Two main constitutional controversies emerged from the case law of 2016.

The first is related to the four rulings (five including a first one at the very end of 2015) issued in connection with the state of emergency. These decisions are evidently important because of the pressure this situation places on French society, the state, and constitutionalism. The state of emergency is a measure of exception that can be decided by the Council of Ministers, in application of an Act of 3rd of April 1955, in situations involving imminent danger resulting from serious breaches of public order or in circumstances which, due to their nature and seriousness, have the character of public disaster. Its initial implementation is limited to 12 days. It can be extended only by a statute. It enables the Minister of the Interior and its local representatives (*préfets*) to limit or prohibit circulation in some places, forbid public meetings or close public places, authorize administrative searches and seizures, ban someone from entering specified areas, or detain someone under house arrest. After the terrorist attacks of the 13th of November 2015, a meeting of the Council of Ministers the same night decided that the state of emergency should immediately be applied. Since then, it has been extended five times and should remain in force until the 15th of July, 2017.

Obviously, as it antedates the current Constitution, the 1955 Act could not be referred to the Conseil constitutionnel. Due to the broad political consensus between the majority and the opposition on the necessity to implement and extend without delay the full effects of the state of emergency, none of the acts extending it adopted since November 2015 were referred to the Conseil. As a consequence, it is through applications

[2] G Drago, *Contentieux constitutionnel français* (4th edn Presses universitaires de France 2016); D Rousseau, P-Y Gahdoun, and J Bonnet, *Droit du contentieux constitutionnel* (11th edn LGDJ 2016).

for priority preliminary ruling on the issue of constitutionality, raised by persons subject to trial pursuant to article 61-1 of the Constitution, that the Conseil was asked to rule on those matters.

The Conseil tried to strike a fair balance between the protection of public order, obviously threatened by terrorism, and the guarantees of individual freedoms, which can be infringed by some of the measures enforced under the state of emergency. Each of the decisions is adamant that "the Constitution does not exclude the possibility that the legislator may establish a regime to govern the state of emergency […] in this context, it belongs to it to ensure that a balance is struck between, on the one hand, the prevention of public order offences and, on the other hand, the respect for the rights and freedoms granted to all persons resident in the Republic." Several fundamental rights were alleged to be imperilled by the state of emergency.

The 2015-527 QPC ruling related to house arrest. As far as the maximum period of time during which an individual placed in such a position is required to remain at home is set at 12 hours per day, the Conseil considered that this measure, which can only be decided against someone if there are serious grounds to think that her behaviour may represent a threat for public security and order, should be regarded as a restriction of freedom but not as a deprivation of freedom which, according to article 66 of the Constitution, should be under the supervision of the Judicial Authority. However, the Conseil insisted that the order placing a person under house arrest, its duration, the conditions governing its application, and the supplementary obligations with which it may be associated should be under the monitoring of the administrative courts, charged with ensuring that such a measure is suitable, necessary and proportionate to the goal pursued. Finally, home arrest should cease when the state of emergency ends, and in case the legislator decides its extension, such measures could not be prolonged without being renewed. Under these reservations, the house arrest was considered constitutional. The 2016-535 QPC ruling addresses the policing of meetings and public places. The Conseil also insisted that such measures, placed under the monitoring of the administrative courts, should be suitable, necessary, and proportionate with the grounds that gave cause for them. It also stated that their duration should not be excessive, having regard to the imminent danger that led to the declaration of a state of emergency. In the 2016-536 QPC ruling, the Conseil allowed administrative searches, even at night and in a private residence, as far as they were justified on the ground of emergency or if it appeared impossible to carry them out during daytime. It admitted that the administrative authority could access all computer data. But copying them was considered unconstitutional. This measure was equivalent to a seizure, and data having no link with the person whose conduct constituted a threat may also be copied. In this respect, the legislator had not achieved a reasonable balance between the safeguard of public order and the right to privacy. The legislator amended the law accordingly. But the new version was referred to the Conseil, which again censored some of its provisions regarding delay of conservation of some data (2016-600 QPC ruling). The last decision to be mentioned was also related to administrative searches conducted immediately after the terrorist attacks of November 2015, before the first act prolonging the state of emergency had created new guarantees to protect rights and freedoms. The Conseil decided that since administrative searches were submitted to no condition and no guarantee was granted, the balance between the safeguard of public order and the right to protect private life was not respected. Although it decided to derogate immediately the questioned norm, the Conseil decided that, in order to protect the public order, this would have no effect on the validity of the penal procedures that had begun before its decisions (2016-567/568 QPC ruling).

The second important controversy that deserves attention in 2016 is related to Decision 2016-741 DC of 8 December 2016, which deals with the statute relating to transparency, the fight against corruption and the modernisation of economic life. This long ruling dealt with a statute that addressed a wide array of topics. The Conseil has been seized by four of the six authorities that are allowed to activate *ex ante* review: The President of the Senate, 60 senators, 60 deputies, and the Prime minister. The latter's referral only targeted article 23 of the statute, which extended the jurisdiction of the Tribunal of Paris regarding financial delinquency. This provision did not appear in the initial governmental bill. It was introduced during the debate by a member of the Legislation Committee.[3] It raised several practical difficulties, especially as this tribunal could hardly face such a huge workload immediately. This is why the Conseil quashed it. From the viewpoint of judicial politics, it is remarkable how the Prime Minister was able to obtain before the Conseil what he could or would not oppose during the process of adoption of the statute.

The validity of several provisions was tested against the objective of constitutional value or legislative accessibility and intelligibility (eg par. 3ff, 11ff, 32ff, and 109ff). It was created by the Conseil in 1999 (99-421 DC ruling) in order to improve the quality of legislative drafting, which has been a major problem for more than 25 years.[4] Accordingly, the Conseil *proprio motu* quashed a provision that would have implied a practical contradiction (par. 146). The Conseil similarly imposed the principle according to which a statute needs to lay down rules and to be normative, and not merely declaratory, aspirational or hortatory (2005-512 DC ruling). While this last principle had not been much used, the Conseil decided to revive it by considering that "The provisions of Article 134 of the contested law, which are limited to conferring on the ordinary general assembly of a limited company the power to entrust a manager with oversight of technological advancements, are devoid of any normative scope. Therefore, this Article should be declared unconstitutional" (par. 99).

Ensuring that no abuses were committed during the parliamentary procedure, the

[3] See http://www.assemblee-nationale.fr/14/amendements/3623/CION_LOIS/CL330.asp; http://www.assemblee-nationale.fr/14/cr-cloi/15-16/c1516086.asp.

[4] Conseil d'Etat, Rapport public, *De la sécurité juridique* (1991); Rapport public, *Sécurité juridique et complexité du droit* (2006); Etude annuelle, *Simplification et qualité du droit* (2016)

Conseil quashed several provisions for having been irregularly introduced into the statute, especially because they resulted from amendments that had no connection, even indirect, with the original content of the bill, and consequently qualified as "riders" (eg par. 50, 82, 107, 120, and 122 to 135). The validity of a provision regarding the creation of a digital repository to ensure information for citizens on the relations between Interest Representatives and public powers, shared by the parliamentary assemblies, governmental and administrative authorities, and territorial collectivities was questioned because it might infringe on the principle of separation of powers. The Conseil rejected this argument, but only after clarifying the way the said provisions needed to be interpreted in order to preserve the autonomy of the two houses of Parliament (par. 25, 28, and 29).

The respect of several substantive constitutional principles was also guaranteed by the Conseil within the framework of its traditional "proportionality control." Regarding penalties imposed on firms for violating payment rules, the Conseil reiterated that "Article 61 of the Constitution does not grant the Constitutional Council general powers of assessment and judgement of the same nature of those belonging to the Parliament, but only grants it the competence to decide on the constitutionality of the contested laws under its consideration. If it is necessary to inflict penalties related to an infraction under the legislature's power of assessment, it falls on the Constitutional Council to ensure that there is no manifest disproportionality between the infraction and the penalties incurred" (par. 88). In general, no manifest disproportion was found because of the general interest the legislator had in view and the appropriateness of the means it resorted to (eg par. 60). According to this kind of self-restrained reasoning, the Conseil controlled the respect of freedom of enterprise by underlying that "The legislator is free to subject the freedom of enterprise, as resulting from Article 4 of the 1789 Declaration, to limitations associated with constitutional requirements or which are justified by the public interest, provided that this does not result in harm that is disproportionate to the objective pursued" (par. 41). Nevertheless, "the obligation of certain companies to make public the economic and tax indicators corresponding to their activity country by country, allows all of the operators in the market or exercising these activities, particularly their competitors, to identify essential elements of their industrial and commercial strategies. Such an obligation infringes on the freedom of enterprise in a manifestly disproportionate way in terms of the objective sought" (par. 103). Regarding this provision, the Conseil moreover decided to make use of a technique it had devised at the time when it was not able to review the constitutionality of statutes after they were promulgated (85-187 DC ruling). In the present case, it repeats that: "The constitutionality of a law already enacted may be examined upon reviewing the legislative provisions that modify it, complete it or affect its scope." As the cancelled provisions are similar to older ones resulting from an Act of 2013, the latter are simultaneously declared unconstitutional (par. 104; see similarly par. 140).

No manifest or irrational disproportion was perceived when the Conseil ensured that the principle of equality was respected: "The principle of equality does not prevent the legislature from regulating different situations in different ways, nor from departing from equality in the public interest, provided that in both cases the resulting difference in treatment is directly related to the subject matter of the law providing for the different treatment" (par. 38; see also par. 3ff, 93 ff.). Neither was it regarding freedom of contract and the stability of contracts (par. 54 and 60), nor regarding the right of property (par. 52ff). Various provisions related to the creation of penal offenses were criticised for being too imprecise, or for violating the principle of the legality of offenses and penalties. Although several among them were immune from this defect (see eg par. 9, 15, and 91), some were declared unconstitutional: "By issuing offences regarding the infringement upon obligations, the content of which has not been defined by the law but by the office of each parliamentary assembly, the legislature infringed upon the principle of the legality of offences and penalties" (par. 36). This consequently led the Conseil to quash other provisions that were intrinsically connected to the quashed one. Similarly, the Conseil cancelled a provision that did not define precisely enough the offense of false accusations (par. 139).

As a representative example of "catch all" contemporary legislation under the Fifth Republic, this statute led the Conseil constitutionnel to make use of most of the procedural tools it has developed since 1958 to ensure the primacy of the *Grundnorm*, both as far as legislative procedure, the quality of legislation, separation of powers, and fundamental rights are concerned.

MAJOR CASES

Other relevant rulings of 2016 include the following four:

Rights and Freedoms

1. *Criminal Prosecution of Negationism Does Not Violate the Constitution*

In Decision 2015-512 QPC, the plaintiff argued that the contested provisions infringed on the principle of equality before the criminal law, since the negation of crimes against humanity other than those mentioned in Article 6 of the Statute of the International Military Tribunal annexed to the London Agreement of 8 August 1945 was not punishable, as well as on the freedoms of expression and opinion. The Conseil consolidated the incrimination of negationism by declaring the Article 24bis of the Act of 29 July 1881 to be in conformity with the Constitution. It equally held that by prohibiting denying crimes against humanity perpetrated by the Nazi regime, the freedom of expression is not violated.

2. *Taxi-drivers' Freedom of Enterprise*

In Decision 2015-516 QPC, the objection alleging a violation of freedom of enterprise was brought to the attention of the Conseil constitutionnel once again after the Decision no. 2015-468/469/472 QPC. In the latter, the challenged provisions of the Transport Code were found to be in conformity with the Constitution. On the contrary, this time the contested second part of Article L.3121-10 of the Transport Code was found to be in

violation of the Constitution. The limitations to the freedom of enterprise determined by the legislator were justified neither by the objective pursued nor by any other general interest. By providing that the exercise of the activity of taxi driver is incompatible with the exercise of the activity of the driver of a chauffeur-driven vehicle, the legislator intended to fight against the fraud in the sector of the transport of patients and ensure the full exploitation of parking authorizations on the public highway. However, the Council pointed out that the activity of taxi driver should not be regarded as incompatible with that of the driver of a chauffeur-driven vehicle since the two activities are carried out by means of vehicles comprising distinctive signs and only light sanitary vehicles may be accredited by compulsory health insurance schemes to ensure the transport service for patients.

3. *Ne Bis in Idem (I-II-III)*

A series of three decisions 2016-545 QPC, 2016-546 QPC, and 2016-556 QPC, form part of the long-running constitutional law saga of the *ne bis in idem* principle. The Constitutional Council compared administrative sanctions to penal ones in order to verify whether provisions applicable to the same persons and facts, but divergent in the quantum of the penalties, were constitutional. By applying the criteria set out in its 2014-453/454 QPC and 2015-462 QPC rulings, and referring to the constitutional objective of fighting tax evasion, the judge reached the conclusion that the contested cumulating is constitutional. The Conseil held that the sanctions provided by the contested provision are both adequate in light of the offenses they punish and proportionate. The judge proceeded only to a reservation of interpretation specifying that a criminal penalty for tax evasion cannot be applied to a taxpayer who has not been definitively been found liable for tax. Regarding the combined application of the contested provisions of articles 1729 and 1741 of the General Taxation Code, the Conseil declared the application to be in conformity with the Constitution and formulated two interpretative reservations. First, the principle of the necessity of offenses and penalties requires that penal sanctions apply only to the most serious cases of fraudulent concealment. The Council specified that the gravity of the offense might be determined by the amount of the fraud or the nature and the circumstances of the taxpayer's actions. Second, the Constitutional Council stated that the proportionality principle implies that the overall amount of the cumulative penalties may not, under any circumstances, exceed the maximum tariff for any of the penalties imposed.

4. *Freedom of the Press*

In Decision 2016-738 DC, the Conseil cancelled Article 4 of the contested law, which modified the current regime for the protection of the secret of journalists' sources, allowing such secrecy to be breached in case an overriding reason of public interest justifies it. According to the Conseil, the legislator had not ensured a balanced conciliation between freedom of expression and communication and several other constitutional requirements, in particular the right to private life, the secrecy of correspondence, the safeguarding of the fundamental interests of the nation, and the search for perpetrators. The Conseil emphasized that the secret of journalists' sources may be limited only if two cumulative conditions are met: the infringement must be justified by an overriding public interest and the measures in question must be strictly necessary and proportionate to the aim pursued by the legislature.

Germany

DEVELOPMENTS IN GERMAN CONSTITUTIONAL LAW

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INTRODUCTION

In 2016, constitutionalism still reigned supreme in Germany. As elsewhere, however, after almost a decade of protracted crises, German institutions began to show signs of stress and exhaustion. Populism is at the gates and 2017 – a big election year in Germany—will tell us whether the centrist consensus, which has shaped post-war politics in Germany for almost seven decades now, will hold. In view of these developments, it is an open question whether the constitutional moments staged in Karlsruhe will continue to be of societal "integration" or whether the juridical taming of politics that has earned the Court its high reputation in the past will become associated with the fuzzy notion of "elitism" that populist movements all over the globe pretend to attack so violently.

THE CONSTITUTION AND THE COURT: TRENDS AND CHALLENGES[1]

So far, the judges seem more or less unimpressed by such considerations. Nevertheless, observers and judges agree that the FCC is under pressure too. This pressure, however, is also a consequence of some of the Court's successes in the past.

Over the years, parallel to Germany's becoming the "reluctant hegemon" of Europe (*The Economist*), the FCC has taken a more activist stance towards matters of European and international integration. This outreach has opened up an inward-looking constitutional doctrine and has added an important voice to the global constitutional discourse. But, since the Court's domestic caseload has not decreased, taking up the new global role has strained the FCC's resources. In 2016, the institutional costs were particularly visible in the CETA case, where the Second Senate of the Court had to decide overnight on an application for a preliminary injunction against the approval of the Treaty by the German representative in the Council of the European Union (see *sub* IV.4.).

Additionally, the doctrinal edifice that the Court has built over the past 65 years, especially in the area of fundamental rights law, is increasingly difficult to sustain. German constitutional doctrine is famous as an attempt to pre-empt and mediate the inherent irrationalities and injustices of democratic power. However, this project has also induced a massive legalisation of politics, which, in turn, has further increased the need and the opportunities for constitutional review. In reaction to more and more subtly differentiated constitutional requirements, statutory law proliferates. Cases brought before the Court today in fields like law enforcement or tax law frequently involve convoluted statutes. If judges take their case law seriously, they must dive deeply into highly technical matters and check multidimensional normative programs—a time-consuming enterprise that again is straining the resources of the Court. One example is the 2016 decision on

[1] The Federal Constitutional Court is one of the most well-researched courts in the world. Basic information on the Court in English, including a documentation of current and past cases, a description of the various types of proceedings, a history of the Court and the annual statistics, can be found on the Court's website, http://www.bundesverfassungsgericht.de/EN/Homepage/home_node.html. The official statistics for 2016 are not available yet.

the investigative powers of the *Bundeskriminalamt*.[2] In this decision, the Court had to evaluate a statute that was already drafted in a very elaborate way in order to comply with various previous FCC judgements. The 2016 decision again partly quashed the new statute and developed in over 360 paragraphs even more precise requirements for government surveillance. The rationalizing impetus underlying this and other judgements is certainly laudable.[3] However, the Court has to be careful not to let its jurisprudence develop into a casuistry that makes it impossible even for a well-meaning legislator to act constitutionally.

So, apart from the larger political context, the current challenges for the FCC include bridging the gap between its new global role and its domestic responsibilities as well as balancing its traditional doctrinal approach with its more recent role as an evaluator of normative complexity.

For the report we have chosen from 2016's major decisions those that demonstrate how the Court is currently approaching these challenges. Cases that are fully translated into English on the Court's website are not included in the report.[4]

DEVELOPMENTS AND CONTROVERSIES IN 2016

Probably the most debated case of the past year was the FCC's judgment from June 21, 2016, on the constitutionality of the OMT Programme of the European Central Bank (EBC) (2 BvR 2728/13 et al.). With this judgment ends the longest case saga in the history of the Court. In the summer of 2012 at the height of the Euro crisis, a group of citizens and MPs raised constitutional complaints and *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) against federal legislation on the introduction of the European Stabilization Mechanism (ESM) and the Fiscal Treaty. Only a couple of days after the Court had given a preliminary decision, in which it held both measures, by and large, to be constitutional,[5] Mario Draghi announced the OMT program in a famous press conference ("whatever it takes..."), promising to the markets that the bank would function as a lender of last resort in order to stabilize the common currency. In a step that is not untypical for the high degree of informality in German constitutional procedure, the plaintiffs extended their complaint in the main proceedings by including the decision of the ECB into their complaint. The Court accepted this and while the oral argument about the preliminary injunction was mostly concerned with the ESM, the oral argument in the main case was a battle about the legitimacy of the ECB, and ESM and the Fiscal Treaty were barely mentioned. In 2014, the Court declared in a first decision ESM and the Fiscal Treaty to be constitutional.[6] In a second decision, six of the eight justices declared their opinion that the OMT program was not covered by the mandate of the ECB. For the first time in the history of the Court, the majority referred the case for a preliminary ruling to the CJEU.[7] As generally expected, the CJEU did not share the German concerns and decided that the decision of the ECB was legal.[8] To formally terminate the procedure, the German Court had now to react to the decision of the CJEU.

In its reference to the CJEU, the FCC had developed two legal arguments to explain its doubts regarding the OMT Program. First, it saw the distinction between monetary and economic politics being undermined by the ECB's decision. Second, the Court interpreted the OMT program as a violation of the prohibition of direct monetary financing of states through the ECB in Art. 123 and 125 TFEU. As the FCC is, according to its own standard, not entitled to review all violations of European law through European organs, but only "evident" ones that create a "structural shift" within the European competence order,[9] the Court had to establish a manifest violation of the ECB. Now, after the decision of the CJEU, it was confronted with an opinion that did not only see no manifest, but no violation at all. It seems fair to say that both courts have a point. The CJEU, not accustomed to a full-fledged review of an essentially political decision that still kept the form of a central bank action, performed a relatively comprehensive and clear review of the ECB's action. The fact that it left the interpretation of the facts to an independent expertocratic agency does not seem too unusual. As far as the German Court is concerned, there were indications that the true intention of the ECB's action was different from classical monetary politics. But anyway, the real challenge for the German Court was procedural. Even if the ECB acted without a mandate, which part of the German state can be made responsible for the action of an independent EU organ? This puzzle was never really solved in the case.

In order to conciliate these starkly contradicting positions in this final decision, the Court noted that its own interpretation of European law was not able to substitute the interpretation of the CJEU. Instead, it had to check according to a weaker standard if the CJEU had rendered a meaningful independent review of the legality of ECB action, even if this review came to a different result than the FCC's assessment (para. 161). To square the circle, the FCC interpreted the CJEU's decision in a very specific way; an interpretation that can also be read as a

[2] Judgement of 20 April 2016, 1 BvR 966/09 and 1 BvR 1140/09.

[3] Similarly, the Judgment of 6 December 2016, 1 BvR 2821/11, 1 BvR 321/12 and 1 BvR 1456/12, on the phase-out of nuclear energy and the right to property.

[4] This concerns two politically important cases: the judgement of 20 April 2016, 1 BvR 966/09 and 1 BvR 1140/09 (Powers of the Federal Criminal Office), which can be found here; and the Judgment of 6 December 2016, 1 BvR 2821/11, 1 BvR 321/12 and 1 BvR 1456/12 (Phase-out of nuclear energy and the right to property), which can be found here.

[5] FCC, Order of 17 April 2013, 2 BvQ 17/13.

[6] FCC, Judgment of 18 March 2014, 2 BvR 1390 et al., *ESM-Vertrag*, BVerfGE 135, 317.

[7] FCC, Order of 14 January 2014, 2 BvR 2728/13 et al., *OMT-Vorlage*, BVerfGE 134, 366.

[8] CJEU, Judgement of 16 June 2015, C-62/14.

[9] FCC, Order of 6 July 2010, 2 BvR 2661/06, *Honeywell,* BVerfGE 126, 286.

warning. The FCC took the CJEU's *factual* description of the ECB's program as *normative* requirements. In other words, it read the ECB's own description of the OMT program as conditions for the legality of the program, e.g. with regard to the safeguards that should prevent states from refinancing themselves directly through the program (paras. 163 et seq.). This reading creates something like a substantial constitutional standard for actions of the ECB. We will see if these standards will be used some day by the European courts or if they will remain just a piece of German European constitutional law.

English press release available here.

MAJOR CASES

Separation of Powers: Global and local challenges

Decision of 13 October 2016, 2 BvE 2/15 – The rights of the parliamentary committee investigating NSA spying

Domestic separation of powers cases can have important international ramifications, as shown by this case. In the aftermath of the *Snowden* revelations, the German Bundestag established the so-called "Committee of Inquiry into NSA Activities." The primary purpose of the Committee was—and still is—to investigate whether the joint signal intelligence activities by the German Federal Intelligence Service (BND) and the U.S. National Security Agency (NSA) violate constitutional rights. To this end, the Committee requested the Federal Government to hand over a documentation of all search terms (so-called "selector lists"), which the BND had received from the NSA in order to filter traffic at German Internet hubs. The Government refused to comply arguing that such a disclosure would violate the expectations of confidentiality on behalf of the U.S. government and would seriously undermine transatlantic intelligence cooperation. Two parliamentary groups and members of the Committee challenged the refusal citing Article 44 of the Basic Law, which grants inquiry committees the right to collect evidence.

The Second Senate ruled that the application was unfounded, further accentuating a 2014 decision which had recognized limits of the right of inquiry in the field of foreign policy and national security.[10] In the 2016 decision, the Court again evaluated the Committee's right in light of the Government's interest to effectively organize the intelligence services and intelligence cooperation. This interest is of constitutional relevance because national security belongs to the Government's "functional" sphere of competence. However, the Court stressed that national security is not generally off-limits for parliamentary inquiries. Rather, a balancing test is necessary. In the concrete case, the specific interests of the Committee in receiving the selector lists were outweighed by the potential implications of the collection for national security and for the U.S.-German relationship, especially considering that the Government had already provided the Committee with detailed information on the cooperation. The concept of a national security exception will ring familiar to constitutional lawyers from the U.S. and other jurisdictions. Many German scholars remain highly skeptical in this regard.

English press release available here.

Rights and Freedoms

Judgement of 31 May 2016, 1 BvR 1585/13 – Sampling and the right to artistic freedom

For German constitutional judges, cases involving the arts are relatively rare, although Article 5 sec. 3 of the Basic Law explicitly recognizes the right to artistic freedom. So, one can assume that the FCC approached the case reported here with more than the usual excitement, not the least because cases on art law give judges the opportunity to prove that underneath their robes creative spirits hide. Usually, these spirits are then transformed in eloquent prose on the importance of art and artistic freedom.

The case at hand concerns a highly controversial issue in contemporary art: sampling. In 1977, the electronic music band Kraftwerk released its sixth album *Trans Europa Express*. The album featured a composition called "Metall auf Metall." Twenty years later, a German hip hop producer took a two-second rhythm sequence from the original song and used this "sample" as a loop for a new song. Kraftwerk then sued the composer and the production company. The Federal Court of Justice (FCJ) decided in favour of Kraftwerk because the free use exception German copyright law gave no right to commercial sampling.

The First Senate of the FCC ruled that the FCJ's decision had violated the right to artistic freedom of the claimants. It started its legal analysis with the observation that copyright law needs to strike a balance between the property interests of the producers and the conflicting fundamental rights of subsequent users (para. 82). The Court then elaborated that in hip hop the direct citation of an original sample is considered to be an important means for the "'aesthetic re-formulation of the collective memory of cultural communities' … and as such an essential element of an experimentally synthesizing process of creation" (para. 99). If a music genre defines itself through aesthetic strategies involving copying, the constitution demands that copyright laws and their application must take this into account.

English press release available here.

Judgment of 19 April 2016, 1 BvR 3309/13 – On the right to determine parentage

The right of an individual to know his or her parents is widely recognized as one aspect of the general right to private life (Article 8 of the European Charter of Human Rights), or of the so-called "general right of personality," which under German doctrine is derived from Article 2 sec. 1 in conjunction with Article 1 sec. 1 of the Basic Law (*Allgemeines Persönlichkeitsrecht*). In 2007, the FCC had obliged the legislature to pass regulation that made it possible for children to initiate court proceedings in order to determine "legal paternity." Through such proceedings, a legal father-child relationship can be established, including all mutual rights and obligations. But children do not always seek "legal paternity." Some are only concerned with "bi-

[10] Judgment of 21 October 2014, 2 BvE 5/11, *Rüstungsexport*, BVerfGE 137, 185.

ological paternity," i.e. they want to find out who *is* their biological father without necessarily establishing a legal bond to this person. In German civil law, such a claim can be based on § 1598a of the Civil Code. However, this provision only grants such a right for the father, the mother or the child *within* an existing legal family vis-à-vis the other two members of that family. People outside this small group cannot be forced by legal means to consent to a genetic parentage test or to providing a genetic sample suitable for such a test.

This legal situation is unsatisfying for those who suspect that their legal family is not their real family, but who do not necessarily want to give up their existing (legal) family ties. The complainant in the present case, who was born out of wedlock in 1950, was in such a situation. Having failed to convince the civil courts that § 1598a of the Civil Code should be interpreted broadly as to give a claim also towards the "putative biological, but not legal father", the claimant turned to the FCC and argued that such an interpretation was mandated by its constitutional "right of personality."

The FCC, however, held that the constitutional complaint was unfounded because in light of the many conflicting fundamental rights claims at stake, the legislature has a wide "margin of appreciation" when weighing the conflicting claims. In particular, the "right to respect for one's private and intimate sphere" (*Recht auf Achtung der Privat- und Intimsphäre*) derived from Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 of the Basic Law has to be taken into account, which protects both the mother and the potential biological father from disclosing information on sexual relationships against their will (paras. 53–54). Moreover, a man whose biological paternity is determined against his will is affected in his right to informational self-determination (*Recht auf informationelle Selbstbestimmung*) (Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 of the Basic Law) and in his right to physical integrity (Art. 2 sec. 2 of the Basic Law) (paras. 55–58). Finally, the members of the child's existing legal family have a right to family life protected under Art. 6 sec. 1 GG are affected (paras. 59, 63).

In such a complex normative situation, the legislature's decision not to provide the means for determining parentage in isolated proceedings vis-à-vis the putative biological father is not impermissible, even though a different legislative decision might also be compatible with the Basic Law (para. 72).

English press release available here.

Foreign, International and/or Multilateral Relations

Decision of 13 October 2016, 2 BvR 1368/16 et al. (Applications for a Preliminary Injunction) – The EU – Canada Comprehensive Economic and Trade Agreement (CETA) before the FCC

The legal battle over multilateral trade agreements is currently fought on many grounds. In the European Union, the Court of Justice will soon decide on the division of powers between the Union and the Member States.[11] But opponents of the trade deals also take recourse to national courts, including the FCC. In what was promoted as the "biggest constitutional complaint in the history of the Court," over 200,000 applicants joined forces to challenge Germany's participation in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and thus ultimately the ability of the EU to close the deal. In a parallel *Organstreit* proceeding, the parliamentary group of the Left Party in the Bundestag pursued the same objectives.[12]

The claimants relied on a now well-known doctrinal construct that the Court had initially invented to let citizens challenge the constitutionality of EU acts by means of an individual constitutional complaint (*Verfassungsbeschwerde*). The core of the argument is that the individual right to vote (Article 38 of the Basic Law) in conjunction with the constitutional principle of democracy (Article 79 sec. 3 and Article 20 secs. 1 and 2 of the Basic Law) not only guarantees formal participation in an election but meaningful representation.[13] In other words, German voters can claim that the competences of the democratically elected German parliament must not be undermined (*ultra vires* control) or hollowed out (identity control).

The claimants argued that several parts of CETA did not fall within the scope of the competences of the European Union. Additionally, CETA would empower democratically unaccountable institutions – so-called dispute settlement bodies—which would hollow out the political process and the representative institutions in the Member States and thus violate the "constitutional identity" of the Basic Law. The petitioners urged the Court to take immediate action and to issue a preliminary injunction in order to prevent the Council of the European Union from authorizing the signing of CETA and its provisional application.

The Court acted swiftly. In an unusual move, it ordered a public hearing on the question whether a preliminary injunction should be issued. After a day of debate and a night of deliberation, the Court declined to issue the preliminary injunction.

The lengthy opinion on the preliminary injunction leaves much room for interpretation on how the case will be decided on the merits. Nevertheless, it is already clear from the decision that the FCC takes the constitutional challenges seriously. While the Court emphasizes the importance of external trade relations the broad discretion of the Federal Government in the fields of European, foreign and foreign economic policy as well as the "reliability on the part of the Federal Republic of Germany" as a pre-condition for the global influence of Germany and the European Union, it also affirms several points that are crucial for the plaintiffs' challenge; namely, the distinction between foreign di-

[11] Case 2/15 on the Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU.

[12] On this type of proceedings see http://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Organstreitverfahren/organstreitverfahren_node.html.

[13] *See* Judgment of 30 June 2009, 2 BvE 2/08 et al., *Lissabon*, BVerfG 123, 267 <353, 400>; Order of 6 July 2010, *Honeywell*, BVerfGE 126, 286 <304>; Order of 14 January 2014, 2 BvR 2728/13 et al., *OMT*, BVerfGE 134, 366 <392 para. 37>; Judgement of 21 June 2016, 2 BvR 2728/13 et al., para. 148.

rect investment and foreign portfolio investment (no EU competence for the latter, according to the Court, para. 53), the existence of additional limits to EU competences in several areas covered by CETA (paras. 54–58) and, most importantly, the need to ensure democratic accountability of all institutions created by CETA (paras. 59–65). These standards will most certainly be fleshed out in the final decision and could seriously impede the ability of Germany, and consequently of the EU, to participate in ambitious multilateral trade projects. How the standards will relate to the CJEU's Singapore decision will be one of the more interesting questions in the following years.

English press release available here.

5. Decision of 15 December 2016, BvL 1/12 – Treaty Override

Technically a case from 2015 (the decision dates from December 15 but was published only in February 2016), the Treaty Override decision addresses one of the central questions of international law: when and how can states in dualist systems disobey international treaties?

The case originated from a legal dispute involving the now defunct 1985 Double Taxation Treaty between Germany and Turkey. In this treaty, the two countries had agreed on measures to avoid double taxation. According to the German Federal Court of Finance, who referred the case to the FCC, a later statutory amendment to the German Income Tax Act from 2003 directly contravened the Treaty. The Federal Court of Finance asked the FCC if the enactment of the Income Tax Act would not only be a unilateral breach of Germany's international obligations but also violate the German Basic Law.

From a doctrinal point of view, it is not immediately clear how the Federal Court of Finance could arrive at this conclusion. Article 59 sec. 2 sentence 1 of the Basic Law is commonly read as stating that international treaties enjoy the same rank as federal statutory law. And as a part of federal statutory law, they are subject to the principle "lex posterior derogat legi priori" (a later law supersedes a prior, conflicting law). How can the conflict between two statutory laws rise to the issue of constitutionality?

For the Federal Court of Finance, the answer was *Görgülü* (para. 14). In this seminal case from 2004, the FCC had decided that, despite the generally dualist approach of the Basic Law, the European Charter of Human Rights—an international treaty—enjoyed an elevated rank amongst German statutory law.[14] Elevated means that all German law, including the Basic Law, must be interpreted in light of the Convention and of the judgments of the European Court of Human Rights. According to the FCC, a violation of this obligation is at the same time also a violation of the principle of legality (Article 20 sec. 3 Basic Law) and can be challenged before the FCC. Now, the referring chamber of the Federal Court of Finance, in line with many German scholars, derived from *Görgülü* the rule that not only the Convention but international treaty law in general supersedes federal statutory law and that the parliament may deviate from international treaties only to protect "fundamental constitutional principles" (para. 59).

However, as the FCC made clear, this interpretation was based on a serious misreading of the Court's previous decisions. The FCC first repeated that, as a rule, the domestic status of international treaties equals the status of federal statutory law (Article 59 sec. 2 of the Basic Law). The Court added that while the Basic Law is strongly committed to international law, the principle of "openness to international law" (*Grundsatz der Völkerrechtsfreundlichkeit*) does not translate into an *absolute* constitutional obligation to obey *all* rules of international law. While the principle enjoys constitutional rank, it must be balanced with the principles of democracy and parliamentary discontinuity. The Court emphasizes: "Democratic power is always temporary power" (para. 53). In order to balance its commitment to international law with the idea of democratic government, the Basic Law itself has created a differentiated system, which is not up for judicial re-invention. *Görgülü* then, the Court explained, was a different matter, because the Constitution itself recognizes in Article 1 sec. 2 of the Basic Law the protection of human rights as one of the central values of German constitutionalism (para. 59).

English press release available here.

CONCLUSION

2016 was a year with many legally wide-ranging and politically important decisions. All in all, the ability of the FCC, a relatively small institution, to lead substantial oral arguments and to deliver many thoroughly argued judgments remains astonishing. Yet the danger of an institutional overstretch, both as a matter of institutional capacity and of political legitimacy, debated since the 1970s, seems to become more and more acute. Maybe wrongly so: between 1985 and 1999 the Court published 33 volumes of its official collection; and between 2000 and 2014, 36 volumes. This is only a modest increase. A historical perspective may teach us that the presence of the Court in virtually all politically contested questions has been a part of the normality of the Federal Republic since its beginnings.

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[14] FCC, Order of 14 October 2004, 2 BvR 1481/04, *Görgülü*, BVerfGE 111, 307.

Hungary

DEVELOPMENTS IN HUNGARIAN CONSTITUTIONAL LAW

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OVERVIEW

The Hungarian Constitutional Court (Court, CC) finished 355 cases in 2016. Only one-fourth of them resulted in a decision on the merits, and only a fragment ended with an annulment of the unconstitutional legal act or court decision.

In this year-in-review, we would like to give a short overview of the most important decisions of the Court in 2016 and give some information about the political and legal background where the Court operates. We also point out the most important controversies that characterize this year's case law and seek some conclusions.

THE CONSTITUTION AND THE CONSTITUTIONAL COURT

The Hungarian Fundamental Law effective from 1 January 2012 and Act CLI of 2011 on the Constitutional Court have significantly modified the competencies of the Constitutional Court and the role of the different institutions in initiating constitutional review. Changes implemented already by the amendments to the former Constitution in 2010 and 2011 stayed in force concerning the government coalition gaining fundamental influence in nominating judges and limiting the competence of the Court regarding economic and financial constitutionality issues. The president of the Court was formerly elected by the judges for three years, but with the reform, the president became elected by the Parliament for the duration of the whole term of his office. Finally, an amendment raised the number of judges from 11 to 15 without any justifiable pressing need.

Among several changes, the Fundamental Law introduced three types of constitutional complaints and abolished the formerly existing *actio popularis*. The system of *actio popularis* meant that it was a legal possibility for everyone to turn to the Constitutional Court without personal interest claiming that law, a legal provision or regulation was contrary to a constitutional provision (abstract ex-post facto review).

The solemn aim of the new constitutional complaint mechanisms was to protect against personal injuries caused by ordinary courts and provide a possibility for constitutional review also in cases where the complainant cannot turn to the ordinary court. Moreover, the Constitutional Court may supervise the constitutionality of legal provisions when applied in certain judicial cases and lead to an unconstitutional court decision. Judicial referral as it existed before 2012 stayed in force, which means that judges in pending cases turn to the Constitutional Court in case they state that an applicable piece of law is unconstitutional.

Originally, besides the ombudsman (who initiated almost all procedures of this kind after 2012), the Government and a one-fourth minority of the MPs (from 2010 the latter would need the cooperation of all parliamentary opposition groups) were entitled to initiate the abstract ex-post facto review procedure of the Constitutional Court. From March 2013, with the entering

into force of the Fourth Amendment to the Fundamental Law, the Head of the Curia and the Chief Public Prosecutor can also submit a proposal for a review of constitutionality. The new regulation can still be qualified in this regard as a very restrictive one as to the control of legislation especially in comparison to the former solutions.

DEVELOPMENTS AND CONTROVERSIES IN 2016

As a result of a constitutional amendment in November 2010, a serious limitation of the competences of the Constitutional Court was introduced. According to this amendment, the Constitutional Court may assess the constitutionality of acts related to the state budget, central taxes, duties and contributions, custom duties, and central conditions for local taxes exclusively in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion, or with rights related to Hungarian citizenship. Also, the Court may only annul these acts in cases of violation of the above-mentioned rights. The restriction of the Constitutional Court's competences was the answer of the alliance of the governing parties to a CC decision, which annulled a law on a certain tax imposed with retroactive effect. From 2010 to 2013, the two-thirds majority having the competence to adopt constitutional amendments overruled other decisions of the CC as well.[1] As a result of the new system, the control of the legislation and the government (strictly cooperating with each other in this parliamentary democracy) became more difficult as the initiatives for the constitutional review of the problematic pieces of legislation became more frequent in procedures attached to concrete judicial cases, launched in constitutional complaint procedures. The high non-admissibility of these constitutional complaints meant a severe restriction on the number of cases examined on the merits by the Constitutional Court.[2]

Although the new provisions in the Fundamental Law on the competencies of the Constitutional Court provide for several procedures to initiate the review of a piece of legislation, in reality, due to the above-mentioned "court-packing" and the modified ways of the election of the members and the president, plus due to the competence restrictions, the Constitutional Court has lost much of its actual relevance compared to the period before 2010.

The changes mentioned in Part II have led to a change in understanding the protection of the constitution and the protection of constitutionality differently. We explain the result of this different understanding in Part IV with the 2016 cases. Interpretation of the CC has changed significantly towards a more deferential understanding of constitutionality. To summarize, not only the institutional challenges or the changes in the competence of the Court are worth mentioning when it comes to the Hungarian Constitutional Court but also, partly as a result of this, the actual composition of the judicial body. The change in the composition has led to a change in the understanding of constitutionality. The cases below will show that the majority of the Court is willing to accept political proposals formulated as legislative acts and show deference for the legislative majority in sensitive cases. Sovereignty, democracy or the rule of law are understood differently from earlier concepts developed by the CC. This process is accelerated by the Fundamental Law's closing and miscellaneous provisions where it is declared that Constitutional Court decisions issued prior to the entry into force of the Fundamental Law are repealed. Not only has the relation to former case law changed significantly in recent years but also the relation of the Hungarian constitutional order to its European and international counterparts. In 2016 the CC made reservations in the majority opinion with regard to the law of the European Union and dissenting opinions questioned the relevance of ECtHR decisions in the domestic constitutional interpretation of fundamental rights. It is also a major dilemma of 2016 how the interpretation of the constitution is ruled by the Fundamental Law. The Fundamental Law declares in Article R (3) that the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the Avowal of National Faith (Preamble), and with the achievements of our historical constitution. In 2016, the Constitutional Court has started to take this provision seriously as we will see in Decision 22/2016 (XII. 5.) below.

MAJOR CASES

Decisions on elections and direct democracy's impact on political competition

In 2014, for the first time Hungarian citizens without residency in Hungary could participate in parliamentary elections and vote by postal voting. At the same time, postal voting is not allowed to Hungarian citizens residing in Hungary but who are abroad on election day. In **Decision 3086/2016 (IV. 26.),** the CC held that this difference in treatment did not violate the right to free elections (Article XXIII of Fundamental Law) and the right to non-discrimination (Article XV).

According to the Court, the residence requirement expresses that residents have a more intensive connection to the political community so it can be expected that those voters will be at home on election day or go to an embassy or a consulate to cast a vote. The other argument was that although the possibility of voting by post seems to be an advantage, it should be regarded together with the electoral system, which gives non-resident voters only one vote for party lists (while resident voters can vote both for single member candidates and party lists), which is a disadvantage for non-resident voters. The easier method of voting was therefore considered by the Court to be a form of compensation for them. In our opinion, this raises serious concerns as to the principle of effective citizenship: that while

[1] European Commission for Democracy through Law (Venice Commission), *Opinion on the Fourth Amendment to the Fundamental Law of Hungary* [CDL-AD(2013)012] 83.

[2] The Constitutional Court of Hungary, 'Statistics' <http://hunconcourt.hu/constitutional-court/statistics> accessed 14 February 2017.

ensuring an advantage for the non-resident voters, the law brought the resident voters into a relatively disadvantageous position.[3]

In **Decision 3130/2016 (VI. 29.)**, the CC upheld the resolution of Parliament that ordered a national referendum on the question 'Do you want the European Union to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the Parliament?' The Court held that according to the Constitutional Court Act, it can only examine the formal procedure of the Parliament (which was constitutional) but cannot review the constitutionality of the subject of the referendum approved by the National Election Commission and the Supreme Court (Curia). However, the CC also rejected the constitutional complaints challenging the Curia's decision approving the referendum question.[4] According to the CC, the petitioners had no standing to challenge the decision of the Curia because as simple voters their fundamental rights were not affected by the decision. We argue in line with many constitutional scholars that the decision of the CC was far too deferential because the question asked on the referendum was unconstitutional. The Fundamental Law does not allow voting on questions that do not belong to the competence of the parliament. Among other constitutional problems, this question can hardly be regarded as a purely Hungarian legislative issue.[5]

Increasing restrictions on political communication rights

The freedom of assembly is regulated in Hungary by an act adopted in 1989 as a huge step in the democratic transition process. According to the very liberal regulation, an ex-ante ban on assembly is possible only in two cases: if according to the police it seriously endangers the proper functioning of the representative state institutions or courts, or if the circulation of traffic cannot be secured by another route. Any other problem that might emerge during the event (like the violation of rights of others or the risk of a crime) can result in the dispersing of the event. In **Decision 13/2016 (VII. 18.)**, the CC, however, held that the police acted lawfully and constitutionally when it used a new, non-codified reason to enact a prior restraint on a demonstration in front of the home of the prime minister (the reason was the assumed violation of the privacy of the inhabitants in the neighbouring district). The CC also argued that there was an unconstitutional omission, meaning that the Parliament should amend the act on the freedom of assembly in order to regulate the cases when the freedom of assembly and the right to privacy are in collision.

On the contrary, in **Decision 14/2016 (VII. 18.)**, the CC annulled the decisions of the police and the court supervising it that forbade a demonstration based on hypothetical grounds (assuming that it would be dangerous and would violate others' rights). However, the CC affirmed that there is an unconstitutional omission and prescribed that the Parliament implement safeguards to ensure the peaceful character of demonstrations and resolve the collision of the freedom of assembly with other fundamental rights, primarily by restricting the first more.

The Hungarian Media Act states that a reporter cannot add an opinion to the news. In **Decision 3264/2016 (XII. 14.),** the CC held this provision is not against the right to free expression and freedom of the press unless it makes clear that this is not a fact but an opinion of someone. So it upheld the decision of the Curia that decided that a political party cannot be tagged as "far-right" in the news report because this adjective constitutes an opinion and not a fact.

It would seem that the CC expanded the freedom of the press in **Decision 19/2016 (X. 28.)** by stating that the media has a right to broadcast 'public service advertisements' (not-for-profit advertisements with a public purpose). However, in the concrete case, the CC annulled a Curia decision where the Curia found that the advertisements of the Government on campaigning to encourage voters to participate in the above-mentioned migration quota referendum initiated by the Government were illegal. The Curia held that public service advertisements were just a means to circumvent the strict campaign regulation and to ensure an illegal advantage for the Government in the campaign. The CC annulled this important Curia decision.

Wrestling with other state institutions for the protection of informational rights

In two consecutive decisions [**Decision 16/2016 (X. 20.)** and **Decision 17/2016 (X. 20.)**], the CC upheld its position that photographs showing police actions shall be published without prior permission of the police officers concerned. In the two similar constitutional complaints, press organs initiated the examination of the judgments of ordinary courts as these declared that the press organs violated the law by publishing photographs of police officers in action without their prior permission. In its reasoning, the CC pointed out that the conditions for publishing such photographs, as declared by the CC in a previous case [**Decision 28/2014. (IX. 29.)**] should be taken into consideration by the ordinary courts. As in these cases, the freedom of the press was in conflict with human dignity; balancing between the conflicting rights is unavoidable. Such photographs can usually be published if the publishing is not arbitrary, so it provides due information about contemporary events as public information about the exercise of executive power. According to the CC, in this case, the courts failed to balance properly between the conflicting rights. Their interpretations were not in accordance with the constitutional requirements. Moreover, the CC emphasized that while ordinary courts are in the position to examine the state of affairs, to evaluate the evidence and finally to decide in concrete cases, the interpretation of the CC on constitutional principles and on the scope of constitutional rights must be taken into consideration. It is worth adding

[3] Eszter Bodnár, 'All Voters are Equal but…Two Case Studies on the Voting Rights of Hungarians Living Abroad' (2016) ICL 4.

[4] Decisions 3130/2016. (VI. 29.), 3150/2016. (VII. 22.), 3151/2016. (VII. 22.).

[5] Zoltán Pozsár-Szentmiklósy, 'A Kúria végzése a betelepítési kvótáról szóló népszavazási kérdésről. Országgyűlési hatáskör az európai jog homályában' (2016) Jogesetek Magyarázata 1-2.

that the ongoing discussion of the ordinary courts and the CC on the legality and the constitutionality of publishing photographs alike is far from ending.[6]

In **Decision 8/2016 (IV. 6.)**, the CC declared that funds used by the foundations established and companies owned by the National Bank of Hungary are public funds; therefore the information regarding their expenditure shall be qualified as information in the public interest. The case was initiated by the president of Hungary (the head of the state) as an ex-ante review of the amendment to the Act on the National Bank of Hungary, which stipulated certain restrictions on public information. According to the amendment, data regarding the functioning of the companies owned by the National Bank were considered part of a decision-making process and therefore secret for 30 years while information regarding the functioning of the foundations established by the National Bank were deemed similarly. According to the CC, companies owned by the National Bank are indirectly owned by the state; therefore the information regarding their activity is by definition data of public interest. Concerning the foundations established by the National Bank, taking into consideration the source of their assets and their activity, the CC declared that their funds are public funds and are performing public tasks. The CC finally declared that the challenged provisions were unconstitutional, as there was no legitimate aim to limit the freedom of public information. Overall the decisions on the right to information show that the CC is often up to fight against the restrictive interpretation of ordinary courts or ready to challenge government attempts.

Selectivity in the protection of the rule of law

Decision 7/2016 (IV. 6.) examined the retroactive effect of certain provisions of the amendment to the Act on the Hungarian Post Office. The case was initiated by the president of Hungary as an ex-ante review. The new regulation introduced a limitation on the publicity of data regarding the business activity of the Hungarian Post Office and its companies in order to protect their business interests from other competitors present on the market. The constitutional dilemma could have been quite similar to the case of the amendment to the Act on the National Bank of Hungary: the president here did not object to the limitation of the public access to these data. The petition claimed simply that the retroactive introduction of the new provisions was unconstitutional. According to CC case law, a piece of legislation with retroactive effect is not always unconstitutional, but only when it has a punitive or more burdening effect. The CC argued in this 2016 case that the examined provisions have no punitive or burdening effect. As they are only of a clarifying nature to the conditions for exercising the freedom of information, the retroactive effect of the law was found constitutional.

In **Decision 23/2016 (XII.12.)** the CC examined the constitutionality of the Act on the special reimbursement program open for capital market investors. Those investors who lost property due to the bankruptcy of big brokerage companies could take part in the reimbursement program. The loss was caused by systemic irregularities in brokerage activities. Due to the fact that the examined regulation contained limitations of the access to reimbursement in many aspects, dozens of constitutional complaints were submitted, claiming that the act in question limited the fundamental rights of the complainants (equal treatment, the right to property, the rule of law and the right to fair trial). The CC declared that the system of reimbursement established by the law is of an *ex gratia* nature based on equity, which constitutes no ground for such right-based claims. In other aspects, the CC found the regulation reasonable and based on public interest. The constitutional complaints were therefore rejected. The Constitutional Court in this decision also rejected the constitutional complaints of financial institutions as the *ex gratia* remedy for the loss investors were to be offered by all financial institutions. The institutions are to be compensated for this actual violation of their property rights only in a later stage, according to the Act CXXIV of 2015 on the stability of the capital market. Some financial institutions claimed that the measures implemented by the act were not proportionate concerning the limitation of their right to property, but the CC declared the constitutionality of the related, highly problematic provisions as well.

In several constitutional complaint decisions in 2016, the CC further declined to overturn the decisions of ordinary courts in cases concerning foreign currency loan contracts.[7] The economic crisis of 2008 and especially the rapid exchange rate depreciation of the Hungarian forint resulted in a significantly worsened situation of debtors. Legislative acts aiming to help the situation and related judicial decisions were reviewed by the Constitutional Court continuously. Novel constitutional ideas, unconventional constitutional measures and new doctrinal solutions were born in foreign currency loan-related decisions. In 2016, in constitutional complaint procedures, the CC enhanced its position developed already in 2014 and 2015. In its **Decision 34/2014 (XI. 14.)**, it examined the unconstitutionality of the legislative act regulating basically two questions: whether exchange rate margins in foreign currency loan contracts are null and void and whether unilateral amendments to contracts are unfair.[8] According to the Constitutional Court, the rules did not attain the level of unconstitutionality either in the details or as a whole. The act did have a restrictive effect on the fundamental rights in question, but the restriction itself could not be considered unconstitutional under a proportionality test. In **Decision 2/2015 (II. 2.)**, the petitioner judges claimed that the principle of separation of powers, right to fair trial, the rule of law and the legal certainty were breached in credit crunch related legislation.[9] The Constitutional

[6] Éva Balogh, 'A megkülönböztetés művészete: bírói mérlegelés a közszereplőkkel kapcsolatos közlések szabadsága kapcsán' (2016) Fundamentum 1.

[7] Decisions 3103/2016. (V. 24.), 3098/2016. (V. 24.), 3167/2016. (VII. 1.), 3222/2016. (XI. 14.), 3272/2016. (XII. 20.).

[8] Act XXXVIII of 2014 on the Resolution of Questions Relating to the Uniformity Decision of the Curia Regarding Consumer Loan Agreements of Financial Institutions.

[9] See also Act XL on the Rules of Settlement Provided for in Act XXXVIII of 2014 on the Resolution of Questions Relating to the Uniformity Decision of

Court rejected all judicial referrals. Later, the Constitutional Court concluded a great number of decisions on the subject of foreign currency loan crises legislation in 2015 and 2016 with regard to the various constitutional complaints. All claims were rejected,[10] although the CC itself acknowledged that the extraordinary emergency solutions were problematic from the rule of law point of view. They imposed an unreasonable burden on financial institutions with retroactive effect and furthermore did not allow for a fair trial.

The constitutional identity of Hungary defined as making reservations to EU law

In **Decision 22/2016 (XII. 5.)**, the interpretation of the Fundamental Law had been requested from the Court by the ombudsman. As explained in the motion, the concrete constitutional issue was related to the European Union's Council Decision (EU) 2015/1601 of 22 September 2015 on migration.

The CC established that the EU provides adequate protection for fundamental rights. The Constitutional Court, however, cannot set aside the protection of fundamental rights, and it must grant that the joint exercise of competences would not result in violating human dignity or the essential content of other fundamental rights.

The Court set two main limitations in the context of the question on the legal acts of the Union that extend beyond the jointly exercised competences. First, the joint exercise of competence shall not violate Hungary's sovereignty; second, it shall not lead to the violation of its constitutional identity. The CC emphasized that the protection of constitutional identity should take the form of a constitutional dialogue based on the principles of equality and collegiality, implemented with each other's mutual respect. The Constitutional Court established its competence for the examination of whether the joint exercise of powers by way of the institutions of the EU would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution.

The curiosity of the case is that this is the first time that the CC has ruled explicitly on the relation of EU law and the domestic constitution claiming that the Fundamental Law has ultimate supremacy in fundamental constitutional questions. Furthermore, the constitutional identity, the inviolable core of the constitution, has never been defined as such formerly. The country's historical constitution as an element of the unamendable identity also poses new questions in the Hungarian constitutional order. If the Fundamental Law is amendable only up until it does not interfere with the historical constitution as a basis, the historical constitution not defined so far in the positive constitutional law in effect might have a new, stronger position at least as a tool of the constitutional interpretation.[11]

CONCLUSION

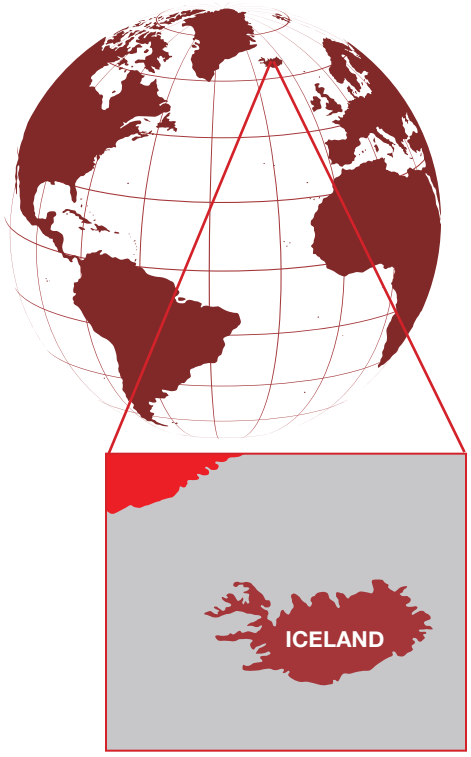
The above cases showed that the CC decided important matters in 2016, but relevant decisions were carefully designed not to impose undesirable constraints on the legislature.[12] There are considerable improvements with regard to the right to information, but on the other hand freedom of the press is limited. Retroactive effect of a piece of legislation is rarely found unconstitutional although the CC alludes to the rule of law in many decisions. The role of participatory democracy is underlined, but many decisions justify restrictions on actual democratic participation. On the other hand, participation is made possible in the form of a popular vote when it can have no legal consequence. Financial support is given in important cases, but the circumstances are not clear. Constitutional complaints remain the major competencies of the Constitutional Court to question the constitutionality of government actions. State institutions are not active in initiating ex-post facto review of legislation. Judges, therefore, remain the key actors in initiating important petitions, raising fundamental questions together with the individual complaints. As we explained, constitutional justice is puzzling in 2016 as to the evaluation of doctrinal development. As to its relevance as a balancing factor to governmental powers, it certainly loses further points in 2016.

the Curia Regarding Consumer Loan Agreements of Financial Institutions and on other related provisions.

[10] According to statistics of the Constitutional Court, in 2015 630 motions were submitted to the Constitutional Court in the same subject and 1,300 constitutional complaints with essentially identical texts were submitted in the same period. 700 foreign currency loan cases were active on 31 December 2015. Alkotmánybíróság, 'Statisztika' http://alkotmanybirosag.hu/dokumentumok/statisztika/2015 accessed 14 February 2017.

[11] Schweitzer Gábor, 'Alaptörvény – sarkalatos törvény – történeti alkotmány' in Boóc Ádám' Fekete Balázs (eds), *Il me semblait que j'étais moi-même ce dont parlait l'ouvrage – Liber Amicorum Endre Ferenczy* (Patrocinium 2012) 261–262; Szente Zoltán, 'A historizáló alkotmányozás problémái – a történeti alkotmány és a Szent Korona az új Alaptörvényben' (2011) Közjogi Szemle 3.

[12] Zoltán Szente, 'The political orientation of the members of the Hungarian constitutional court between 2010 and 2014' (2016) 1 Constitutional Studies 1.



Iceland

DEVELOPMENTS IN ICELANDIC CONSTITUTIONAL LAW

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INTRODUCTION

From a constitutional perspective, the year 2016 was a tumultuous one in Iceland. However, the events of the year mostly played out in elections and on TV, not in courts. In early April, the Prime Minister resigned after a scandal concerning his off-shore property broke on national television, and parliamentary elections to take place in the fall were announced. In June, a new president was elected. In the parliamentary elections on October 7, parties had representatives elected to Parliament, which meant that forming a government was no easy task and the year ended without one. These events will be discussed in more detail below.

Iceland has, in spite of the financial crisis of 2008, which hit the country severely, remained a stable democratic state. To some extent, the constitutional drafting process begun in 2011 is still underway although it is unclear to what extent changes will be made. This will also be discussed further below. So will seminal court cases decided in 2016.

THE CONSTITUTION AND THE COURTS

Iceland's constitutional history from the late 19th century is characterized by constitutional continuity. In spite of the important changes to the constitutional system, which have taken place since the first undisputedly Icelandic Constitution of 1874, only three Constitutions have entered into force (1874, 1920 and 1944).

The current Constitution of Iceland dates from 1944 (no. 33/1944). In 1942, it was decided that a republic would be founded once it became possible to end the association with Denmark after 1943. A constitutional committee was set, charged with drafting a constitution for the republic, but expressly forbidden to make any amendments except those directly following the dissolution with the Danish monarch and the founding of the republic. Consequently, the only changes made to the constitution of the monarchy at the founding of the Republic were those directly related to the head of state and the mode of government. The constitution of 1944 was viewed as provisional. Constitutional committees were at work from 1944 onwards. That project was abandoned in the 50s, to be taken up again in the early 1970s (a new Constitution draft was introduced in 1983 but was not adopted) and then again in 2009. In 2011, a Constitutional Council drafted a new Constitution, but this draft has not been adopted either.

This does not mean, however, that the Constitution has remained unchanged from 1944. In 1959, the electoral system was drastically changed; in 1968, the rules on eligibility to vote were altered; in 1984, the electoral system was amended once again; in 1991, Althing (the Icelandic Parliament) was made unicameral and the distinction between the executive and judicial powers made clearer. In 1995, a completely revised chapter on human rights was adopted and the fiscal control of Parliament was clarified. In 1999, the electoral system was amended once again and in 2013, an amendment to simplify the amendment procedure entered into force, adopted in order to make it easier to pass any amendment based on the constitutional drafting that took place in 2011-2013.

Throughout this time, Iceland has been—and still remains—a representative democracy with an elected head of state that holds a largely ceremonial role, a parliamentary sys-

tem of government and independent courts. However, public trust in institutions is relatively low.

The court system is (until Jan. 1, 2018, when a new Court of Appeals will come into existence) two-tiered. There are eight district courts and one Supreme Court. All courts exercise judicial review of parliamentary acts as well as executive decisions. Constitutional review is thus vested in all courts. Courts in Iceland have been relatively active (compared to most of their European neighbours) in finding laws unconstitutional.[1]

DEVELOPMENTS AND CONTROVERSIES IN 2016

Presidential Authority and the Dissolution of Parliament

The main constitutional event of 2016 began with the publication of the so-called Panama Papers.[2] Sigmundur Davíð Gunnlaugsson, who was then Prime Minister of Iceland, walked out of a TV interview with journalists from the Swedish and Icelandic state broadcasters when asked about a company called Wintris Inc., established in a tax haven. One of the main issues of his career as Prime Minister had been the treatment of foreign creditors after the financial crisis of 2008.[3] It later became clear that he had sold his half of the company to his co-owner (the woman now his wife) for $1 on Dec. 31, 2009, the day before a law entered into force that would have required him to declare the ownership of Wintris as a conflict of interest.[4]

Large parts of the public viewed this as a conflict of interest and a breach of good faith, irrespective of whether the ownership ever had any influence on Mr. Gunnlaugsson's politics. The ensuing scandal led to the largest protests in the history of Iceland, and a course of events in which considerable constitutional uncertainty arose. On April 5th, the Prime Minister met with the President and (allegedly) requested the dissolution of Parliament. In a press conference after their meeting, the President stated that the Prime Minister had requested a dissolution of Parliament, but that he, the President, had refused to dissolve Parliament, *inter alia* because he wanted to discuss this with the other party in the coalition government.[5]

Shortly after the President's press conference, a short press release came from the office of the Prime Minister, stating that the he had in fact not requested dissolution of Parliament. It thus seems that the protagonists in this drama disagree on whether the Prime Minister indeed requested the dissolution of Parliament or not. It is clear, however, that the Prime Minister was increasingly isolated politically and that he had not discussed the option of dissolving Parliament with his coalition partner (the Independence party), whose chairman stated in the media that the dissolution order from the President had been intended as a threat to get the coalition to stick together.[6] Mr. Gunnlaugsson's Progressive Party decided in a party meeting that very same day that he would resign as Prime Minister while keeping his position as Chairman of the party.[7]

In Icelandic constitutional law, the dissolution of Parliament is permissible under art. 24 of the Constitution. It provides that the President of the Republic may dissolve Althing (the Parliament). A new election must take place within 45 days from the announcement of the dissolution. Althing shall convene not later than 10 weeks after its dissolution. Members of Althing shall retain their mandate until Election Day. However, according to art. 13 of the Constitution, the President shall entrust his authority to Ministers, and according to art. 14 of the Constitution, Ministers are accountable for all executive acts.

The constitutional question concerning the dissolution of Parliament was twofold: first, as the crisis was brewing, the question arose whether the President could step in and dissolve Parliament, thus in effect making the electorate the arbiter of the scandal that had arisen. The second question was whether the President could independently evaluate a request for the dissolution of Parliament. Because of the largely ceremonial role played by the President, the theory for much of the 20th century had been that this was not the case. But the President did, indeed, refuse to sign such an order on April 5, 2016.

In spite of the limited role of the head of state, it had been argued in theory at least from 2009 that no dissolution of Parliament would take place unless both the Prime Minister and the President agreed on that decision.[8] There was therefore no doubt that the President could not dissolve Parliament unless the Prime Minister agreed. This is based mostly on art. 19 of the Constitution, which provides that executive acts become valid when counter-signed by a Minister. The question that remained was whether the

[1] See Ragnhildur Helgadóttir, 'Status Presens – Judicial Review in Iceland' (2009) 27 Nordisk Tidsskrift for Menneskerettigheter 185 and Björg Thorarensen, 'Judicial Control over Althingi: Altered Balance of Powers in the Constitutional System'(2016) 12(1) Stjórnmál og stjórnsýsla.

[2] See, for clarification, Wikipedia, 'Panama Papers' https://en.wikipedia.org/wiki/Panama_Papers accessed 17 April 2017 and Luke Harding, 'What are the Panama Papers? A guide to history's biggest data leak' *The Guardian* (London 5 April 2016) https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers accessed 17 April 2017.

[3] See e.g. Brian Bremner and Omar Valdimarsson, 'Iceland gets tough with foreign creditors of failed banks' *Bloomberg.com* (10 May 2013) https://www.bloomberg.com/news/articles/2013-05-09/iceland-gets-tough-with-foreign-creditors-of-failed-banks accessed 17 April 2017.

[4] See the full interview at https://www.youtube.com/watch?v=Zx7c8huezqY For English-language commentary, see e.g. http://www.telegraph.co.uk/news/2016/04/04/icelands-prime-minister-walks-out-of-interview-over-tax-haven-qu/ and http://www.independent.co.uk/news/world/europe/panama-papers-icelands-prime-minister-walks-out-of-interview-over-tax-questions-a6967091.html.

[5] Freyr Gígja Gunnarsson, 'Féllst ekki á ósk Sigmundar Davíðs um þingrof' *ruv.is* (Reykjavik, 5 April 2016) http://www.ruv.is/frett/fellst-ekki-a-osk-sigmundar-davids-um-thingrof accessed 2 April 2017.

[6] Nanna Elísa Jakobsdóttir, 'Sigmundur Davíð segir forsetann hafa sagt ósatt' *visir.is* (Reykjavik, 5 April 2016) http://www.visir.is/g/2016160409279/sigmundur-david-segir-forsetann-hafa-sagt-osatt accessed 17 April 2017.

[7] Ibid.

[8] Ragnhildur Helgadóttir, Þingræði á Íslandi: Samtíð og saga (Forlagið 2011).

President had been within the boundaries of his role when he refused to sign an order dissolving Parliament when requested to do so by the Prime Minister. One of the authors of this article (RH) stated in the media that such was her opinion already on April 5. This was based on the assessment that these were the extraordinary circumstances of a very isolated and arguably distraught PM attempting to use the dissolution of a democratically elected Parliament as leverage to increase his chances of success in negotiating how to endure a political scandal. Other academics were more hesitant to accept the constitutionality of the President's action.[9] However, the President clearly thought that the Prime Minister's request was arguably a misuse of the possibility of dissolving Parliament, as he stated at the press conference that it wasn't possible to use the presidency in a tug-of-war between the leaders of political parties.[10] The open question that remains in Icelandic constitutional law is how to hold a President—since he can undertake such evaluations— accountable for his or her decisions, as it is stated clearly in the Constitution's art. 11 that 'The President of the Republic may not be held accountable for executive acts'. If these events signal a more powerful presidency, and not only an emergency use of presidential powers, that question will be immensely important.

The Fate of the Constitutional Draft of 2011

In 2011, a Constitutional Council was tasked by Parliament to draft a new Constitution for Iceland. It handed a draft Constitution to Parliament later that year after a quite inclusive and innovative process.[11] Voters approved enacting a new Constitution 'based on the draft' in a referendum in the fall of 2012. The draft was discussed in Parliament but not adopted before the general elections in 2013, in which anti-revisionist parties gained a majority in Parliament.[12]

Before the elections that were held in October 2016, NGOs and others tried to put the constitutional revision back on the agenda.[13] The different standpoints of political parties in the 2016 elections can be divided up in two: on one hand the parties that wanted to hold onto the current Constitution but amend it in some ways and update it, and on the other hand parties that championed a new Constitution and wanted to use the draft that the Constitutional Council presented in 2011 at least as a starting point.

It is interesting to note that the parties who formed the coalition government which took power in January 2017 fundamentally disagree on how to go about the changes. The Independence Party believes that every change to the Constitution should be carefully considered and that it is not desirable 'to overthrow the Constitution and get a completely new one. That can hardly be reconciled with predictability and legal certainty.'[14] However, the party believes that there should be a provision on referendum in the Constitution and that provisions on the presidential powers should be updated.[15]

The party *Bright Future* wants to use the draft of the Constitutional Council but act on objective and well-founded suggestions for improvement. They also mention that it is necessary that the explanatory report and other travaux preparatoires need to be clear. Finally, they think that the nation should get time to familiarize itself with the new Constitution.[16]

The third coalition party, *Viðreisn,* believes that it is necessary to finish the revision of the Constitution. They want to strengthen direct democracy so that the public can have a say on important issues and to sharpen the separation of power.

In the coalition agreement between these three parties from January 2017, it is stated that the work of revising the Constitution will be continued on the basis of the extensive work that has taken place in the past few years. The cabinet will invite all political parties represented in Parliament to appoint representatives to a parliamentary committee, which will work with specialists in constitutional law and agree on amendments to the Constitution that will be submitted to Parliament no later than 2019.[17]

The coalition agreement also notes that it is important for the amendments to be discussed thoroughly in public before being discussed in Parliament.[18]

Finally, it must be noted that the provisional amendment enacted by Act 91/2013, which provided for a special amendment process in order to facilitate building on the constitutional drafting of the last few years, will run its course on April 30, 2017. The regular amendment process (two Parliaments with a general election in between must adopt a constitutional act) will thus be applicable to any amendments discussed in 2019.

[9] Áslaug Karen Jóhannsdóttir, 'Forseti aldrei hafnað tillögu forsætisráðherra um þingrof' *stundin.is* (Reykjavik 5 April 2016) http://stundin.is/frett/forseti-aldrei-hafnad-tillogu-forsaetisradherra-um/ accessed 15 April 2017.

[10] Freyr Gígja Gunnarsson, 'Lygileg atburðarrás 5. apríl' *ruv.is* (Reykjavik, 5 April 2016) http://ruv.is/frett/lygileg-atburdaras-5-april accessed 2 April 2017.

[11] Stjórnlagaráð, 'The Constitutional Council – General information' http://stjornlagarad.is/english/ accessed 17 April 2017.

[12] Iceland review, 'Iceland's Parliamentary Election: Final results' http://icelandreview.com/news/2013/04/28/icelands-parliamentary-election-final-results accessed 17 April 2017.

[13] See e.g. the videos made by Stjórnarskrárfélagið https://www.facebook.com/Stjornarskrarfelagid/videos/1317088394968676/.

[14] Sjálfstæðisflokkurinn, 'Stjórnskipunar – og eftirlitsnefnd, landsfundarályktun 2015, <http://xd.is/wp-content/uploads/2016/03/Stj%C3%B3rnskipunar-og-eftirlitsnefnd-Landsfundur-Sj%C3%A1lfst%C3%A6%C3%B0isflokksins-2015.pdf> accessed 3 April 2017.

[15] Sjálfstæðisflokkurinn, 'Stjórnskipunar – og eftirlitsnefnd, landsfundarályktun 2015, <http://xd.is/wp-content/uploads/2016/03/Stj%C3%B3rnskipunar-og-eftirlitsnefnd-Landsfundur-Sj%C3%A1lfst%C3%A6%C3%B0isflokksins-2015.pdf> accessed 3 April 2017.

[16] Björt Framtíð, 'Áherslurnar' http://www.bjortframtid.is/politik/aherslurnar/ accessed 3 April 2017

[17] Stefnuyfirlýsing ríkisstjórnar Sjálfstæðisflokks, Viðreisnar og Bjartrar framtíðar http://www.mbl.is/media/34/10134.pdf accessed 3 April 2017.

[18] Ibid.

MAJOR CASES

Separation of Powers

Hrd. 268/2016 of June 9, 2016

In this case, the dispute was between the capital city of Reykjavik and the state of Iceland and centred on whether the state was obligated to close one landing field in the domestic airport in Reykjavik. In 2013, the Interior Minister and representatives of the city of Reykjavik had signed an agreement requiring *inter alia* the state to close one landing field of the domestic airport and to revise zoning rules for the airport.

In the case, the state argued that the Minister of Interior did not have the authority to make such an agreement but the Supreme Court noted that arts. 13 and 14 of the Icelandic Constitution provide that the President lets the Ministers execute his powers, and that the Ministers are responsible for all executive acts. The Court also cited art. 1 of the Cabinet Act no. 115/2011 and art. 4 of President Edict no. 71/2013, in which all matters assigned to the Ministry of Interior are listed, but this list included affairs concerning transportation. Therefore, the Court held that the Interior Minister was competent to make such an agreement in the name of the Icelandic government.

The Supreme Court interpreted the agreement and found it clear that by signing this agreement, the Minister had obligated the state of Iceland to announce the closing of the landing field. However, it found the request that zoning rules be revised to be unjustifiable.

Rights and Freedoms

Hrd. 80/2016 of December 1, 2016

The plaintiff, S, is a woman with disabilities who received payments from the city of Reykjavik which enabled her to receive full service in her own home because of her disability—but only every other week. This meant that she had to spend every other week at a home for people with serious disabilities. In an agreement done in accordance with rules thereon, the city of Reykjavik had thus agreed to pay *inter alia* for a certain number of hours of help in the house, general help and a supporting family, so that she could live in her own apartment in her parents' house every other week. The plaintiff requested that the payment be increased so that she could live in her apartment full time. The city of Reykjavik refused that request.

In this case, the plaintiff argued that by refusing, the city had contravened several provisions of the administrational law; para. 1 of art. 71 of the Constitution (protecting the right to privacy and family life); and art. 76 of the Constitution (guaranteeing certain social rights) and interfered with the rights of people with disabilities, guaranteed by certain acts[19] as well as the UN Convention on the Rights of Persons with Disabilities (CRPD).

The Supreme Court stated that the city's decision was a refusal to provide the plaintiff with services beyond what was required by the rules governing agreements such as that made with S. It held that neither the provisions of Act no. 40/1991 nor Act no. 59/1992 placed any further obligations on the city than those listed in these rules. The Supreme Court also noted clearly that the UN convention on the rights of persons with disabilities had not been incorporated into Icelandic law and could therefore not increase the city's obligations towards persons with disabilities that were legally imposed on the city. The city of Reykjavik was acquitted.

There are two noteworthy aspects to the case. First of all, the Court's refusal to interpret article 76 of the Constitution in light of the state's obligations under the CRPD. It is traditional in Icelandic law (see e.g. Hrd. 125/2000) to interpret domestic law in light of international obligations but that is not done here to a degree sufficient to require the city to enable S to live independently. Secondly, the Court states clearly that the CRPD has not been incorporated into Icelandic law. This may herald a step back towards the hard-line dualism that characterized Icelandic court decisions before 1990. However, the authors find it more likely that this comment was added to refute the argument by the plaintiff that the CRPD had indeed been incorporated by Act no. 59/1992. As amended in 2010, that Act's art. 1 states that the executing of this Act 'shall be informed by the international obligations that Iceland is bound by, especially the CRPD.' In light of this, it seems likely that the Supreme Court was just clarifying that this reference was intended to lead to the Convention being used in interpretation but was not incorporated so as to trump older laws. But this is not clear.

Hrd. 100-108/2016 of December 8, 2013

A group of people were arrested in 2013 for protesting the building of a new road in a lava field called Gálgahraun. They were condemned for violation of art. 19 of the Police Act, which states that the public shall obey police instructions when the police are maintaining law and order in public. A few of them sued against the Icelandic state for compensation for unlawful arrest. All of the cases were alike. The Supreme Court found that the road construction had been lawful (legal) and that the police had therefore the duty to do what was necessary to preserve public order and to ensure that the public road administration could continue the construction.

It was undisputed that the people arrested had not obeyed police instructions when they were repeatedly asked to leave and had therefore tried to prevent the construction. The Supreme Court had also found (in previous cases) that the actions of the police had been in accordance with the principle of proportionality.

The plaintiffs argued that art. 19 of the Police Act did not provide clear authorisation for an arrest, and that arresting people protesting peacefully was a violation of freedom of expression, (art. 73 of the Constitution) and freedom of assembly (para. 3 of art. 74 of the Constitution). They also argued that their arrest and placement in a prison cell was a violation of art. 67 of the Constitution and art. 5 of the ECHR. The Supreme Court discussed this argument and stated that art. 19 of the Police Act was a rule of conduct, and that a violation of that rule was punishable,

[19] Act no. 40/1991 on municipal social services, Act no. 59/1992 on the matters of people with disabilities.

as evidenced by a number of earlier cases. It was therefore lawful to arrest the plaintiffs. The lower court (whose opinion was affirmed with additional comments) noted that the authorisation for arresting people in this case was not art. 19 of the Police Act, but para. 1 of art. 90 in Act no. 88/2008 of criminal proceedings.

The Supreme Court thus held that the arrest had been in proportionality and that art. 67 of the Constitution and art. 5 of ECHR had not been violated. It noted that the freedoms of assembly and expression could be limited by law to maintain public order. The arrests were therefore held to be lawful and the state was acquitted.

Foreign, International and/or Multilateral Relations

Hrd. 80/2016 of December 1, 2016

See above.

Hrd. 707/2016 of November 9, 2016

A district court's ruling on devolving a five-year-old Icelandic boy to the Norwegian child protection agency was appealed to the Supreme Court. The boy's mother and grandmother had taken the boy illegally to Iceland in the summer of 2016 after the mother had lost custody of the boy in Norway. The Norwegian child protection agency requested that the boy be returned to that country based on Act no. 160/1995 on the Recognition and Enforcement of Foreign Decisions on the Custody of Children and the Return of Abducted Children, etc.

The Supreme Court noted that the child protection agency had provided a statement from Norwegian authorities stating that it had been unlawful to leave Norway with the boy and keep him elsewhere. The Supreme Court also noted that the Norwegian agency had custody over the boy according to the custody decision in Norway and Norwegian law. It held that it was not the Icelandic judiciary's role to re-evaluate that verdict. The mother and the grandmother argued that returning the child would violate para. 2 of art. 66 of the Icelandic Constitution, which states *inter alia* that no Icelandic citizen shall be expelled from the state. The Supreme Court stated that return of a child to those that have custody of the child is not an expulsion within the meaning of para. 2 of art. 66 of the Constitution, and that the provision did therefore not prevent returning a child with Icelandic citizenship based on the Act.

CONCLUSIONS

It is too early to determine what the most important developments were in Icelandic constitutional law in 2016.

It is interesting that the role of the President is arguably more unclear than before as the traditional view of a strictly ceremonial head-of-state role took a beating in the relatively dramatic events concerning the attempt by an embattled Prime Minister to get an order to dissolve Parliament.

The outcome regarding constitutional changes and the continuation of the amendment process started in 2010 is quite uncertain. Arguably the most important Constitutional Court case of the year was the case concerning assistance for independent living. The decision does not seem unduly progressive but whether it actually is a step backwards, either for the protection of rights which are guaranteed both in domestic and international law or more generally for international law in the Icelandic legal system, remains to be seen. Other cases discussed here were clearly in accordance with earlier case-law and theories.

India

DEVELOPMENTS IN INDIAN CONSTITUTIONAL LAW

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INTRODUCTION

The Indian Constitution was adopted by a Constituent Assembly on 26 November 1949, came into effect on 26 January 1950, and has undergone 101 amendments since the adoption. Consisting of a Preamble, 448 Articles, 12 Schedules, and 5 Appendices, it is the longest constitution in the world. The Constitution defines fundamental rights of the citizens; prescribes their duties; establishes the structure, procedures, powers, and duties of government institutions; and sets out directive principles to the state.

The Preamble to the Constitution is a brief introductory statement that sets out the guiding purpose and principles of the Constitution. It is based on the Objective Resolution which was drafted and moved in the Constituent Assembly by Jawaharlal Nehru on 13 December 1946.[1] The Supreme Court has recognized that the Preamble may be used to interpret ambiguous areas of the Constitution.[2] The Constitution defines the Union of India and its Territory,[3] Citizenship,[4] enumerates the Fundamental Rights in Part III of the Constitution which are justiciable, sets forth the Directive Principles of State Policy in Part IV which are non-justiciable, and contains Fundamental Duties.[5] It also sets forth the machinery of the Union (Centre),[6] the States,[7] the Union Territories,[8] and Tribal Areas.[9] The Constitution includes provisions on local governing machinery like the *Panchayats*,[10] Municipalities,[11] and Co-operative Societies.[12]

THE CONSTITUTION AND THE COURT

The Indian Supreme Court has developed the basic structure doctrine as a "novel and extensive doctrine of constitutional judicial review,"[13] and it is chiefly thanks to this development that the Constitution of India endures. The use of basic structure review is distinct from other forms of judicial review that the Court came to exercise. It assesses whether a state action "damages or destroys" basic features of the Constitution. The damage or destroy standard establishes a high threshold of constitutional injury for the Court to intervene.

The Indian Supreme Court has been extremely progressive in the protection of fundamental rights. It has expanded the scope of Article 21's right to life over the years to include a whole range of social rights from the

[1] Parliament of India Archives, http://parliamentofindia.nic.in/ls/debates/facts.htm.
[2] *Keshavanand Bharti v. The State of Kerala*, (1973) 4 SCC 225.
[3] Part I of the Constitution of India, 1950.
[4] Ibid, Part II.
[5] Part IVA.
[6] Part V.
[7] Part VI.
[8] Part VIII.
[9] Part X.
[10] Part IX.
[11] Part IXA.
[12] Part IXB.
[13] Sudhir Krishnaswamy, "Constitutional Durability" http://www.india-seminar.com/2010/615/615_sudhir_krishnaswamy.htm.

Directive Principles, which were considered not justiciable before. The right to life now includes the right to livelihood,[14] the right to health,[15] the right to education,[16] the right to food,[17] adequate housing, and the right to a clean environment.[18] The Court also developed a unique form of litigation called public interest litigation, relaxing the rules of standing to allow any public-spirited person or organization to litigate matters that bear on groups of people who are unable to access courts themselves to seek relief. While public interest litigation, or PIL as it is referred to, currently faces backlash it is still an important instrument for the protection of fundamental rights in the country.

DEVELOPMENTS AND CONTROVERSIES IN 2016

One of the biggest constitutional debates of 2016 concerned the appointment of judges, which led to a constitutional crisis and a face-off between the executive and the judiciary.

Judges of the higher judiciary, namely High Court judges and judges of the Supreme Court, had been appointed by a collegium of the senior-most judges of the Supreme Court. The 99th amendment to the Constitution in 2014, however, introduced the National Judicial Appointments Commission Act (NJAC Act). The constitutionality of the NJAC Act was challenged in the Supreme Court. It was contended that the Act adversely affected the independence of the judiciary and affected the basic structure of the Constitution.[19] On October 16, 2015, a five-judge constitutional bench of the Supreme Court headed by Justice J.S. Khehar declared the National Judicial Appointments Commission along with the 99th Constitutional Amendment Act "unconstitutional and void," thereby restoring the Collegium system.[20] The Court, however, did recognize the lack of transparency in the Collegium system and as a step towards improving the appointment of judges asked the government to submit a draft Memorandum of Procedure (MoP) for a reform.

This olive branch could have paved the way for genuine institutional reform of the Collegium system with greater transparency and executive/public participation.[21] Instead, the government did not approve any MoP and stalled pending appointments of 77 judges to the higher courts for over nine months. When the executive finally cleared the names of 34 judges after much public wrangling, all 34 names selected were from the subordinate judiciary who, on current evidence, decide fewer cases and are less likely to strike down legislative/executive action than advocates appointed from the Bar.[22] Following this, in November 2016, the Supreme Court Collegium returned the names of 43 candidates for an appointment to various high courts to the Union government for reconsideration. Under the applicable procedural rules, the executive was now bound to appoint these judges. But it has not yet appointed them, which affirms that the confrontation between the executive and the judiciary subsists.

The Union Government delayed the preparation of a MoP, as many believe, to dilute the primacy of the judiciary in the appointment process by tweaking the new Memorandum in favor for the executive. Moreover, the government has been stalling the appointment of judges in the face of escalating vacancies in the High Courts, and it remains to be seen if this conflict is resolved in 2017.

MAJOR CASES

A bulk of the decisions of the Supreme Court in 2016 concerned fundamental rights and freedoms. We review a few of the most important cases here.

Subramanian Swamy v. Union of India and Others [(2016) 7 SCC 221]

Dr. Subramanian Swamy, a prominent leader of the Bharatiya Janata Party (BJP), made allegations of corruption against the Chief Minister of Tamil Nadu in 2014. The State of Tamil Nadu filed several criminal defamation suits against Dr. Swamy.

While there are civil remedies for defamation in India, defamation is also a criminal offense under Sections 499 and 500 of the Penal Code. In response to these criminal complaints, Dr. Swamy challenged the constitutionality of sections 499 and 500 of the IPC under Article 32 of the Constitution of India,[23] which allows any person to directly approach the Supreme Court to enforce her fundamental rights guaranteed by the Constitution. Politicians Rahul Gandhi, Arvind Kejriwal, and a few journalists who had been charged with criminal defamation joined

Dr. Swamy in the challenge, arguing that sections 499-500 of the Code inhibit the freedom of expression.[24]

[14] *Olga Tellis & Others v. Bombay Municipal Corporation*, 1985 SCC (3) 545.

[15] *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, 1996 SCC (4) 37.

[16] *Unnikrishnan J.P. v. State of Andhra Pradesh and Others* (1993) 1 SCC 645.

[17] *People's Union for Civil Liberties v. Union of India and Others,* 2007 (12) SCC 135.

[18] *Occupational Health & Safety Assn. v. Union of India,* (2014) 3 SCC 547.

[19] *Supreme Court Advocates-on-Record Association and Another v. Union of India* (W.P.(C) No.13/2015) (2016) 5 SCC 1.

[20] The collegium system evolved after three landmark judgments of the Supreme Court, known as the "three judges cases": the first, second, and the third judges cases. A collegium, consisting of the Chief Justice of India and 4 other senior-most SC judges, made recommendations for persons to be appointed as SC and HC judges, to the President.

[21] Sudhir Krishnaswamy, "The People's Court" (India Today, 24 November 2016).

[22] Ibid.

[23] Article 32 allows the Petitioner to move the Supreme Court to enforce her Fundamental Rights.

[24] Criminal proceedings against the petitions had been stayed pending the constitutional challenge.

Article 19(1) (a) of the Constitution[25] provides the right to freedom of speech and expression to every citizen of the country. However, this right is subject to reasonable restrictions that can be imposed by the State in the interests of the "sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense."

To decide whether the criminal offenses of defamation amounted to a violation of the right to freedom of speech and expression, Justice Dipak Mishra of the Supreme Court first made a comprehensive analysis of the term "defamation" and the concept of "reputation." He relied on the Universal Declaration of Human Rights 1948 and the ICCPR which both protect the right to free speech and the right to reputation. The SC further built on comparative case law to understand the concept of reputation as a part of the basic right to life and dignity, specifically referring to the Canadian Supreme Court decision *Hill v. Church of Scientology of Toronto;*[26] the South African decision *Khumalo v. Holomissa;*[27] and on *Karako v. Hungary*[28] where the European Court of Human Rights recognized that the freedom of speech may be restricted to protect reputation.

Interpreting the right to freedom of speech and expression, the Supreme Court held that notwithstanding the expansive and sweeping ambit of freedom of speech it is not absolute and may be subject to reasonable restrictions, as any other right. On the other hand, the Court held that the right to honor, dignity, and reputation are constituents of the right to life, in line with is previous decisions.

The Court concluded that although freedom of speech and expression is inviolable, it is subject to reasonable restrictions and held that Sections 499 and 500 of the Indian Penal Code could not be called unreasonable for they are neither vague nor excessive nor arbitrary.

The Court emphasized the balance of fundamental rights, observing that no right is absolute. Fundamental Rights are equal and one cannot be preferred to another, because they exist in concord and not in watertight isolation. The Court held that in a case where two Fundamental Rights clash, the right which better promotes public interest must be upheld. It held that if a law limits constitutional rights, such limitation is constitutional if it is proportional.

Shyam Narayan Chouksey v. Union of India [Writ Petition(s)(Civil) No(s). 855/2016]

The petitioner in this case was a retired government employee who filed a petition under Article 32 to the Supreme Court, advocating respect to the National Anthem under the provisions of the Prevention of Insults to National Honour Act, 1971. The petition claimed that the National Anthem was often sung in impermissible circumstances, that necessary respect was not accorded to the Anthem when sung, played, or being recited, and it is the duty of every person to show respect to the National Anthem.

The Supreme Court Bench, consisting of Justice Dipak Mishra and Justice Roy, passed an interim order detailing several controversial directions. The Bench held that there shall be no commercial exploitation or dramatization of the National Anthem. That it should not be included as a part of a variety show, shall not be printed on any object, and never displayed in a manner and such places that are tantamount to disrespect. What is more, the Bench also gave unprecedented directions to citizens on what they should do when the National Anthem is played. Some of the directions read as follows:

a. All cinema halls in India shall play the National Anthem before the feature film starts and all present in the hall are obliged to stand up to show respect to the National Anthem.
b. Before the National Anthem is played or sung in a cinema hall on the screen, the entry and exit doors shall remain closed so that no one can create any disturbance which could disrespect the National Anthem. After the National Anthem is played or sung, the doors can be opened.
c. When the National Anthem shall be played in cinema halls, it shall be with the National Flag on the screen.
d. The abridged version of the National Anthem made by anyone for whatever reason shall not be played or displayed.

What was also controversial was that the Supreme Court went on to hold that these directions were issued so that love and respect for the motherland are reflected by showing respect to the National Anthem and National Flag and to instill in citizens the feeling of patriotism and nationalism. The Court relied upon clause (a) of Article 51A of the Constitution and held that it is the sacred obligation of every citizen to abide by the ideals engrafted in the Constitution and that they are duty-bound to show respect to the Anthem, which is the symbol of constitutional patriotism and inherent national quality.

While there is no doubt that respect to the National Anthem should be showed, the mandatory screening of the National Flag and playing of the National Anthem in all cinema halls before every film is hugely problematic. This judgment was subsequently twice clarified so that individuals with disabilities need not stand while the National Anthem was played. This clarification was sought because this judgment was being implemented with such fervor in cinema halls that persons unable to stand were seriously threatened. It has been subject to substantial criticism whether the Supreme Court can force feelings of patriotism, and whether en-

[25] Article 19. (1) (a) All citizens shall have the right to freedom of speech and expression.

[26] [1995] 2 SCR 1130 (holding that a good reputation is closely related to the innate worthiness and dignity of an individual and an attribute that must, just as much as freedom of expression, be protected).

[27] [2002] ZACC 12; 2002 (5) SA 401 (stating that law of defamation seeks to protect the legitimate interest individuals have in their reputation, which supports the value of human dignity, but that it needs to be balanced with the protection of free speech).

[28] (2011) 52 ECtHR 36.

forced display of the National Flag and the Anthem is required for the same.

Parivartan Kendra v. Union of India [(2016) 3 SCC 571]

This decision was passed in a public interest litigation filed by an NGO, Parivartan Kendra, seeking compensation and redress for two Dalit sisters, Chanchal and Sonam, who fell victim to a brutal acid attack. The two sisters were not given adequate treatment after the acid attack and were ill-treated at the hospital due to their caste. It was only after they were taken to Delhi that they received adequate treatment. The PIL sought directions from the Supreme Court that would help secure justice, compensation, and dignity for all acid attack survivors, including the development of a rehabilitation scheme and an increase in compensation to victims of acid attacks. It also sought that acid attacks be included as an offense within the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Allowing the petition, the judges referred to directions given by the Supreme Court in a previous decision on compensation for victims of acid attacks in *Laxmi v. The Union of India,*[29] in which the Supreme Court, in addition to banning the over-the-counter sale of acid, had also directed that State governments provide a minimum amount of Rs. 3 Lakhs as compensation to each acid attack victim under Victim Compensation Schemes. While the Supreme Court in the present case acknowledged that there was no proper implementation of regulations or control for the supply and distribution of acid, it did not issue further guidelines in this regard. It focused on compensation and held that *Laxmi* mandated only a minimum compensation of Rs.3 Lakhs. The State government has the discretion, however, to provide more compensation to the victim in the case of acid attack as per the guidelines.

In the instant case, considering the expenses already incurred by the victims' family, the Court directed that Chanchal be paid compensation of Rs. 10,00,000/- and her sister be paid compensation of Rs. 3,00,000/- by the State government and further that the State government be responsible for their entire treatment and rehabilitation. This compensation was awarded not only regarding the physical injury but also considering the victim's inability to lead and enjoy wholesome lives because of the acid attack. In addition to the increased compensation, the Supreme Court passed a few general directions:

a. State governments should take up the matter with all private hospitals in their States to not refuse but provide full treatment to acid attack victims, including medicines, food, and reconstructive surgeries.
b. Hospitals should issue certificates that the person is a victim of an acid attack so that she may get benefits of schemes for reconstructive surgeries and compensation.

This judgment of the Court was progressive in stressing the plight of acid attack victims to justify the need for enhanced compensation. It tried to highlight the social stigma that victims face, the difficulty they have in obtaining employment, and the tremendous medical expenses they incur towards the lifelong treatment of their injuries. The Supreme Court stated that such enhancement of compensation will not only help the victim secure medical treatment but will also motivate the State to strictly implement the guidelines so that acid attacks are prevented in the future.

In an important direction, the Supreme Court also directed all States to take steps to include acid attack victims' names on the disability list. This recognizes the life-long consequences that acid attack victims face, as was effectively pointed out by the Court, and would also enable them to rights and entitlements under the law relating to persons with disabilities.

Devika Biswas v. Union of India [AIR 2016 SC 4405]

Devika Biswas was an activist who filed this petition after a mass sterilization camp in the Araria District of Bihar. The camp was carried out on January 7, 2012, by a single surgeon where 53 women were operated on within the period of just two hours from 8 pm to 10 pm, in a school. The women were operated on atop school desks by the surgeon, who used just a single set of gloves with the aid of only a torch-light, and without the facility of running water. There was no provision of pre-operative and post-operative care, or even counseling, that would inform the women of the permanent nature of sterilization or its side effects. The petition also reported on many other sterilization camps that had taken place in other States where none of the procedures laid down by the government were followed. Devika Biswas asked for a series of directions including the setting up of a committee to investigate the facts relating to this sterilization camp and to initiate departmental and criminal proceedings against those involved. She also prayed that the government guidelines be scrupulously adhered to so that such incidents do not recur in any part of the country and that additional compensation will be paid to the women. The PIL highlighted the conduct of mass sterilization in highly unsanitary conditions in the States of Kerala, Madhya Pradesh, Maharashtra, Chattisgarh, and Rajasthan.

The Supreme Court relied on the case of *Ramakant Rai (I) and Anr. v. Union of India and Ors,*[30] in which it had prescribed detailed guidelines and procedures to be adhered to in the conduct of sterilizations. The Court directed the Union government during the hearings to report on the implementation of each direction given in *Ramakant Rai* and the details of the utilization of funds under the Family Planning Indemnity Scheme, 2013. The various State governments were also asked to file affidavits that explained the extant situation in their States.

In response to these directions, Chattisgarh provided a Status Report on the progress made by the "Anita Jha Committee" that was set up to address the deaths caused by the sterilization camp in Bilaspur. Bihar accepted the failure of the sterilization camp and that it had issued show-cause notices to

[29] [(2014) 4 SCC 427].
[30] (2009) 16 SCC 565.

the relevant persons in charge of the camp. While the State of Madhya Pradesh did not deny the conduct of sterilizations, it claimed that these were performed under informed consent and after review of cases by the State Quality Assurance Committee. Rajasthan stated that standard operating procedures were being followed and Kerala and Maharashtra did not submit any substantial reports. The Union of India proposed phasing out sterilization camps over the next three years and submitted that Tamil Nadu, Maharashtra, Sikkim, and Goa, as well as Chattisgarh, have phased out sterilization altogether.

Finally, the Supreme Court in its judgment lamented the lack of a health policy in the country, which could address these concerns. It disagreed with the Ministry of Health and Family Welfare's position that Public Health comes solely under the purview of the State Government. The Court pointed out that Entry 20A of the Concurrent List pertains to "Population Control and Family Planning" over which the Union has superior powers of legislation:[31]

> *If the sterilization program is intended for population control and family planning (which it undoubtedly is) there is no earthly reason why the Union of India should refer to and rely on Entry 6 of the State List and ignore Entry 20A of the Concurrent List. Population control and family planning has been and is a national campaign over the last so many decades. Therefore, the responsibility for the success or failure of the population control and family planning program (of which sterilization procedure is an integral part) must rest squarely on the shoulders of the Union of India. It is for this reason that the Union of India has been taking so much interest in promoting it and has spent huge amounts over the years in encouraging it. It is rather unfortunate that the Union of India is now treating the sterilization program as a Public Health issue and making it the concern of the State Government. This is simply not permissible and appears to be a case of passing the buck.*

While the sentiment of the Court that sterilization should be treated as a subject under the competence of the Union Government is a fair argument since the federal executive has more effective powers, the Court's observation that reproductive treatments such as sterilization would not be a public health issue is of serious concern. Unless violations of reproductive rights are not treated as important public health violations, they will never be given priority.

The Court held that the concerned sterilization procedures endanger the right to life under Article 21 of the Constitution, which included the right to health and reproductive rights. It relied on *C.E.S.C. Limited and Ors v. Subhash Chandra Bose*,[32] which has interpreted the "right to health" as an aspect of social justice informed by both Article 21 of the Constitution as well as the Directive Principles of State Policy, and international covenants to which India is a party. The Court also relied on *Suchita Srivastava v. Chandigarh Administration*[33] in holding that the exercise of reproductive rights would include the right to make a choice regarding sterilization by informed consent and free from any form of coercion. Finally, the Court also referred to a decision of the Committee on the Elimination of Discrimination Against Women (CEDAW) in *A.S. v. Hungary,*[34] expounding the CEDAW Convention, and held: *Compulsory sterilization...adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.* The Court issued the following directions:

a. That the Ministry of Health and Family Welfare should display on its website a full list of approved doctors and their particulars in each State, District and Union Territory.
b. A checklist should be prepared under the directions in *RamakantRai* that explains the impact and consequences of the sterilization procedure along with signatures by the concerned doctor as well as of a trained counselor certifying that the proposed patient has been explained the contents of the checklist and has understood its contents as well.
c. Sufficient time of about an hour needs to be given to a patient to accommodate a change of mind.
d. Preparation of an annual report, in addition to the six-monthly reports required, to be published by the State Quality Assurance Committees containing details on the number of persons sterilized as well as the number of deaths or complications arising out of the sterilization procedure.
e. Strengthening of the Primary Health Care centers across India and efforts to ensure that sterilization camps are discontinued as early as possible.
f. The need to ensure that informal or formal targets towards sterilization are not fixed by States, allowing health workers and others to compel persons to undergo forced sterilization merely to achieve these targets.
g. The Court expressed its displeasure with the inadequate responses of Madhya Pradesh, Maharashtra, Rajasthan, and Kerala regarding the sterilization camps and specifically directed the Chief Justices of these States to initiate a *suo motu* public interest petition to consider the allegations that had been made against them and directed the States of Bihar and Chattisgarh to speedily and efficiently conclude their investigation into the sterilization tragedies.
h. To announce a National Health Policy at the earliest, keeping in mind issues of gender equity.

[31] [AIR 2016 SC 4405] para 69.

[32] (1992)1 SCC 441.

[33] (2009)9 SCC 1.

[34] *Ms. A. S. v. Hungary*, Thirty-sixth session, CEDAW/C/36/D/4/2004, 7-25 August 2006, http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf.

CONCLUSION

The Supreme Court seemed to speak in different voices in the year 2016. It gave fundamental rights such as the freedom of speech a very narrow interpretation. But some benches of the Court penned broad and expansive directions on the reproductive rights of women and rights to compensation, treatment, and rehabilitation of acid attack survivors. One could question whether the Supreme Court interprets rights consistently.

It is also important to note that the judiciary has vehemently protected its autonomy, even though this attracted severe criticism for a lack of transparency. The perceived threat to the independence of the judiciary seems to eclipse the need for a change and participation in the judicial appointment process. Their steadfast protection of judicial autonomy indicates that courts tend to preach accountability without practicing it.

Indonesia

DEVELOPMENTS IN INDONESIAN CONSTITUTIONAL LAW

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INTRODUCTION

The Indonesia Constitutional Court is at a critical point in history as President Joko "Jokowi" Widodo has consolidated his power. When President Jokowi came to power in 2014, he faced an opposition majority in the legislature bent on obstructing him.[1] In the middle of 2016, however, Jokowi has consolidated his power in the arenas of elite contestation.[2] Jokowi's coalition now holds some 67 percent of parliamentary seats after he successfully made some political maneuvers to convince two principal opposition parties to switch allegiance.

With a parliamentary majority, the Jokowi administration has entered into the arena of an "uncontested" presidency.[3] Some constitutional stakeholders have been hoping the Court would play a critical role to balance the power of the presidency. But the Court has gone through periods of transition from the interventionist court to a now seemingly constrained and tamed court.[4] Under the chairmanship of Arief Hidayat, the Court has retreated from the boldness of the first-generation Court. In the period after the first decade of the Constitutional, it became common to refer to the Indonesian Constitutional Court as composed only of "second-rate judges." These "second-rate judges" had the effect of reducing the impact of the Court's jurisprudence.

THE CONSTITUTION AND THE COURT

The Indonesian 1945 Constitution divided the judiciary into the Supreme Court and the Constitutional Court as two separate institutions. The Constitution maintains the Supreme Court has the authority to review ordinances and regulations made under any statutes. But the Constitution also equips the Constitutional Court with authority to conduct reviews of statutory legislation. This arrangement means that the right of judicial review is not uniformly given to a single Court; the Supreme Court and the Constitutional Court each share different judicial review authority.

The Indonesian Constitutional Court is a specialized court that has the final word on constitutional issues. The Court has the power to review laws for their constitution-

[1] Stefanus Hendrianto, "Indonesia's Constitutional Conundrum: The Weak Presidency, the Strong Opposition, and the Regional Elections Law," *Int'l J. Const. L. Blog*, Oct. 4, 2014, available at http://www.iconnectblog.com/2014/09/indonesias-constitutional-conundrum-the-weak-presidency-the-strong-opposition-and-the-regional-elections-law/.

[2] For a detailed analysis of Jokowi's political consolidation, please see Eve Warburton, "Jokowi and the New Developmentalism," *Bulletin of Indonesian Economic Studies*, Vo. 52, No. 3, 297-320 (2016).

[3] In the recent Jakarta Governor Election, which took place on April 19, 2017, Anies Baswedan successfully took down President Jokowi's key ally, Basuki Tjahja Purnama. Purnama is backed by President Joko Widodo's ruling party. Baswedan is supported by a retired general, Prabowo Subianto, who narrowly lost to Widodo in the 2014 presidential election and is expected to challenge him again in the 2019 presidential election. The Jakarta governorship is widely seen as a litmus test for winning the presidency, and the result would put President Jokowi in the defensive position.

[4] For a detailed analysis of the evolution of the Indonesian Constitutional Court, please see Stefanus Hendrianto, "The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia," 25 *Washington International Law Journal* 489 (June 2016).

ality in the absence of a concrete dispute.[5] The Constitutional Court Law also allows an individual to request a review.[6] If a law is found unconstitutional, the Court will either nullify the law or order the parliament or the executive to make amendments. In addition to the authority over statutory review, the Constitution also equips the Court with the authority to resolve disputes over the power of state institutions; to decide the legality of the dissolution of a political party; to resolve disputes over the results of general elections; and, to review a motion for impeachment of the President.[7]

The Court has nine justices that have equal authority to decide all the important decisions. The Constitution provides equal appointment power among the three branches of government: three justices are appointed by the President, three appointed by the People Representative Council (*Dewan Perwakilan Rakyat*, hereinafter the "DPR") and three appointed by the Supreme Court.[8] There is a term limit imposed in which the justices only serve for five years but can be re-appointed for another five years. Also, there is a mandatory age limit in which the justices retire at age 70. The Chief Justice and Deputy Chief Justice, however, only serve for a term of two years and six months but can be re-elected for the second term.[9] The associate justices will elect the chief justice and his deputy through an internal election mechanism.

DEVELOPMENTS AND CONTROVERSIES IN 2016

As explained earlier, most judges of the current Court are "second-rate judges." Two major controversies have supported this view in the 2016 term. The first controversy was in a series of litigation in the Tax Amnesty case. The tax amnesty policy is the pet project of President Jokowi, and aims to improve tax compliance in Indonesia.

In July 2016, some NGOs challenged the constitutionality of the Tax Amnesty Law before the Court. In response to this legal challenge, the Jokowi administration moved immediately to "pressure" the Court. After the hearing process of the judicial review of the Tax Amnesty Law had begun, President Jokowi "summoned" Chief Justice Arief Hidayat to the Presidential Palace. Chief Justice Arief Hidayat denied that the meeting was to discuss the tax amnesty cases.[10] According to Hidayat, his visit was intended for an audience and conveyed a report to the President about the international symposium on the Asian Constitutional Court. Regardless of the nature of the meeting, obviously the Chief Justice did not make a wise decision by attending a meeting with the President while there was pending litigation in the Court against the President.

The second controversy was the arrest of Associate Justice Patrialis Akbar. On January 25, 2017, in another major blow to the reputation of the Constitutional Court,[11] the Anti-Corruption Commission arrested Patrialis Akbar as he had allegedly received bribes of US$20,000 (RP 266 million) from a prominent beef importing businessman. The businessman, Basuki Hariman, has admitted giving US$20,000 to an aide of Justice Patrialis Akbar, in which the assistant assured Hariman that Patrialis Akbar would help to sway the judicial review of the *Animal and Husbandry Law II* case for beef importers.[12] Indeed, Patrialis Akbar is the exemplar of a "second-rate judge." His appointment was quite problematic from the beginning, mostly because of his poor record as the Minister of Justice.[13] During his four-year tenure as an associate justice, Akbar did not show any stellar performance either, and he ended his career as a criminal.

MAJOR CASES

The Animal Health and Husbandry Law II case (Decision No. 129/PUU-XIII/2015)

As explained earlier, this case brought down constitutional justice Patrialis Akbar, in which he allegedly accepted US$200.000

[5] The Court only has authority to review a constitutional question in an abstract way and not to resolve a concrete constitutional case. The Court's abstract review does not aim to address the injury suffered by the claimant; rather, it would only pronounce on the constitutionality of the challenged statute. In contrast, a concrete review aims to resolve the injury suffered by the claimant with a concrete remedy

[6] *Undang – Undang No. 24 of 2003 tentang Mahkamah Konstitusi* (Law No. 24 of 2003 on the Constitutional Court), art 51

[7] Constitution of Republic of Indonesia 1945, art 24C (1)

[8] Constitution of Republic of Indonesia 1945, art 24C (3)

[9] Initially, Article 4 (3) of the Constitutional Court Law 2003 provided that the Chief Justice and his deputy shall serve for a three-year term. But in 2011, the lawmakers amended the law and reduced the term of Chief Justice to two years and six months. See Law No. 8 of 2011 on the Amendment of the Constitutional Court Law

[10] "Temui Jokowi, Hakim MK Klaim Tak Bahas Gugatan Tax Amnesty." (Meeting with Jokowi, the Chief Justice Claims No Discussion on the Tax Amnesty case) *Suara.com*, September 1, 2016. Accessed April 15, 2017. http://www.suara.com/news/2016/09/01/150944/temui-jokowi-hakim-mk-klaim-tak-bahas-gugatan-tax-amnesty

[11] In 2013, the Court's reputation was seriously damaged when the then Chief Justice Akil Mochtar was arrested for accepting a bribe to rule on a regional election dispute. Currently, Mochtar is serving life imprisonment

[12] "Beef importer Basuki reportedly confesses to bribing Constitutional Court aide."The *Jakarta Post*, January 27, 2017. http://www.thejakartapost.com/news/2017/01/27/beef-importer-basuki-reportedly-confesses-to-bribing-constitutional-court-aide.html; see also "KPK names MK justice Patrialis Akbar suspect in the bribery case," *The Jakarta Post*, February 27, 2017http://www.thejakartapost.com/news/2017/01/27/kpk-names-mk-justice-patrialis-akbar-suspect-in-bribery-case.html

[13] President Susilo Bambang Yudhoyono appointed Patrialis Akbar as an associate Justice in August 2013. There was speculation that his appointment was because of the collusion between President Yudhoyono and his in-law, Hatta Rajasa, the then Coordinating Minister of Economic Affairs. Akbar was a member of the National Mandate Party (PAN), chaired by Mr. Rajasa. Some NGOs then filed a judicial review in the Administrative Court petition to challenge the appointment of Akbar on the ground that the appointment process was not transparent. The Administrative Court quashed Akbar's appointment on the basis that it did not fulfill transparent and public participatory principle as required by Article 19 of the 2003 Constitutional Court Law. Nevertheless, the High Administrative Court reversed the decision by the District Administrative Court

from Basuki Hariman, a major player in the beef import business. It was suspected that the bribes were given as an attempt to influence Court decision in the judicial review of the statutory regulation that governs the beef import industry.

This case is the sequel of the *Animal Health and Husbandry Law I* case.[14] On August 25, 2010, the Court under the chairmanship of Mohammad Mahfud issued a decision on the judicial review of Law No. 18 of 2009 on Animal Health and Husbandry. The crux of the matter is the Law allowed import of beef and cattle from disease-free zones, regardless of the disease status in the country as a whole. The Court declared that the phrase, "a zone within a country" in art 59(2) of the Law was unconstitutional. The Court considered that the import of live animals from "a country or a zone within a country" is the manifestation of imprudent and dangerous policy because the disease may spread into the area from unsafe parts of the country.

In 2014, the government enacted Law No. 41 of 2014, which reinstated the provision that allows animals imported to Indonesia to come from a country or a zone within a country that already fulfills the health standard. The petitioner challenged the constitutionality of the Law and argued that the zone system would violate the constitutional rights of farmers, traders in livestock, veterinarians, and consumers of animal products.

The Court considered that after the issuance of the *Animal and Husbandry Law I* case, the Parliament had revised the zone system requirement. Thus, the Court opined that there is a difference between the object of norms that have been reviewed in the first case and the second instance. The Court decided that Law No. 41 of 2014 is "conditionally unconstitutional"; that the implementation of a zone system is allowed when there is urgent domestic demand in which the Government needs to import from other countries.

The Court reached the decision unanimously, and Justice Patrialis Akbar casted out his vote for the final deliberation meeting on November 21, 2016. The Court, however, did not announce the decision until February 7, 2017. It was not clear how much influence Akbar had to sway the Court's decision. The fact of the matter is nine Justices made the ruling and Akbar only had one vote. Regardless of what happened behind the scenes, the arrest of Patrialis Akbar has tainted the legitimacy of the Court's decision in this case.

The Abdullah Puteh case (Decision No. 51/PUU-XIV/2016)

In the last term, the Court decided two major cases related to the electoral process. In the first instance, the Court allowed Abdullah Puteh, who has been sentenced to 10 years imprisonment, to participate in the 2017 Aceh Province Governor Election.

During his first term as the Governor of Aceh Province, Puteh was charged with corruption concerning the purchase of two MI-2 helicopters for Aceh Province.[15] In 2004, Puteh began serving his ten-year sentence. But later, Puteh was out on parole before the full sentence was served. Having stayed in the political wilderness for more than a decade, Puteh was planning a comeback with a run in the 2017 Aceh Governor Election. Nevertheless, Article 67 (2) (g) of Law No. 11 of 2006 on Aceh Governance prohibited candidates for governor/deputy governor who had been sentenced for a crime punishable by a term of imprisonment of at least five years, except for treason or political crimes that have been granted amnesty. Puteh then challenged the constitutionality of the Aceh Governance Law to the Court.

The Court granted a decision for the claimant. The Court held that Article 67 (2) (g) of Law No. 11 of 2006 concerning Aceh Government is "conditionally unconstitutional" as long as it does not provide an exception for former convicts who openly and honestly inform the public that he or she is an ex-convict. The Court ruling means that Puteh can participate in the 2017 Aceh Governor Election as long as he notifies the public that he was an ex-convict.

The Voting Rights for Mentally Disabled Persons case (Decision No. 135/PUU-XIII/2015)

In the second major case that related to the electoral process, the Court dealt with the issue of voting rights for mentally disabled persons. Law No. 8 of 2015 on the Election of Governor, Head of Regency, and Mayor stipulates that mentally disabled or disordered persons have no right to vote (Art 57 §3a).

Some NGOs representing mentally disabled persons challenged the law and argued that the prohibition violates the constitutional rights of mentally disabled persons to participate in the general election. They argue that there are different categories of mentally disabled or disordered individuals and each category has its definition, which does not always lead to incapacity to cast a vote.

The Court ruled that indeed there is a distinction between mentally disabled and mentally disordered persons. Nevertheless, the Law did not explain how to assess the distinction between mentally disabled or disordered persons. The Court considered that the General Election Commission is not equipped to evaluate the capacity of mentally disabled or disordered persons as potential voters. The Court held that not all individuals who are experiencing mental disorders or memory disorders would lose the ability to cast a vote. Moreover, the Court considered that the absence of guidelines and institutions for psychiatric analysis of the potential voters is a violation of constitutional rights. The Court finally held that Article 57 (3) (a) is unconstitutional unless it was interpreted in the Court's understanding that mentally disordered is not defined as permanent impairment of mental health, which removes the ability for someone to cast a vote.

[14] Constitutional Court Decision No 137/PUU-VII/2009 (the Animal Health and Husbandry Law I case)

[15] In 2004, Puteh challenged the constitutionality of the Anti-Corruption Law that was used to charge him, but the Court rejected Puteh's claim. See the Constitutional Court Decision 069/PUU-II/2004

The Electricity III case (Decision No. 111/PUU-XIII/2015)

The case was filed by the Head of State Electricity Workers Union (*Serikat Pekerja* PLN) and an employee of the State Electricity Company (*Perusahaan Listrik Negara* – PLN). The claimants contested the constitutionality of Law No. 30 of 2009 on Electricity by arguing that electricity is part of the common good, and therefore it should be controlled by the state instead of private sectors.

This is the third case in which the Court had to deal with the privatization of the electricity industry. The Court had defined the role of the state in providing electricity through previous two cases. In the *Electricity I* case, the Court stated that the control over the electricity industry is essential for the common good.[16] The Court then reaffirmed the authority of the State Electricity Company (PLN) to control the electricity industry in the *Electricity II* case.[17]

In the *Electricity I* case, the Court, under the chairmanship of Jimly Asshiddiqie, declared the entire Law Number 20 of 2002 on Electricity to be unconstitutional. In 2009, however, the government enacted a new electricity law which resurrected the privatization of policy. Under the 2009 Electricity Law, the State Electricity Company no longer has a monopoly in supplying electricity to end-users, and it opens up for Independent Power Producers (IPPs) for involvement in providing electricity.

In the third case, however, the Court considered that the 2009 Electricity Law did not explicitly rule that the involvement of private enterprises eliminated state control over the electricity industry. Therefore, the Court declared that the provision is "conditionally unconstitutional" if it is construed that the involvement of private enterprises will eliminate the principle of "state-controlled" in an important sector of industry such as electricity. This decision does not change the landscape of the electricity industry in Indonesia. The Court reaffirmed the role of the state in controlling and providing electricity to the entire people, but at the same time it did not concur with the petitioner's argument to eliminate the involvement of private enterprises.

The Tax Amnesty Law I case (Decision No. 57/PUU-XIV/2016)[18]

This case involved a challenge against the pet project of President Jokowi: the Tax Amnesty Law.[19] The claimant is an NGO called the Indonesian People's Struggle Union (*Serikat Perjuangan Rakyat Indonesia*). The petitioner argued that the Tax Amnesty Law is discriminatory because the tax evaders are being rewarded for their tax crimes while the honest taxpayers that have been fulfilling their tax obligations did not receive any appreciation from the government. The claimant further argued that the tax amnesty program could undermine the criminal justice system in Indonesia as the Law prevents the Tax Authority, the Attorney General's Office, and the Anti-Corruption Commission to use all the data from the tax amnesty program as evidence for criminal investigation.

The Court unanimously rejected the petition. The Court argued all the data that were submitted to the tax amnesty program shall be protected or otherwise nobody would be interested in participating in it. Therefore, those data shall not be used as evidence in a criminal investigation. Furthermore, the Court ruled that the tax amnesty law only provides immunity to tax related crimes, but it never provides immunity to other offences committed by tax evaders.

As mentioned earlier, there has been a growing suspicion that the Jokowi administration "pressured" the Court to support the Tax Amnesty Law. While there is no substantial evidence that the Court reached the decisions under pressure, the meeting between Chief Justice Hidayat and President Jokowi has, nonetheless, tainted the legitimacy of the Court's decision.

The Prenuptial Agreement case (Decision No. 69/PUU-XIII/2015)

The crux of the matter was a prohibition for a foreigner to own property under the Right to Build (*Hak Guna Bangunan*), as stipulated in Article 36 (1) of the Basic Agrarian Law. While the prohibition only applied to foreigners, it indirectly applied to an Indonesian citizen who married to a foreigner because the Marriage Law No. 1 of 1974 imposed a joint property arrangement in which property acquired during a marriage becomes joint property (*harta bersama*).[20] In other words, a foreigner can acquire property through marital relationship with an Indonesian citizen.

The claimant married a Japanese citizen but retained her Indonesian citizenship. The petitioner purchased an apartment and paid the full amount of payment in September 2012. But the developer refused to provide a certificate of ownership and petitioned the East Jakarta District Court to revoke the purchase. The District Court granted the petition and ruled that the claimant has no legal capacity to enter into a purchase agreement based on Indonesian civil law.

The claimant challenged the constitutionality of both Article 36 (1) of the Basic Agrarian Law and Article 35 of the Marriage Law (the joint property clause). She also challenged Article 29 (1) of the Marriage Law, which stipulates, "at the time of or before the marriage took place, with the mutual consent of both parties, the couple may enter into a prenuptial agreement." The Marriage Law does not explicitly recognize a postnuptial agreement. But there are many couples that might wish to draw up a postnuptial agreement. For instance, in a case where a couple did not sign a prenuptial

[16] Constitutional Court Decision No. 001-021-022/PUU-I/2003

[17] Constitutional Court Decision No. 149/PUU-VIII/2009

[18] In the *Tax Amnesty Law II* case (Decision No. 58/PUU-XIV/2016), the Court unanimously dismissed the case and held that it's ruling in the *Tax Amnesty I* case should be applied to this case

[19] Law No. 11 of 2016 on Tax Amnesty

[20] Law No. 1 of 1974, Article 35

agreement but later decide that they want to have some financial arrangement in place after they accumulate some wealth.

The Court rejected the claim against the Basic Agrarian Law and the joint property clause in the Marriage Law. Nevertheless, the Court chose to review the prenuptial clause. In the Court's opinion, the limitation for husband and wife to enter into a postnuptial agreement is a violation of the freedom of contract. The Court then declared that Article 29 (1) is "conditionally unconstitutional" unless it was interpreted that a marital agreement can be made before, during, and after the marriage took place. In other words, the Court declared that the Marriage Law should be interpreted in light of the recognition of postnuptial agreements.

CONCLUSION

Having reviewed some major cases in the last term, one can see a pattern of how the executive and legislature ignored some of the decisions from the first-generation Court. Then, they passed new laws that reinstated the policies that were being struck down by the Court. In the last term, the Court had to review some cases that dealt with the reinstatement of the government's policies. The Court, however, took a compromise approach by acknowledging that the government has tried to follow the Court's directive, but at the same time it moved to declare some challenged provisions "conditionally unconstitutional." Overall, the Court under the chairmanship of Arief Hidayat has become a less interventionist court. In 2017, Arief Hidayat has to face re-election as the Chief Justice, and the public will wait on whether all of the constitutional court justices still trust him as the Chief Justice. As we write this report, President Jokowi has appointed academic-cum-activist Saldi Isra as a new Associate Justice of the Constitutional Court. With his long track record as an anti-corruption activist and stellar academic credentials, Saldi Isra might be a bold and autonomous judge. Whether he will be remains to be seen.

Ireland

DEVELOPMENTS IN IRISH CONSTITUTIONAL LAW

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INTRODUCTION

2016 was very much a year of transition in Irish constitutional law. The year saw several significant developments, each of which raises important questions for constitutional politics in Ireland which remained undetermined at the start of 2017.

The question of whether the constitutional regime on abortion ought to be amended moved further up the political and constitutional agenda with the establishment of a citizen's assembly chaired by a Supreme Court judge to consider the issue. Criticised by many as an attempt to delay or avoid the making of hard political choices, the assembly is due to make its recommendations in 2017.

The background tension between the judiciary and the government that has been evident for a number of years came to the fore with a public dispute over potential changes to the judicial appointments system. Dissatisfaction on the part of the judges (and many commentators) about the content of the proposals was exacerbated by concerns over the manner and tone of their presentation – a position not helped by the arrival into government of a new "independent" minister who, in his previous existence as a newspaper columnist, had consistently criticised the system as one based on cronyism and political patronage.

THE CONSTITUTION AND THE COURT

The current Constitution in Ireland was adopted in 1937 as a successor to the 1922 "Free State" Constitution. In terms of the courts, the 1937 Constitution (like the 1922 text) departed significantly from the legal system's Westminster traditions by combining a list of fundamental rights with a specific power of judicial review. The rights in question were primarily civil and political in nature but also included a right to education as well as Directive Principles of Social Policy, the latter of which were stated to be non-cognisable by the courts.

The Constitution also contained more conspicuously Catholic influences than its 1922 predecessor, including a religious Preamble[1] and prohibitions on divorce and blasphemy, as well as an acknowledgment of the special position of the Catholic Church (the latter has since been removed). It has been suggested, however, that the nature and impact of these Catholic influences may be commonly overstated with one leading commentator arguing that "[w]hat is more remarkable … is the extent to which that document also reflected secular … values of liberal democracy, respect for individual rights and the separation of Church and State and the extent to which it does not reflect Catholic teaching".[2] In the context of developments in 2016 on abortion, it is relevant to note that the express protection of the right to life of the unborn in Article 40. 3. 3, was not in the original text but was inserted by referendum in 1983.

[1] For discussion, see Mark Tushnet, "National Identity as a Constitutional Issue: The Case of the Preamble to the Irish Constitution" in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury 2012).

[2] Hogan (n 1), at 215-216.

The Supreme Court was one of two "superior courts" identified in 1937 as having the exclusive jurisdiction to invalidate legislation as contrary to the Constitution. In practice, this meant that almost all constitutional litigation was initiated in the High Court, from where it could be appealed as a matter of right to the Supreme Court. Furthermore, the decision was taken in 1937 that the Supreme Court should not be a constitutional court[3] but should have general jurisdiction over all matters. As a result, the Supreme Court had to combine the dual appellate functions of error correction and the principled development of the law across all areas. Given the significant growth in the volume and complexity of litigation in Ireland in recent decades, the result was a substantial increase in the workload of the Court. A 2006 report found that the Court received and processed substantially more appeals annually than any of its counterparts in common law jurisdictions.[4] The 2006 report recommended the establishment of a Court of Appeal. A constitutional amendment to allow for the establishment of such a court was ratified by referendum in October 2013 with the Court of Appeal established in October 2014.

At the time of the referendum, the figures indicated that the Court received 558 appeals in 2013, 605 in 2012, and 499 in 2011 with it disposing of 249, 202, and 190, respectively, in the same period.[5] This gives some indication of the extent of the appellate backlog that had accumulated prior to the establishment of the Court of Appeal. While a portion of these pending appeals were transferred to the new Court, the Supreme Court retained a sizeable number with two additional judges being appointed (bringing the Court to nine) for the express purpose of assisting it in clearing the backlog. By the close of 2016, that appears to have been almost accomplished.

The likelihood is, therefore, that there will be a significant change in the number and nature of cases being dealt with by the Supreme Court in the future. The constitutional amendments introduced by referendum in 2013 stipulate that the Supreme Court has appellate jurisdiction over a decision of the Court of Appeal where it is satisfied that the decision involves a matter of general public importance or that, in the interests of justice, it is necessary that there be an appeal. In practice, this has meant that a prospective appellant must now make a formal written application for leave to appeal. The application may also be the subject of an oral hearing. Initial experience with this new leave stage suggests that, while the Court retains a broad residual discretion to admit cases "in the interest of justice", the decision whether or not to grant leave will primarily be determined on the basis of the first criterion of "general public importance". This suggests that the Court will deal with a much smaller number of cases per year but that these will involve complex or significant questions of law. It is expected that constitutional litigation will feature prominently in the Court's caseload.

CONSTITUTIONAL CONTROVERSIES RIGHTS AND FREEDOMS

Abortion

In terms of public profile, the most significant issue in 2016 was the ongoing debate about the Irish constitutional position on abortion. The main provision relevant to this debate is Article 40. 3. 3:

> "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right".

This was inserted into the Constitution following a referendum in 1983. The current position, as declared by the Supreme Court in its 1992 decision in AG v. X,[6] is that the termination of a pregnancy is constitutionally permissible if there is a real and substantial risk to the life, as distinct from the health, of the mother; and that risk could only be avoided by the termination of her pregnancy.

While the issue has long been controversial in Ireland, the current debate followed several high-profile incidents, including one woman who died from sepsis after reportedly requesting but not being given an abortion, and another where a court order was sought to allow the withdrawal of somatic support for a pregnant woman who had been brain dead for three weeks.[7] From the political perspective, a significant factor seems to have been that the minority government elected in 2016 includes several independents who had publicly expressed support for a change in the constitutional position.

The government therefore announced that it would organise a "citizen's assembly" to consider the possibility of constitutional reform. Comprising a representative sample of 99 voters and one Supreme Court judge (as chair), the assembly has met on a number of occasions in both public and private sessions; received over 13,000 public submissions[8]; and is due to report its recommendations on this issue in mid-2017.[9] A similar body was established by the previous government to address demands for constitutional reform on marriage equality. As with that body,[10] the suspicion has been expressed that the assembly provides a useful mechanism for govern-

[3] Gerard Hogan, "John Hearne and the Plan for a Constitutional Court" 18.1 (2011) DULJ 75.

[4] *Report of the Working Group on a Court of Appeal* (Courts Service 2006).

[5] Courts Service, *Annual Report 2013* at 33.

[6] [1992] 1 IR 1.

[7] Eoin Carolan, *The Ongoing Uncertainty over Irish Law on "The Unborn": A Comment on the Matter of P.P. and Health Service Executive*, Int'l J. Const. L. Blog, Dec. 30, 2014, available at: http://www.iconnectblog.com/2014/12/the-ongoing-uncertainty-over-irish-law-on-the-unborn.

[8] Citizens' Assembly receives more than 13,000 submissions on abortion, December 22, 2016, available at https://www.rte.ie/news/2016/1222/840774-assembly/.

[9] [Details of the meetings held (including written and video materials) are available at https://www.citizensassembly.ie/en/Meetings/.

[10] Eoin Carolan, "Ireland's Constitutional Convention: Beyond the Hype about Citizen-led Constitutional Change" (2015) 13 (3) Int J Const Law 733.

ment to delay addressing an issue on which there may be internal disagreement while also providing some distance between it and any controversial recommendations that may emerge. Nonetheless, the existence of the assembly does mean that the issue will remain high on the public and political agenda for 2017. There is also clearly a possibility—depending on the recommendations of the assembly—of a further referendum on proposed amendments to Article 40. 3. 3 being held in the short to medium term.

While the public debate has largely been concerned with abortion policy per se, academic discourse in 2016 also considered the possible content and implications of any change to Article 40. 3. 3. This is a more complex question than might first appear because of uncertainty over the constitutional position prior to the 1983 referendum. Several judges had suggested, *obiter dicta*, that at least some of the rights protected by the Constitution might apply before birth.[11] It is unclear, therefore, whether the 1983 referendum was declaratory of the underlying constitutional position or brought about some change in it.

The prospect that the Supreme Court may (finally) have to address this ambiguity unexpectedly increased in 2016 with the decision of the High Court in IRM v. Minister for Justice and Equality.[12] This was a challenge to a deportation order, in which it was argued that the Minister was required to take into account the rights of the unborn child of the prospective deportee. In addressing this issue, Humphreys J. referred to the previous dicta to hold that the unborn child enjoys additional rights beyond the right to life acknowledged in Article 40. 3. 3. Furthermore, he expressed the view that these rights are extensive given the insertion into the Con stitution in 2015 of a specific constitutional provision directed to the rights of children.

Reflecting the importance of this judgment, the Supreme Court has been asked to make use of its exceptional "leapfrog" jurisdiction to take an appeal directly from the High Court. If the Supreme Court agrees, it may be that the question of the wider constitutional position will be definitively addressed in 2017. If so, this will clearly have implications for any potential constitutional amendment. In particular, it raises the possibility that the Constitution would continue to have *some*—perhaps very significant—consequences for abortion legislation and policy in the event that Article 40. 3. 3 was simply deleted.

On the other hand, one leading constitutional scholar has suggested in a newspaper article that the removal of Article 40. 3. 3 by referendum would not return the law to its pre-1983 position but would most logically be regarded as a decision by the People "to completely withdraw constitutional protection from the unborn".[13]

With the Citizen's Assembly due to report to the Oireachtas (parliament), and the appeal in I.R.M. to be heard (possibly by the Supreme Court), it seems inevitable that there will be further controversies—both political and legal—in 2017.

Judicial Independence

The other major area of controversy related to proposals for a reform of the judicial appointments system and, potentially, for the establishment of a judicial council. Both issues have been discussed in political circles for an extended period of time. This reflects a general consensus that there are limitations to the current constitutional and statutory frameworks that regulate appointments and accountability.[14] Commonly cited concerns include the limited role of the Judicial Appointments Advisory Committee in the selection by government of candidates for judicial office, an associated perception of political patronage, the lack of any mechanism to discipline judges short of their removal by the Oireachtas, and the absence of any formal body to represent the judiciary.[15]

In 2014, the judiciary expressed support for the introduction of a judicial council and for reform of the appointments system. In a submission to a consultation process, the Judicial Appointments Review Committee argued that "the present system of judicial appointment is unsatisfactory"; that "political allegiance should have no bearing on appointments to judicial office"; that any new advisory board should have the power to rank candidates for office and to designate one as "outstanding"; and that a judicial council with responsibility for discipline, education and representation of the judiciary was "a much needed reform".

Despite agreement on the need for change, however, the new government's moves to introduce changes to the appointment process have attracted criticism from political and legal figures.

In understanding the origins—and potential constitutional implications—of this criticism, a number of background considerations should be borne in mind.

First of all, there has been a concern about the political approach to the judiciary. The holding of an arguably unnecessary referendum to reduce judges' pay and the appearance in the media of details about a meeting between the former Chief Justice and Taoiseach at which the question of judges' pensions was raised were regarded as evidence of a perception on the part of figures in the previous government that there may be political capital to be gained from conflict with an "elite" or "out of touch" judiciary.

[11] G. v. An Bord Uchtála [1980] IR 32, at 69; McGee v. AG [1974] I.R. 284, at 312; Finn v. AG [1983] I.R. 154 at 160.

[12] [2016] IEHC 478.

[13] Gerry Whyte, "Abortion on Demand the Legal Outcome of Repeal of the 8th Amendment", Irish Times, 28 September 2016.

[14] Jennifer Carroll MacNeill, *The Politics of Judicial Selection in Ireland* (Four Courts Press, 2016).

[15] For background to some of these issues, see the blogposts by Laura Cahillane at http://constitutionproject.ie/.

Second, these developments seem to have been perceived by the judiciary themselves as an attack upon their position. Most notably, a representative body, known as the Association of Judges of Ireland, was found in 2011 to represent members of the judiciary. That this was a direct response to the political environment was illustrated by the statement on the AJI website at the time that:

> The background to the foundation of the AJI was the development, over the months that followed the change of government that occurred in March 2011, of a perceived difficult relationship between the judiciary and the executive, from the perspective of many members of the judiciary.[16]

Third, the government that took office after the 2016 general election is a minority coalition, the many parties in which are Fine Gael (the largest party in the previous government) and the Independent Alliance. The latter's most high-profile figure is a newspaper columnist who had previously criticised "cronyism" in the judicial appointments process on many occasions. It has been suggested that one of his key demands in government has been reform of the process and, specifically, that any new appointment body have a lay majority and a lay chairperson. In addition, however, he has continued as Minister to express strong criticism of the judiciary. He claimed on one occasion that it was obstructing reform, and on another that a declaration of judicial interests was required in case judges might "forget their oaths". This prompted criticism from legal and political circles and an apparent response from the Chief Justice who warned in a speech against "inaccurate discussion and misrepresentation of the position of the Judiciary".

There are two aspects of this controversy that are constitutionally significant. The first is the specific question of how judges will be appointed (and disciplined) in the future. As with the law on abortion, this appears to be an issue where some form of change is likely in the medium term. The government is committed to reform, one of its constituent parts has identified this as a priority, and the main opposition party has also produced its own draft legislation (which largely received a more positive response from legal circles). Quite what the final details of these reforms will be is unclear, however. The government has outlined general principles but no draft legislation has yet been published. Given its minority status, it also cannot be assumed that the government will stay in office long enough to enact any legislation. However, the fact that there is broad political and judicial support for some kind of change means a commitment to reform (if not the policies currently proposed) may survive a change of government.

There also appears to be a degree of consensus that a judicial council would be useful but this seems less of a priority at present. While the judiciary have been vocal in making the case for the council, it should be borne in mind that it was first recommended by a special committee in 2000.

The second aspect of this year's controversy that merits attention is the more general question of whether this episode – following on from others – is a signal of more profound change in the relationship between the judicial and political arms of the state. Relations between the two sides certainly seem strained in a way that appears without precedent since independence. The lack of trust on both sides and the willingness to engage in a degree of public criticisms that would have been deemed inappropriate even a decade ago are new dynamics in Ireland's constitutional structures which raise long-term issues around judicial independence and the relative authority of both legal and political actors.[17] While the precise effect of this change is a matter of speculation, it does seem clear—and likely unhelpful—that reforms with important long-term consequences are being formulated at a time of unusual turbulence in this relationship.

MAJOR CASES

The most significant decision of the year was probably that in Collins v. Minister for Finance.[18] This was a challenge to the issuing of long-term promissory notes worth €30 billion by the Minister for Finance to two effectively insolvent banks in 2010 as part of the response to Ireland's severe banking crisis.

Aside from the obvious importance of the subject matter, the proceedings were constitutionally significant because they raised novel issues relating to the separation of powers and, specifically, the respective roles of the government and the Dáil (lower house) in budgetary matters, and of the courts in reviewing them.

The plaintiff's core argument asserted the existence of a general separation of powers principle that control of national debt and expenditure must be vested in the legislative branch. Substantial reliance was placed in this regard on Article 1.8 of the US Constitution and on the Federalist Papers. The specific breach alleged was that the Dáil had abdicated its constitutional function by conferring a statutory power on the Minister to issue debt without imposing either a statutory "debt ceiling" or, alternatively, a requirement to obtain legislative approval.

This was rejected by the Supreme Court. The Court pointed out that the Irish Constitution contained no equivalent provision to Article 1.8. Rather, "[t]he Constitution's main control point on financial matters, is that the appropriation and therefore expenditure of all monies is required by Article 11 to be provided for 'by law'".

However, the Court proceeded to hold that the phrase "by law" required more than a statutory basis for the act in question. Instead, it denoted a broader principle of legality which meant that a law formally enacted "must [also] be consistent itself with the dictates of the Constitution, and the order and

[16] http://aji.ie/ (accessed March 31, 2014).

[17] See Mr. Justice O'Donnell, "Some Reflections on the Independence of the Judiciary in Ireland in 21st Century Europe" (2016) 19 Trinity College Law Review 5.

[18] [2016] IESC 73.

structure it contemplates". The Court concluded that the Dáil here had not abdicated its function because the legislation, while not imposing a debt ceiling, contained other constraints on the Minister's powers. However, it cautioned that the Act was defensible as "a permissible constitutional response to an exceptional situation". This meant that:

> It cannot therefore be considered to be a template for broader Ministerial power on other occasions. Indeed it is unlikely that the Oireachtas would concede such wide ranging power in other less pressing circumstances, but if it did, and, for example, a minister or other body was permitted to provide unlimited financial support, and without limitation in time or object, to any commercial entity, then it clearly would not follow from this case that such was constitutionally permissible.

This suggests that, while the Court did not endorse the general principle advanced by the plaintiff, it does regard Article 11's reference to "by law" as importing a broader "legality" requirement that any formal measures relating to financial matters must provide for an adequate degree of legislative involvement.

Support for this interpretation of Collins can arguably be found in the other major decision of 2016. Barlow v. Minister for Agriculture concerned a dispute over access by fishermen based in Northern Ireland to mussel seed beds in Irish waters. This had been permitted pursuant to a voisinage agreement based on an exchange of letters between the relevant government departments in Belfast and Dublin in 1965. The legal issue here was whether mussel seed were a "natural resource" within the meaning of Article 10 of the Constitution. This Article requires natural resources to be managed "by law". The Court concluded that Article 10 did apply, and that this arrangement did not comply with it. It is noticeable, however, that the Court did not confine itself to finding that this exchange of letters did not constitute "law" in a formal sense. Instead, it outlined a more substantive principle of legality which it specifically connected to democratic representation and accountability:

> The requirement of Article 10.3 of the Constitution for regulation "by law" is not merely a formal procedural provision, important though that would be. In constitutional terms, it means that the Constitution requires that the regulation of natural resources stated to be the property of the State must be the subject of a decision by the representatives of the People who are accountable to them. Legislation is normally required to take place in public (Article 15.8), which carries with it the possibility of public knowledge and debate. In effect, therefore, the Constitution mandates that if State property, in particular natural resources, is to be sold, leased, managed or regulated, then that decision should be made in public by representatives who are accountable to the People who can accordingly make their views known.

Aside from providing clarity on some of the more rarely-litigated Articles of the Constitution, both Collins and Barlow provide support for the possibility that the Court may be developing a substantive conception of legality which extends beyond the right of an individual to know the law[19] to encompass broader principles of democratic accountability. If this is the case, it may have long-term implications for the separation of powers in Ireland and, in particular, for the legislature's traditionally submissive relationship to government. That is particularly so given that references to "by law" or "in accordance with law" appear frequently in the constitutional text.

CONCLUSION

On abortion, on judicial appointments, and on the scope of a possible legality principle, therefore, 2016 was a year of change – but also of continued uncertainty about the form that change will ultimately take.

[19] King v. AG [1981] I.R. 223.

Israel

DEVELOPMENTS IN ISRAELI CONSTITUTIONAL LAW

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INTRODUCTION

This review presents key developments in the jurisprudence of the Israeli High Court of Justice (HCJ) in 2016. These developments reflect part of the multifaceted longstanding role of the HCJ in constitutional challenges of the State of Israel which involve complicated dilemmas concerning minorities, emergency laws, prolonged belligerent occupation and recurring armed conflicts, unique rules of citizenship, and the complex relation between religion and state.

THE CONSTITUTION AND THE COURT

Israel's constitutional model is based on an incomplete constitution, due to the original decision in the early years of independence not to complete the constitutional design at the time of the establishment of the State, but rather to leave it as an incremental enterprise. The Israeli constitution includes several Basic Laws that regulate the governmental structure and institutions, and the HCJ also has a respectable tradition of judicial protection over the unwritten common-law rights and freedoms. Basic Laws are enacted by the Knesset (Parliament), which holds both legislative and constituent powers. In 1992, the Knesset enacted two Basic Laws on fundamental rights- Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation- that constitute a partially entrenched bill of rights. The HCJ *United Mizrahi Bank* case asserted the authority of judicial review, comparable to the "Marbury" model. This joint legislative-judicial change, known as the "constitutional revolution", resulted in the HCJ becoming the central institution in the development of constitutional protection of human rights.

Therefore, the Israeli constitutional law story is rather unique as it applies American-style judicial review to primary legislation, yet its constitutional laws are enacted through ordinary legislation procedures, in the British style. Israel is also particularly unique due to the inverse ratio between the thin written constitution and the constitutional role of its court. The HCJ hears petitions about Knesset legislation and administrative decisions as the first instance, and its constitutional review model is very close to an "abstract" review. The HCJ is highly accessible to all types of petitions, maintaining broad individual standing in administrative and constitutional petitions (also from protected populations in Judea and Samarea). For over a decade now, the existence and scope of constitutional judicial review in Israel has been harshly contested.

DEVELOPMENTS AND CONTROVERSIES IN 2016

Separation of Powers

HCJ 4374/15 The Movement for Quality of Government v. The Prime Minister of Israel (27 March 2016)

This case, one of the most prominent of the year, addressed the constitutionality of the "Gas Outline", an administrative "outline" decided by the Israeli government regarding gas reservoirs found in Israeli economic

territory in 2009.[1] In 2015, the government decided to contract with a series of energy companies, including Noble Energy, to produce natural gas out of the reservoirs. The gas deal that was presented in the "outline" included many legal and regulatory aspects, all of which were concentrated by the government into a single contract with the gas companies. For that reason, the HCJ was confronted with the need to determine the limits of executive authority, and to rule on questions of delegation and granting an exemption from antitrust law in the energy sector through a government contract, which in effect reorganized the entire energy sector.

This judgment, which was high profile and well covered by the media, had engaged several departments of the Israeli legal system ever since the discovery of the gas reserves and especially over the first quarter of 2016. The General Director of the Antitrust Authority, Prof. David Gilo, resigned in protest of the Gas Outline, stating that it would significantly hurt the competitiveness of the natural gas market. During the HCJ's hearings, the Israeli Prime Minister, Benjamin Netanyahu, testified before the panel and introduced the government's arguments on the importance of the Outline.

The constitutionality of the Outline, as distinguished from its economic feasibility, was specifically highlighted due to its unprecedentedly vast economic significance and the reluctance of the cabinet to enact it as primary legislation. The HCJ discussed the authority of the cabinet and its discretion. In particular, several major issues were analyzed:
First, the Gas Outline included a "Stability Clause" according to which the government guarantees the gas companies a stable regulatory environment for a period of a decade by agreeing not to make changes in legislation and by opposing legislative initiatives in fields such as taxes, antitrust, and export quotas. The majority of the bench (4-1) held that the clause was prescribed *ultra vires* and was void due to it being contrary to the basic administrative law principle of the prohibition on restricting the cabinet's independent discretion. It was ruled that the scope of this discretion does not extend to the decision not to exercise it, especially when the case is subject to political dispute and when the government wishes to restrict the discretion of its successors.

Second, a fundamental section of the government's plan involved a broad exemption for the energy companies from antitrust law. Since the Gas Outline was contracted in a monopolistic regulatory climate, the HCJ addressed legal exemption for an agreement of that nature. Section 52 of the Antitrust Law (1988) vests the Minister of Finance with the authority to exempt a restrictive practice from the provisions of the Antitrust Law on grounds of *"*foreign policy and security considerations*"*. The HCJ deliberated the required conditions in which the Section can be applied and whether it was exercised in a reasonable manner. Aside from Justice Joubran, who elaborated on the missing factual background to serve as a foundation for exercising Section 52 and the insufficient timeframes given to the public to express its position regarding the Outline, the justices of the bench did not find any flaw in the exercise of Section 52 of the Antitrust Law.

Third, the HCJ deliberated whether the issues addressed in the Outline needed to be regulated by primary legislation, or whether a cabinet decision would suffice. Dissenting Deputy President Rubinstein determined that the "aggregate effect" of the Outline amounted to a substance requiring primary legislation, and consequently necessitated an orderly and transparent process. However, the majority opinion (3-2) decided that the validity of the entire Outline, as distinct from the stability clause, was not contingent upon being anchored by primary legislation. As the public's trustee for the state's assets, the government is obligated to exercise its authority in order to optimally preserve the state's proprietary rights to the natural gas. Accordingly, it was decided to cancel the Gas Outline due to the stability clause, without applying judicial intervention in the other matters that were addressed, while suspending the declaration of voidness for a year to allow for an alternative regulation.[2]

HCJ 3132/15 "Yesh Atid" v. The Prime Minister of Israel (13 April 2016)
In a five-justice panel, the HCJ debated the question of whether *Basic Law: The Government* grants the prime minister the authority to hold the position of a minister in addition to being a Prime Minister. The petition was filed by an opposition party against the background of the appointment of Prime Minister Netanyahu to several ministerial departments after the 2015 election.[3] Faced with a challenge to the Prime Minister's multiple functions, the HCJ determined that whereas the Prime Minister's holding of these cabinet positions was technically legal, it was an unconducive situation to democracy. The majority denied the petition and held that according to constitutional interpretation and the constitutional convention, the Prime Minister was authorized to function as a minister.[4] However, subject to Deputy President Rubinstein's opinion (Justices Hendel and Meltzer, in their alternate opinion, concurring), the decision was served a "validity

[1] A summary is available here. For a review *see* Rachel Frid de Vries, *Stability Shaken? Israeli High Court of Justice Strikes Down the Stabilization Clause in the Israeli Government's Gas Plan*, 18 J. World Investment & Trade 332 (2017).

[2] The majority opinion consisted of Deputy President Rubinstein and Justices Joubran, Hayut, and Vogelman against the dissenting opinion of Justice Sohlberg, who held that the stability clause does not restrict the Knesset's legislative power, but rather limits the government's discretion, as it is authorized to do, as long as the government maintains its ability to rescind its "administrative promise".

[3] At a certain point, Netanyahu was simultaneously Israel's prime minister; foreign minister; Communications Minister; Economy, Industry, and Trade ministers, and Labor Minister and Regional Development Minister.

[4] President Naor, Deputy President Rubinstein, Justices Joubran and Hendel concurring. Based on constitutional interpretation, Justice Meltzer's substantive dissenting opinion was that the Prime Minister was not authorized to serve as a minister. After reading the opinions of the justices of the panel and seeking to reach a compromise, Justice Meltzer presented an alternate position according to which he concurred with Deputy President Rubinstein's opinion regarding the "validity notice", such that it became the majority opinion.

notice", whereby if at the end of an eight-month period the situation remained as it was, the case could be appealed again.[5]

In December 2016, following the ruling, Prime Minister Netanyahu passed his Minister for Regional Development and Minister of Economy, Industry and Trade titles to other members of his coalition.

MAJOR CASES

Legislative Process and Regulatory Independence

HCJ 8612/15 The Movement for Quality Government v. The Knesset (17 August 2016)

This petition addressed the legislative process of a reform in the electricity sector: merging the Electricity Regulatory Administration and the Electricity Authority to fulfill the governmental policy regarding the Gas Outline. The reform was passed as part of the "Economic Arrangements Law", a rapid omnibus government bill presented to the Knesset each year alongside the Budget Law.[6]

The petitioners claimed that the reform chapter should be invalidated due to constitutional defects in the legislative process.[7] They oppose the Arrangements Law as the appropriate legal framework for reform, and criticize the Coalition's decision to legislate the bill in an Ad-hoc Select Committee that was assembled outside the Knesset's Economic Affairs Committee to avoid the Chairman's refusal of the Minister of Energy's request to legislate the reform "as is".

The HCJ rejected the petition. It has been the consistent ruling of the HCJ that legislating under the Arrangements Law does not amount, in itself, to an independent cause for striking down legislation. The HCJ ruled that holding the legislation outside the Committee – the "natural habitat" for the legislation – due to the Chairman's position was "inappropriate and unacceptable" (at para. 13 of Justice Hayut's judgment). The court emphasized that it prevents effective discourse and parliamentary scrutiny, and thus infringes the principle of parliamentary independence which is crucial to a properly functioning democratic regime. The court stressed that if the petitioners would have proved that the bill was indeed legislated "as is", it would have declared that this was a "severe and substantial defect at the root of the legislative process", which justifies annulment. However, after examining the legislative process, it concluded that the legislation at hand did not pass "as is" as legislative deliberations took place, and following which the bill was modified. Therefore, the legislative infringement did not meet the "severe and substantial" threshold for judicial intervention and both process and outcome were deemed valid.

Another claim by the petitioners was that merging the two regulatory agencies is an effective impeachment of the former Electricity Commissioner by the Act, and therefore a personal legislation. Justice Esther Hayut, leading the court's opinion, to which Justice Vogelman and President Naor concurred, started her reasoning with an important statement regarding the possibility of invalidation of Knesset legislation with "a personal motive" that "may be infringing with the "foundational principles of our system" (para. 16). Nevertheless, this argument was eventually rejected, mainly because the petitioner did not establish substantial factual grounds to prove that this is the case.

Banning Political nominees

EA 1095/15 The Central Elections Committee for the 20th Knesset v Haneen Zoabi (10 December 2015)

In this ruling, the HCJ rejected the Central Election Committee's decision to ban Haneen (Hanin) Zoabi and Baruch Marzel as candidates to the 20th Knesset election. President Naor scrutinized the case under Article 7(a) of Basic Law: The Knesset, which determines the standards for banning candidates and parties.[8] The majority (8-1) opinion decided that Zoabi and Marzel's speech and conduct did not cross the threshold of evidence to prove incitement; support of terror; or denying Israel's existence as a Jewish democratic state. Deputy President Rubinstein (dissenting) held that the banning decision should be upheld as is.

Political Appointments and Corruption

CA 4456/14 Kellner v. The State of Israel (29 December 2015)

This ruling, also known as the "Holyland Case", concerned three major public corruption affairs involving bribery between real estate entrepreneurs and public officials, among them the former Prime Minister of Israel, Ehud Olmert, and the former Mayor of Jerusalem, Uri Lupolianski. While addressing each of the appeals, the court's 948-page judgment delved into many central and general legal issues in criminal law. Most significant for us is the fact that the judgment upheld, in part, the conviction of former Prime-Minister Olmert. The court acquitted Olmert from one bribery offence, but upheld the remaining indictments (among them, bribery and obstruction of justice) and sentenced him to imprisonment—a first in Israel's history.

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[5] *See* Ittai Bar-Siman-Tov, *Time and Judicial Review: Tempering the Temporal Effects of Judicial Review,* in Patricia Popelier, Sarah Verstraelen, Dirk Vanheule, Beatrix Vanlerberghe (eds.), The Effects of Judicial Decisions in Time 197 (Intersentia, 2013); Rosalind Dixon and Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 Wis. L. Rev. 683 (2016).

[6] *See* Susan Hattis Rolef, *Background Paper - The Arrangements Law: Issues and International Comparisons* (The Knesset Research and Information Center, 2 January 2006).

[7] Landmark court judgments seem to endorse that judicial review of the legislation might apply in cases of inappropriate legislative procedure whenever there is a flaw that constitutes a serious violation of the "fundamental principles of the legislative process". *See* HCJ 5131/03 *Litzman v. Knesset Speaker* 59(1) PD 577 [2004] (Isr.); HCJ 4885/03 *Isr. Poultry Farmers Ass'n v. Gov't of Isr*. 59(2) PD 14, 46-48 [2004] (Isr.). *See* Suzie Navot, *Judicial Review of the Legislative Process*, 39(2) Isr. L. Rev. 183 (2006).

[8] *See generally* Mordechai Kremnitzer, *Disqualification of Lists and Parties: The Israeli Case*, in András Sajó (ed.), Militant Democracy 157 (Eleven International Publishing, 2004).

HCJ 232/16 The Movement for Quality of Government v. The Prime Minister of Israel (08 May 2016)

The HCJ denied the petition against the appointment of MK Aryeh Deri as the Minister of Interior. Deri's criminal offences, which include bribery and breach of trust, were committed while holding the position of the Minister of Interior during the late 1980s. This petition was denied shortly after the denial of an earlier petition against the appointment of Deri as the Minister of Economy and Industry.[9] The HCJ held that the petitioners did not sufficiently prove a direct and clear link between the crimes Deri committed at the end of the 1980s and the position of Minister of Interior specifically, aside from it being the position held at the time of his past offenses. Therefore, notwithstanding difficulties raised by this appointment, it does not exceed the margin of reasonableness (Justices Joubran and Danziger). Justice Hendel (Dissenting) held that the decision to appoint Deri as Minister of Interior is extremely unreasonable, and therefore the appointment should be annulled.

HCJ 43/16 "OMETZ" (Citizens for Proper Administration and Social Justice in Israel) v. The Government of Israel (01 March 2016)

In a five-Justice panel, the HCJ unanimously denied the petition against the appointment of Adv. Dr. Avichai Mandelblit as the Attorney General. The court ruled that the threshold justifying intervention had not been crossed, despite allegedly administrative law defects in Mendelblit's appointment process. The HCJ found that the professional-public committee that nominates prospective Attorney Generals carried out their role meticulously and in accordance with Administrative Law and the cabinet decisions. The grounds that were established against the appointment, including the fact that only one nominee was recommended and not three as originally requested by the Minister of Justice, as well as Mandelblit's involvement in the "Harpaz Affair", did not justify judicial intervention. The HCJ also denied the claims that Mandelblit's previous position as Cabinet Secretary under the Prime Minister's Office necessitated a waiting period prior to his appointment as Attorney General, considering there is no such waiting period prescribed by law. As for the possible conflict of interest between the two positions, the HCJ ruled that it can be resolved through a conflict of interest statement.

Human Rights and National Security

The Home Demolitions Controversy

Against the backdrop of the current wave of terrorism in Israel since 2015, the use of home demolitions was accelerated. In response, a growing number of petitions are being submitted against the practice, and the HCJ engaged again with the constitutionality of the practice, which is governed by Regulation 119 of The Defence (Emergency) Regulations, 1945. The main debate considered the connection between the house residents and the offense; the distinction between punitive sanctions and deterrents and collective punishment.[10]

Although President Naor decided not to set an extended panel in order to re-evaluate the current precedents on this issue, several Supreme Court Justices have expressed doubts regarding the legality and effectiveness of home demolitions in petitions brought before them, and some have raised the need to reopen the discussion on this method.[11] In the *Cedar* case,[12] Justice Vogelman opined that the act requires sufficient evidence of involvement of the suspect's family, and is otherwise disproportional. Similarly, Justice Mazuz in the *Meri* case[13] questioned the effectiveness and proportionality of the method, as well as the precedents' validity considering near-past developments in international law and Israeli constitutional law.

HCJ 5304/15 Israeli Medical Association v. The Knesset (11 September 2016)

This petition challenged the force-feeding prisoners law, arguing that it is unconstitutional as it violates human dignity for an improper purpose and violates international law as it constitutes a form of inhuman and degrading treatment. The case was heard by a panel of three Supreme Court Justices.

The HCJ unanimously rejected the petitioners' arguments and upheld the law as both constitutional and in compliance with international law. In a lengthy opinion by Deputy President Elyakim Rubinstein, he surveyed the international and comparative law and relied on precedents holding that force-feeding prisoners on a hunger strike is neither inhuman nor degrading. Nevertheless, Israel's law is exceptional. Whenever force-feeding prisoners is allowed in democratic countries, the exclusive consideration is the prisoner's well-being. Only in Israel, the law instructs the court to also consider "severe harm to security". Nevertheless, the law's dominant purpose is humanitarian - the preservation of the hunger striking prisoner's life- under conditions that aim to ensure protection of the prisoner's dignity, and with strict supervision by legal and medical agents. National security is only a secondary purpose. Therefore, the HCJ held that the law allowing

[9] HCJ 3095/15 *The Movement for Quality of Government v. The Prime Minister of Israel* (13 August 2015). Deri resigned from this position following his refusal to use his statutory authority under the Antitrust Law prior to the "Gas Outline" approval in the cabinet.

[10] *See e.g.* David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories 145-163 (2002); Aeyal Gross, The Writing on the Wall: Rethinking the International Law of Occupation 163 fn. 118 (2017).

[11] These were non-binding individual opinions.

[12] HCJ 5839/15 *Cedar v. The Military Commander of IDF Forces in the West Bank* (15 October 2015).

[13] HCJ 1125/16 *Meri v. The Military Commander of IDF Forces in the West Bank* (31 March 2016). *See also* Justice Mazuz opinions in HCJ 7220/15 *Aliwah v. Commander of IDF Forces in the West Bank* (1 December 2015); HCJ 8154/15 *Daud Abu Jamal v. GOC Home Front* (22 December 2015); HCJ 6745/15 *Abu Hashiah v. The Military Commander of IDF Forces in the West Bank* (1 December 2015); HCJ 1630/16 *Masudi et al. v. The Military Commander of IDF Forces in the West Bank* (23 March 2016).

force-feeding of hunger-striking prisoners passes the tripartite constitutional test set out in Basic Law: Human Dignity and Liberty.[14]

Human Rights and Economic policy

HCJ 4406/16 The Association of Banks in Israel v. The Knesset (29 September 2016)

The salary of executive officials in traded financial cooperations has been on the public agenda for many years, voicing claims against the increasingly high salaries and the weak supervisory system. Consequently, the "Executive Salary Act" was passed in 2016, essentially capping the salary of the highest paid employees in financial companies to 2.5m NIS (§4(1)) and setting a ratio of 1:35 between the highest and lowest paid employees (§2(b)). The Association of Banks in Israel and the Israel Insurance Association petitioned before the HCJ, challenging the constitutionality of the set ratio and cap, as it infringes upon the Freedom of Occupation, Freedom of Contract, Freedom of Competition and the property rights of the corporation and its executives. The petitioners argued that the legislation was not for a proper purpose, since the main goal is harming the executives, and that the ratio infringes disproportionately on their rights while constituting unlawful discrimination of the financial institutions.

The HCJ, in an extended panel of seven Justices, ruled that the ratio and cap are constitutional and stated that there are no grounds to intervene in the intermediate rules, and specifically the intermediate period that was set by the Act.

HCJ 9134/12 Gavish v. The Knesset (21 April 2016)

This ruling denied a petition challenging the constitutionality of §4 to the Retirement Age Law of 2004, which sets the mandatory retirement age at sixty-seven, for both men and women,[15] and allows an employer to force the retirement. The petition was submitted following the *Weinberger* case, deliberated before the National Labor Court, in which it was decided that an employee could not automatically be forced to end her employment upon reaching retirement age, and that the employer must exercise discretion, considering the individual retirement case on its merits.[16] The National Labor Court left the question of constitutionality to the HCJ, and *Gavish* filled that gap. The petitioners claimed that even following *Weinberger,* §4 is unconstitutional, and actually masks the potential discrimination.

The decision of the HCJ acknowledged that the mandatory retirement age infringes upon the right to equality; however, it does so in compliance with the proportionality tests. Nevertheless, President Naor noted that the retirement age is a matter that should be further addressed in the Knesset and public debate.

Religion and State

HCJ 7625/06 Ragachuva v. The Ministry of Interior (31 March 2016)

The petitioners were foreign nationals who resided in Israel as tourists and were later converted to Judaism by private ultra-Orthodox rabbinical courts. The Ministry of Interior refused to recognize these conversions, holding the position voiced by the State in its response to the petition that the Law of Return of 1950 applied only to those who converted while in Israel and by the official system overseen by the Chief Rabbinate. The question necessitated before the HCJ was whether the Law of Return, and specifically Article 4(b), which includes the term "converted", applies to those who have completed an orthodox conversion in Israel not through the official system.[17]

The majority opinion, handed down by President Naor, held that the term "converted" should be interpreted as referring to those whose conversion was conducted in a recognized Jewish community according to its established standards. An interpretation of the Law of Return according to which only conversion through the official system would suffice for the Law lacks a textual basis and would not fulfill its purpose.

CONCLUSION

One cannot overstate the importance of the Israeli Judiciary. There is hardly any public affair which does not arrive to the court's scrutiny, and the court actively adjudicates on political, military and religious issues no matter how contentious. In 2016 alone, the HCJ nullified the stability clause in the Gas Outline; recognized conversions to Judaism by private ultra-Orthodox rabbinical courts for the Law of Return; and gave a "validity notice" to the Prime Minister for holding several cabinet positions. It allowed the re-appointment of Aryeh Deri as the Minister of Interior, permitted the policy of home demolitions, and approved the law which reduces the salaries of high officials in financial companies. The impact of the HCJ on Israeli constitutional law, as well as on society, thus remains crucial.

[14] For a review of the case from an International law perspective, *see* Jesse Lempel, *Force-Feeding Prisoners on a Hunger Strike: Israel as a Case Study in International Law*, Harv. Int'l L. J. (2 December 2016).

[15] §3 to the Law allows women to voluntarily retire at the age of sixty-two.

[16] NLA 209/10 *Weinberger v. Bar Ilan University* (6.12.12).

[17] Previous HCJ rulings have dealt with tangent questions: In HCJ 1031/93 *Psaro (Goldstein) v. The Ministry of Interior* (1995) and HCJ 5070/95 *Na'am-at-Movement of Working Women and Volunteers* (2002) it was decided that a conversion need not be approved by the Chief Rabbinate for the purpose of the Law of Return and the civil registration. In HCJ 2597/99 *Rodriguez-Tushboim v. Minister of Interior* (2004) it was decided that the Law of Return applies to a non-Jew who while residing lawfully in Israel underwent conversion, in Israel or abroad. *See e.g.* Gidon Sapir, *How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy over Who is a Jew as an Illustration*, 39 Vand. J. Trans. L. 1233 (2006).

Italy

DEVELOPMENTS IN ITALIAN CONSTITUTIONAL LAW

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INTRODUCTION

This report firstly provides a brief introduction to the Italian Constitutional system, with a particular emphasis on the system of constitutional justice (section II). Secondly, the report contains a narrative exposition of two particularly important controversies from 2016 (section III). In these decisions, the Italian Constitutional Court (ICC) actively engaged as the supranational dimension of constitutional law, showing at the same time a high level of compliance to the principle of openness towards supranational and international law, and a firm stance in upholding the complex substantive and institutional balance of the Italian Constitution. In section IV, the report provides an overview of landmark judgements adopted by the ICC in 2016. The last section draws some conclusions.

It may be worth mentioning that in 2016 a far-reaching constitutional reform law was passed by the Parliament to transform its second house (*Senato*) into a body representing the Regions within national lawmaking procedures and at the same time expand national legislative competences. This reform was rejected in a constitutional referendum held on 4.12.2016. In the meantime, a new electoral law concerning the first house of the Parliament (*Camera dei deputati)* had already been passed (in 2015). The ICC was just marginally involved in these two highly controversial topics. First, the constitutional referendum that called upon the Court to rule that a consumers' association had no standing to directly challenge the acts summoning the referendum.[1] Second, the important ruling on the law for the election of the Chamber of deputies, which was initially scheduled for 4.10.2016, was delayed to 2017 (and subsequently announced on 25.1.2017).

THE CONSTITUTION AND THE COURT

The Italian Constitution, entered into force on the 1st January1948, provides the basic provisions regulating fundamental rights and constitutional institutions. It was adopted by the popularly elected Constituent Assembly that led Italy out of the constitutional transition from the pre-war fascist regime to a fully-fledged democratic state. It is a rigid constitution,[2] as it possesses higher rank than ordinary legislation. Constitutional provisions may not be amended or derogated by ordinary legislation. Moreover, a special procedure for constitutional amendment is provided by the Constitution in order to ensure that any amendment to it is the outcome of a meditated decision to be adopted with a relatively broad political and electoral consensus. The ICC is part of the safeguards of the 1948 rigid Constitution. Its establishment was one of the most impacting institutional innovations of the 1948 Republican Constitution. Its nature and function were immediately revealed by the collocation of constitutional provisions regulating its functioning under the section entitled "Guarantees of the Constitution".

However, the Constitution provided only a regulatory sketch of the Institution's main tasks and duties. It took a long time for the Court to be equipped with the regulation that

[1] C Cost no. 256 of 2016.

[2] Albert Venn Dicey, *Flexible and Rigid Constitution* (Clarendon Press 1901) 124–213.

the Parliament was in charge of adopting. Only eight years after the entry into force of the Republican Constitution, the ICC was eventually able to function and to deliver its first judgment. The ICC is composed of fifteen judges, appointed through three different channels. Five of them are elected by the Parliament, five are appointed by the President of the Republic, and five are elected by members of the three superior tribunals (Supreme Court, Council of State, and Court of Auditors). Eligibility criteria are designed to guarantee a high level of independence and technical expertise. Each judge is appointed for a nine-year term of office, a relatively long term for constitutionally relevant offices in the Italian legal system. The term is not renewable nor extensible. The ICC is an essentially collegial organ, as no dissenting or concurring opinions are admitted and decisions are taken collectively.

The access to the ICC is characterized by a mixed system. On the one hand, Regions and the central Government have a direct access to the Court. The latter is entitled to contest regional legislative acts alleged to be incompatible with the Constitution while the former are entitled to contest national legislative acts alleged to be prejudicial to their own legislative competence as guaranteed by the Constitution. On the other hand, the "general" system of access to the Court is an indirect one, where questions of constitutionality may only be raised by judges within the framework of a controversy where the legislative act deemed unconstitutional needs to be applied. Additionally, referring judges are called to play the role of filters, as they may refer a question of constitutionality only if their doubt on the constitutionality of the given act is "not manifestly unfounded" and the question of constitutionality affects a norm to be applied in the case at bar. In this sense, common judges, given their essential role in triggering the Court's jurisdiction, have been depicted as "gatekeepers"[3] of constitutional adjudication.

Referrals are inadmissible and the ICC does not consider their merits if referring judges fail in exercising their role as gatekeepers (e.g. if they do not explain why the resolution of the matter is relevant in the case over which they are presiding; if the question is inherently contradictory; or if it does not involve an act having the force of law). When the Court reaches a decision on the merits of a referred question regarding the constitutionality of a legal provision, it issues a decision that either sustains (*pronuncia di accoglimento*) or rejects the challenge (*pronuncia di rigetto*). In the former cases, the Court declares a law unconstitutional. The effect of these decisions is that the challenged law loses effect retrospectively: the law can no longer be applied by any judicial organ or public administration from the day after publication of the Court's decision in the official bulletin. This also precludes the application of the unconstitutional provision to past events. The Court's declaration is definitive and generally applicable in that its effect is not limited to the case in which the question was referred.

A declaration of unconstitutionality may affect only a portion of a law that is deemed incompatible with the Constitution. This may happen also with a legislative vacuum, thus calling the Court to exercise a creative function that is far from the Kelsenian idea of the "negative legislator".[4] This may only happen when the judicial addition is imposed in only one admissible direction from the Constitution, leaving no room for political discretion. When the Court rejects a constitutional challenge, it only declares the referred question "unfounded" but does not prevent other judges from raising the same question (even at a different stage of the same proceeding), nor the same referring judge from raising a different question. Additionally, the Court may substantively modulate the effects of its decision by adopting interpretative judgements. These decisions confer a crucial role to interpretation and the related distinction between provisions and norms.[5] With interpretative judgement, the ICC may strike down interpretation as unconstitutional while keeping parliamentary texts integer.

Another access to the judicial review of the ICC is the direct method of judicial review to settle controversies arising between the Regions and the State. In these cases, the Government can appeal directly against a regional law, and a Region can appeal directly against a national law or a law enacted by another Region. Even though the incidental access is generally considered the one characterizing the Italian judicial review system, direct review has played an increasingly important role among the Court's tasks, and became the larger part of the workload since the reform of regionalism that occurred in 2001.

A direct access to the Court is also provided within the category of cases arising from conflicts of attributions, where the Court is called to settle disputes among State bodies. These cases are decided by defining which body is entitled a certain power.

Paradoxically, a description of constitutional adjudication in Italy would be only partial if limited to the activity of ICC and domestic organs. In the dualistic perspective that traditionally praised the Italian legal system, the ICC bears, in principle, exclusive authority of reviewing legislation. Nonetheless, the ICC needs to cope with the authority of other judicial bodies endowed with the power of adjudication. In particular, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have been assigned with increasingly important tasks that need to be coordinated with national constitutional adjudication. Tasks and functions of the three Courts do not overlap; however, they seem to develop a composite constitutional system.[6]

In particular, Italy's membership in the EU has, over time, affected the Italian constitutional system in a very significant manner.

[3] Piero Calamandrei, "Il Procedimento per la Dichiarazione di Illegittimità Costituzionale", *Opere giuridiche*, vol III (Morano 1956) 372.

[4] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange, Ltd 1945) 268–69.

[5] Vezio Crisafulli, *Lezioni di diritto costituzionale: 1* (2 edizione, CEDAM 1970) 41.

[6] Leonard FM Besselink, A Composite European Constitution (Europa Law Pub 2007)

The ICC's mind-set toward this phenomenon has dramatically changed over time. From a reluctant approach, the Italian Court transformed itself into one of the most European friendly national constitutional courts on an ongoing "European Journey"[7] that experienced some significant developments during 2016. The next section focuses on these developments.

DEVELOPMENTS AND CONTROVERSIES IN 2016

In the last ten years,[8] the ICC has actively engaged the supranational dimension of constitutional law and rights. The ICC enforced international law and the ECHR, as well as EU law. In a few controversial cases, it also upheld the complex balance of substantive and institutional values underpinning the Italian Constitution against some rulings of the ECtHR[9] and ICJ.[10] Last year, poignant examples were given for both attitudes, regarding EU law and the CJEU.

Judgment no. 187 is (for now) the epilogue of a lengthy dispute concerning the compatibility with an EU directive on fixed-term work of the extensive use of temporary employment in schools, as authorized by Italian law.[11] Considering that the relevant EU provisions had no direct effect and ought to be enforced through the constitutional scrutiny of national law, the ICC[12] voiced widespread concerns of lower courts and joined one of them in requesting a preliminary ruling from the CJEU to clarify the scope of the directive. With its *Mascolo* judgment,[13] the CJEU held that, pending the completion of selection procedures for the recruitment of tenured staff, the renewal of fixed-term employment contracts could not be allowed indefinitely and that fixed-term employees were entitled to compensation for any damage suffered because of such renewal. Following this ruling, and before the constitutional proceedings reached their conclusion, in yet another school reform,[14] the Parliament passed several provisions on the maximum duration of fixed-term employment contracts in schools and on compensation for past temporary staff. Therefore, judgment no. 187 concluded that EU law had been violated, but that the resulting abuse had been subsequently "nullified". Although it may be disputed whether the afforded compensation is enough in every specific case, this sequence of events is a significant instance of cooperation amongst courts and with the legislator (albeit somewhat grudgingly). It is also an example of the ICC operating in its style and capacity of "networking facilitator".[15]

The so-called *Taricco* case, decided on 23.11.2016, with a ruling published on 26.01.2017,[16] is another case of preliminary reference to the CJEU, with remarkably less irenic and harmonic overtones. In its 2015 *Taricco* judgment,[17] the Grand Chamber of the CJEU faced a question concerning criminal offences for VAT evasion in Italy. These offences are often perpetrated through elaborate organizations and operations. Consequently, investigations require a long time and prosecution may become time-barred under the relevant provisions of the Italian Criminal Code, which had been modified by the legislator with a significant reduction of the limitation period. Based upon the rather broad phrasing of Article 325 TFEU, the CJEU held that national time limitations should neither prevent effective and dissuasive penalties "in a significant number of cases of serious fraud affecting EU financial interests", nor provide for longer periods in respect of frauds affecting national financial interests, than in respect of those affecting EU financial interests. The CJEU also added—somewhat unexpectedly—that national courts should verify by themselves if that was the case and, if need be, disapply the domestic provisions regulating the maximum extension of the limitation period in order to allow the effective prosecution of the alleged crimes. According to the CJEU, this would not infringe Article 49 of the EU Charter of Fundamental Rights (principles of legality and proportionality of criminal offences and penalties) nor Article 7 ECHR (no punishment without law) with regard to pending criminal proceedings. On the one hand, the alleged crimes constituted, at the time when they were committed, the same offence and were punishable by the same penalties. On the other hand, the CJEU considered the statute of limitation as a procedural institution. In the CJEU's view, the extension of the limitation period and its immediate application are not prohibited when the offences have never become subject to limitation.

In Italy, some courts perceived a complex constitutional problem concerning Article 25(II) of the Italian Constitution ("No punishment may be inflicted except by virtue of a law in force at the time the offence was committed"), with at least two facets: the CJEU had called for an *ex post facto* increase of criminal liability, as, according to a well-established Italian legal tradition, the limitation period is part and parcel of the substantive discipline of criminal offences (it is the temporal dimension of criminal liability); and the possibility of disapplying the relevant provisions was not only unfore-

[7] Paolo Barile, 'Il Cammino Comunitario Della Corte' [1977] Giurisprudenza Costituzionale 2406.

[8] Since C Cost nos. 348 and 349 of 2007.

[9] C Cost no. 264 of 2012.

[10] C Cost no. 238 of 2014.

[11] Council Directive 1999/70/CE of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by CES, UNICE, and CEEP [1999] OJ L155/43.

[12] C Cost no. 207 of 2013.

[13] Joined Cases C-22/13, C-61/13, C-62/13, C-63/13, and C-418/13 *Raffaela Mascolo and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli* [2015] EU:C:2015:26.

[14] Legge 13 luglio 2015, n. 107, (Riforma del sistema nazionale di istruzione e formazione e delega per il riordino delle disposizioni legislative vigenti).

[15] Vittoria Barsotti, Paolo G Carrozza, Marta Cartabia, and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (OUP USA 2016).

[16] C Cost no. 24 of 2017.

[17] Case C-105/14 *Taricco and Others* (2015) EU:C:2015:363.

seen and unforeseeable but also subject to exceedingly vague conditions, incompatible with the certainty required in criminal law. Therefore, questions were addressed at the ICC, which in its turn asked the CJEU to take into greater account the national principles. The ICC asked whether the disapplication is mandatory, even when its effect would consist of an infringement on the supreme principles of the national constitutional identity of a Member State.

In its preliminary reference, the ICC makes some effort to frame national constitutional concerns within EU legal categories (e.g. referencing to Article 4 TEU, and Articles 49 and 53 of the Nice Charter). Nevertheless, by emphatically invoking supreme constitutional principles, the ICC shows itself ready to take a bold stance: activating the so-called counter limits (limits to sovereignty limitations acceptable due to EU law) to interdict the effects of the *Taricco* judgment on national courts. Much will depend on the answer that the CJEU has been asked to provide urgently.

MAJOR CASES[18]

Separation of Powers

Judgment No. 52 of 2016: Constitutional Guarantees and Political Discretion on Religion

The Court settled a dispute between the President of the Council of Ministers and the Court of Cassation concerning a decision by the latter upholding an appeal brought by an association of atheists which had sought an order requiring the President of the Council of Ministers to launch negotiations with a view to concluding an agreement (similar to a concordat) with it as a religious organisation.

The ICC concluded that the decision whether to start negotiations is reserved to executive discretion. The Government can be held accountable for it as a political matter before Parliament, but not before the courts. Therefore, the matter was considered primarily under the separation of powers perspective, though the decision had a significant indirect impact in the field of freedom of religion.

Rights and Freedoms

Judgment No. 63 of 2016: "Anti-Mosques" Regional Laws

In this case, the Court considered a direct application from the President of the Council of Ministers questioning the constitutionality of portions of a Lombardy regional law modifying regional principles for planning facilities for religious services. The claimant alleged that the legislation violated the equal religious freedom of all religious creeds and exceeded the legislative competences of the Region. The Court struck down those portions of the contested provisions that made distinctions based on the relative size of the denomination or the presence or absence of a formalized pact between the State and the denomination. The Court also struck down provisions requiring newly-constructed places of worship to install video surveillance systems as exceeding regional competences, since the pursuit of safety, public order, and peaceful coexistence is allocated exclusively to the State under the Constitution.

Judgment No. 84 of 2016: Scientific Research on Embryos

In this case the Court heard a referral order concerning the 2004 law on medically assisted reproduction, in which it was requested to rule that embryos that were destined to be destroyed (as they would not be implanted, where affected by disease) could be used for scientific research, notwithstanding the statutory prohibition on such usage. Relying on ECtHR case law, the Court noted that there was no pan-European consensus on such a sensitive issue and dismissed the application, holding that "the choice made by the contested legislation is one of such considerable discretion, due to the axiological issues surrounding it, that it is not amenable for review by this Court".

Judgment No. 213 of 2016: Health-Care Benefits in More Uxorio Cohabitation

In this case, the Court considered a referral order questioning the compatibility with the Constitution of the exclusion from certain social security benefits of non-married partners. The provisions at issue entitled spouses and close relatives of severely disabled people with parental leave. The referral order claimed that the law was unconstitutional as long as it did not include *more uxorio* partners among the beneficiaries of the right to parental leave. The ICC struck down the omission of the *more uxorio* partner from beneficiaries as unconstitutional, thus extending the parental leave right recognition to them. The Court affirmed that even though *more uxorio* cohabitation and marriage are not fully equivalent, it is unreasonable in the case at hand to exclude the former from the beneficiaries of parental leave rights, as disabled persons have the same needs and right to health care, whichever is their marital status.

Judgment No. 225 of 2016: The Rights of Children in the Separation of Same-Sex Couples

In this case, the referring Court alleged that the contested provisions of the civil code regulating parent-child relationships, as modified in 2013, violated the Constitution as long as they did not allow the referring Court to evaluate on a case-by-case basis whether it mirrors the interest of minors to maintain a significant relationship with the former partner of the biological parent, within a same-sex couple. The ICC dismissed the case as unfounded, since the referring judge failed to consider a provision of the civil code that could offer adequate protection to the interest at issue. In fact, Article 333 of the civil code allowed taking into consideration behaviors that are detrimental to the interest of the child, such as any unjustifiable interruption (imposed by one or both parents) of any significant relationship of the child with third persons. In these cases, judicial authorities are entitled to adopt any suitable measures on a case-by-case basis at the initiative of the Public Prosecutor, who could possibly be requested to act by the subject that was involved in the unjustifiable interruption of a significant relationship with the minor. The ICC found that there was no legislative vac-

[18] The ICC provides some official full-text translations of its decisions. These translations are available at the ICC official website: http://www.cortecostituzionale.it/actionJudgment.do. The following summaries rely on official translations, where available.

uum, and that the legal position of the former partner may be adequately protected through these legal arrangements, which the referring judge failed to consider.

Judgment No. 286 of 2016: In the Mother's (Sur)name

In this case, the ICC declared unconstitutional several provisions of the civil code, insofar as they did not allow the parents, by mutual consent, to attribute to their children at the moment of birth the maternal as well as the paternal last name. The Court held that the voided legal provisions violated the child's constitutional right to his or her own personal identity and the constitutional right to equal dignity between parents and spouses. Moreover, the ICC relied on Article 8 (right to respect for one's private and family life) and Article 14 (non-discrimination) of the ECHR, and on the relevant case law of the ECtHR, that recently declared that the obligation to transmit only the father's name is in violation of the ECHR (*Cusan and Fazzo v. Italy, App.no. 77/07, 7 January 2014*). As a result of the ICC's decision, parents may agree to add the maternal last name after the paternal last name to their child's name at the moment of birth or adoption. However, in the absence of an agreement between the parents, the existing provisions related to the attribution of the paternal last name remain applicable in expectation of a legislative intervention destined to regulate the matter comprehensively in accordance with criteria eventually compatible with the principle of parity.

Foreign, International and/or Multilateral Relations

Judgement 102 of 2016: Ne Bis in Idem no. 1

One of the most problematic frontiers with the ECHR concerns the different notions of "criminal matter" adopted by each system: narrower in Italy; broader at Strasbourg. A number of questions stemmed from this very significant divergence.

In Judgment n. 102 of 2016, the Court heard two referral orders, from criminal and tax divisions of the Court of cassation, concerning the punishment of the illegitimate use of nonpublic financial information with both criminal and administrative sanctions, allegedly in violation of the *ne bis in idem* principle (ECHR Protocol no. 7, Article 4). All the questions were found inadmissible for various reasons: most notably because, although a double line of punishment may be in breach of the ECHR (if a formally administrative sanction is substantially afflictive), it is for the legislator to settle the issue by making the appropriate choices, also taking into account the fulfillment of obligations under EU law. This may include keeping both criminal and administrative sanctions while unifying or coordinating existing investigation and punishment procedures.

Judgement 193 of 2016: Lex Mitior

The Court heard a referral order concerning administrative sanctions for the violation of labor law: their unusual severity had been mitigated by a subsequent law, but only after they had been definitively applied to the party. The question was whether the Constitution and the ECHR require the subsequent and more lenient law (*lex mitior*) to prevail also over *res judicata*. The question is unfounded: while in the abstract the *lex mitior* principle may apply to administrative sanctions, the question should focus on single sanctions, and on the specific norms governing them, in order to assess their afflictive character; not—as was the case—on the general norms applicable to all administrative sanctions, as some of them might fall beyond the scope of constitutional and ECHR guarantees.

Judgment No. 200 of 2016: Ne Bis in Idem no. 2

In this case the Court heard a referral order concerning a provision of the Code of Criminal Procedure which limits the applicability of the *ne bis in idem* principle to the same legal fact as regards its constituent elements (*idem ius*), rather than to the same historical fact (*idem factum*), with the result that the criteria for establishing whether the fact is the same are more restrictive under Italian law (which considers both legal and material elements) than under the ECHR (which only considers material elements). The Court ruled the legislation unconstitutional insofar as it did not provide that the applicability of the *ne bis in idem* principle must be assessed with reference to the same historical-naturalistic fact, albeit considered with reference to all of its constituent elements (conduct, event, causal link). Italian law must base its assessment on the *idem factum*, and has no scope for *idem ius*.

Judgment No. 275 of 2016: Concept of Punishment in National Law and the ECHR

In this case the Court considered several Referral Orders on the 2012 law providing for the suspension of officials elected in local and regional bodies when they are found guilty, although not definitively, of certain offences (and also prohibiting them, in the same cases, to run for office). This also applies when the offences where committed before 2012. Many questions were raised, and all were found inadmissible or unfounded. Some points are particularly relevant: for the ICC, the effects of the questioned norms cannot be constructed as a "punishment", neither under Italian constitutional law nor under Article 7 of ECHR and the ECtHR case law (analyzed in detail by the ICC); rather, they are precautionary measures, aimed at preventing illegality in public administration[19] and at enforcing the constitutional duty of citizens entrusted with public functions "to fulfill such functions with discipline and honor" (Article 54, Para. 2, of the Italian Constitution). Therefore, these measures may also take into account previous offences and convictions, in barring access to (and permanence in) office. The ICC analysis is especially significant as it dwells on issues which will be considered in the upcoming Strasbourg judgment on the (partially similar) *Berlusconi* case.[20]

[19] See also C Cost no 236 of 2015.

[20] Application no. 58428/13, Silvio Berlusconi against Italy, lodged on 10.9.2013, communicated on 5.7.2016.

CONCLUSION

Fifty years after the publication of John Henry Merryman's series of articles on the "Italian style"[21] in comparative law, the ICC stays true to this peculiarity. In particular, its attitude in the European constitutional space assumed a characterizing stance of active participation in the so-called judicial dialogue. Even though the general trend of the ICC engagement has been a collaborative one, the Court has not missed the opportunity of remaining true to its own interpretation of the Italian constitutional tradition. This attitude towards supranational and international "relationality"[22] is a recent development of the Court's mindset towards the globalization (and, in particular, the Europeanization) of constitutional adjudication, which was dramatically developed in its case law in 2016. On the one hand, many of the reported judgments rely on the European courts' case law and make a proactive effort to ensure the highest level of compliance with EU law and with the ECHR.[23] On the other hand, when it came to the core values of the constitutional identity of Italy, the ICC openly embraced a distinct position from the one of the CJEU. By submitting a reference for preliminary ruling, the opportunity arose for further collaboration with the CJEU.[24] Consequently, some distinctive features of the national legal order might become elements for common values in a system fostering pluralism. Only the future will tell if this invitation to cooperate will be taken up by the CJEU. As to the present, the attitude of the ICC toward supranational and international law should be evaluated and considered by taking into account this complex and articulated picture in its entirety.

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2) Marta Cartabia, 'Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication' (2016) 8 The Italian Journal of Public Law 37
3) Tania Groppi and Irene Spigno, 'Constitutional Reasoning in the Italian Constitutional Court', *Comparative Constitutional Reasoning* (Cambridge University Press Forthcoming) <https://ssrn.com/abstract=2498966>
4) Diletta Tega, 'The Italian way: a blend of cooperation and hubris' (2017) 2 The Heidelberg Journal of International Law/Zeitschrift für ausländisches *öffentliches* Recht und Völkerrecht, forthcoming
5) Giorgio Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective* (Intersentia 2013)

[21] John Henry Merryman, "The Italian Style I: Doctrine" (1965) 18 Stanford Law Review 39; John Henry Merryman, "The Italian Style II: Law" (1966) 18 Stanford Law Review 396; John Henry Merryman, "The Italian Style III: Interpretation" (1966) 18 Stanford Law Review 583.

[22] Barsotti and others (n 15) 235.

[23] See Section IV, C of this report.

[24] C Cost no. 24 of 2017, see further in Section III of this report.

Kenya

DEVELOPMENTS IN KENYAN CONSTITUTIONAL LAW

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INTRODUCTION

This brief review considers significant constitutional events in Kenya in 2016, with some spill over to the year 2017. Kenya has been a field of remarkable constitutional development since 2010, when it enacted for itself a new Constitution replacing the 1963 Independence one. The country has since been embroiled in constitutional interpretation, refinement, and implementation.[1] Drafters of the 2010 Kenyan Constitution "decided not to decide"[2] various points, so several constitutional articles end with a clause that Parliament should enact legislation to implement the Constitution.[3] Kenya's Parliament has engaged in massive enactment of legislation to give effect to various parts of the Constitution in the last six years,[4] and courts have been involved in interpreting statutes and executive action under the authority of the Constitution. This review reports these developments by flagging the important ones, some of which started before 2016 but were a subject of settlement (judicial or otherwise) in 2016. Others will be subject to final determination in 2017, and as such are not, except for one, covered in the review.

THE CONSTITUTION AND THE COURT(S)

The Independence Constitution had been a subject of sustained "abusive constitutionalism."[5] It had been amended several times before 1992, which has worked to deprive it of a propensity to act as a tool of control or an incubator of democracy.[6] After 1992, Kenya resorted to *ad hoc* constitutional review processes in the form of constitutional amendments and attempted constitutional revisions[7] until 2008, when it was felt that the fruitions of such *ad hoc* measures were not a reliable and sufficient framework for democracy. In particular, whereas most of these reforms were directed at the electoral body and courts,[8] substantive failure by the then electoral body, Electoral Commission of Kenya (ECK), to conduct free and fair elections coupled with a refusal by the then powerful opposition group, Orange Democratic Movement, to present its grievance to court over the 2007 general elections[9] exposed the ineffectiveness of the *ad hoc* measures and consequently provided an impetus for urgent constitutional reform processes.[10] These processes culminated in the Constitution of

[1] See Ben Sihanya, *Constitutional Implementation in Kenya: Challenges and Prospects* (2011).

[2] The phrase is extracted from Rosalind Dixon and Tom Ginsburg, "Deciding Not to Decide: Deferral in Constitutional Design" 9 *International Journal of Constitutional Law* (2011).

[3] See e.g. articles 9, 14, 15, 18, 21, 23, or 63.

[4] A list of legislation enacted in 2016 is available at http://kenyalaw.org/kl/index.php?id=5995.

[5] See generally David Landau, "Abusive Constitutionalism"47 *UC Davis Law Review* 189 (2013).

[6] See Yash Ghai and Jill Cotrell, "Constitution Building Processes and Democratization Kenya" available at http://www.katibainstitute.org/Archives/images/Constitution_Building_Processes_and_Democratization-Kenya.pdf accessed 20 April 2017.

[7] Such as repeal of its section 2A, of the then Constitution that paved way for multi-party democracy in 1991.

[8] See Rok Ajulu "Kenya's 1997 Elections: Making Sense of the Transition Process" 14 (1) New Eng. J Pub. Pol. (1998).

[9] Human Rights Watch, "Kenya's Unfinished Democracy" available at https://www.hrw.org/reports/2002/kenya2/Kenya1202-01.htm (last visited 31 April 2016).

[10] Government of Kenya, Report of the Independent Review Commission, 2009.

Kenya 2010 that sought not just to reform the judiciary and the electoral body but other (if not every) aspects of Kenya's public regulation including human rights, institutions, public finance, land, and national security.[11]

Regarding courts, Kenya does not have a specialized court to address constitutional matters called a "Constitutional Court," as South Africa and Germany have. All the superior courts in Kenya (the High Court, Employment and Labor Relations Court, Environment and Land Court, Court of Appeal and Supreme Court) have the authority to make interpretations and determinations on the Constitution.[12] Ordinarily, the High Court has the explicit original jurisdiction to (a) determine questions of violations of rights and also (b) interpret the Constitution.[13] This jurisdiction is exercised either by a single judge or by an even number of judges (more than three) if the dispute concerns a novel point of law.[14] A decision from the High Court can be appealed against to the Court of Appeal. The High Court at Nairobi in Kenya has a division designated to hear and determine petitions on human rights and constitutional matters. Other High Court stations can hear any petition—the arrangement in Nairobi is purely administrative.

At the apex of the judicial system is the Supreme Court.[15] The Court has both original and appellate jurisdiction. It has original jurisdiction to determine (a) presidential elections and (b) request for advisory opinions at the instance of the national government, state organ or county government on a matter that concerns a county government.[16] It does have appellate jurisdiction to hear and determine appeals from the Court of Appeal in cases of interpretation of the Constitution and in cases in which it or the Court of Appeal certifies a matter to be of general public importance- though a certification by the Court of Appeal can be reviewed or set aside.[17] Thus, the Supreme Court is the court with the final authority on constitutional interpretation, but that authority can only be exercised if a matter falls within its jurisdiction.

DEVELOPMENTS AND CONTROVERSIES IN 2016

There were two significant controversies in 2016- one purely political and another case based. The political one concerned the tenure of commissioners of the electoral body, the Independent Electoral and Boundaries Commission (IEBC). It started when opposition leaders called for the resignation of IEBC commissioners that presided over the 2013 general elections.[18] The opposition circulated an article titled *The Kenyan People's Case against IEBC* setting out their grievances against the electoral body and called upon Kenyans to attend (weekly) protests until the commissioners—and more so its then chair Ahmed Issack Hassan—vacates office.[19] The government responded first by suppressing the protests through the security forces and the president declined at first to cede to the opposition demands requiring that the constitutional procedures be followed first.[20] The opposition insisted and promised more protests, and following increased violence, deaths, and destruction of property, the commissioners resigned on their own and through a parliamentary initiative involving major political parties a process was set up to oversee their substitution.[21]

However, the most pronounced controversy in 2016 was perhaps one that surrounded the succession of the Supreme Court judges, profiled as the "Retirement Age Cases." The subject matter started around 2015 but became a subject of Supreme Court determination in 2016. It was principally a judicial dispute on when the judges of Superior Court should retire. The Judicial Service Commission, the constitutional agency responsible for the hiring of judges, issued retirement letters to some judges on the basis that they were about to get to 70 years which was the constitutional timeline for judges appointed under the new Constitution. The judges reacted by filing a number of Petitions at the High Court, the lead petition being *Philip K. Tunoi & Another v. The Judicial Service Commission & Another.*[22] The main contention was about the lawful period of service of Superior Court judges who were already duly appointed and were in service under the repealed Constitution (the Constitution of Kenya 1969), and who then continued in service under the Constitution of Kenya, 2010. Supplemental to the dispute was a claim by

[11] See e.g. Karuti Kanyinga and James D. Long, "The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution," 55 (1) 35*, Afr. St. Rev*. (2012).

[12] See Constitution of Kenya, Chapter 10.

[13] Constitution of Kenya, 2010 art. 162.

[14] Ibid.

[15] Constitution of Kenya*,* 2010 art. 163.

[16] Ibid*.*

[17] Art. 163.

[18]Standard Team, Raila Odinga, "Why we are holding mass protests against IEBC," available at https://www.standardmedia.co.ke/article/2000201969/raila-odinga-why-we-are-holding-mass-protests-against-iebc (accessed 20 April 2017).

[19] Judie Kaberia, "CORD vows to continue Monday protests against IEBC," May 22, 2016, http://www.capitalfm.co.ke/news/2016/05/cord-vows-continue-monday-protests-iebc/ accessed 20 April 2017.

[20] Nancy Agutu, "We will not allow destructive protests, Uhuru tells Raila," The Star available at http://www.the-star.co.ke/news/2016/06/10/we-will-not-allow-destructive-protests-uhuru-tells-raila_c1367112

[21] Francis Gachuri, "IEBC commissioners agree to leave office on negotiated settlement," https://citizentv.co.ke/news/iebc-commissioners-agree-to-leave-office-on-negotiated-settlement-135774/.

[22] Petition No. 244 of 2014. Others included Petition No 495 of 2014, Justice Leonard Njagi v. The Judicial Service Commission, the Judiciary and The Attorney General; and Petition No 386 of 2015, Lady Justice Kalpana Rawal v. the Judicial Service Commission, the Secretary of the Judicial Service Commission; Okiya Okoiti Omtatah.

the judges that their rights were being violated and that the Judicial Service Commission was breaching their legitimate expectations. At the High Court, the petition was heard by five judges.[23] Dismissing it, the High Court held in summary that:

> there was no violation of the constitutional rights and legitimate expectations of the Petitioners; the JSC had no mandate in determining whether the retirement age of judges in office on the effective date was seventy or seventy-four years as such mandate belonged to the Judiciary in the first instance; issuing retirement notices is the responsibility of the Judiciary; and the retirement age of judges in office on the effective date is seventy years.[24]

The Deputy Chief Justice, Kalpana Rawal, was aggrieved by the decision of the High Court, as other judges were. She filed an appeal in the Court of Appeal, which was heard and determined by seven judges.[25] It was also dismissed, and the Judges of the Court of Appeal held:

> In the final analysis, we have reached the conclusion that on the whole, the High Court did not err in holding that the Constitution did not preserve and save the retirement age of judges prescribed by section 62(1) of the former Constitution as read with Section 9 of the Judicature Act and Section 31 of the Sixth Schedule to the Constitution, and that with effect from the effective date, the retirement age of all judges is 70 years. For these reasons, the appeal cannot succeed. It fails and is hereby dismissed.[26]

Justice Rawal, the then Deputy Chief Justice, filed a notice of appeal, contemporaneously, with an application for a stay, staying the decision of the Court of Appeal, at the Supreme Court. The application for stay was heard by a single judge of the Supreme Court, Justice Ndungu, who allowed it and stayed the decisions of the Court of Appeal.[27] The appeal to the Supreme Court had been filed just a few days before the then Chief Justice, Willy Mutunga, retired. Justice Njoki Ndungu had, in granting stay orders at the Supreme Court directed that the application be heard, *inter parties,* at a date that would be after the departure of the Chief Justice.[28] The Chief Justice in turn, exercising his "administrative powers," varied the orders that had been given by Justice Njoki Ndungu and gave directions that the application be heard on a priority basis.[29]

When the applications were scheduled for a hearing, a private citizen, Okiya Omtata, who had been enjoined by the High Court as a party, filed a preliminary objection arguing that the Supreme Court did not have jurisdiction to hear the appeal that was to be filed at the Supreme Court and whose subject matter the applications were aiming to preserve.[30] Five judges of the Supreme Court heard the preliminary objections, and the majority upheld it.[31] The effect of upholding the preliminary objection was that the Supreme Court was conflicted and did not have jurisdiction to entertain the appeal, let alone to grant the orders that had been previously granted. The orders were set aside, and the Judicial Service Commission advertised for the positions of Deputy Chief Justice and judge of the Supreme Court.[32]

MAJOR CASES

Because of succession at the Supreme Court, there were hardly any cases that were heard after the decision in the *Rawal case*. Chief Justice Dr. Willy Mutunga retired, and the *Rawal case* having had the effect of "removing" justices Rawal and Tunoi, both of the Supreme Court, there was no *coram* to hear any case. The process of hiring a new Chief Justice, as well as other judges of the Supreme Court, took time. There were, however, many other significant cases that were heard in the High Court and Court of Appeals involving interpretation and application of the Constitution and which had a far-reaching impact on the text and principles that undergird the Constitution, such as separation of powers, human rights, and foreign relations. Some of these are highlighted below.

Separation of Powers

The Constitution of Kenya embodies a rich symmetry of separation of powers at many levels. At the one hand, power is divided vertically between the national and county governments, and at another level it is divided horizontally between the judiciary, executive, and legislature. Even within the legislature, powers (and functions) are divided between the national assembly and the

[23] R. Mwongo, Pj, W. Korir, J, C. Meoli, J, H. Ong'udi, J, C. Kariuki, J.

[24] Para 399.

[25] Justice Kalpana H. Rawal v. Judicial Service Commission & 3 others [2016] eKLR. (Per Justices, Kariuki, Makhandia, Ouko, Kiage, M'inoti, J. Mohammed & Odek, Jj.A).

[26] The decision is available at http://kenyalaw.org/caselaw/cases/view/122357/ acceded on 23 April 2017.

[27] Kamau Muthoni, "Supreme Court moves to save Rawal and Tunoi hours after Court of Appeal sends them home," available at https://www.standardmedia.co.ke/article/2000203232/supreme-court-moves-to-save-rawal-and-tunoi-hours-after-court-of-appeal-sends-them-home accessed on 23 April 2017.

[28] Richard Munguti, "Mutunga fast tracks Rawal retirement case," http://www.nation.co.ke/news/Mutunga-wades-into-Rawal-retirement-case/1056-3225372-format-xhtml-nt1pdoz/index.html accessed on 23 April 2017.

[29] Ibid.

[30] Kalpana H. Rawal & 2 others v. Judicial Service Commission & 3 others [2016] eKLR (Per JB Ojwang), available at http://kenyalaw.org/caselaw/cases/view/123000/ accessed on 23 April 2017.

31 Mutunga, Wanjala and Ibrahim JJSC, against Ojwang and Ndungu JJSC.

[32] Abiud Ochieng, "End of the road the for Rawal, Tunoi as jobs are advertised," (Daily Nation, 15 June 2017) available at http://mobile.nation.co.ke/news/end-of-the-road-the-for-rawal-tunoi-as-jobs-are-advertised/1950946-3251578-1185j5a/index.html.

senate (both of which make up Parliament).[33] The devolved government is also divided into county executives and county assemblies.[34] Kenya currently has 47 counties, and thus also 47 county assemblies.[35]

There have been legion disputes between national government and county governments over the exercise of powers (as well as privileges), some of which have been a subject of judicial determination in 2016.[36] One of the most significant was *International Legal Consultancy Group & another v. Ministry of Health & 9 others* [2016] eKLR.[37] This case was about division of functions between the national and county governments in relation to health. It arose out of a decision by the national government, through the Ministry of Health, to procure certain medical equipment to be used in health facilities throughout the country. Citing the *Inter-Governmental Relations Act* 2012, the court, in that case, dismissed the petition that had been filed in the interest of county governments and observed that:

> "the constitutional and legislative intent was to have all disputes between the two levels of government resolved through a clear process established specifically for the purpose by legislation, a process that emphasizes consultation and amicable resolution through processes such as arbitration rather than an adversarial court system. As a result, a separate dispute resolution mechanism for dealing with any disputes arising between the national and county governments, or between county governments, has been established."[38]

Some other disputes have been on the relationship between the judiciary and the executive. Most significant in this regard was that of *Law Society of Kenya v. Attorney General & Another* [2016] eKLR.[39] This case was about the powers of the President to appoint the Chief Justice and the Deputy Chief Justice. Proceedings in that case were provoked by the enactment of the *Statute Law (Miscellaneous Amendment) Act* 2015 that sought to make minor amendments to various statutory enactments, including the *Judicial Service Act* 2011. Regarding the *Judicial Service Commission Act,* the bill sought to amend it to prescribe timelines for transmission of names to the President after recommendation by the Commission and most importantly sought to amend the provisions of section 30(3) of the Judicial Service Commission Act by requiring that the Commission submits names of three persons for appointment to the position of the Chief Justice and the Deputy Chief Justice. It had been contended that by allowing such amendments, the judiciary was going to be perceived by the public as an appendage of the executive and more importantly that the said amendments would achieve a collateral purpose of limiting the independence of the Judicial Service Commission and the judiciary, which collateral purpose was claimed to have been evidenced by the "fact that the amendments only affect the Chief Justice and the Deputy Chief Justice but not the Judges of the Court of Appeal and the High Court who are appointed in a similar manner."[40] The High Court, which heard the case, determined that:

> "To the extent that the amendments to section 30(3) of the Judicial Service Act compelled the Judicial Service Commission to submit three names to the President for appointment of the Chief Justice and the Deputy Chief Justice respectively, the said amendments violated the letter and the spirit of Article 166(1) of the Constitution."[41]

Rights and Freedoms

In the year 2016, legion petitions involving violations of human rights were heard and determined by the High Court. The most significant was one that found its way to the Court of Appeal from the High Court: *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others* [2016] eKLR.[42] The appeal concerned justiciability and enforceability of socio-economic rights under the 2010 Constitution. Most pointedly, the case expressed the tension between the right to housing as a socio-economic right and the right to private property. The Court had to decide on the extent to which socio-economic rights can trump private property rights. A key feature in the appeal was the interpretation of the scope of the power of the High Court to grant appropriate relief as per *Article 23 of the Constitution* in cases involving the implementation of rights and fundamental freedoms.

Sometime around 1992, members of *Mitu-Bell Welfare Society* **were relocated by the** government to occupy and reside in a property belonging to *Kenya Airports Authority*. The residents then put up their slum dwellings, schools, and churches and established their businesses on the property and sought—in vain—the Commissioner of Lands to issue them title deeds to the portion of the appellant's land that they occupied.[43] In 2011, the Airports Authority placed a notice in the local daily newspapers giving the occupants and residents seven days to va-

[33] Constitution of Kenya*, Chapter* 8.
[34] Ibid*,* Chapter 11.
[35] Constitution of Kenya, First Schedule.
[36] Available at http://kenyalaw.org/caselaw/cases/view/120392/ accessed 31 March 2017 .
[37] Ibid.
[38] Ibid para. 65.
[39] http://kenyalaw.org/caselaw/cases/view/122379/ accessed 31 March 2017.
[40] Para 19.
[41] Ibid, Para 307.
[42] http://kenyalaw.org/caselaw/cases/view/123600/ accessed 31 March 2017
[43] Ibid.

cate portions of the suit property that they occupied.[44] The notice also stated that upon expiry of the notice period, any buildings, installations, or erections thereon were to be demolished or removed and all activity was to terminate in the area.

The petitioners reacted by filing a case in the High Court, and the High Court held, *inter alia*, that any forceful eviction and or demolition without a relocation option is illegal, oppressive, and violates the rights of the petitioners. Also, that the respondent (state) was to provide, by way of affidavit, within 60 days, policies and programs for the provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements. The state was further to furnish copies of such policies and programs to the petitioners, other relevant state agencies, and Pamoja Trust to analyze and comment on the policies and programs.[45]

The state appealed against the decision in the Court of Appeal, which allowed the appeal arguing in part that "Under the political question doctrine and noting the provisions of Article 20(2) and 20 (5) (c) of the Constitution, a trial court should rarely interfere with a decision by a state organ concerning the allocation of available resources for progressive realization of socio-economic rights solely on the basis that it would have reached a different conclusion."[46] The CoA did, however, observe that "in any eviction, forcible or otherwise, adequate and reasonable notice should be given. Respect for human rights, fairness, and dignity in carrying out the eviction should be observed. The constitutional and statutory provisions on fair administrative action must be adhered to."[47]

Foreign, International, and Multilateral Relations

Republic of Kenya All War Heroes & Others v. Attorney General & Others [2017] eKLR, though decided in January 2017, was an important case of the year 2016.[48] In the *Republic of Kenya All War Heroes & Others*, the petitioners sued 97 respondents and named over 70 intended and or interested parties. The case also attracted six *amicus curiae*. The respondents and interested parties included former heads of states and governments, foreign embassies and diplomatic missions, international organizations, and individuals. The petitioners, however, encountered difficulties in serving some of the respondents, among them the United Stated Embassy, and sought an order from the Court to the Ministry of Foreign Affairs to help them effect service of the summons to the foreign missions/embassies, international organizations, and former heads of state and governments. In dismissing the application, the Court held that it would be:

> "Flouting international law and the provisions of the Privileges and Immunities Act and indeed the Constitution if it decrees or issues summonses in this case unless it is satisfied that the immunity has been waived."[49]

The Court further added:

> "Article 32 of the first schedule of the Articles of Vienna Convention on Diplomatic Relations having the force of law in Kenya provides that the immunity from jurisdiction of Diplomatic agents and of persons enjoying immunity under article 37 thereof may be waived by the sending state and that such waiver must always be express."[50]

Other Constitutional Development

The other noteworthy constitutional development in Kenya concerned, seemingly, unsuccessful attempts of the Parliament and political fractions to amend the Constitution. The Constitution has not been amended since its adoption in 2010. Several amendment bills that sought to change that came in the year 2016 both from the National Assembly and Senate.[51] These include: the Constitution of Kenya Amendment Bill (No 2) 2016 that proposed to reduce the number of county governments from 47 to 46 by reorganizing Nairobi County under the national government;[52] the Amendment Bill (No 1) 2016, that sought to empower the Senate to increase the timelines for transfer of functions assigned to the county governments;[53] Constitution of Kenya Amendment Bill seeking to amend Article 143 of the Constitution in order to extend the presidential immunities to the Deputy President not only because she performs sovereign functions but also because the Deputy President symbolizes Kenya's sovereignty;[54] and Constitution of Kenya Amendment Bill 2016, that sought to change the process of dealing with electoral disputes.[55] Most significantly, a popular initiative to amend the Constitution, termed "Okoa Kenya," collapsed after failing to gather the required threshold of a million signatures.

CONCLUSION

Kenya has been through interesting constitutional developments. The dissolution of commissioners of the electoral body was

[44] Ibid.

[45] Ibid.

[46] *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others* [2016] eKLR, http://kenyalaw.org/caselaw/cases/view/123600/ accessed 31 March 2017

[47] Ibid, para 114.

[48] Constitutional Petition 426 of 2016, http://kenyalaw.org/caselaw/cases/view/130653/ accessed on 31 March 2017.

[49] Ibid.

[50] Constitutional Petition 426 of 2016, http://kenyalaw.org/caselaw/cases/view/130653/ accessed on 31 March 2017.

[51] The amendment bills were published in the official Gazette.

[52] http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/The_ConstitutionofKenya_Amendment__No.2_Bill_2016.pdf accessed on 31 March 2017.

[53] http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/ConstitutionofKenya__Ammendment_Bill_2016.pdf accessed on 31 March 2017.

[54] http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/ConstitutionofKenya_Amendment_BillNo35of2016.pdf accessed on 31 March 2017.

[55] http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/TheConstitutionofKenya_Amendment_Bill_No_79of2016.pdf accessed on 31 March 2017.

perhaps *the* happening that absorbed the nation and its resolution without an amendment to the Constitution demonstrated that (a) the Constitution is not the cause of institutional inefficacy in Kenya, and (b) amending the Constitution is not the panacea for political grievances and controversies. The Supreme Court succession for its part demonstrated – all through – that the Court as an institution was weak to the extent that it played to predictions that it would be divided 3:2, based on fairly known inter-judge "friendships," creating an ugly impression that the Court was not impartial.

The foregoing notwithstanding, Court decisions on challenged parliamentary legislation as well as claims by individuals alleging human rights abuse evidences that the institution of judicial review has the potential to succeed in Kenya under the new Constitution. The 2010 Constitution bestowed on the citizens a duty to defend it and much legislation enacted by the Parliament has been a subject to judicial review because of individual initiatives. The Court has developed a policy, through jurisprudence, not to condemn such parties to pay costs of a petition in the event they lose and this policy has further encouraged judicial review.

Lithuania

DEVELOPMENTS IN LITHUANIAN CONSTITUTIONAL LAW

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INTRODUCTION

For the Constitutional Court of the Republic of Lithuania, the past year was steadfast in terms of the variety and complexity of constitutional matters brought before it. In 2016, the Constitutional Court had, *inter alia*, to adjudicate on such issues as the dismissal of criminal proceedings after the expiry of a statutory limitation period for criminal liability without giving the accused person the possibility of removing doubts regarding his/her guilt; the limitation on the amount of a maternity allowance payable to mothers before and after childbirth; the temporary removal from office of a municipal mayor or deputy mayor suspected of having committed a criminal act; the payment of remuneration to members of the Seimas (the Parliament of the Republic of Lithuania) who fail to perform their duties; the approval given by the Seimas for a questionable conclusion of an ad hoc investigation commission of the Seimas, etc.[1]

As was noted in one of the decisions adopted by the Constitutional Court last year, under the Constitution of the Republic of Lithuania, courts not only administer justice but, in the same manner as other state institutions, may implement, within their competence, the constitutional objectives pursued under the foreign policy of the Republic of Lithuania and international obligations of the state, taking into account the constitutionally established geopolitical orientation of the State of Lithuania. The activity of the Constitutional Court in the field of international cooperation in 2016 can serve as an illustration of such possible engagement by courts. Two key points follow from this activity of the preceding year, i.e. the intensive preparation by the Constitutional Court for the 4th Congress of the World Conference on Constitutional Justice,[2] to be held from 11 to 14 September 2017 in Vilnius, and its cooperation with the constitutional courts of the European Union's Eastern Partnership countries—Georgia, the Republic of Moldova, and Ukraine—by providing assistance to these countries in their processes of creating a state under the rule of law.

In 2016, the Constitutional Court also strongly advocated in favour of the individual constitutional complaint and its introduction into the constitutional legal order. The year 2016 was notable for positive changes in the field of public relations and publicity of the Court's activities. For instance, the Constitutional Court was the first among Lithuanian courts to launch the live Internet broadcasting of its public hearings; the provisions of the systematised official constitutional doctrine of the Republic of Lithuania and the texts of other publications that had previously been produced only in a printed format were made available on the official website of the Constitutional Court.

[1] Texts of the acts of the Constitutional Court in English are available on its official website http://www.lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2016.

[2] For more information, please consult the official website of the 4th Congress http://www.wccj2017.lt/en.

THE CONSTITUTION AND THE COURT

The Constitution of the Republic of Lithuania was adopted by referendum on 25 October 1992. This marked a new future of the constitutional development of an independent democratic state of Lithuania. The Constitution, as the highest-ranking act and a social contract, is based on universal and unquestionable values, such as sovereignty belonging to the Nation, democracy, the recognition of inalienable human rights and freedoms and respect for them, respect for law and the rule of law, the limitation of the scope of state powers, the duty of state institutions to serve the people and their responsibility to society, civic consciousness, justice, and the striving for a harmonious civil society and a state under the rule of law.

For the first time in the history of the State of Lithuania, the Constitution of 1992 also consolidated the institute of constitutional judicial review. The Constitution stipulates that, in Lithuania, constitutional control is carried out by the Constitutional Court, which consists of nine justices, each appointed for a single nine-year term of office. The Constitutional Court, which was formed and began its activities in 1993, ensures the supremacy of the Constitution within the legal system, as well as administers constitutional justice, by deciding whether the laws and other legal acts adopted by the Seimas are in conformity with the Constitution, and whether the acts adopted by the President of the Republic or the Government are in compliance with the Constitution and laws. Under the Constitution, in performing this function, the Constitutional Court has the exclusive powers to interpret the Constitution by revealing its meaning and the content of its provisions.

According to the Constitution, the right to apply to the Constitutional Court is vested in the Seimas *in corpore*, not less than 1/5 of all the members of the Seimas, the President of the Republic, the Government, and all courts. The Lithuanian legal system does not provide for the institution of the individual constitutional complaint, which would enable individuals to directly apply to the Constitutional Court. However, legislative actions have recently been taken (i.e. relevant constitutional amendments have been registered) in the Seimas in order to introduce individual constitutional complaints.

Currently, the Constitutional Court is also a full member of international organisations—the World Conference on Constitutional Justice and the Conference of European Constitutional Courts—uniting constitutional justice institutions. From the very beginning of its activity, the Constitutional Court has been actively cooperating with the constitutional courts of neighboring countries—Latvia and Poland. Over the last few years, the Constitutional Court has considerably strengthened the cooperation with the constitutional courts of the European Union's Eastern Partnership countries—Georgia, the Republic of Moldova, and Ukraine. The Constitutional Court also maintains cooperation ties with the European Commission for Democracy through Law (Venice Commission), which have become especially evident in the context of the upcoming 4th Congress of the World Conference on Constitutional Justice.

DEVELOPMENTS AND CONTROVERSIES IN 2016

According to the official constitutional doctrine developed by the Constitutional Court of the Republic of Lithuania, respect for international law is an inseparable part of the constitutional principle of a state under the rule of law. However, due to the fact that the Constitution and international law are inherently autonomous and have superiority in their respective spheres, certain incompatibilities between international legal norms and constitutional norms may arise.[3] The so-called *Paksas case* is a prominent example of such incompatibility.

This case was initiated in the European Court of Human Rights (ECtHR) after the Constitutional Court had adopted the ruling of 25 May 2004, in which it was held that, under the Constitution, a person who, *inter alia*, grossly violated the Constitution and breached the oath and, as a result of this, was removed under the impeachment procedure from office could never again stand in elections for an office requiring a person to take an oath to the State of Lithuania. A person who was directly affected by the said Constitutional Court's decision—Rolandas Paksas, a former President of the Republic of Lithuania—applied to the ECtHR in defence of his right to stand in elections. Having considered the application, in its judgment of 6 January 2011,[4] the ECtHR ruled that the permanent and irreversible disqualification from standing in parliamentary elections was disproportionate and that, in having established such a disqualification, Lithuania had violated Article 3 of Protocol No 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), which, as mentioned in the judgment of the ECtHR, consolidates the fundamental principle of an effective political democracy and implies the subjective rights to vote and to stand for election. In the judgment of the ECtHR, it is acknowledged that the right at issue is not absolute and that certain limitations of this right are permissible, but that these limitations may not be of a permanent character.

The Constitutional Court and the ECtHR assessed the situation regarding one's ineligibility to stand in parliamentary elections from different positions: in its rulings, the Constitutional Court emphasised allegiance to the State of Lithuania, loyalty, and (in) eligibility to take up a responsible office once a serious transgression has been committed—a gross violation of the Constitution and a breach of an oath taken to the state; while the ECtHR interpreted the same situation

[3] Dainius Žalimas, 'The Openness of the Constitution to International Law as an Element of the Principle of the Rule of Law' (International Conference 'Constitutional Court of the Republic of Slovenia – 25 Years', Bled, June 2016) http://www.us-rs.si/media/zbornik.25.let.pdf.

[4] *Paksas v Lithuania* App no 34932/04 (ECtHR, 6 January 2011).

more through the right of the electorate – the citizens of the state concerned—to determine and decide whom they would like to see as their representatives, as well as through the disclosure and interpretation of the concept of the electoral right.

After the delivery of the said judgment of the ECtHR, measures were taken in Lithuania to implement it. The Seimas adopted amendments to the Law on Elections to the Seimas, under which, a person who grossly violated the Constitution and breached the oath could stand in parliamentary elections after a five-year period following his/her removal from the office held. Such provisions amending the law were evidently incompatible with the doctrinal provisions formulated in the Constitutional Court's ruling of 25 May 2004. Thus, it is no wonder that the Constitutional Court, in its ruling of 5 September 2012, recognised that such amendments were in conflict with the Constitution. The Constitutional Court held that, in itself, the judgment of the ECtHR may not serve as a constitutional basis for the reinterpretation (correction) of the official constitutional doctrine, and that the renouncing of international obligations in the sphere of human rights would not be a constitutionally justified option. This led to another important conclusion, namely that the Republic of Lithuania is obliged to adopt relevant amendment(s) to the Constitution.

In 2016, the Constitutional Court had to return to this issue by assessing the constitutionality of the resolution of the Seimas whereby the Seimas had approved the conclusion of the ad hoc Investigation Commission of the Seimas for the Restoration of the Civil and Political Rights of President Rolandas Paksas.[5] Having found the resolution of the Seimas to be in conflict with the Constitution, the Constitutional Court reiterated that, in order to remove the incompatibility between the Constitution and the provisions of the Convention, as well as to implement the related judgment of the ECtHR, there is only one way – to amend the relevant provisions of the Constitution; any other way is impossible under the Constitution.

The Seimas has repeatedly attempted to implement the aforementioned judgment of the ECtHR in a constitutional way, i.e. by adopting the amendments of the Constitution, which would lead to the elimination of the incompatibility between the provisions of the Constitution and the Convention, but none of its attempts have been successful.

MAJOR CASES

Separation of Powers

The Constitutional Court has held more than once that, after the Constitution has directly established the powers of particular institutions of state power, no state institution may take over such powers from another state institution, or transfer or waive them, and that such powers may not be amended or restricted by means of a law; otherwise the principle of the separation of powers, which is consolidated in the Constitution, would be violated. The Constitutional Court had to recall the said doctrinal provision in its ruling of 22 December 2016. This case dealt with the issue of the approval given by the Seimas for the questionable proposals of an ad hoc Investigation Commission of the Seimas (hereinafter referred to as the Commission) for the Restoration of the Civil and Political Rights of President Rolandas Paksas. The Constitutional Court set out the principled provision that the Seimas may not approve a conclusion of any possible content made by an ad hoc investigation commission of the Seimas, *inter alia*; any such proposals formulated therein that would be incompatible with, among other things, the requirements stemming from the constitutional principle of the separation of powers.

One of the proposals set out in the conclusion of the Commission was to supplement the provisions of the Statute of the Seimas governing impeachment proceedings so that the Seimas would be granted the competence, under the specified circumstances, to review and annul an impeachment against a person without applying to the Constitutional Court concerning this issue. The Constitutional Court found that such proposal denied the constitutional concept of the institute of impeachment as revealed in the official constitutional doctrine, under which two independent institutions of state power—the Seimas and the Constitutional Court—have powers in impeachment proceedings; under the Constitution, each of these institutions in impeachment proceedings is assigned specific powers corresponding to their respective functions. If such proposal were implemented, the Seimas would interfere with the competence assigned to an institution of judicial power – the Constitutional Court – in impeachment proceedings and take the powers granted to the Constitutional Court. Moreover, by means of the proposals (among other things, to regulate the legal consequences of constitutional liability by means of a resolution of the Seimas) as set out in the conclusion of the Commission, an attempt was made to interpret the provisions of the Constitution in a way different from that provided by the Constitutional Court in its acts, thus denying the powers of this court to officially interpret the Constitution and interfering with the constitutional competence of this court (as an institution of judicial power) to administer constitutional justice.

Therefore, this resolution of the Seimas, whereby the Seimas had approved the conclusion of the aforementioned Commission, was ruled by the Constitutional Court to be in conflict with, *inter alia*, the constitutional principle of the separation of powers.

Rights and Freedoms

The vast part of the constitutional justice cases considered in 2016 comprised cases significant for protecting and ensuring the constitutional rights and freedoms of persons (the right to fair proceedings, the right to freely choose a job or business, the right to receive fair pay for work, the right to social security, the protection of consumer rights, the equality of the rights of persons). Among the cases in this category, particular attention should be paid to three cases.

Firstly, in one of its cases, the Constitutional Court had to assess the constitutionality

[5] For more information on this case, see Chapter IV.1 of this report.

of the provisions of the Code of Criminal Procedure regulating the termination of criminal proceedings after the expiry of a statutory limitation period. In the ruling of 27 June 2016, the impugned legal regulation was held to be in conflict with the Constitution insofar as, under this regulation, a case was to be dismissed by the court without assessing charges brought against the accused and without ascertaining whether the accused had reasonably been charged with having committed a crime or whether the acquitted person was reasonably acquitted of a crime with which he/she had been charged. The Constitutional Court held that the impugned legal regulation precluded a court from acting in such a way that the truth in a criminal case would be established and the question of the guilt of the person accused of having committed a crime would be fairly resolved. If a court fails to assess whether the charges brought against the accused person are reasonable and the case is dismissed for the reason that the statutory limitation period for criminal liability has expired, the impression is created that the accused is not convicted only because the prescribed limitation period has expired. Thus, the preconditions are created for the continued doubts as to whether the accused was reasonably charged with having committed a crime, as well as the continued doubts as to the good repute of the accused.

In the second case at issue, the Constitutional Court considered the constitutionality of the legal regulation, consolidated in the Code of Criminal Procedure, under which a member of a municipal council holding the office of mayor or deputy mayor may be temporarily removed from office if he/she is suspected of the commission of a criminal act or is charged with committing a crime. The Constitutional Court, in its ruling of 17 February 2016, held that, under the Constitution, the status of a municipal council member holding the office of mayor or deputy mayor does not imply any requirement that, with regard to this municipal council member, the relevant law must establish such grounds and procedure for applying procedural coercive measures (including temporary removal from office) that would be different from those established with regard to other persons. The Constitutional Court also held that the Code of Criminal Procedure consolidates the sufficient guarantees to ensure that the rights of a person, *inter alia*, a member of a municipal council holding the office of mayor or deputy mayor who is subject to the procedural coercive measure of temporary removal from office, including the right to freely choose a job, would not be limited in a disproportionate manner. Therefore, the impugned legal regulation was ruled not in conflict with the Constitution, insofar as it does not establish the prohibition on removing a member of a municipal council from the office of mayor or deputy mayor, or any additional criteria limiting the duration of his/her removal from office.

In the third case in this category, the Constitutional Court had to assess the constitutionality of the legal regulation imposing a limitation on the size of maternity allowances. By its ruling of 15 March 2016, the Constitutional Court recognised the unconstitutionality of the impugned legal regulation, insofar as it provided that a maternity allowance could not be higher than the maximum amount provided for in the Law on Sickness and Maternity Social Insurance. Under the impugned legal regulation, in cases where the average remuneration received by a working woman exceeded the maximum compensatory earnings, she was granted a maternity allowance calculated according to these compensatory earnings, and the amount of the payable allowance was not connected to the remuneration received by the woman within the established period before the leave and could be significantly lower than the average of the received remuneration. According to the Constitutional Court, the impugned legal regulation, whereby the amount of a maternity allowance was limited, did not appropriately implement the guarantee of paid leave before and after childbirth, as consolidated in Paragraph 2 of Article 39 of the Constitution, under which the amount of benefits paid to working mothers during the guaranteed period of their leave before and after childbirth must correspond to the average remuneration received by them within the reasonable period of time before this leave.

Foreign, International, and Multilateral Relations

Substantiating the interpretation concerning the right of judges to receive other remuneration, the Constitutional Court, in its decision of 16 May 2016, revealed new aspects of the activity of courts related to foreign policy and international relations. It noted that, under the Constitution, the role of courts is not limited exclusively to the administration of justice. Like other institutions of state power, courts, within their constitutional competence, either independently or in cooperation with other state institutions, may participate in carrying out the general tasks and functions of the state. Among other things, courts may also engage in the activity aimed at achieving the constitutional objectives of the foreign policy of the Republic of Lithuania and in fulfilling international obligations and obligations related to full membership in the EU and NATO, including participation in international cooperation and democracy promotion projects. This geopolitical orientation pursued by the Republic of Lithuania constitutes a constitutional value and implies the relevant activity of the State of Lithuania, its institutions, and individuals employed therein, which is aimed at contributing to the partnership of other states within the EU or NATO, or at contributing to the integration of these states into the said international organisations by promoting the dissemination of universal and democratic values and the principles of EU law, including the dissemination of these values and principles in the spheres related to the improvement of the systems of justice and the activity of courts. Thus, the participation of the State of Lithuania and its institutions, including courts, in the said activity may be implemented, among other things, through the engagement of judges in support projects funded by international organisations or foreign states, or in projects financed under the Lithuanian Development Cooperation and Democracy Promotion Programme, in cases where such projects are related to improving the system of justice and the activity of courts. However, the said participation may not interfere with the performance of the main constitutional judicial function of administering justice

in a proper and effective manner and must be compatible with the impartiality and independence of judges.

Other

Among other cases of 2016, particular mention should be made of the ruling of 5 October 2016, in which the Constitutional Court declared unconstitutional a provision of the Statute of the Seimas insofar as, under this provision, remuneration for the given month could not be reduced by more than one-third for a member of the Seimas who, during that month, continuously failed, without an important justifiable reason, to attend the sittings of the Seimas or the sittings of the committees or other structural units of the Seimas. In its ruling, the Constitutional Court noted that, under the Constitution, when regulating one of the guarantees of the parliamentary activity of the members of the Seimas, i.e. the payment of remuneration for the work of the members of the Seimas, the legislature must take account of the constitutional duty of the members of the Seimas to attend the sittings of the Seimas, as well as the sittings of the committees or other structural units of the Seimas. The legislature is also obliged to provide for the financial consequences for continuous failure (without an important justifiable reason) to fulfill this constitutional duty. The episodic or even continuing fulfillment of only part of the constitutional powers (such as drafting laws and other legal acts of the Seimas, meeting with voters, performing other parliamentary activities) of a member of the Seimas without an important justifiable reason, including failure to attend the sittings of the Seimas, or the sittings of the committees or other structural units of the Seimas, may not be regarded as the proper implementation by the member of the Seimas of his or her constitutional duty to represent the Nation, i.e. the duty for the implementation of which the member of the Seimas is remunerated. Thus, the payment of remuneration from the funds of the state budget to a member of the Seimas who continuously, without an important justifiable reason, fails to attend the sittings of the Seimas, or the sittings of the committees or other structural units of the Seimas, should be considered a constitutionally unjustified privilege.

CONCLUSION

The preceding year was marked not only by the variety and complexity of constitutional matters brought before the Constitutional Court but also by the intensive international cooperation and public promotion of the activity of the Constitutional Court. In 2017, the Constitutional Court will face other challenges, the biggest one most probably being the 4th Congress of the World Conference on Constitutional Justice, which will focus on "The Rule of Law and Constitutional Justice in the Modern World". At the same time, the Constitutional Court will carry out its jurisprudential activity following from the adjudication of constitutional justice cases, which promise to be important and complex. For instance, the Constitutional Court will investigate the constitutionality of the legal provisions exempting from mandatory military service the priests of certain religious communities and associations. It will also have to consider whether, in cases of family reunification, the Constitution allows refusing to issue a temporary residence permit to a foreign national who has entered into a same-sex marriage or same-sex registered partnership in another state with a citizen of the Republic of Lithuania who resides in Lithuania (taking into account the circumstance that such marriages or partnerships are not allowed under national law).

Malaysia

DEVELOPMENTS IN MALAYSIAN CONSTITUTIONAL LAW

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INTRODUCTION

Readers will be aware that Malaysia has since 1957 had a Constitution that is federal and enshrines constitutional monarchy in a broadly Westminster-style governmental structure.[1] In 1963 the Borneo states of Sabah and Sarawak joined the Federation under an amended version of the 1957 Constitution. Some political background is needed to understand the balance of this brief survey.

Since 1957 Malaysia has been governed by the Barisan Nasional (BN, formerly Alliance) multi-ethnic coalition, which until 2008 commanded at least the two-thirds majority in Parliament required for most constitutional amendments, and was thus able to manipulate the Constitution according to its desires. Since 2008 the political system is best described as two-party, with two coalitions (BN and Pakatan Rakyat) each commanding around half of the votes in the general elections of 2008 and 2013. The BN retains power having won a majority of seats in Parliament despite securing fewer votes than the opposition in the 2013 elections.[2] A measure of Islamicisation of the legal system has proceeded since the dawn of the 21st century. Article 3 of the Constitution provides that Islam is the religion of the Federation.

DEVELOPMENTS AND CONTROVERSIES IN 2016

Controversy I: Kleptocracy

The year 2016 was overshadowed by a non-constitutional event, namely the abject failure to secure any meaningful accountability of the Prime Minister (PM) in respect of the financial scandal surrounding the development corporation 1 Malaysia Development Berhad (1MDB). The PM has never given convincing or consistent explanations for the US$681 million that passed through his personal bank account nor of the RM42 billion missing from 1MDB.[3] By the beginning of 2016, every form of political and legal accountability in respect of this scandal had been blocked, and the Attorney-General (AG) had been summarily sacked when it appeared he was pursuing criminal charges against the PM.[4] The year 2016 continued this sorry saga in the same vein despite the incremental accretion of evidence resulting from investigations in the United States, Singapore, and Switzerland implicating the Prime Minister and people close to him.[5]

These events cast a pall over a set of institutional arrangements established under a constitution that signally failed to perform their

[1] For an introduction, see AJ Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, 2012).

[2] 'Malaysia Vote: PM Najib Razak's Barisan Nasional Wins,' BBC, 6 May 2013, http://www.bbc.com/news/world-asia-22422172 (accessed 24 April 2017).

[3] The Economist, 'Malaysians Underestimate the Damage Caused by the 1MDB Scandal,' http://www.economist.com/news/leaders/21710820-opposition-has-do-more-win-over-rural-malays-malaysians-underestimate-damage (accessed 24 April 2017).

[4] 'Malaysia's Attorney-General Clears Najib of Corruption over Cash Gift from Saudi Royals', The Straits Times, 27 January 2016, http://www.straits (accessed 24 April 2017).

[5] The Economist, above n.3.

task. In addition, and relatedly, 2016 saw a further reversal of reforms carried out during 2011-13, as the PM moved to suppress criticism and displays of dissent.[6]

One development arising from this constitutional blockage was that public opinion turned to the traditional Rulers, the nine Malay Sultans, looking for a resolution of the scandal. The Rulers sit in a Conference of Rulers that has some limited constitutional powers that include the power to make pronouncements on state policy. They issued a statement asking for accountability and an explanation from the Prime Minister. Even this initiative the Prime Minister was able to ignore with apparent impunity despite the high social and political standing of the Rulers.[7]

In January 2016 a new Attorney-General (AG) declared the Prime Minister innocent of any wrong doing in the 1MDB issue. This event was followed by a lively and instructive debate as to the role of the Attorney-General, with the Bar Council challenging the dismissal of the previous AG, disputing the appointment of the new AG, and the latter's clearing of the PM, as well as arguing that the AG had, in any event, no power to make a declaration of this kind.[8]

In the wake of this decision, there was some interest in the question whether the AG's discretion to refuse to prosecute could be reviewed. In March the Malaysian Bar filed a judicial review action challenging the AG's decision to exonerate the PM.[9] The courts in Malaysia have always granted the AG an almost completely unfettered discretion whether to prosecute or discontinue a case.[10]

Controversy II: Punitive Powers of Syariah Courts

On 6 April 2017, the Federal Parliament witnessed the tabling of a controversial Bill to increase the punitive powers of the syariah (i.e., shari'a) courts. Public debates about the Bill had been ongoing for almost two years, triggered by the Kelantan State Assembly's unanimous approval to amend the state's Syariah Criminal Code. The amendment introduced a range of Islamic criminal law punishments in the state (including amputation for theft offenses and stoning for adultery or same-sex sexual conduct), but these could not be implemented because of the limitations set by the 1965 Syariah Courts (Criminal Jurisdiction) Act. This federal-level law only authorizes Syariah Courts to impose a maximum of three years imprisonment, fine not exceeding Ringgit Malaysia (RM) 5000, and/or six strokes of the cane. To pursue the implementation of Kelantan's Syariah Criminal Code, the Islamic opposition party, PAS, which governs Kelantan, pledged to table a private member's bill to amend the 1965 Act.

When the Bill was first mooted, the amendment was designed in such way as to allow Syariah Courts to impose *any* punishment mandated by Islamic law other than the death penalty. This broad construction was later changed. When the Bill was tabled, it sought to raise the limits of existing punishments to 30 years' jail, a maximum fine of RM 100,000, and/or 100 lashes. For proponents of the Bill, therefore, the amendment would merely *increase* the upper limits of Syariah punishments. They have largely refrained from using the term 'Hudud Bill'[11] (a Member of Parliament who supported the Bill argued in Parliament that the Bill had nothing to do with Hudud), focusing instead on their desire to 'empower the Syariah Courts,' and prevent personal sins and moral degradation among Muslims. The call for support was aimed to strike at the religious sentiments of Muslims, but this was also laced with other economic and political rhetoric. For instance, it was emphasized that Muslims had a duty to unite to safeguard the dignity of Islam as the majority religion (and the religion of the Federation) and that Muslim judges within the syariah branch deserved an equal status (and thus, equal remuneration) with their counterparts in the civil branch. As it stands, the sentencing jurisdiction of the lowest court in the civil court hierarchy is capped at a maximum of five years' jail, twelve strokes of the cane, and fines of up to RM 10,000.

The Bill's constitutionality continues to be a subject of great debate. In particular, the possibility of disproportionate punishments for personal sins and victimless crimes and the implementation of such punishments on Muslims raise questions about the rights to equality and equal protection. Although the ruling party (UMNO) has pledged to support the Bill, its progress through Parliament has been a mixed success. In May 2016 the government suspended its order of business to pave the way for Abdul Hadi Awang (PAS President) to table the Bill, but he asked for a postponement until the next Parliament sitting. Throughout October and November 2016, the Bill was tabled twice but it was never debated. The Bill's fate remains uncertain, and public debates about its constitutionality and propriety continue to divide a multiracial and multireligious society.

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[6] See, e.g., 'Critic of Najib Razak, Malaysian Leader, Gets Prison for 1MDB Disclosure,' https://www.nytimes.com/2016/11/15/world/asia/malaysia-rafizi-ramli.html?_r=0Najib criticism (accessed 24 April 2017).

[7] 'Rulers Want 1MDB Issue Settled,' The Star, 6 October 2016, http://www.thestar.com.my/news/nation/2015/10/06/rulers-want-imdb-issue-settled/ (accessed 24 April 2016).

[8] 'The Malaysian Bar to Appeal to High Court Decision Regarding Judicial Review of the Exercise of the Attorney-General's Powers,' Bar Council Press Release, 15 Nobember 2016, http://www.malaysianbar.org.my/legal/general_news/press_release_%7C_the_malaysian_bar_to_appeal_high_court_decision_regarding_judicial_review_of_the_exercise_of_the_attorney_generals_powers.html (accessed 24 April 2017).

[9] Ibid.

[10] *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66 (FC); *Poh Cho Ching v Public Prosecutor* [1982] 1 MLJ 86; *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors* [2014] MLJU 581.

[11] 'Hudud' is Islamic criminal law.

MAJOR CASES

Apostasy and the Jurisdiction of the Syariah Courts

In *Azmi Mohamad Azam v Director of Jabatan Agama Islam Sarawak and Others*,[12] the High Court of Sabah and Sarawak examined the longstanding questions surrounding the formalities of renunciation of Islam and the jurisdiction of the syariah courts in apostasy cases. The Applicant renounced Islam to embrace Christianity, and he sought to change his name and remove the word 'Islam' from his national identity card. His request was rejected by the National Registration Department (NRD), who insisted on a letter from the State Islamic Department and a court order confirming his 'release' from Islam. When he approached the Sarawak Islamic Department (Limbang branch), he was told that the department could not assist him and was asked to make an application before the Syariah Court. The Syariah Court did not formally hear his case, but the Chief Syariah Judge issued a letter informing the Applicant that the court had no jurisdiction to issue the certificate of apostasy. He then proceeded to the Civil Court for relief, seeking, among others, a *mandamus* order to compel the NRD to change his name and remove the word 'Islam' from his identity card.

The High Court judgment in favor of the Applicant is significant for two reasons. The first concerns the jurisdictional boundaries of the Syariah Court. The Court accepted the settled principle that apostasy issues must be determined according to Islamic law, and although the Syariah Court Ordinance 2001 and the Majlis Agama Islam Sarawak Ordinance 2001 bore no provision regulating apostasy, the Court argued that the jurisdiction of the Syariah Courts can be *implied*. However, the Court in this case focused heavily on the constitutional right to religious freedom, when it could have ruled that the matter before it should be decided by the Syariah Court. The Court considered religious freedom to be the 'most inalienable and sacred of all human rights,' and accordingly the right to choose one's own religion should not be subject to Syariah Court approval. In addition, the Court determined that the Syariah Court only has jurisdiction over persons *professing* the religion of Islam, and the Applicant – by virtue of being a practicing Christian – could no longer be said to 'profess' Islam.

Although the Court took pains to distinguish the present case from previous decisions concerning apostasy,[13] this decision is a welcome approach to deciding important constitutional questions, which is rightly under the purview of the Civil Courts.

Child Conversions and Custody Battles

These cases continued to be at the centre of debates on Malaysian constitutional law in 2016, particularly in light of the decision in *Viran Nagappan v Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505. The Court considered two principal questions: (1) whether a Civil or Syariah Court had jurisdiction—in the context of Article 121(1A) of the Constitution—to make conflicting custody orders; and (2) whether a Civil Court could make a recovery order in light of an existing (and enforceable) custody order by the Syariah Court. The Muslim father in the Syariah Court and the non-Muslim mother in the Civil Court were both granted custody of their two children. The son, however, was taken away by the father, prompting the mother to obtain a recovery order from the High Court. On appeal, the father argued that the Civil Courts had no jurisdiction over the dissolution of his marriage or over the custody of the children because he is a Muslim, bringing these issues within the jurisdiction of the Syariah Court.

In a unanimous judgment, the Federal Court held that the conversion of one spouse to Islam does not strip the Civil Courts of jurisdiction in matters of divorce and custody. On the issue of conflicting orders, however, the Federal Court exercised more restraint. Although the court recognized that the Syariah Court had no jurisdiction to grant custody order in favor of the father (it also added that the father's application before the Syariah Court was an 'abuse of process'), it nevertheless granted that the syariah order was a valid order until it was set aside.[14] The existence of conflicting custody orders also precluded the High Court from entertaining the mother's application for a recovery order of her son.

The outcome of this decision is thus a curious one, posing practical issues for law enforcement officers faced with conflicting court orders.[15] The Court's approach could be seen, in one respect, as a step forward, given its decision that conversion to Islam does not automatically dissolve a non-Muslim marriage and preclude the Civil Courts' jurisdiction. Yet, its affirmation that the Syariah Court's custody order in favor of the husband (which preceded the Civil Court's order in favor of the mother) was valid could be seen as a step backward, as it appears to have implicitly legitimized the recalcitrant husband's disregard of the Civil Court order.

Non-Muslims Not Allowed to Become Syariah Practitioners

In *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin* [2016] MLJU 40, the question that arose for determination in the Federal Court was whether a non-Muslim possessing the requisite academic and professional qualifications could be admitted as a syariah practitioner. The Islamic Religious Council (Majlis Agama Islam) of the Federal Territories had declined to process the plaintiff/respondent's application on the basis that as a Christian, she did not fulfill the requirement to be admitted as a syariah practitioner. The plaintiff sought judicial review, partly on the ground that the rule requiring syariah practitioners to be Muslims is in contravention of Articles 8(1) and/or 8(2) and/or Article 5 and/or Article 10(1)(c) of the Federal Constitution.

[12] [2016] 6 CLJ 562.

[13] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Another* [2007] 4 MLJ 585); *Hj. Raimi bin Abdullah v Siti Hasnah Vangarama binti Abdullah* [2014] 4 CLJ 253

[14] *Viran Nagappan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505, 507-8.

[15] Ibid., at 508.

In allowing the Majlis's appeal and dismissing the application for judicial review (which had succeeded before the Court of Appeal), the Federal Court held that Article 8 (the equality clause) permits discrimination on the basis of 'reasonable or permissible classification,' and that was what had occurred. The Federal Court observed that a syariah court, like any other court, must be able to enforce its laws and rules against its practitioners when necessary, and in this case, it could not legally do so as the plaintiff is a non-Muslim. Moreover, from the syariah perspective, faith is important, and the plaintiff's non-Muslim faith would be an impediment to her duty to assist the Syariah Court in upholding syariah law (para 51). Further, the plaintiff was not being deprived of her livelihood contrary to Article 5(1) (the right to life and personal liberty), as she could still practice as an advocate before the Civil Courts, and was indeed doing so. The challenge based on Article 10(1)(c) (the right to freedom of association) was also rejected, as that provision refers only to the right to form associations, not the right to be part of any existing association of one's choosing. In view of these, it was held not unconstitutional for the relevant religious body such as the Majlis to stipulate that only Muslims can be syariah practitioners.

Constitutionality of the Sedition Act

The case of *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia*[16] is significant both for the Court of Appeal's declaration that a key provision in the Sedition Act is unconstitutional and for its application of the proportionality test to determine constitutionality of laws vis-à-vis fundamental liberties. According to the Court of Appeal, the proportionality test is now an entrenched part of Malaysian constitutional law and, as the Federal Court (the highest court in Malaysia) opined in *Public Prosecutor v Azmi bin Sharom*,[17] *the test* is encapsulated within the equality provision (Article 8) in the Federal Constitution. The proportionality test is particularly relevant where the law implicates a fundamental liberty/right that is not absolute but qualified, as in the case of freedom of speech, guaranteed to citizens under Article 10 of the Constitution.

Malaysia's Sedition Act makes it an offense to say or publish matters with a seditious tendency. Seditious tendency is broadly defined as:

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or any Government;
(b) to excite the subjects of any Ruler of the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;
(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;
(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;
(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or
(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.

While the Federal Court upheld the offence-creating provision (section 4) of the Sedition Act in its earlier decision in *Azmi bin Sharom*, the Court of Appeal opined in *Mat Shuhaimi* that this did not preclude it from determining the constitutionality of section 3(3) of the Act. Section 3(3) deems irrelevant the intention of the person charged at the time he spoke or committed any act producing the seditious material to establish the offense. This, as the Court highlighted, puts the issue of the accused person's intention beyond judicial consideration. While the Court appears to countenance this as falling within one of the permissible objectives for restricting freedom of expression in Article 10, it nonetheless stated that the provision making intent an irrelevant element of the offense disproportionately restricts freedom of expression and therefore violates the equal protection clause. The provision was declared invalid. The upshot of this is that sedition remains an offense in Malaysia but is no longer a strict liability offense.

While this decision is undoubtedly to be welcomed, it is suggested that the Court of Appeal had not adequately dealt with the issue that was raised of the Sedition Act being enacted in 1948 before the Federal Constitution of 1957 came into existence. Article 4(1) of the Constitution only provides that 'any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.' Technically, it is questionable whether any provision exists in the Constitution for the Court of Appeal to have granted the declaration in the terms sought by the plaintiff (see para 45). The appropriate provision that the Court could have relied on in reaching its conclusion is Article 162(6), which provides that 'any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day … may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.' 'Modification' is defined in Article 162(7) as including amendment, adaptation, and repeal. It is submitted that the Court could have made reference to Article 162(6) and 162(7), declared section 3(3) to be inconsistent with Articles 10(1) and 8(1), and declared the offending provision repealed under Article 162(6). While the declaration actually granted can no doubt still be interpreted or elaborated in these terms, the concern is that a more executive-minded panel of the Federal Court (or even a subsequent Court of Appeal) may seize on the ambiguity to deprecate the important conclusions reached in *Mat Shuhaimi bin Shafiei*.

[16] [2017] 1 MLJ 436.
[17] [2015] 6 MLJ 751.

Preventive Detention

The case of *YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Abar & Ors*[18] is significant not just for reaffirming the objective review test for arrests and detentions under Malaysia's internal security laws (which allow for preventive detention), but for holding that this standard of review is also applicable in determining whether an unlawful arrest gives rise to compensation.

The facts giving rise to the case were politically charged. The appellant, a Member of Parliament, was arrested by the police. She was subsequently informed that she was being arrested and detained under the (subsequently repealed) Internal Security Act 1960 (ISA). During her one-week detention, the appellant alleged that she was continually held in solitary confinement, lived under inhumane conditions, was deprived of all her constitutional rights, and was not allowed reasonable access to her lawyer or her family members. She was later released, and the Deputy Inspector General of Police issued a formal press statement that her release was unconditional because 'the police was satisfied that she was not a threat to public order and security.'

While affirming the Federal Court's earlier decision in *Mohammad Ezam Mohd Nor & Ors v Inspector General of Police*[19] to apply an objective test specifically to section 73(1), ISA, empowering police arrests and detentions without warrant, the Court of Appeal also reaffirmed the general proposition that in any challenge to an administrative action or act, the courts are entitled to 'objectively scrutinize' the exercise of power to see whether there exist reasonable grounds for the act or decision. This is *notwithstanding* any subjective formulation in the power-conferring statute.[20] The earlier case of *Mohammad Ezam* arose from an application for a writ of habeas corpus. The Court of Appeal nonetheless held that the same objective test applied in determining a civil claim for damages for wrongful arrest and detention. Applying this test, the Court of Appeal adjudged that the police had 'failed to show the court credible and sufficient material to establish that the arresting officer … had reasonable and substantive grounds to support their belief that the arrest of the appellant was urgently required to meet the ends [prescribed under the statute]'.[21] As the Court noted, the allegations were made several months before the arrest, and therefore there was no immediate or imminent act or live threat that justified the use of the powers to arrest and detain without a warrant. There was also no attempt by the police to conduct preliminary investigations into the allegations before the arrest. Indeed, the Court of Appeal called into question the motives for the arrest and opined that they appeared to be for 'a collateral or unrelated ulterior motive.'[22] Consequently, the Court held for the appellant and granted not only general damages but also aggravated and exemplary damages against the police.

This decision is to be welcome as it ensures that executive action must be exercised lawfully and that even though recourse to the courts for release may have been overtaken by events (e.g. release after a period of detention), a further disciplining tool exists in the form of civil compensation.

CONCLUSION

It is impossible to claim that 2016 was an encouraging year for the Constitution and constitutional law. Yet, even if political constitutionalism and democratic institutions appear under threat (as they are in many places where they were thought quite secure), some cases in the courts show that there is still a judiciary whose decisions may on occasion support fundamental rights and constitutional values, even if they do so in an inconsistent and sometimes problematical manner.

[18] [2016] 6 MLJ 352.

[19] [2001] 1 MLJ 321 (Federal Court).

[20] Ibid, [34].

[21] Ibid, [69].

[22] Ibid, [67].

Mexico

DEVELOPMENTS IN MEXICAN CONSTITUTIONAL LAW

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INTRODUCTION

Taking a look at the developments in Mexican Constitutional Law in 2016 illustrates well the transformation the justice system has gone through in the last decade, both procedurally and substantively; and, the complex social reality of the country. In only a decade, the criminal justice system was transformed of an inquisitorial to an accusatory model in 2008; long-standing procedural rules of the individual constitutional complaint mechanism, the *Juicio de Amparo* (amparo suit), were modified in 2011; and, shortly after, human rights established in international treaties from which Mexico is part were incorporated as part of the constitution. All of these changes place a bigger burden on the judiciary and particularly on the Mexican Supreme Court (hereinafter the Supreme Court or Court). As we will see in the following sections, one way or another these transformations are manifesting. The new criminal justice principles are colliding with government interests to tackle serious drug-related violence (Section III); the Supreme Court is extensively taking into account international human rights instruments to adjudicate the increasing number of amparo suits in its docket (Sections II and IV); and the Court is often having to solve cases closely related to state surveillance and national security.

THE CONSTITUTION AND THE COURT

The design of the Mexican constitutional justice system has become increasingly robust throughout constitutional history. The constitution of 1917 was born with a substantive charter of rights that included the social justice demands of the revolution and inherited the worldwide known individual constitutional complaints mechanism created in the 9th century with American and European influences: the amparo suit. For almost 80 years, the amparo suit was virtually the only mechanism to bring constitutional questions to the Supreme Court until 1994 when, in the midst of the fall of the single-party hegemonic regime, the dormant *controversias constitucionales* (competence allocation mechanism) were modernized and the *acciones de inconstitucionalidad* (abstract judicial review) were adopted. Both the competence allocation mechanism and abstract review are concentrated forms of review granting standing to a limited number of actors (i.e. the executive and legislative powers, the attorney general, legislative minorities, political parties, etc.), whereas the amparo suit is a semi-concentrated and concrete form of review granting standing to anyone who considers that their constitutionally protected rights have been violated. Although the modernization and adoption of concentrated forms of judicial review have put the Court in a more prominent position

as an arbiter of political disputes, the amparo suit remains the only mechanism available for individuals to bring cases before the Supreme Court.

Within this system of constitutional justice, the Supreme Court is the highest authority for constitutional interpretation. Its membership comprises 11 Justices appointed by the President (in charge of nominating) and the Senate (in charge of confirmation by a qualified majority) to serve for 15-year terms. The Supreme Court convenes in en banc sessions (*Pleno*) three times a week and in two five-judge panel sessions (*First Chamber* and *Second Chamber*) once a week. Yet, the two panels adjudicate the vast majority of cases—which in addition happen to be amparo suits.

Through the amparo suit, individuals are able to challenge the constitutionality of statutes, legality of authority acts (*amparo indirecto*) and judicial decisions (*amparo directo*) in federal courts. Roughly speaking, amparo suits only reach the Court in the form of appeal when a constitutional question in the 'strict sense' remains unanswered or if the Court deems a case important and transcendent. Importantly, it has to be noted that assessing the impact of Supreme Court rulings in amparo is a difficult task for two reasons: the effects of rulings and precedential rules. On the one hand, the effects of rulings are *inter partes* as opposed to *erga omnes*—meaning that despite the declaration of unconstitutionality of a norm in a given case, it remains valid for the rest of the population.[1] On the other hand, the amparo's precedential system requires five rulings, all with the same outcome, to become binding on lower courts—which for practical matters means that constitutional questions are not necessarily settled when the Supreme Court issues a decision. In this sense, the reader must bear in mind that, in our opinion, the selection of cases in section IV below illustrates well recent developments in constitutional law but does not imply an assessment on their impact on constitutional rights doctrine.

In 2011 an amendment to article 1 of the constitution introduced major changes for constitutional interpretation on human rights matters. The amendment incorporated human rights treaties ratified by the Mexican State as part of the constitution, prohibiting any restriction or suspension of rights except on the cases and under the conditions provided by the constitution. Moreover, it established the pro personae interpretative principle and the obligation of all state authorities, within the scope of their jurisdiction, to promote, respect, protect and guarantee human rights according to the principles of universality, interdependence, indivisibility and progressiveness. Normatively speaking, this amendment incorporated human rights established in treaties as part of the constitution, except in a state of emergency (article 29 of the constitution). Unfortunately, in a major setback of the amendment in 2014, in a 10 to 1 decision solving a circuit split (*contradicción de tesis*), the Supreme Court decided that any restriction established in a constitutional provision should prevail over human rights.[2] In spite of this hindrance, in our opinion, the amendment has already had a noticeable impact on the resources Justices use to solve rights related cases. Today it is already a settled practice to establish the interpretative framework to include international human rights law,[3] a practice that 15 years ago was virtually non-existent.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The surge of violence related to drug trafficking and organized crime has been the main public issue Mexico has faced in the last decade. The federal government has increasingly relied on the armed forces to act as the institutions in charge of most public security functions, which according to articles 21 and 29 of the constitution should be in charge of civil authorities and only under a state of emergency could the military take control. Without a formal declaration of a state of emergency, what constitutionally is supposed to be the exception has become the rule. Remarkably, in this period the Mexican state has also shown efforts aimed at signaling its commitment to rights protection, namely through the adoption of constitutional reforms aimed at making the criminal justice system transparent and rights protective; and better comply with international human rights standards.

The normalization of the use of the military for public security functions and the constitutional reforms that have been adopted aimed at, arguably, transforming the justice system into one that fits into a true liberal democracy seem to be colliding. On the one hand, the government wants to provide the military with more power and discretion in order to efficiently tackle the problem of organized crime; but on the other hand, doing that would mean putting into question the realization of true liberal democracy.

The 2008 constitutional reform is a good example to illustrate the collision of government interests. Promoted as a measure to finally have a fair criminal justice system on the one hand, the reform substituted a closed, inquisitorial, mostly written model with an open, adversarial and oral model in order to foster transparency and efficiency; however, on the other hand, it created a regime of exception for the investigation and prosecution of organized crime (the type of crimes under which drug-related matters are prosecuted) where minimum standards of due process in the phase of investigation do not apply.
In the 10 years since the *war on drugs* was

[1] Since 2010, this review mechanism provides the possibility for the Supreme Court to declare legal norms void with general effects. After five consecutive rulings declaring the same norm unconstitutional and previous warnings to Congress, the Supreme Court has the power to declare the unconstitutionality of the norm at hand. To this date, the Supreme Court has not exercised this power.

[2] SCJN, CT 293/2011. For a thorough analysis of the decision-making of this case and others see: José Ramón Cossío, Raúl Mejía and Laura Rojas, *La Construcción De Las Restricciones Constitucionales A Los Derechos Humanos* (Porrúa 2015).

[3] In fact, this was incorporated by the Supreme Court as the rule in a declarative opinion (*Expediente Varios 912/2010)* issued in July 2011 shortly after the amendment to article 1. SCJN, *Expediente Varios 912/2010,* 14 July 2011, available at < http://fueromilitar.scjn.gob.mx/Resoluciones/Varios_912_2010.pdf>, accessed 10 April 2017. For a detailed analysis of the decision-making process of this opinion see: Ramón Cossío, Raúl Mejía and Laura Rojas, *El Caso Radilla, Estudio y Documentos* (Porrúa 2013).

launched by the Federal Government in 2006, neither having the military on the streets nor the institutional mechanisms to make criminal investigation more efficient have delivered the expected results. As both academia and mass media have documented, the war on drugs has led to a substantial increase in violence levels and human rights violations. The rise in homicide rates is, arguably, the most dramatic proof of this change. These rates increased from 8.1 homicides per 100,000 inhabitants in 2008 to 23.5 in 2011.[4] As this shift has been even more noticeable in the states where the military has conducted public security tasks, the debate within and outside legislative arenas has been particularly focused on the role said institution should play in public security matters. This became a pressing issue particularly because in 2016 the Secretary of Defense, Gral. Salvador Cienfuegos, publicly declared a number of times that the military no longer wants to perform police functions, and explicitly asked for the Congress to issue a legal framework to regulate their activities.[5]

Unsurprisingly, toward the end of 2016 and the beginning of 2017, three legislative bills were presented to propose the creation of a brand new piece of legislation on internal security aimed at regulating the participation of the military in public security functions. In particular, two out of the three bills—one presented in the Chamber of Deputies by the ruling Institutional Revolutionary Party (PRI, its acronym in Spanish), and the other by the National Action Party (PAN, its acronym in Spanish), the party in power when the war on drugs was launched—seek to institutionalize the role and broaden the power of the military in law enforcement. Roughly speaking, the bills provide a possibility to formally declare the existence of threats to the interior security, under which the military is empowered to take over police and investigation functions—namely, detaining individuals, conducting searches, conducting interrogations, intervene communications, etc.

Those that defend the reform argue that it is just providing a legal framework to what has been happening on the ground for such a long time and establishing clear limits to the military. However, the reform has been widely criticized by the civil society and NGOs who argue that it is militarizing law enforcement in Mexico and following a strategy that has increased human rights violations and has not been an effective way of combating organized crime. The government is under pressure from two fronts: the conditional support of the military by the issuing of a statute providing a legal framework for their activities; and the realization of the formal constitutional commitments it has acquired aimed at building a state where human rights are protected.

Should any of the bills or a mild version of them pass, it is feasible to think that sooner or later the Supreme Court would have to decide on the constitutionality of the new piece of legislation. It remains to be seen whether the Supreme Court would decide to give preference to the government interest for wider discretion and powers to investigate and to prosecute organized crime or to the protection of human rights.

MAJOR CASES

In the cases decided by the Supreme Court, two relevant trends are clearly identifiable. On the one hand, the extensive use of international human rights instruments to set the interpretative framework to decide cases; and on the other hand, an increasing number of rulings discussing the limits to surveillance powers.

Use of International Instruments

Principle of Legality in Criminal Law – Amparo Directo en Revisión 2255/2015

An individual challenged the ruling sentencing him to spend 10 months and 15 days in prison for committing the crime of insulting an authority provided in Article 287 of the Criminal Code of Mexico City. The Supreme Court sitting *en banc* struck down the provision on the basis that it went against the principle of legal certainty as defined in Article 14 of the Mexican Constitution and Article 9 of the Inter-American Convention on Human Rights (ACHR). According to the analysis of the Court, the crime of insulting an authority left unclear what conduct would result in criminal prosecution. The most prominent aspect of this ruling is the strong emphasis placed on the interpretation of the principle of legality developed by the Inter-American Court of Human Rights (ICoHR) in the cases of Fermin Ramirez v. Guatemala and Castillo Petruzzi et al v. Peru. In Castillo Petruzzi et al v. Peru, the ICoHR interpreted Article 9 saying:

> 121.The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty.

This Supreme Court could have used existing interpretations of the principle of legality as developed by the Mexican Supreme Court but instead it opted for an interpretation developed by the ICoHR.

Right to Private Life and Reparations – Amparo Directo en Revisión 3236/86

An individual challenged a ruling by a Mexico City Court of Appeals which found that

[4] See Miguel Ángel Berber Cruz, "Trayectorias de violencia. Homicidios 2008-2014", Nexos, july 2016 (available at: http://www.nexos.com.mx/?p=28803).

[5] See 'Que Las Tropas Regresen a Los Cuarteles, Dice Cienfuegos' (*El Universal*) http://www.eluniversal.com.mx/articulo/nacion/seguridad/2016/12/8/que-las-tropas-regresen-los-cuarteles-dice-cienfuegos accessed 15 April 2017; Cienfuegos: "El Ejército debe salir de las calles; fue un error entrar en esa guerra" (*Sin Embargo*) http://www.sinembargo.mx/16-03-2016/1636596 accessed 15 April 2017.

an individual was guilty of defamation but failed to condemn him to provide monetary compensation. In this case, the First Chamber ruled that Articles 39, 40 and 41 of the Mexico City Law of Civil Responsibility to Protect the Rights to a Private Life, Honor and Self-Image were unconstitutional. This legal instrument provided a civil remedy for those individuals subject to defamatory statements. The Court ruled said provisions were unconstitutional for two reasons. First because they did not require monetary compensation on all cases and second because they impose a limitation to the amount that could be paid. The Court ruled that these provisions were contrary to the compensation regime found in Article 63.1 of the ACHR, which provides that

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

The Supreme Court interpreted Article 63.1 directly and ruled that providing an effective remedy to a violation of convention rights required monetary compensation not subject to limitations.

Rights of Persons with Disabilities – Acción de Inconstitucionalidad 33/2015

In abstract review, the National Human Rights Commission challenged the constitutionality of several articles in the Law for the Attention and Protection of Persons With the Condition and Within the Spectrum of Autism. The Supreme Court upheld most of the articles, but the most interesting feature of this case is the substantive interpretation given to the International Convention on the Rights of Persons with Disabilities. The Supreme Court by a majority of 10 to 1 ruled that Article 4.3 of said Convention imposed a substantive requirement to give meaningful participation to persons with disabilities before deciding on governmental policy or legislation that affects them directly. A majority of 7 Justices found that in this case the requirement had been complied with, but they pointed out that it would be better if this obligation was regulated so authorities are aware of the requirements they need to comply with before passing legislation or implementing policies that affect persons with disabilities. There were 3 minority votes that considered that the legislation did not comply with the consultation requirement of Article 4.3 of the Convention and therefore the law should be struck down. This is another example of the Supreme Court making substantive interpretations of international instruments that have an effect on the understanding of the requirements of the legislative process.

Gender Equality – Amparo en Revisión 59/2016

In this case a married man who was denied day care service for his child challenged the constitutionality of Articles 201 and 205 of the Social Insurance Law for discrimination based on gender. The Second Chamber of the Supreme Court ruled that said provisions in fact were discriminatory and therefore unconstitutional because they only gave the right to childcare to women workers. According to the Court, the Convention on the Elimination of all Forms of Discrimination Against Women imposed an obligation to judge with a gendered perspective. Therefore, adopting a gendered perspective, the Court found that this distinction was unjustified particularly because it assigned roles based on gender stereotypes, resulting not only in the discrimination of men to access childcare service but also in an unduly affection to the child. This is another example of the Court adopting a substantive obligation from an international instrument.

Right to Education – Amparo en Revisión 750/2015

In this case, the First Chamber of the Supreme Court ruled that a Public University from the State of Michoacan could not charge registration fees because this would be a violation of the right to education of the plaintiffs. The Constitution of the State of Michoacán in its Article 138 had recently established the right to free higher education and an agreement was signed between the state government and the university which allowed this measure to be implemented for two years. However, the state government did not renew its funding commitment to the university, thus the latter started charging registration fees once again. The Court ruled that even though the right to access education was not absolute, it was subject to the principle of progressiveness and could not be rolled back arbitrarily. Based on said principle, once a socioeconomic right is established or recognized, any rollback should be subject to strict scrutiny—meaning the authority should prove both the lack of funds and efforts for the realization of the right at hand. To justify its interpretation, the Court made extensive references to international human rights instruments that define the right to education such as Article 13 of the International Covenant on Economic, Social and Cultural Rights and the interpretation of the progressiveness principle in relation to education developed in General Comments no. 11 and 13 developed by the Committee on Economic, Social and Cultural Rights.

Right to Equality (LGBTI Rights) – Amparo en Revisión 710/2016

In this case a woman working for the state was denied the right to register her wife for social security benefits. Accordingly, the plaintiff challenged several provisions of the Social Services and Security for Government Employees Law based on which the registration denial was motivated on for discrimination based on sexual preference. The Second Chamber of the Supreme Court found that the use of heteronormative language to define the beneficiaries from social security resulted in an unconstitutional suspect classification against same-sex couples. This ruling was uncontroversial and consistent with previous rulings made by the Supreme Court on the rights of same-sex couples. Just as in the set of cases included in this section, the Court once again relied extensively on rulings from the ICoHR and on its interpretation of the ACHR, Article 24 and Article 1, in cases such as Espinoza Gonzáles v. Perú and Duque v. Colombia.

National Security

The Court was faced with national security issues mainly in relation to the power of law enforcement agencies to wiretap private communications and the right to privacy.

Geolocation without judicial warrant – Amparo Directo en Revisión 3886/2013

In this criminal case, the First Chamber decided on the limits of the right to privacy and private communications. The defendant argued that the use of geolocation of the phone of the victim should be dismissed as evidence in the trial in which he stood accused for kidnapping because, on the one hand, the victim had not authorized to reveal private communications and, on the other hand, this had been done without judicial warrant. In a 3 to 2 decision, the Court found that when there is a criminal investigation in which there is reasonable suspicion of a real and imminent danger for the victim, the right to protect private communications is inapplicable. Accordingly, in cases in which the authority has reason to believe there is a real and imminent danger, then it can require, without judicial warrant, telecommunication companies for private communications in which the victim had intervened. In all other cases, the Court considered, a judicial authorization is required to allow the police to access private communications for criminal investigations.

Geolocation and Call Registry – Amparo en Revisión 964/2015 and 937/2015

In the other relevant case on the extent of powers to intervene private communications in the context of criminal investigations, the Second Chamber ruled on whether Articles 189 and 190 of the Federal Radio and Telecommunications Law violated their right to privacy as protected by Article 11 of ACHR. These articles imposed two requirements on telecommunication companies: to keep a registry with information on the communications of its users and to provide geolocation information when required to do so by law enforcement authorities. The Court ruled that the registry in itself was not unconstitutional but that in order to get access to the information contained in it, the legislation had to be read as requiring judicial authorization before any information was given. The other aspect of the law that was being challenged, which was the power of law enforcement agencies to get geolocation information without judicial authorization, which was in line with existing precedent of the Court,[6] was considered constitutional.

Recurso de Revisión en Materia de Seguridad Nacional 1/2016

This case was filed directly in the Supreme Court under a new judicial review instrument tailored for the legal advisor of the President to challenge resolutions of the INAI (an autonomous agency, whose decisions as a general rule are non-appealable for government officials) ordering the disclosure of information when the President deems it affects national security. The individual had asked for information on the use of powers to wiretap private communications. The petitioners asked from the Centre of Research and National Security the number of times it had asked for authorization from the federal judiciary to wiretap private communications, the number of times their petitions had been granted, how many had been denied and the number of persons or electronic devices which had been wiretapped in 2014. Eventually the decision reached the Transparency Institute, which ordered the disclosure of information, which in turn was challenged by the legal advisor of the President. The Court ruled 10 to 1 against the government and considered that disclosing the information required by the National Transparency Institute would not affect national security. The Court concluded that it is not possible to establish a general rule to determine what kind of information could be disclosed without endangering national security, leaving the issue to be decided on a case-by-case basis. Which, for instance, means that to the extent that citizens file information disclosure petitions on any issue the President considers to be related to national security, the disclosure of information would require a two-tiered process, one at the Transparency Institute and one at the Supreme Court.

CONCLUSION

The selection of cases decided by the Supreme Court for this report show interesting aspects of constitutional adjudication in Mexico. While it is clear that the Court is now consistently using international human rights instruments in delimiting interpretative frameworks to adjudicate rights-related cases, this does not necessarily mean one could argue the Court is becoming a more progressive constitutional tribunal. Without a doubt, having Justices open to consider international law for their decision-making is not a minor feature for the development of constitutional law. However, we consider it is very important not to forget that, given the procedural complexities of the constitutional justice system, in assessing the impact and consequences of a given case (especially in amparo) it is necessary to make more detailed analyses that are beyond the scope of this report. As seen in the cases in Section IV above, one can see positive outcomes in terms of the right to equality (AR 710/2016 and AR 59/2016) and to education (AR 750/2015) but at the same time in the most basic (and pressing) issues as due process for the intervention of private communications, the Court has upheld the constitutionality of such interventions without a judicial warrant (AR 964/2015 and 937/2015). Put in a broader perspective, the latter is particularly relevant to be aware of since it might be signalling the Court's deference to rights-restrictive government policies when it comes to criminal law enforcement, an issue of particular importance given the pressing human rights crisis Mexico is in and the fact that as outlined in Section III will most likely keep returning to the Supreme Court's docket.

[6] See Acción de Inconstitucionalidad SCJN 32/2012.

Myanmar

DEVELOPMENTS IN MYANMAR CONSTITUTIONAL LAW

Daw Hla Myo New, Justice of the Constitutional Tribunal

INTRODUCTION

The constitution-building process in Myanmar is a long journey, like that of most other countries. It continues with time as Myanmar gains new historical and political experience. The most salient issues facing Myanmar relate to the struggle with internal armed conflict and insurgency that arose since its independence.

In a modern democracy, the most important feature of a Constitution is mechanisms to strengthen popular participation in public life. Democracy should connote equality between the majority people and other national races. The participation of national races in social justice, protection of human rights, and political, administrative, and economic concentration is imperative. The Tribunal, or Constitutional Court, by recognizing the legal norms and sources of law, provides the opportunity for minorities to preserve their own traditional norms, values, and practices. The core function of the Tribunal is to stabilize the constitutional order in an ethnically diverse society.

The constitutional recognition of the freedom of belief, religion of every individual, and the prohibition of discrimination is a paramount guarantee against the possible negative impact of a state religion or the predominance of religion in one country.

The independence and impartiality of the judiciary at large enhances the credibility and trust in the Tribunal. Strong institutional legitimacy of the Tribunal then promotes the "pull" of the Constitution as well as its integrity.

CONSTITUTION AND THE COURT

The Constitutional Tribunal of the Union, the very first of its kind in Myanmar, was established in 2011 along with a series of democratic transitions after the country had been under military rule for nearly three decades. It started to function on March 30, 2011.

The extent of review powers as well as the institutional design of constitutional review varies greatly around the world. Of the classical distinction of decentralized (or "diffuse") and concentrated (or "specialized") judicial review, Myanmar utilizes the latter, which spread mainly after World War II. Myanmar, a newly democratic state, views constitutional review as a cornerstone of judicial power. This power entails the implementation of the rule of law and acts as a check on the action of the executive branch in accord with constitutional guarantees and fundamental rights. The objective is to uphold constitutional principles against any legislation or other governmental action that might contravene them. The Constitution endows the Constitutional Tribunal with the power to settle disputes between the Union, regions, and self-administered areas, as well as among them. The Tribunal evaluates, in judicial proceedings, legislation and other governmental acts to ensure that they comply with the Constitution (Section 322 of the Constitution). The Tribunal is thus explicitly mandated to examine the constitutionality of law.

Constitutions vary on the timing and circumstances of review. The Myanmar Constitutional Tribunal may entertain a legal challenge only after the enactment of a legislation (*ex-post* review). There are, of course,

advantages and disadvantages to both pre-enactment constitutional review and *ex-post* constitutional review. But e*x-post* constitutional review allows the Tribunal to scrutinize a challenged legislation with fuller information about its effects in real social situations. The Constitutional Tribunal of Myanmar, therefore, exercises constitutional review only in the context of a specific case or controversy. In other words, review takes place when a petitioner submits a dispute or complaint directly to the Tribunal, alleging a violation of the Constitution or its interpretation. The Tribunal acts only on petitions brought by authorized individuals or other branches of government.

Constitutional Review in Myanmar in History

Myanmar (formerly known as Burma) regained independence from the British Empire on January 4, 1948. Myanmar has had three constitutions since then, namely the Constitution of the Union of Burma (1947); the Constitution of the Socialist Republic of the Union of Myanmar (1974); and the Constitution of the Republic of the Union of Myanmar (2008), which is currently in force.

Parliament democracy was instituted in Myanmar after independence in accordance with the Constitution of the Union of Burma (1947), which was revoked in 1962 in a military coup. In 1974, the Constitution of the Socialist Republic of the Union of Myanmar entered into force through a referendum. From 1974 to 1988, the country was under the regime of the Myanmar Socialist Program Party as a one-party state. The Constitution of the Socialist Republic of the Union of Myanmar was revoked after a military coup.[1] The idea of establishing a separate constitutional authority did not appear in either of the two earlier constitutions, although the constitutional jurisdiction effectively was vested in the Supreme Court according to the 1947 Constitution of the Union of Burma. Its section 151(1) read:

> (1) If any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is upon it, he may refer the questions to that Court for consideration, and the Court may, after such hearing as it thinks fit, report to the President thereon.
>
> (2) No reports shall be made under this section save in accordance with an opinion delivered in open Court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.

Subject to this proviso, the President could seek a legal opinion of the Supreme Court on any constitutional problem concerning the Constitution by a referral. Under the 1947 Constitution, the Supreme Court was granted additional powers to implement the Constitution if was deemed necessary by the Parliament (Section 153):

> The Parliament may make provision by an Act for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it or under this Constitution.

Section 4 of the Union Judiciary Act gave expansive powers to the Supreme Court to supervise "over all courts in the Union." The Supreme Court could on its own motion or if a case was submitted to it, revise and correct any court decision within the Union contrary to the extant legislation. Moreover, section 25 of the Constitution gave citizens access to the Supreme Court to seek the protection of their rights by submitting writs. The Supreme Court was, therefore, empowered to check the constitutionality of the activities of the judiciary and executive against the Constitution:

> (1) The right to move the Supreme Court by appropriate proceeding for the enforcement of any of the rights conferred by this Chapter is hereby guaranteed.
>
> (2) Without prejudice to the powers that may be vested in this behalf in other Courts, the Supreme Court shall have the power to issue directions in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari appropriate to the rights guaranteed in this Chapter.
>
> (3) The right to enforce these remedies shall not be suspended unless, in times of war, invasion, rebellion, insurrection or grave emergency, the public safety may so require.

However, with the new Revolutionary Government, the *Pyithu Hluttaw* (People's Parliament) became authorized to review and decide on constitutional issues. Section 200 and Section 201 of the 1974 Socialist Constitution read as follows:

> Section 200
>
> (a) In interpreting the expressions contained in this Constitution, reference shall be made to the interpretation Law promulgated by the Revolutionary Council of the Union of Burma.
>
> (b) Amendments to and further interpretation of expressions contained in the law mentioned in Clause (a) shall only be made by the *Pyithu Hluttaw*. (Peoples' Parliament)
>
> (c) The validity of the acts of the Council of State, or of the Central or Local Organs of State Power under this Constitution shall only be determined by the *Pyithu Hluttaw*. (Peoples' Parliament)
>
> Section 201
>
> The *Pyithu Hluttaw* (Peoples' Parliament) may publish interpretation of this Constitution from time to time as may be necessary.

In 1993, the military government organized a National Convention with the aim of drafting a democratic constitution. It was ceased for nearly three years but resumed in 1996. The Convention came to a successful end in

[1] The military-based State Law and Order Restoration Council (SLORC) suspended the 1974 Constitution upon taking power in 1988.

2007 when it fully drafted the Constitution of the Republic of the Union of Myanmar. The Constitution was then adopted in a national referendum on May 29, 2008. The Constitution includes a total of 15 Chapters, 457 Sections, and 5 Schedules. A separate constitutional authority named the Constitutional Tribunal of the Union, composed of 9 members, including a Chairperson who is chosen by the President and Speakers of two houses of Parliament, was established to exercise constitutional review jurisdiction.

Access to the Tribunal

A constitutional matter may be directly submitted to the Tribunal by the President of the Union; the Speaker of the *Pyidaungsu Hluttaw* (Union Parliament); the Speaker of the *Pyithu Hluttaw* (Peoples' Parliament); the Speaker of *Amyotha Hluttaw* (National Parliament); the Chief Justice of the Union; and the Chairperson of the Union Election Commission to obtain a constitutional interpretation, resolution, or an opinion of the Tribunal pursuant to Section 325 of the Constitution. In addition to those individuals, the Chief Minister of the Region or State, the Speaker of the Region or State *Hluttaw* (Parliament), the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body, and at least 10 percent of all MPs of the *Pyithu Hluttaw*, or *Amyotha Hluttaw,* may submit a matters to the Tribunal to obtain an interpretation, resolution, or opinion in compliance with the prescribed manners (Section 326).

Individuals or institutions who may not petition the Tribunal directly due to procedural hurdles, shall do so indirectly through a state official such as the President of the Union, or Speakers of both houses of Parliament, and others who have the right to submit matters to the Tribunal directly. A private individual cannot bring a case to the Tribunal. But a general court may do so if a question arises to the constitutionality of a legislative act or provision, in a case or controversy, and the Tribunal has not decided on the subject matter before. The concerned general court must stay the trial and submit a question to the Constitutional Tribunal. The resolution of the Tribunal of the dispute applies to all cases.[2]

When a case is submitted to the Tribunal, the Chairperson sets up a scrutiny body proportionally composed of three members from among those elected by the President of the Union and the Speaker of both houses of Parliament. When the case is found complete with required documents, the scrutiny body reports it to the Tribunal for a hearing. The case is heard in a plenary session. If it is not possible to be heard in a plenary session because of the absence of one member or other credible reasons, it must be heard by at least six members including the Chairperson. The hearings of the Tribunal are before public except in cases bearing on state secrets or security of the Union.

The resolution of the Tribunal is final and conclusive.[3] Resolutions, interpretations, and opinions of the Constitutional Tribunal are published in the Union Gazette and published annually as the rulings to be quoted as well. However, official English translations of resolutions are unavailable.

CASES AND CONTROVERSIES

The Tribunal decides few cases in comparison to constitutional courts and similar institutions in other jurisdictions. Since its establishment in 2011, a total of 14 cases have been brought before the Tribunal. This could be attributed to the fact that:

(a) The Tribunal is a newly established institution, formed only in 2011.

(b) It is not vested with a power to entertain individual complaints.

(c) The access to the Tribunal is subject to detailed conditions.

(d) Public and state institutions lack relevant knowledge about the Tribunal.

(e) Referral cases by an ordinary court seeking constitutional interpretation can be made through the Supreme Court only (one case had been referred since 2011).

(f) An individual MP cannot file a case with the Tribunal.

In one case, the Tribunal decided that a provision in the law of Emoluments, Allowances and Insignia of Office for Representatives of the Regions/States was unconstitutional, since the Ministers of National Races Affairs have equal status with the Ministers of the Region/States and they should be, therefore, entitled to the same rights and privileges.

The Tribunal also declared once that the decision of the executive was not in accord with the Constitution. There was also a case where an application filed for conferring of judicial power to administrative officers of the General Administrative Department of the Ministry of Home Affairs.[4]

In one case, the Attorney General petitioned the Tribunal to review its own decision in a case that concerned the Civil Procedure Code, the Criminal Code, and the Evidence Act. The Tribunal opined that neither the Constitution nor the Tribunal Law allows an interpretation that there is a right of appeal or review of its own decisions.[5]

There were also cases seeking the interpretation of the Constitution. In a case indirectly related to the electoral rules, the Tribunal held that the rules determined the power allocated to the Union Election Commission.

The biggest challenge to the Tribunal posed the question on the status of Committees, Commissions, and Bodies formed by each *Hluttaw* (Parliament). At issue was whether these bodies ought to be regarded as Union Level work to Union Level Organization

[2] Ibid, s 323.

[3] Ibid, s 324.

[4] Submission No.2/2011, Rulings of the Constitutional Tribunal (2011) 63.

[5] Submission No.2/2012, Rulings of the Constitutional Tribunal (2012) 31.

was unconstitutional.[6] This case led to the resignation of all members of the Tribunal, including the Chairperson, from their post.

Most of the States and Regions seek clarifications from the Tribunal whether they shall exercise the legislative powers entrusted to them under Schedules II and III of the Constitution before a repeal or amendment of the extant Union laws.

Cases submitted during 2011-2016 by type:

2011 - Separation of Power	1
- Constitutional Interpretation	2
2012 - Constitutional Interpretation	3
2013 - Constitutional Interpretation	1
2014 - Constitutional Interpretation	5
2015 - Constitutional Interpretation	1
2016 - Constitutional Interpretation	1
Total	14

MAJOR CASES

In 2016, only one case was brought before the Tribunal. On March 30, 2016, a new government took office, and all 9 members of the Tribunal were replaced by new ones chosen by the President, the Speaker of the People's Parliament, and the Speaker of the National Parliament, respectively, as their terms expired, according to the Constitution. In the selection process and subsequent approval of the candidates in the Union Parliament, two were challenged. The two candidates qualified for judgeships based on the provision: "(iv) person who is, in the opinion of the President, an eminent jurist," may be selected as a member of the Constitutional Tribunal. However, they failed to meet other requirements for the position and, most importantly, were candidates of the Speakers.[7] Despite the challenge, they were approved as new members of the Tribunal.

Twenty-three representatives of the National Parliament put forward a submission calling on the Tribunal to interpret the provision of Section 333, Subsection (iv) of the Constitution. The MPs specifically questioned whether the qualification, a "person who is, in the opinion of the President, an eminent jurist" does not apply only to members of the Tribunal who were selected by the President of the Union. Pursuant to Article 4(b) of the Law of the Constitutional Tribunal, the President may select a person as a member of the Tribunal if the candidate is an eminent jurist, despite lacking other professional qualification. The MPs argued that the selection was unconstitutional.

The core question was whether the "eminent jurist" exception only applies to judicial appointments by the President. The Tribunal approached the issue intertextually—it was necessary to take into account the entire Constitution in context. Sections on the appointment of the Union Attorney General;[8] the Deputy Union Attorney General;[9] the Auditor General;[10] the Chief Justice and Associate Judges of the Supreme Court;[11] and finally on the appointment of the Chief Justice and Judges of the High Court of the Region or State[12] all include similar clauses that empower the President of the Union to use discretion in appointing those officials. This discretion pertains to the last stage of the selection process, where the candidates for the Constitutional Tribunal, after being selected by the two Speakers and the President, are appointed to the bench. Another reason was that the President is entrusted with this privilege as he is the head of state as well as the executive. It would be unconstitutional if it were restricted that the President had the power to exercise discretion to appoint the officials and judges.

On the other hand, it was clear after reviewing the whole submission that it was asking the Tribunal to accede to the applicants' interpretation rather than requesting the interpretation of the Tribunal. The judges thus held that the submission was incompatible with the Constitution, and it was dismissed.

CONCLUSION

The Tribunal has confronted some challenges since its establishment. Some commentators argue that certain constitutional rights are absolute, but others are of the view that rights, such as the right to free expression, are qualified. Constitutional rights are guaranteed only insofar as their exercise is not contrary to the laws enacted for security of the Union, law and order, and community peace. Some authors critique undue influence of the executive on the judiciary, and emphasize the importance of judicial independence and access to courts, while again others argue that access to justice should remain exclusive.

The Constitutional Tribunal for its part applies law to everyone in a fair and consistent manner. The Tribunal is committed to the principle of impartiality. It tries to promote clarity and consistency across the judicial process, because coherent legal doctrine makes the exercise of justice transparent. Transparent and properly functioning judiciary in turn enhances the quality of the rule of law.

With regard to the complaints, on the repressive legislation, the Union Parliament prioritizes review and abolition of such old laws. The Parliament must enact legal framework capable to withstand scrutiny and not misuse its power. One of the important functions of the Constitutional Tribunal is to protect

[6] Submission No.1/2012, ibid 1.

[7] See s. 333(d) of the Constitution: (ii) person who has served as a Judge of the High Court of the Region or State for at least five years; or (ii) person who has served as a Judicial Officer or a Law Officer at least 10 years not lower than that of the Region or State level; or (iii) person who has practiced as an Advocate for at least 20 years.

[8] s. 237(a)(iv)(dd).

[9] s. 239(a)(iv)(dd).

[10] s. 244(a)(iv)(cc).

[11] s. 301(d)(iv).

[12] s.310(d)(iii).

people's fundamental rights and promote democracy. An appropriate balance in the choice of legislative schemes can improve the functioning of the government and improve the legitimacy of the actions of all branches. Judicial independence leads to the rule of law, which forces the impartiality. It is also essential to the protection of fundamental rights and other constitutional guarantees.

It is necessary for the Constitutional Tribunal to engage in outreach and disseminate information about its role, functions, and decision-making. State institutions and citizens must have wide knowledge about the Tribunal and how to access it in their pursuit of justice. The Constitutional Tribunal is trying to share information about its activity and to develop sufficient information services.

The effective and efficient implementation, protection and promotion of fundamental rights of citizens is more likely to succeed if the constitutional provisions are clearly formulated within a given constitutional framework. The effective guarantee of constitutional rights shall be based on the rule of law, and it is characterized by foreseeability, accessibility, accountability, separation of powers as well as recognition and protection of the rights of every person.

It is of this view that the courts should have a reputation of being independent, impartial, efficient, and representing the highest quality. Access both physical and to legal assistance to the courts also plays an important role. Finally, it is necessary to ascertain that the bodies protecting the constitutional rights of citizens are provided sufficient financial, human, and technical resources.

Since the mandate of the Tribunal does not reach to individual complaints, the Union Supreme Court has an important role in promoting and protecting citizens' constitutional rights. A citizen whose rights and liberties, recognized by the Constitution have been violated petition the Supreme Court (writs system). The right to petition the Court is, however, subject to the exhaustion of other available legal remedies. The citizen, a party to a dispute, can also request the Supreme Court to make a referral to the Constitutional Tribunal (the so-called incidental attack on constitutionality) for a ruling that a contentious provision of law affecting a resolution of the case is contrary to or inconsistent with the Constitution.

Another constitutional mechanism of the Union Supreme Court that contributes to the protection of constitutional rights is its mandate to receive and consider complaints to submit amicus briefs, or recommendations to bring cases before the courts on behalf of the alleged violation of other constitutional rights. Presently, the National Human Rights Commission has also gained public trust as an independent institution to promote citizens' rights. The rule of law and constitutionalism are in this sense a joint project to which all state institutions must positively contribute.

Netherlands

DEVELOPMENTS IN LITHUANIAN CONSTITUTIONAL LAW

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INTRODUCTION

In this contribution, we will first give a general picture of the Constitution of the Kingdom of the Netherlands, with a focus on the absence of constitutional review of primary legislation by the courts. Secondly we will discuss two issues that were important in constitutional developments in 2016. These are a referendum on an EU Association Agreement with Ukraine and a court case involving climate change. They illustrate major issues in Dutch constitutional law. The Netherlands does not have a constitutional court, so in this respect our contribution will differ from most other country reports.

CONSTITUTIONAL HISTORY

Article 115, par. 2 of the Dutch Constitution as revised in 1848 introduced the formula that 'statutes are inviolable'. The Hoge Raad (Supreme Court) of the Netherlands judged in 1961 that this wording (then Article 131, par. 2) meant that it had no power to oversee the constitutionality of a certain Act of Parliament, including the procedural aspects. The appellant had claimed that this Act was not in fact an Act of Parliament because it had never been approved in a proper manner and according to the appropriate constitutional procedural rules. The Hoge Raad ruled that it had to assume that the legislature itself had considered the constitutionality of the Act including compliance with the provisions regarding legislative procedure, and that courts have no power to second-guess the interpretation that the legislature itself had given to the Constitution. Article 131, second paragraph, intended to protect primary legislation against constitutional review by the courts. It has always been uncontroversial that this did not apply to all other types of legislation, such as delegated legislation by statutory instruments, municipal legislation, by-laws enacted by professional and economic public authorities, and ministerial legislation. All of these types of rules could be constitutionally reviewed by all courts.

During the 1960s and 1970s, proposals were made to revise the Dutch Constitution, including one by an Official Commission on the Revision of the Constitution to include judicial constitutional review of primary legislation. There was some academic support for this, and the Hoge Raad also appeared to be sympathetic to the idea. Most of the proposals considered constitutional review by ordinary courts, in parallel to their powers with regard to the effect of international law in the Dutch legal order. A separate, specialized constitutional court was hardly ever considered.

However, little support was found for this in political circles.

Meanwhile, developments in the field of human rights led to a further shift in opinion among lawyers. Early observers of fundamental rights protection and its potential functions had already noted that the need for judicial protection of fundamental rights would increase if the government became more and more dominant in its relationship to Parliament, even to the extent that parliamentary participation in primary legislation was no more than symbolic because majority coalitions in Parliament would most often just give their blessings to legislative proposals from the government rather than seeing themselves as co-legislators.

From 1976 onwards, since the European Court of Human Rights (ECtHR) found the first violation of the ECHR by the Netherlands in the case of *Engel*,[1] Dutch lawyers became accustomed to breaches in the inviolability of Acts of Parliament.

This was reflected in the debates in Parliament on the revision of the Constitution which led to the revised Constitution of 1983. The government's proposal to replace article 131, second paragraph by the more modern wording of article 120 was accepted: 'The courts shall not review the constitutionality of Acts of Parliament (statutes) and Treaties'. Did this exclude judicial review of primary legislation against fundamental unwritten principles of law?

In the *cause célèbre,* which is the case of the Harmonisatiewet,[2] the Hoge Raad concluded that the limits that followed from the 'traditional place of the judiciary within the political system' prevented constitutional review of primary legislation against fundamental principles of law.

THE CONSTITUTION TODAY

This settled the issue of the scope of the new article 120 of the Constitution. Courts were not allowed to review the constitutionality of statutes, neither with regard to their content nor to the legislative procedure, and this included a review in the light of unwritten fundamental constitutional principles.

An important assumption is that the legislature itself has a keen eye for issues of constitutionality. In practice this turns out not always to be the case, especially—but certainly not exclusively—in the field of fundamental rights. There is probably room for improvement in a procedural and a substantive way. Advisory bodies pay attention to constitutionality of legislative proposals, but Parliament is not obliged to follow this advice. There is a role here also for the indirectly elected First Chamber of Parliament.[3]

The Rise of the ECHR

The *Engel* case, mentioned above, concerned military disciplinary law, and the violation was only minor. Nevertheless, this alerted Dutch lawyers of the potential of the ECHR as a standard for review of primary legislation. On the basis of article 94 of the Constitution, norms of every hierarchical status can be reviewed against the ECHR, and the awareness of this Convention in the Dutch courts increased. The 1985 *Benthem* judgment of the ECtHR gave a new impulse to the constitutional effects of the ECHR in the Netherlands. The arrangement of appeal in administrative cases was revised, the Council of State was restructured, and the scope of judicial review was expanded under the influence of article 6 ECHR. This was extended even further by the 1995 judgment in the case of Procola, a case concerning the Luxembourg Council of State which bears a strong resemblance to its Dutch counterpart.[4] In the Netherlands it has had a strong impact at an institutional level. In the course of 25 years, the Dutch Council of State was more or less completely restructured.

In other areas, the ECHR proved equally important. Freedom of speech, protection of family life, detention regimes, and the law of criminal procedure, all saw judgments by the ECtHR with strong impact on the Netherlands.[5]

The ECHR grew increasingly important and the Constitution lost part of its impact and its significance in legal practice. The impact of the ECHR functions as a 'bypass' for the lack of judicial constitutional review of primary legislation. That said, it happens only exceptionally that a piece of primary legislation is found to violate ECHR law. More often, the complaints before the Strasbourg court concern administrative action, sometimes court decisions.

The ECtHR considers itself the 'final authoritative' interpreter of the Convention,[6] and the Netherlands takes that seriously. In practice, this means that the cases concerning all countries are relevant.

Constitutional Fundamental Rights and Treaty Rights

Due to the rise of the ECHR, the fundamental rights in the Constitution have become less important in practice. A striking example is the protection of property rights: art. 14 of the Constitution now only protects against certain forms of arbitrary expropriation without compensation, whereas art. 1 First Protocol ('A1P1') gives a much broader protection.[7]

In 2010, the Staatscommissie Grondwet (Official Commission on the Constitution) published recommendations to strengthen the constitution by incorporating treaty law, e.g. the rights of access to justice, freedom of expression, and protection of confidential communication. In 2016, the government presented a legislative proposal to introduce a provision on access to the courts into the Constitution. This bill is still pending.

Privacy protection also is mainly a matter of treaty law (now including the Charter on Fundamental Rights of the EU).[8]

[1] ECHR 8 June 1976 (Plenary), Appl. No. 5100/71 a.o., Engel and others v The Netherlands.

[2] Hoge Raad 14 april 1989.

[3] The directly elected chamber is called the Second Chamber.

[4] ECHR 28 September 1995, Appl. No. 14570/89 Procola v Luxembourg.

[5] De Wet 2008.

[6] ECtHR 9 June 2009, Appl. No. 33401/02, Opuz v Turkey, par. 163: the ECtHR will see 'whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States'.

[7] Gerards 2011:58 sq.

[8] ECJ 8 april 2014, joined cases C-293/12 & C-594/12: the Directive on data retention was declared invalid by the ECJ. Following this judgment, national legislatures have to react speedily, or cases will be brought before the national courts. E.g. Provisional Court The Hague, Judgment of 11 March 2015, ECLI:RBDHA:2015:2498.

Interpretation in Conformity with Higher Law

In practice, rather than 'disapplying' national law in case of conflict with directly effective treaty law, courts prefer interpretation of national law in conformity with treaty law. In itself, this is a familiar part of the canon of interpretation, as we can see from the German examples in interpretation in conformity with the Constitution and the British example of the Human Rights Act (courts should interpret and apply national law in conformity with the ECHR 'so far as it is possible to do so'), as well as from the European Court of Justice's case-law in the *Marleasing* line. In the Dutch context, some spectacular examples can be found of these figures. One of the reasons is that interpretation in conformity avoids the irreversibility problem: if a Dutch court would disapply a statutory provision, the legislature will have difficulty to repair the provision.[9] Interpretation in conformity seems to leave more room for dialogue, both between courts and the legislature, and between national and European courts.[10] The courts strive for consistency and a 'treaty-conform' result.[11]

MAJOR CASES

Climate Change: The Urgenda Judgment

The Dutch corporation Urgenda (a contraction of Urgent Agenda) advocates sustainability and innovation. In 2012, Urgenda requested the Dutch government to reduce Dutch greenhouse gas emissions in 2020 by at least 40% in comparison with 1990. When the government did not meet the request, Urgenda started a lawsuit against the Dutch state in 2013. On 24 June 2015, the Dutch district court (*rechtbank*) at The Hague issued its ruling (ECLI:NL:RBDHA:2015:7145). It ruled that the state acted unlawfully towards Urgenda because of its climate policy. It also ordered the state to reduce Dutch greenhouse gas emissions in 2020 by at least 25% in comparison with 1990.

In September 2015 the state appealed against the ruling. On 9 April 2016 it sent its statement of grounds of appeal to the appeal court (*gerechtshof*) at The Hague. The procedure before this court will start in 2017.

The Urgenda judgment led to many reactions, even outside the Netherlands.[12] In the Netherlands, many constitutional lawyers wrote about the judgment. From a constitutional point of view, the judgment is highly relevant for the idea of separation of powers (*trias politica* in Dutch legal parlance).

In its judgment, the district court remarked on separation of powers (paragraphs 4.94-4.102). It acknowledged that a central issue in the judgment was whether ordering the state to reduce emissions thwarted the separation of powers (4.94). It stressed that there is no complete separation of powers in the Dutch legal system. Courts are sometimes obliged to judge the acts of democratically legitimized political institutions. However, when such acts entail policy considerations of divergent interests concerning the organization of society, judicial restraint or abstinence is required (4.95). Urgenda's claim—asking the court to order the state to cut Dutch emissions—called for restraint (4.96). However, the claim was not outside the domain of the courts. Urgenda asked legal protection and courts should offer this, although the issue of emissions involved political decision-making (4.98). The court also stated that the facts on which the state and Urgenda agreed necessitated wider action by the state (4.99). According to the court, Urgenda's claim did not amount to an order to the state to take specific legislative or policy measures. Should the court order the state to cut Dutch emissions, the state would still be free to decide in which way it would act (4.101). The district court concluded that separation of powers was no obstacle for ordering the state to cut emissions, as the state would still have discretion (4.102).

In paragraph 15 of its statement of grounds of appeal, the state argued that separation of powers was in fact an obstacle for the court order. The Urgenda claim concerned Dutch climate policy. This policy involved many policy and political considerations, so courts should exercise restraint (15.1, 15.12, and 15.13). Another reason for restraint was that the order to cut emissions had consequences for natural and legal persons who were not a party in the proceedings (15.4). Because of this, the district court ought not to have given the order it did (15.5). The state further argued that a cut in Dutch emissions could only be achieved through acts of Parliament. This made the court order an order for legislation, which courts are not allowed to give (15.14).[13]

Constitutional lawyers were not always positive about the judgment. According to Roel Schutgens, professor of jurisprudence at Radboud University Nijmegen, the district court went too far. The court did not pay sufficient attention to the discretion of the Dutch government in matters of climate policy. The actual policy of the government amounted to a reduction of Dutch emissions in 2020 by 20% in comparison with 1990. The court ought only to have given the order it did if it were obvious that the government could not reasonably have come to its actual policy. According to Schutgens, this was not obvious at all. By giving the order, the court violated the separation of powers.[14]

According to Geerten Boogaard, lecturer in constitutional and administrative law at Leiden University, the judgment created constitutional difficulties. These difficulties

[9] Donner 1982.

[10] De Lange 2005.

[11] See also De Wit 2012.

[12] See e.g. https://www.theguardian.com/environment/2015/jun/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling and Lord Carnwath's speech about Climate change and the courts, held on 26 November 2015. See also Roel Schutgens, Urgenda en de trias (Urgenda and the separation of powers), NJB 2015/1675, (p. 2270-2277).

[13] The Dutch state referred to Supreme Court (*Hoge Raad*) jurisprudence to argue the latter point. See HR 21 March 2003, ECLI:NL:HR:20083:AE8462 (*Waterpakt*) and HR 1 October 2004, ECLI:NL:HR:2004:AO8913 (*Faunabescherming/Provincie Fryslan*).

[14] See Roel Schutgens, Urgenda en de trias (Urgenda and the separation of powers), NJB 2015/1675, (p. 2270-2277).

concerned judicial construction and separation of powers. The judicial construction in the Urgenda judgment was perhaps too autonomous. And in relation to the separation of powers, the court perhaps talked out of turn and should have left matters of climate policy to political institutions. It would, according to Boogaard, have been better if it had confined itself to a declaratory judgment that the state acted unlawfully if it did not reduce Dutch emissions in 2020 by at least 25%, in comparison with 1990.[15]

The consequences of the Urgenda judgment for separation of powers and Dutch climate policy are unclear, as the state has appealed. What does seem clear is that the judgment might not be in line with Supreme Court (*Hoge Raad*) jurisprudence.[16] It also seems clear that the court might have made itself vulnerable by the amount of fact-finding in its judgment. This made it easier for the state, in its statement of grounds of appeal, to criticize the court's interpretation of the facts.

One final remark should be made about the procedure before the courts. The district court gave its order to the state in 2015. The procedure before the appeal court will start in 2017. Doubtless at least one of the litigants will go the Supreme Court after the appeal. By the time the Supreme Court will reach a verdict, we might be close to the year 2020. By then, ordering the state to reduce emissions in 2020 by at least 25% in comparison with 1990 might be pointless.

The Referendum on Ukraine

On June 27, 2014, the European Union and its 28 Member States[17] made an Association Agreement with Ukraine. This extensive treaty (486 articles, 44 annexes, and 3 protocols) was agreed simultaneously with Association agreements with Moldova and Georgia. These are part of the activities of the so-called Eastern Partnership of the EU, aimed at promoting stability and prosperity in those three countries and Belarus, Armenia, and Azerbaijan. The EU has Association Agreements with 23 states and groups of states, including for example Lebanon, Israel, Turkey, and Central America.

An Association Agreement facilitates free movement of goods, services, capital, and persons, analogous to the freedoms that form the economic core of the EU Treaties. In some cases it has in the past been a first stage of a process that resulted in accession to the EU, but this is by no means automatic.

On July 1, 2015, an Act on Consultative Referenda came into force in the Netherlands.[18] In it, arrangement was made for consultative referenda. It enables referenda with regard to statutes, i.e. legislative decisions of Parliament and government acting together. If a statute has been made, has received royal assent, and has been published, it can be subjected to a referendum before its entry into force. In the Netherlands, the approval of treaties of major significance normally takes the form of a statute. Although there is evidence that it is politically difficult and risky to make foreign policy the object of referenda, the Dutch legislature decided not to include treaty-approving statutes in the list of statutes that are excluded from being subjected to a referendum.[19] Article 11 of the Consultative Referendum Act 2015 states: 'If it has been definitively established that a referendum has led to an advisory opinion to reject, a bill will be presented as speedily as possible. The bill will propose that the statute will be repealed or it will regulate its entry into force.' It is up to the legislature to review its own earlier legislative decision, and there are two possible outcomes: either it accepts the advice of the referendum electorate and repeals the statute, or it rejects the advice and sets a date for the entry into force of that statute. The referendum result is therefore clearly not binding on the legislature. Furthermore, the Act requires a turnout of at least 30% of the electorate[20] for any referendum result to be valid.

Almost immediately after the entry into force of the Consultative Referendum Act, a political grouping centred around a rightwing website (GeenPeil) started a campaign to subject the Act of approval of the Ukraine Association Agreement to a referendum. Legislative approval of this association agreement had taken place by Act of Parliament (statute) of 8 July, 2015 (Stb. 2015, 315). The GeenPeil campaign was motivated by a strong anti-EU sentiment, and based on the contention that the Assocation Agreement was the first step in the process of accession of Ukraine to the EU. The initial request—for which 10.000 signatures are required—was quickly successful, and ultimately 427.939 signatures supported the referendum application. The Kiesraad (Electoral Commission) found that among them there were sufficient numbers of valid signatures to make the application succesful (the statutory threshold is 300.000). The referendum was held on 6 April 2016. More than 4 million voters took part, of whom 61% (2,509,395) voted against the approval of the Association Agreement, 38,2% (1,571,874) voted in favour, and 0,79% (32.344) voted blank.

The turnout was 32,8%, which made the result valid.

Aftermath of the Referendum

While the constitutional status of the referendum result is that of a non-binding opinion, a few days before the referendum most political parties let it be known that they would consider themselves bound to the outcome. After the result and the turnout of only 32,8%, Parliament and government

[15] See Geerten Boogaard, Urgenda en de rol van de rechter. Over de ondraaglijke leegheid van de trias politica (Urgenda and the role of the courts. The unbearable emptiness of the separation of powers), Ars Aequi January 2016, p. 26-33.

[16] See the following Supreme Court jurisprudence, as mentioned by the Dutch state: HR 21 March 2003, ECLI:NL:HR:2003:AE8462 (*Waterpakt*); HR 1 October 2004, ECLI:NL:HR:2004:AO8913 (*Faunabescherming/Provincie Fryslan*); HR 6 February 2004, ECLI:NL:HR:2004:AN8071 (*Vrede c.s./Staat*); HR 9 April 2010, ECLI:NL:HR:2010:BK4549 (*Clara Wichmann/Staat*).

[17] Because both the EU and all of its Member States are parties to the treaty, it is a 'mixed agreement.'

[18] Act of 10 March 2015, Stb (Official Journal) 2015, 123.

[19] The exclusion list mentions budget statutes, revisions of the Constitution, and statutes regarding the monarchy as its most important items.

[20] The Dutch electoral register is linked to the population register, so no separate registration for any election or referendum is required.

were confronted with a major political problem. They decided not to stick to the non-binding character of the outcome, but to go into a process of re-negotiation with the other EU Member States, all of which have ratified the treaty. Unsurprisingly, progress in this area was not forthcoming. Finally, after more than 8 months, the Dutch government came forward with a declaration by the European Council of 15 and 16 December 2016, in which some of the concerns that were voiced during the referendum campaign were addressed. The Dutch government presented this as a 'decision' by the European Council.[21]

The Conclusion of the European Council of 15 December 2016 is worded as follows (under point 23-24):

> '23. After having carefully noted the outcome of the Dutch referendum on 6 April 2016 on the Act of Parliament approving the Association Agreement and the concerns expressed prior to the referendum as conveyed by the Dutch Prime Minister, the European Council takes note of a Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council (Annex), which addresses these concerns in full conformity with the Association Agreement and the EU treaties. 24. The European Council takes note that the Decision set out in the Annex is legally binding on the 28 Member States of the European Union, and may be amended or repealed only by common accord of their Heads of State or Government. It will take effect once the Kingdom of the Netherlands has ratified the agreement and the Union has concluded it. Should this not be the case, the Decision will cease to exist.'

Despite the not unambiguous wording of the Conclusion and the Annex, this document can only be read as an interpretive statement of the EU side of the contracting parties. The interpretive statement was not co-authored by the Ukraine government. Therefore, in accordance with art. 31, par. 2 (b) of the Treaty of Vienna of 1969 it can probably only be relevant for the interpretation of the treaty if the other party—in this case Ukraine—will have accepted it.

The conclusion of the Dutch government was that a bill to regulate the entry into force of the Act of approval was to be submitted as soon as possible. After the entry force of this Act, ratification of the Treaty could take place. After this the Association Agreement itself provides (Article 486, par. 2) that it will enter into force on the first day of the second month following the date on which the last act of ratification was deposed.

The analysis presented here was confirmed by the Dutch Council of State's Advisory Division on January 18, 2017. The Council of State suggested to the government to provide further clarification with regard to the legal status of the Decision of the 28 Heads of State or Government. The government added a few lines to its Explanatory Memorandum. Parliament will debate the matter after the parliamentary elections to be held on March 15, 2017.

All in all, the picture is that the Dutch government and coalition parties, by binding themselves in advance to the outcome of a referendum before they could know what the turnout and the result would be, have manoeuvred themselves into a conundrum on a European level, incurring in a diplomatic result that is unconvincing and most likely gratuitous. This must be part of a learning process with regard to referenda, and with regard to the relationship between constitutional norms (and provisions regarding the status of referenda) and political realities.

[21] Kamerstukken (Parliamentary documents) 21501-20, nr. 1176, p. 5-7.

Nigeria

DEVELOPMENTS IN NIGERIAN CONSTITUTIONAL LAW

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INTRODUCTION[1]

The Supreme Court of Nigeria currently comprises the Chief Justice of Nigeria and sixteen other Justices. Although the statute of the Court envisages as many as twenty-one, the present size is the largest in the history of the Court. Recent Chief Justices have resisted further expansion of the bench. Compulsory retirement age is set by the Constitution at seventy,[2] but Justices may retire at sixty-five. Justices almost always serve out their tenure. Since 1999, for example, there has been only one retirement before the age of seventy (illness). However, high membership turnover, because Justices mostly get appointed about the age of sixty (the average appointment age of the present bench is 59.5 years), means there are frequent vacancies on the bench. In 2016, membership turnover was about 20 percent. (Three Justices retired upon attaining seventy while four new Justices were appointed.) At present, only fifteen members are participating in the work of the Court due to recusal of two Justices because of corruption investigations.

The Supreme Court was established in 1956 (as the Federal Supreme Court) and was initially subject to the appellate jurisdiction of the United Kingdom's Judicial Committee of the Privy Council, until 1963 when it became a final court of appeal in the Nigerian legal system. Nigeria has a two-tier appellate court structure comprising the Supreme Court and the Court of Appeal below it. During its sixty-year existence, 108 Justices have served on the Supreme Court. The current Chief Justice, Walter Onnoghen, the sixteenth, took office on 7 March 2017, although he had acted in that capacity since 10 November 2016 when the fifteenth Chief Justice retired. In 2016, there were four female Justices on the Court, the largest number ever. This is significant because only a half-dozen women have served on the Court, and the first appointment was only in 2005. However, women account for nearly a quarter of all appointments to the Court since that year.

The Court never sits *en banc*. It conducts most business in panels of five. However, seven Justices ('Full Court') are empanelled ad hoc by the Chief Justice for constitutional cases and for reconsideration of the Court's precedents. In 2016, about 20 percent of all cases were heard by the Full Court, although this was rather peculiar as most of these were election-related (which usually involve constitutional issues) following the 2015 general elections in Nigeria. (In practice, the regular five-Justice panels sometimes also hear appeals raising constitutional issues, although it is not clear why this is so.) Every Justice on a panel is required to write an opinion in every case he participates in. This practice is a modified form of the seriatim opinions of English appellate courts because unlike the former, one Justice is assigned writing the primary opinion, which is circulated to other members of the panel. When the panel is split, the assignment is given to one of the majority Justices. Other Justices are required to write their own opinions as well, although frequently they are short concurring opin-

[1] See generally, Solomon Ukhuegbe, 'Recruitment and Tenure of Supreme Court Justices in Nigeria,' https://dx.doi.org/10.2139/ssrn.2034920

[2] Constitution of the Federal Republic of Nigeria 1999, s 291(1).

ions, or even merely a statement aligning with the primary opinion. Dissents are rare. This strong consensus norm is, however, weakened by occasional dissensus on justification even where there is agreement on whether the appeal is allowed or refused. All judgments are read in open court.

The business of the Court is mainly private law (including commercial law), criminal law and civil procedure. While rights cases are uncommon, constitutional rights are sometimes considered in criminal appeals. That said, the Court's output is low in rights jurisprudence, international law and social policy.

THE CONSTITUTION AND THE COURT

The jurisdiction of the Supreme Court is set out directly in the Nigerian Constitution (sections 222, 223). While it has no advisory jurisdiction (abolished since 1963), it has limited original jurisdiction. But its purely appellate jurisdiction is the source of at least 99 percent of caseload annually (100 percent in 2016). The Supreme Court has the exclusive jurisdiction to hear appeals from the Court of Appeal, every decision of which is potentially appealable to the Supreme Court, at least with leave of either Court. Leave is not required for any appeal from decisions of the Court of Appeal in any civil or criminal proceedings on any question of law, or any question as to the interpretation or application of the Constitution. In addition, the Supreme Court must hear an appeal on any question as to whether any of the fundamental human rights provisions have been, are or are likely to be contravened in relation to any person, or an appeal for review of a death sentence imposed by a lower court. It may also hear appeals from the Court of Appeal on any question as to whether a person has been validly elected under the Constitution to the office of President, Vice President, Governor, or Deputy Governor, or whether the term of office has expired or has ceased, or whether the office has become vacant.
The original jurisdiction enables direct access to the Supreme Court in legal disputes between the central government and the States, or between the central legislature and the President or a State or a State legislature. This jurisdiction therefore serves federalism and the separation of powers functions. In addition, there is a quasi-original jurisdiction to entertain reference of 'substantial questions of law' from the Court of Appeal.[3]

Because of its extensive jurisdiction, the business of the Supreme Court consists mostly of mandatory appeals. It has no effective means of regulating the volume or content of its docket, and hence has almost no influence on its agenda. The result is that the Court is under severe caseload pressure and has significant arrears of work, mostly routine appeals. Except for criminal appeals and a few other categories, it takes perhaps up to ten years before an appeal is heard.

DEVELOPMENTS AND CONTROVERSIES IN 2016

Appointments to the Supreme Court, including the Chief Justice, are made by the President on the recommendation of the National Judicial Council (NJC). This twenty-member body, established by the extant Nigerian Constitution (1999), has a mandate that includes recommending persons for appointment to the superior courts and the headships of the courts, including the Chief Justice of Nigeria. In October 2016, on the eve of the retirement of the 15th Chief Justice, the Council recommended to the President to appoint the ranking Justice, Walter Onnoghen, as the sixteenth Chief Justice. It has been a consistent practice since the appointment of the fifth Chief Justice in 1979 for the recruitment of the Chief Justice to be made from within the Supreme Court strictly based on seniority. Ten successive appointments of Chief Justices spanning democratic rule and military dictatorship (1983, 1985, 1987, 1995, 2006, 2007, 2009, 2011, 2012, and 2014) have adhered to the seniority preference. It was a surprise, therefore, that the President delayed accepting the recommendation of the NJC for four months (although in the meantime he appointed Justice Onnoghen as Acting Chief Justice immediately, the fifteenth Chief Justice retired in November 2016).

Although the government did not make its position officially known, it was clear that its view was that the recommendation of the NJC on the appointment of a Chief Justice was not necessarily binding. While it had some support within the legal profession and the public, the government's position was generally considered unfavourably as a thinly veiled attempt to take control the judiciary. Even if the position taken was noble, it was clearly misguided. Section 231(1) of the Constitution provides that,

> The appointment of a person to the office of the Chief Justice of Nigeria shall be made by the President *on the recommendation* of the National Judicial Council subject to confirmation of such appointment by the Senate.

Before the present Nigerian Constitution, which created the NJC, the appointment of the Chief Justice was firmly in the hands of the executive. Under the 1960 Independence Constitution, the appointment was made by the Governor General on the advice of the Prime Minister,[4] and in the 1979 Constitution the appointment was 'made by the President in his discretion.'[5] The difference between the two was that the former was a Westminster-type constitution, with executive power vested in the Prime Minister and his cabinet, while the latter is a presidential constitution. There is, however, a clear shift in the present Constitution. The President is merely the titular appointor with only the power of formal appointment. He no longer has a free hand to select the Chief Justice, and indeed has no discretion at all since the NJC recommends only one person for appointment. In such a system, the best practice is that the recommendation is binding and where, in excep-

[3] Constitution, s 295(3).
[4] S 105(1).
[5] S 211(1).

tional circumstances, the President does not accept the recommendation, he should disclose his reasons, and must under no circumstances appoint a person not recommended.[6]

At any rate, before 2016 on six consecutive occasions with three Presidents under the present Constitution, recommendations by the NJC for appointment of the Chief Justice had been accepted without demur. The sudden pretence to a presidential prerogative or discretion in the appointment comes too late in the day. The whole purpose of the NJC and its mandate is to secure the autonomy of the judiciary.[7] The NJC is essentially a committee of the judiciary. It is headed by the Chief Justice and all but seven members are judges or retired judges. This ensures that the appointment and discipline of judges are completely insulated from interference by the government. If the apparent position of the government is accepted, nothing stops it from extending it to the appointment of other Justices of the Supreme Court, who are also appointed by the President on the recommendation of the NJC. This would effectively create a presidential veto on judicial appointments, a power that the Constitution assigns to the Senate by requiring confirmation of such appointments.

The controversy ended happily on 8 February 2017, when, after four months, the presidency yielded to public pressure by accepting the NJC recommendation and sending the candidate to the Senate for a confirmation hearing. Justice Walter Onnoghen secured legislative confirmation on 1 March and took office 7 March as the sixteenth Chief Justice of Nigeria. This was an important victory for judicial independence. A critical indicator of the institutionalization of the Supreme Court of Nigeria during the past fours decades is the stability of its recruitment regime and its insulation from political interference.

MAJOR CASES

Separation of Powers

Governor, Ekiti State v. Sanmi Olununmo (2017) 3 NWLR (Part 1551) 1

This case decides a constitutional matter of high importance politically in Nigeria—the security of tenure of elected local government councils. Despite that, the case was assigned to a regular five-Justice panel rather than the Full Court. Nigeria has 774 local councils. While the Constitution guarantees their democratic character as elected bodies, it vests in the State's legislative competence to regulate the councils:

> *The system of local government by democratically elected local government councils is under this Constitution guaranteed,* and accordingly, the Government, of every state shall…ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.[8]

On the face of the text, the only apparent limitation of legislative regulation of local councils by the government of a State is the guarantee that they must be democratically elected. Yet, the import of this was never clear. Laws regulating local government everywhere in Nigeria often vest the State governor with the power to dissolve the councils before the expiration of their elected tenure. Such laws often provide a pretext for State capture of the councils and the replacement of elected councils with compliant unelected 'caretaker committees.' The constitutionality of one such law was challenged in this case. The Local Government Administration (Amendment) Law, Cap. L11, Laws of Ekiti State (Southwest Nigeria) stipulated a tenure of three years for elected council members subject to the following proviso in section 23B:

> (1) Provided always that the governor is by this law empowered to dissolve local government councils for overriding public interest subject to the two-thirds majority approval of members of the House of Assembly;
>
> (2) Such dissolution shall not exceed a period of twelve calendar months wherein the governor shall have power to appoint a seven-member Caretaker Committee out of which a chairman shall be appointed pending the conduct of election to occupy the office of the chairman.

Local government councils in the State were elected in December 2008 for a tenure of three years. However, all sixteen local councils were dissolved by the Governor in October 2010 and caretaker committees were appointed to run the councils pending elections. It was argued on behalf of the government that nothing in section 7 of the Constitution should restrict the legislature from enacting a law empowering the Governor to dissolve local government councils in the State. The Supreme Court rejected this claim as 'an unbridled affront' to the Constitution. Instead, stated the Court,

> Having thus guaranteed the system of local government by democratically-elected government councils, the Constitution confers a toga of sacrosanctity on the election of such officials whose electoral mandates derive from the will of the people freely exercised through the democratic process. Put differently, the intendment of the Constitution is to vouchsafe the inviolability of the sacred mandate which the electorate, at that level, democratically donated to them. …Simply put, therefore, the election of such officials into their offices and their tenure are clothed with constitutional force. They cannot, therefore be abridged without breach-

[6] See *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, UN Doc A/HRC/11/41 (2009), para 33; The Commonwealth, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (British Institute of International and Comparative Law, 2015) 51-56.*

[7] Some scholars consider this claim unsubstantiated. See Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 AJCL 201, 228. ('We also found little evidence in favour of the widespread assumption that [judicial] councils increase quality or independence in the aggregate.')

[8] Section 7(1).

> ing the Constitution from which they derive their force. The only permissible exception, where a State governor could truncate the lifespan of a local government council which evolved through the democratic process of elections, is 'for over-riding public interest' in a period of emergency.[9]

This categorical position of the Court on the constitutional security of tenure for local councils will engender democratic consolidation in Nigeria. Undemocratic governance at that level cannot be expected to augur well for representative government at State and national levels. Although not entirely novel, as there were already affirmative lower court precedents on section 7 of the Constitution, this Supreme Court decision will put the matter beyond doubt. The decision places a high threshold for lawful interference with the tenure of councils, as a 'state of emergency' requires a specific proclamation under the Nigerian Constitution for a limited number of purposes.[10] The occasions of lawful interference with council tenure should therefore be relatively rare.

Although there was no dissent in this case, Justice M.D. Muhammad disagreed that the Ekiti State law was unconstitutional, but found that the Governor acted unlawfully by the terms of section 23B of the law. In his view,

> A community reading of [both the Constitution and the legislation] makes one conclusion necessary: that the Ekiti State House of Assembly is empowered to make laws for the function of local government councils in the State provided such laws do not temper [sic] with or abrogate the guaranteed existence of the democratically elected councils in the State.
>
> In the case at hand, I am of the firm and considered view that section 23B of the Ekiti State Local Government Administration (Amendment) Law which empowers the governor to dissolve democratically elected councils "for over-riding public interest subject to the two-thirds majority approval of members of the House of Assembly" only is not by its tenor inconsistent with section 7(1) of the 1999 Constitution that guarantees the existence of the councils. What is unconstitutional is the use to which the Governor invoked his powers as lawfully conferred by the legislation. A lawful resort to the section presupposes the existence of facts from which the "over-riding public interest" behind the dissolution of the council(s) by the governor may readily be inferred. In the instant case, the appellants have failed to demonstrate these facts. Where, for example, the peaceful function of a local government council, for whatever reason, has become impossible, the House of Assembly may by a resolution of two thirds majority approve the Governor's request to dissolve the council(s). It is unthinkable to imagine that such a situation would engulf the entire sixteen councils at the same time. Even if the sixteen local government councils had been so affected, it remains the appellants' burden to so establish. Having failed to discharge this burden, the lower court is right not only in its decision that the trial court had wrongly declined jurisdiction but also in the decision…that, on the merits, the governor's dissolution of the sixteen democratically elected councils was unconstitutional and void. The governor's exercise of his powers under the enabling law is arbitrary and unpardonable.[11]

The extent that the section 7 guarantee of "democratically elected local government councils" does not trump a law granting the governor power to sack the councils may suggest that Justice Muhammad understates the normative significance of the constitutional provision. However, his less categorical approach to reading the provision implicitly acknowledges due deference to the legislature, especially as section 23B of the Ekiti State law contains the democratic safeguard of two-thirds majority legislative approval of the Governor's exercise of the statutory power in the "over-riding public interest."

Rights and Freedoms

Orji Uzor Kalu v. Federal Republic of Nigeria (2016) 9 NWLR (Pt. 1516) 1

This case is an important contribution to the execution of anti-corruption policies in Nigeria. The Supreme Court ended an abuse of legal process politically-exposed persons (PEP) used to frustrate criminal investigation and prosecution initiated against them. Using the pretext of enforcing their constitutional rights against anti-corruption and other law enforcement agencies, PEPs seek, and sometimes secure, injunctions enjoining these agencies not to arrest or prosecute them until the determination of suits to enforce their fundamental rights. While their "gagging suits" drag out in court, the pressure from law enforcement wanes.

The appellant, Mr. Orji Kalu, a former State governor, filed a suit to enforce his constitutional rights and obtained an *ex parte* order from a High Court restraining the Economic and Financial Crimes Commission (EFCC) from arresting him. EFCC was investigating him for corruption and money laundering committed while he was governor. Despite this, EFCC filed charges against him in a Federal High Court. He unsuccessfully sought to quash these charges with the injunction.

The Supreme Court held that it was improper to use legal processes to "muzzle" or prevent a law enforcement agency from discharging its statutory functions, especially the investigation and prosecution of crimes. As the Court pointed out, the constitutional rights of personal liberty and freedom of movement are qualified by the public interest to bring a person before a court in execution of a court order or upon reasonable suspicion of his having committed a criminal offence.

> For a person to rush to court to place a clog or shield against criminal investigation and prosecution is a clear interference with the powers given by law and

[9] (2017) 3 NWLR (Part 1551) 1, 33 (Nweze, JSC).

[10] Section 306.

[11] (2017) 3 NWLR (Part 1551) 1, 45-46.

> the constitution to EFCC in the conduct of criminal investigation and prosecution. It is clearly an abuse of due process of the law.[12]

Mathew Nwokocha v. Attorney-General of Imo State (2016) 8NWLR (Pt. 1513) 141

One of the constitutional guarantees to safeguard fairness in the criminal process is the right of "every person who is charged with a criminal offence [to] have, without payment, the assistance of an interpreter *if he cannot understand the language used at the trial of the offence."*[13] This right is critical in a society with a large illiterate population. The Supreme Court has held that the use of an interpreter was mandatory where a person charged with a criminal offence does not understand the language used in the trial and should be entered in the trial record.

> …[W]here an interpreter is provided at the commencement of the trial and a record of this is made, it is desirable, and indeed a constitutional duty of the trial judge to record this fact also on subsequent days of the trial when use is made of the interpreter. *Where however the judge fails to make a record of the use of the interpreter in subsequent days of the trial, the trial is not per se thereby vitiated.*[14]

In the present case, the Supreme Court clarified the consequence of failure to record the use of an interpreter throughout a trial. The defendant was charged with armed robbery and was convicted and sentenced to death. The trial record showed that an interpreter was used when the charges were read and his plea taken. But there was no record of use of an interpreter subsequently during the trial. One of the grounds of appeal was that failure to use an interpreter throughout the trial was denial of a fair hearing and hence vitiated the trial.

The Supreme Court surprisingly disagreed. According to the Court, 'Once it is shown that there was an interpreter at the commencement of the trial, there is a presumption of regularity that the interpreter was present on subsequent days, even though not so recorded, unless proved otherwise.'[15] It is not clear why the burden should be on the defendant to show that he was denied his constitutional right to be assisted with an interpreter where the record of the trial is silent on the matter, especially where the defendant is charged with a capital offence. The constitutional right becomes meaningless in the circumstances. Perhaps what partly swayed the Court was the failure of the defence counsel to raise the matter during the trial.[16] Even that, however, does not justify why the constitutional right did not seem to carry much weight in the Court's consideration.

CONCLUSION

The Supreme Court of Nigeria is a strong and autonomous institution. The prolonged stability of the Court and absence of any direct political interference has resulted in the accumulation of diffuse support. There is growing public trust in the Court's resolution of important political issues. The election cases, which are not reviewed here due to space constraint, where the Court resolved issues of credibility of elections, the role of political parties and innovative use of electoral technologies, confirm the significant level of trust political actors and the public have in the Court.

Perhaps the next set of Supreme Court Justices may include persons from outside the judiciary for the first time in nearly four decades as part of a plan to diversify recruitment, portending important changes for the Court. But, unfortunately, there is as yet no plan to relieve its present caseload pressure, which puts the Court under significant operational stress.

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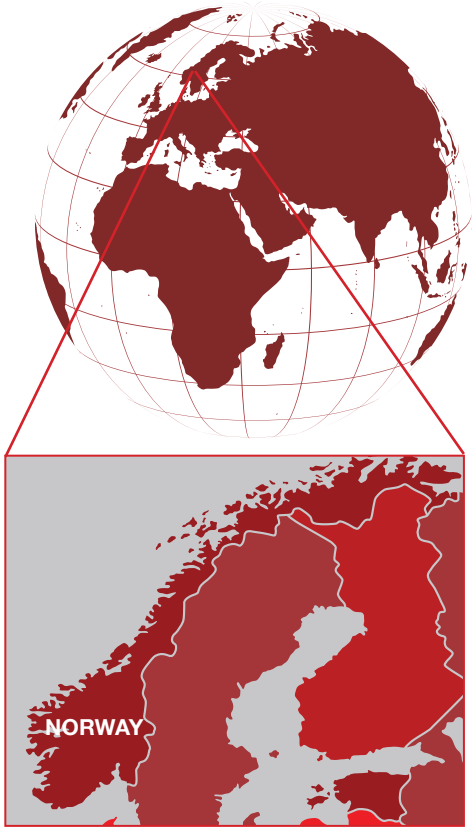
[12] (2016) 9 NWLR (Pt. 1516) 1, 19-20.

[13] Constitution, s 36(6)(e).

[14] *Anyanwu v. The State (2002) 13 NWLR (Pt. 783) 107, 127 [emphasis added].*

[15] (2016) 8 NWLR (Pt. 1513) 141, 188

[16] 'It is borne out on record also that the appellant was represented by counsel at the trial and he did not object to the proceedings on account of absence of an interpreter. The right, having been lost is now too late in the day and cannot be revisited. It is an afterthought.' Ibid., 164.



Norway

DEVELOPMENTS IN NORWEGIAN CONSTITUTIONAL LAW

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INTRODUCTION

Developments in Norwegian constitutional law 2016 were marked by courts' adjustments to a major constitutional reform of 2014. In it, the 1814 Norwegian Constitution was amended with a bill of rights, thus constitutionalizing international human rights that had until then been incorporated by ordinary legislation. Questions of rights dominated constitutional adjudication. The political debate saw some discussion of two separation of power issues: one, the preparations towards the separation between church and state, a constitutional alteration of 2012 effectuated from January 1, 2017;[1] the other questions of parliamentary competence to instruct the government in concrete cases in connection with a government decision to reduce quotas in the licensed hunt of wolves.[2]

Norway is a monarchy functioning as a constitutional democracy. It was established as a state independent from Denmark in 1814, enacted its Constitution, and was then unionized by Sweden until 1905. In the 1800s, the Norwegian Constitution was considered positive law and played a significant role in adjudication, both due to the lack of statutes in the new country and to its symbolic value as a Norwegian base of law. Less used in legal adjudication through the 1900s, it has remained a central political and legal document.

While not a party to the EU,[3] EU legal influence is significant due to the Norwegian membership in the European Economic Area (EEA), which grants access to the internal market on the condition that Norway implements relevant EU legislation.[4] The core international Human Rights conventions, and the European Convention of Human Rights (ECHR) are incorporated into Norwegian law through the Human Rights Act of 1999 (HRA), and influences Norwegian law in a constitution-like way as the provisions of these instruments take precedence before conflicting Norwegian law.[5]

In *politics*, 2016 was Prime Minister Erna Solberg's (Conservative) third of her four-year-term coalition government. The minority right-of-centre government, comprising the Conservatives and the right wing Progress Party (FrP), is reliant on parliamentary support from two centrist parties, the Liberal Left and the Christian Democrats. Areas of

[1] Parliamentary enactment of May 21, 2012.

[2] Following the Constitution § 75 a) and d), Parliament regulates the Government through legislation and budgetary dispositions. Legal foundations for instructing the Government in concrete cases are less clear, but the tendency of Parliament to "invite" the Government to (re)consider concrete cases has been rising since 2000, with a particular surge in 2015-2016, see Meld. St. 17 (2016–2017), https://www.regjeringen.no/no/dokumenter/meld.-st.-17-20162017/id2538216/sec1 (retrieved April 5, 2017).

[3] Two referenda, in 1972 and 1994, voted "no" to the EU by slim majorities (53.5% and 52.2%).

[4] The EEA agreement was incorporated into Norwegian law by Lov av 27. november 1992 nr. 109. By its § 2 EU-legislation has prevalence before Norwegian law in cases of conflict. About 70% of EU directives are also relevant to Norway under the EEA, see NOU 2012:2, 25.3.3 In addition to the influence of the directives and other EU regulations come the decisions of the EU and EFTA courts. See http://www.europautredningen.no/wp-content/uploads/2011/12/NOU201220120002000EN_PDFS.pdf (retrieved March 15, 2017).

[5] The Human Rights Act 1999 (lov av 21. mai 1999 nr 30) § 3.The other conventions are the International Covenant on Civil and Political Rights – and on Economic, Social and Cultural Rights (both 1966), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention on the Elimination of All Forms of Discrimination against Women (1979) and Convention on the Rights of the Child (1989).

political disagreement within this group of parties have been environmental policies and stricter immigration and asylum regulations.

The Norwegian *economy* was influenced by the decrease in oil prices in 2015 and parts of 2016. Norges Bank (the central bank) has left its main policy interest rate on hold at a record-low 0.5% since March 2016. Real estate prices are still rising, particularly in the capital, Oslo, and other larger cities. The unemployment rate continued to rise in 2016, but is still low compared to other European countries, at 4.5%.

Among *social* developments, questions of immigration and asylum following the refugee crisis of 2015 are still high on the public and political agenda, as is the fear of increasing terror in Europe. Areas of particular concern are how to ensure the protection and care for unaccompanied minor asylum-seekers, and how proposed expansions of police and security forces' investigative and preventive measures balance the public need for security against the right to privacy and freedom of expression.

THE CONSTITUTION AND THE COURT

Outside the United States'1789 Constitution, Norway's from 1814 is the oldest still in force. Enfranchising a comparatively substantial part of the population, it also contains central constitutional principles such as the division of powers, and rights, such as the protection of free speech and property, a ban against retroactive legislation and unwarranted searches. While having been changed more than 300 times since, the Constitution has proven particularly durable.[6]
Judicial review was developed early after the constitutional enactment, and practiced throughout the 1800s. It was explicitly ascertained by the Supreme Court in 1866. The Norwegian form of review resembles U.S. review in time of origin and way of development.[7] It is concrete, *ex post* and "strong form",[8] yet has historically been practiced quite deferentially, but with a certain increase following 2000. The customary law of review was written into the Constitution § 89 in 2015.[9]

With a few exceptions, Norwegian courts have general jurisdiction and preside over criminal and civil cases, as well as administrative and constitutional ones. Courts are organized in three levels: 64 district courts, six general courts of appeal and one Supreme Court. In principle, all legal disputes may be brought before the Supreme Court, but subject to approval from the three-member Supreme Court board of appeals. Approval is granted to appeals of significance to cases outside the case in question, or that otherwise a rise questions of particular importance. The Supreme Court is a court of precedence, and its principal goal is to contribute to clarity and development of the law within the Norwegian constitutional and legal framework. In ordinary cases, the Court sits in panels of five, in cases of extraordinary importance or those potentially reversing constitutional precedence, in Grand Chamber of 11 justices or with all 20 justices in plenary.

Norwegian Supreme Court Justices are appointed for life, i.e. until mandatory retirement at 70. Under the Constitution, both judges and Supreme Court Justices are appointed by the government. By statute, such appointments take place following the recommendation of an independent advisory board.[10] In the absence of parliamentary hearings, judicial appointments have drawn little public attention, and have traditionally been un-politicized. Rules for appointing Chief Justices are less clear. In 2016, the first female Chief Justice, Toril Marie Øie, was appointed to the Supreme Court. She had been on the Court since 2004 and had previous experience from the Ministry of Justice Legal Department. While Øie is generally recognized as a sound choice for the position, the process leading up to her appointment drew some criticism for lack of transparency.[11]

The principle of oral contradiction is central to Norwegian adjudication. The Supreme Court annually decides between 110 and 130 cases following oral hearings. The remainder of the 2000+ annual full or limited appeals is decided following written proceedings – around 500 with reasoned premises, the rest following a simplified procedure. In 2016, the Supreme Court received 2,331 appeals. 829 of these were appeals against judgments, the rest were against orders or decisions.[12] In the last 15 years, the number of dissenting judgments has varied between 16-26%. In 2016, the number was 16%, significantly down from the 24% in 2015.

DEVELOPMENTS AND CONTROVERSIES IN 2016

For long historical periods, constitutional adjudication has been a rather peripheral part of Norwegian law and political life. Constitutional law is generally under-theorized, and marked by much the same legal pragmatism seen as a central tenet of Scandinavian law.[13] In the last 10-20 years, however, constitutional debates particularly over questions of *rights* have gradually picked up following three different, but interconnected phenomena:

[6] See Ginsburg, T. and Melton, J., *Norway's Enduring Constitution: Implications for Countries in Transition*, available at http://www.constitutionnet.org/files/norways_enduring_constitution.pdf (retrieved March 15, 2017).

[7] Holmøyvik, E., Årsaker til utviklinga av prøvingsretten i Noreg og Danmark Tidsskrift for rettsvitenskap, 718-779 (2007).

[8] Tushnet, M., *Alternative forms of judicial review*, 101 Michigan Law Review 2781 (2003).

[9] Parliamentary enactment June 1, 2015.

[10] The Court Act (1915) § 55 a.

[11] See Kierulf, A., *Norway: New Chief Justice Appointed to the Supreme Court*, Int'l J. Const. L. Blog, Mar. 1, 2016, at: http://www.iconnectblog.com/2016/02/norway-new-chief-justice (retrieved March 21 2017).

[12] See Supreme Court Annual Report 2016, available at http://www.domstol.no/globalassets/upload/hret/arsmelding/supremecourtofnorway2016.pdf (retrieved March 21 2017).

[13] See i.a. Husa, J., Nuotio, K. & Pihlajamäki, H. (eds.), *Nordic Law - Between Tradition and Dynamism*, (Intersentia 2008), pp. 55-64; Schlesinger, R., Baade,

First, an increasing *judicialization* of politics: politically initiated as answers to ever more complex societal challenges, this shifts areas formerly subject to political deliberation via legal regulations to judicial adjudication. Increasing caseloads have led to reforms aiming to have the Supreme Court concentrate on the more principled cases and precedence-making. Judicialization increases the potential decision-making power of the judicial branch.

Second, an increasing *globalization*, particularly the influence of European law, contributing further to the complexity of societal regulation and posing new challenges to previously nation-focused legal systems. Formally, neither EU law nor international Human Rights law—with ECHR law as the most influential by far—is "constitutional"—both sets of law are incorporated into the dualistic Norwegian legal system through ordinary laws, and can be politically repealed by ordinary laws.[14] In practice, however, both sets of rules *function* constitutionally: first, in that they limit the practical legal scope for political action through confines that are hard to alter in the reigning political climate, and second that by their incorporative acts they are given precedence before Norwegian rules in cases of conflict, placing them in a semi-constitutional position. In addition to the basic EU principles, more than 170 statutes and 1000 administrative regulations have been incorporated in Norway in the period 1992-2011.[15] The EU Court is influential for the understanding of EU law, but the substantial part of EU law enters Norway through *legislative acts* based on directives or other EU legal acts. While human rights law was also incorporated by Parliament through the Human Rights Act (1999), the effectuation of it is primarily done through cases brought before the courts, thus enhancing the focus on how another branch than the political is arbiter of the scope of political action.

A third development is a gradually renewed judicial focus on constitutional *rights-thinking* in the last decade. Up until 2014, this may have been inspired by the international influence on legal thinking and adjudication – the combined rights focus and state-citizen conflict dynamics of EU and ECHR law resembles constitutional adjudication more than ordinary legislative adjudication. With the 2014 Constitutional reform,[16] central human rights until then "only" protected by conventions and incorporated through the HRA were amended to the Constitution as part of the celebration of the Constitution's 200-year anniversary.[17] This led to a substantial rise in the use of constitutional provisions in Supreme Court reasoning in 2016.[18] The average number of cases referring to the Constitution was 0.6% of the total annual case load in the years 1990-1999, and 1.2% in 2000-2009. In 2010-2016, the average was 2.1%, with the years 2015 and 2016 as top years, at 3.6% and 5.2%, respectively. It is important to note that even with this marked increase in use of the Constitution, cases disregarding or substantially reinterpreting legislative acts have remained stable. The average number of such cases in the year 2000-2017 is one to two per year,[19] and the years 2015 and 2016 follow this average.

Two amendments were made to the Constitution in 2016: in March, § 49 of the Constitution was altered in order to constitutionalize the principle of local self-government.[20] Norway has a long history as a decentralized country where local communes have substantial self-government, but this has not been reflected in the Constitution. The alteration concluded a series of debates following Norway's ratification of the Council of Europe Charter on Local Self-Government in 1989,[21] which article 2 provides that "The principle of local self-government shall be recognized in domestic legislation and, where practicable, in the constitution". In May, the Norwegian Central Bank, "Norges Bank" (1816), was written into the Constitution in § 33, which now reads: "Norges Bank is the Norwegian Central Bank".[22]

In the 2015-2016 parliamentary period, 44 proposals to amend the Constitution were put forth. Of these, 21 concerned modification, re-proposals or linguistic questions arising from the 2014 constitutional reform. Two of them concerned issues of substantial debate in the 2014 reform: one proposal to constitutionalize requirements for interfering into the constitutionalized rights and one the details of judicial review doctrine.[23]

H., Herzog, P. & Wise, E., *Comparative Law*, 6th ed., New York (Foundation Press, 1998).

[14] See note 5 and 6.

[15] NOU 2012:2, 7.1.

[16] See Bårdsen, A., *Guardians of Human Rights in Norway: Challenging mandates in a new era.* Speech given in Litteraturhuset, Bergen, May 11 2016, available at http://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/guardians-of-human-rights---11052016.pdf (retrieved April 5, 2017).

[17] Added to the prohibition against prosecutor's inhumane treatment (§ 96), the anti-retroactivity ban (§ 97), freedom of expression (§ 100) and the takings clause (§ 105) were: the right to free and secret elections (§ 49), the right to life (§ 93), protection of liberty (§ 94), the right to a fair trial (§ 95), the presumption of innocence (§ 96, 2), equality before the law (§ 98), freedom of assembly (§ 101), the right to privacy (§ 102), the rights of the child (§ 104), freedom of movement (§ 106) and the principle of legality (§ 113). Some socio-economic rights were subject to substantial debate in Parliament. Amended to the Constitution were the right to education (§ 109), the right to work (§ 110), the right to a healthy environment (§ 112) and the rights of the Sami people (§ 108), whereas the right to participate in cultural activities (§ 107) and to health (§ 111) were not.

[18] Search in database "Lovdata", Supreme Court civil and criminal cases, reasoned decisions from chamber and appeals committee for all years, and "grunnlov*" in the free term search. "Substantial reinterpretation" refers to cases where the influence of a constitutional provision visibly leads the Court to interpret a statute differently.

[19] Peaking in 2010, with four cases.

[20] Parliamentary enactment of March 31, 2016.

[21] ETS No.122.

[22] Parliamentary enactment of May 24, 2016.

[23] Dok 12:8 and 12:19 (2015-2016).

MAJOR CASES

Right of boycott vs. right of establishment HR-2016-2554-P

The only Supreme Court plenary case in 2016 concerned the Norwegian Transport Workers Union aiming to boycott the Danish-owned company Holship Norge AS to prevent Holship from using its own stevedores to load ships in a Norwegian Port. The Union wanted to force Holship into signing a Norwegian collective agreement assuring registered stevedores preferential rights. The Supreme Court concluded on dissent (10-7) that the boycott ran counter to the right of establishment under the EEA Agreement Article 31. The majority held that the primary object of the boycott was to prevent Holship from establishing itself in the loading and unloading business at the Port of Drammen. In balancing the right to boycott under the Norwegian Boycott Act, as seen in light of the un-incorporated rights following from the ILO-Convention nos. 87, 98 and 137 and the revised European Social Charter,[24] and the EEA right to establishment, the latter prevailed. The majority emphasized an interpretation obtained from the European Free Trade Association (EFTA) Court on the matter.

The case merits interest for answering a constitutional question of some controversy and for solidifying the judicial view of another:

First, in the 2014 constitutional reform, the formulation of a new article 92 created uncertainty about whether all human rights treaties ratified by Norway were to be protected in the same way that the human rights constitutionalized in the reform—or whether the rights not constitutionalized remained of the same hierarchical (non-constitutional) status as before. On this question, the Court *en banc* held the latter, with the effect that the un-incorporated ILO Conventions were seen as less weighty in the balancing process against the EEA right of establishment.

Second, it confirmed the judicial answer to the fact that Parliament, when constitutionalizing human rights in 2014, voted against constitutionalization of a proposed article setting out the criteria for interfering into the rights amended—that they be prescribed by law, be proportionate and necessary.[25] The rights amended are formulated briefly, in line with Norwegian constitutional tradition. But that also means they are textually "absolutes", an implication the un-amended provision was meant to resolve. Considering the rights absolute was no viable option for the Supreme Court, which instead in several cases has chosen to interpret them in light of their international counterparts,[26] thus in reality adjudicating according to the un-amended provision. This line of interpretation—the doctrine that the constitutional rights provisions are to be interpreted in light of their international counterparts—was followed by all justices in this plenary decision.

Right of property – ground lease regulations HR-2016-304-S, HR-2016-2195-S

A particular Norwegian *ground lease* arrangement has created a number of controversies in the last 15 years – politically, in Norwegian courts, and also in the ECtHR.[27] In the post-WWII era, limited resources made ground lease arrangements attractive. Property owners could expediently obtain a steady income from their land without making investments or selling it, and non-property owners could lease land at affordable prices. There exist some 350.000 ground lease contracts, the majority of which are for private homes.[28] Prior to 1976, such agreements were governed by contracts, often concluded for a period of 99 years and with clauses giving the lessee a right to extension upon expiry. A new Ground Lease Act granted all lessees the right to claim extension of their lease on the same conditions as previously and without limitation in time. With real estate prices soaring in the 1980s, a number of lessors used the opportunity under the law to demand redemption, which resulted in many lessees being put in a difficult financial position. Because of the dramatic increase in pressure on real estate prices, the legislator thought it necessary to intervene to protect the lessees' interests. The level of possible rent increases was regulated so that they could only reflect general inflation, not the rising cost of land, and by allowing the lessee a right to extension upon expiry under un-altered conditions.[29] The Supreme Court in Plenary upheld this right of extension in a decision from 2007[30] while the ECtHR in *Lindheim v. Norway* found it to interfere unduly with the right of property under Protocol 1, no. 1 in 2012.[31] Parliament altered the Act in 2015.[32]

Two Grand Chamber cases concerning ground lease were decided in 2016. HR-2016-304-S, dealing with a concrete estimation of redemption price, merits interest because of the way its reasoning differs from that of the 2007 Supreme Court decision, where the ECtHR found the reasoning in the 2007 case to fall short of demonstrating that the Supreme Court had properly understood and balanced the conflicting interest in consistence with ECtHR case law criteria, this 2016 case is reasoned in a way both properly discussing the redemption regulation under ECtHR criteria and explaining how Parliament has reasoned before striking the balance as regulated.

[24] Convention concerning Freedom of Association and Protection of the Right to Organise (Entry into force: 04 Jul 1950), Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Entry into force July 18, 1951), Convention concerning the Social Repercussions of New Methods of Cargo Handling in Docks (Entry into force July24, 1975), ETS No.163.

[25] Innst. 187 S (2013–2014), 2.10. An amendment to the same effect was re-proposed in September 2016, Dok. 12:8 (2015–2016).

[26] See HR-2014-2288-A, HR-2015-206-A, R-2015-289-A.

[27] Case of *Lindheim and others v. Norway*, 13221/08.

[28] Proposal No. 41 to the *Odelsting* (2003-2004), p. 11.

[29] The Ground Lease Act (1996) § 33.

[30] HR-2007-1594-P.

[31] Case of *Lindheim and others v. Norway*, 13221/08.

[32] Act 2015-06-19-63.

HR-2016-2195-S was based on a claim that a 2006 case solved by reference to the old Act merited compensation from the state as it was based on grounds incompatible with the ECHR protection of property, as shown by the 2012 *Lindheim* case. The Grand Chamber held (8-3) that § 200 of the Courts Act (1915) made the case un-actionable, as it in reality represented a replay of the 2006 case in which the claim of ECHR incompatibility could have been raised, but was not. The minority held the claim actionable as grounded on the state's liability as legislator.

Retroactive legislation, property rights: Parliamentary pensions HR-2016-00389-A

A retired MP, Carl I. Hagen (FrP) argued that amendments to a statute regulating parliamentary pensions were in violation of the prohibition against retroactive laws in the Constitution § 97. The amendment did retroactively affect Hagen's pension, a protected property right under the Constitution § 105 and ECHR Protocol 1, art. 1. Under § 97 precedent, it only bars retroactive legislation interfering in legitimate expectations and of a certain magnitude. The Supreme Court did not find these thresholds met by the disputed amendment. It emphasized that the amendment did not involve a particularly extensive interference into Hagen's protected property rights, and that he in any case did not have a legitimate expectation that this right in the form of the pension in question would remain unchanged. Social considerations such as economic sustainability, equality and a fair distribution between the generations were emphasized in the Court's overall assessment.

Sami rights HR-2016-2030-A

A group of Sami reindeer herders had used Stjernøya Island in Finnmark as a summer grazing area for a number of years, and claimed this made them the rightful owners of parts of the island with reference i.a. to ILO Convention no. 169.[33] The Supreme Court concluded that the ILO Convention did not provide for such rights, but that principles of property law should be interpreted in light of Sami conditions. The reindeer herders had not been the original owners of the island, and thus had not established ownership by principles of occupation of ownerless land. The state had exercised right of ownership to Stjernøya since the 18th century and the locals had used the island's outfield land resources. The Sami reindeer herders' use had also not been sufficiently intensive and dominating to be able to establish right of ownership on the basis of immemorial usage.

Right of privacy, principle of legality HR-2016-1833-A

The police confiscated a cellphone believed to have been used to film an assault. The defendant refused to cooperate with the police by unlocking the phone with his fingerprint. While the Criminal Procedure Act § 157 gives the police grounds for "bodily searches", including taking blood samples, the Supreme Court did not find the forced use of someone's finger to be covered by that provision. A textual interpretation suggested the provision was meant to enable finding of evidence on or within the body of a suspect, not the use of a body part to access evidence *outside* of the body. The Constitution § 113 principle of legality was thus not satisfied, and there was no other legal basis to interfere into the private sphere of the suspect as protected by the Constitution § 102.

CONCLUSION

A central reflection upon 2016 is that of a political and legal community, courts in the forefront, endeavoring to cope with the implications of the 2014 constitutional reform. While aiming "only" to constitutionalize rights already well established in Norwegian law, its revitalization of constitutional thinking in a country traditionally satisfied with a rather pragmatic approach to the Constitution presents a number of legal methodological challenges—and opportunities. These are likely to continue, both in court practice and possibly also in debates over some of the proposed constitutional amendments in the coming 2017 parliamentary election.

[33] Convention concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force: 5 Sep 1991).

Pakistan

DEVELOPMENTS IN PAKISTANI CONSTITUTIONAL LAW

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INTRODUCTION

Since the retirement of the former Chief Justice Iftikhar Chaudhry at the end of 2013, Pakistan's apex court has progressively looked to extricate itself from the political limelight.

The era of the 'Chaudhry Court' was marked by extraordinary exertions of judicial power such that the judiciary had emerged as one of the most prominent players in the country's governance system.[1] However, this was also a period during which the charges of judicial activism and overreach beyond constitutional bounds had to some extent tarnished the court's standing, and the Chaudhry Court was increasingly seen as an overtly political institution. As a result, with the end of the Chaudhry era, the judiciary was under pressure to show restraint on a range of political questions and confine itself to a more traditional role. Given the relatively short tenures of the Chief Justices who followed in Chaudhry's footsteps, the court also appeared to lack strong leadership and clear direction.

Within a span of less than two years, three chief justices assumed office and completed their tenures as per the mandatory appointment and retirement terms under the Constitution. Quite poetically, the 23rd Chief Justice of the Supreme Court served a mere 23 days in that office. Anwar Zaheer Jamali, the 24th Chief Justice, assumed office in September 2015 for a tenure that was scheduled to end on 30 December 2016. Chief Justice Jamali appeared determined to put the public law jurisdiction of the Supreme Court in a hiatus and reduce this constitutional court to a purely appellate forum. This is an endeavour he nearly succeeded in despite the political storms blowing over on the capital's Constitution Avenue, on which the Supreme Court of Pakistan sits between the Parliament and the Prime Minister's Secretariat.

2016 was thus the year of the Supreme Court's ultimately futile attempt to dust off a political question doctrine and voluntarily hand back the powers it had accumulated over the last decade. That it failed despite such conscious effort reveals the extent to which the court has become a central player in Pakistan's constitutional scheme, which appears to be the lasting legacy of the Chaudhry Court.

THE CONSTITUTION AND THE COURT

Prior to analysing the reluctant constitutionalism of the Supreme Court in 2016, it may be useful to briefly outline Pakistan's constitutional scheme and the place of the judiciary in it. Pakistan's 1973 Constitution, which has undergone several major changes, provides for a federal and parliamentary system of government in its present form.

The federation is composed of four provinces and four territories. The Punjab is the largest province in the country, with more than half the population of the country residing therein. The dominance of the Punjab in the political system and overwhelming representation in the military and bureaucracy has historically been the source of tension amongst the federating units. The 18th Amendment to the Constitution, passed in 2010, transferred

[1] Moen Cheema, 'The "Chaudhry Court": Deconstructing the "Judicialization of Politics" in Pakistan' [2016] 25 Washington International Law Journal 447.

considerable powers and legislative competencies to the provinces, thereby alleviating some of the historical grievances on the part of the smaller provinces.

However, the general elections held in 2013 resulted in a political landscape whereby the Pakistan Muslim League (PML) of the incumbent Prime Minister Nawaz Sharif won the overwhelming majority of the seats for both the provincial and the national legislatures in the Punjab, thereby enabling the party to form the federal government. The major opposition parties – the PTI, led by famous cricketer-turned-politician Imran Khan, and the PPP, headed by former president Asif Ali Zardari—succeeded in forming the provincial governments in two of the other provinces. While this initially created optimism for the emergence of a positive strand of competitive federalism whereby the different provincial governments may be incentivised to outperform each other in governance, the political system has somewhat reverted to the old scheme of inter-provincial resentment at the dominance of the Punjab in policymaking and allocation of resources by the federal government as well as fierce political competition between the various political parties.

Another key issue that has historically been salient in Pakistan's constitutional politics is the dominance of the military. While Pakistan was meant to be a parliamentary democracy under the 1973 Constitution, the country has experienced two extended periods of military rule, from 1977-1988 and again from 1999-2007. Despite the ouster of the military from a direct role in governance, Pakistan remains a weak and transitional democracy with the military retaining the capacity to by and large dictate important aspects of foreign and national security policy. There are lingering concerns that political instability caused by street protests by the opposition parties risks weakening the government, thereby further empowering the military.

Since 2002 Pakistan has been plagued by a multi-faceted and complex problem of terrorism, militancy and insurgency which has caused enormous loss of life and economic impact. During its fight against militancy, terrorism and insurgency, the military has acquired considerable influence over domestic security policies as well.

In the aftermath of a particularly gruesome attack on a school in December 2014, the military was able to generate sufficient public pressure to compel all the major parties to agree on the 21st Amendment, which sanctioned the establishment of military courts to try terrorists for an initial period of two years. The constitutionality of the amendment was challenged before the Supreme Court in 2015 on the basis that it violated the 'basic structure' of the Constitution. While the court upheld the validity of the amendment by a considerable majority, it was notable that six judges wrote dissenting opinions questioning the constitutionality of the constitutional amendment.

Pakistan's judiciary is composed of three tiers—a hierarchy of subordinate judiciary in the districts and several special courts and tribunals; a High Court in each of the provinces as well as the capital territory of Islamabad; and the Supreme Court at the apex. In addition to having an appellate jurisdiction in civil and criminal cases decided by the subordinate judiciary, the High Courts have a prominent judicial review or 'Writ' jurisdiction under Article 199 of the Constitution. Although Article 199 does not use the nomenclature of the prerogative writs it does grant the High Courts powers to issue orders in the nature of *certiorari*, *mandamus*, *habeas corpus* and *quo warranto*. Furthermore, it gives the High Courts the power to 'make an order giving such directions to any person or authority… as may be appropriate for the enforcement of any of the Fundamental Rights.'

The Supreme Court sits as the appeal court from the decisions of the High Courts under Article 185, including in cases under their Writ jurisdiction. In addition, the court has an 'Original Jurisdiction' under Article 184(3) to directly hear questions of 'public importance with reference to the enforcement of any of the Fundamental Rights' and has the power to issue any order of the nature that the High Courts can issue under Article 199.

Since the 1990s, the Supreme Court has liberalised standing requirement and procedural formalities in cases falling under its Original Jurisdiction in order to create the scope for Public Interest Litigation. The court also granted itself the power to take up cases *suo motu*—that is, even in the absence of a petitioner. The Chaudhry Court made a dramatically expanded use of the Original Jurisdiction by entertaining or initiating *suo motu* petitions challenging a range of governmental action including several prominent cases of mega corruption scandals against the federal government; highest appointments in the bureaucracy, public corporations and regulatory bodies; as well as human rights cases involving abuse of powers by the police, bureaucracy and local politicians. In one prominent and highly controversial case in 2012, the Chaudhry Court convicted the incumbent Prime Minister of contempt for refusing to follow the court's direction to re-initiate money laundering and corruption investigations against President Zardari.[2] The court subsequently held that the elected Prime Minister was disqualified from being a Member of Parliament and dismissed him from office.[3]

As noted earlier, the post-Chaudhry Supreme Court attempted to reduce its political footprint but struggled to completely extricate itself from adjudicating controversies of pure politics. By late 2014, for example, after making several public demands on the Supreme Court to take up allegations of large-scale rigging in the 2013 elections, the opposition PTI launched a 'Long March' on the capital Islamabad and successfully organized a protest sit-in on Constitution Avenue opposite the Parliament and the Supreme Court. As Pakistan veered dangerously close to political instability, speculations of yet another military coup were rife.

[2] *Criminal Original Petition No. 06 of 2012, In Suo Motu Case No. 04 of 2010*, P.L.D. 2012 S.C. 553.

[3] *Muhammad Azhar Siddique v. Federation of Pakistan,* P.L.D. 2012 S.C. 660.

Nonetheless, the Supreme Court, which appeared to be the only constitutional institution capable of resolving this crisis, remained steadfastly on the sidelines. Ultimately, however, the judiciary was dragged in the middle of the controversy when the government and opposition agreed on the formation of a commission of Supreme Court judges to investigate the claims of large-scale rigging.[4] In July 2015, after extensive hearings, the judicial commission found that while there had been several irregularities and errors, the elections were by and large fair. The opposition accepted the commission's findings even if grudgingly and the judiciary thus succeeded in ending a protracted controversy which had nearly led to the ouster of yet another elected government through extra-constitutional means. Such was the immediate context to Chief Justice Jamali's ascension and partially explains his resolve to take the Supreme Court further away from the political spotlight.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The relative calm enjoyed by the Supreme Court during the first six months of Chief Justice Jamali's tenure was shattered in April 2016 by the storm of 'Panamagate' when the International Consortium of Investigative Journalists made millions of confidential documents held by a Panamanian law firm publicly available. These leaks revealed the connections of the ruling Sharif family—the Prime Minister, his brother the Chief Minister of Punjab and his two apolitical sons residing in the UK, and his daughter, who has been groomed as the heir apparent—with at least eight offshore companies which owned some of the most expensive properties in London. The Panama leaks thus gave credence to long-standing allegations of corruption and money laundering dating as far back as the early 1990s when Nawaz Sharif enjoyed the first of his three tenures as Prime Minister.

Under pressure from the opposition, the Prime Minister made an address to the nation and then before the Parliament proffering vague explanations of his family's fortunes and offering himself up for accountability. The Prime Minister first sought to create an inquiry commission composed of retired judges but after criticism sent a request to Chief Justice Jamali to constitute a judicial commission of Supreme Court judges to probe the Panama controversy. The Chief Justice, however, declined to form a commission on the grounds that the terms of reference sent by the Prime Minister were so broad that it would take the omission several years to conclude its proceedings.

After extended wrangling between the government and opposition parties over the terms of reference of a judicial commission, the PTI filed a petition before the Supreme Court in August 2016 seeking the disqualification of the Prime Minister on the grounds that he had lied before Parliament in his address and had failed to disclose his assets before the Election Commission prior to contesting the last elections. Simultaneously, the PTI launched a campaign of protest gatherings across the country. As the political temperature soared, the Supreme Court refused to act.

In October, six months after the Panama leaks, Imran Khan called upon the rank and file of the PTI to march to Islamabad and forcibly lock down the capital. The day before the scheduled lockdown, amidst a police operation and the looming threat of violent protests, the Supreme Court finally acted to defuse the tensions by announcing the formation of a larger bench headed by the Chief Justice to hear the Panama case and expedite the proceedings. Throughout November, the court gathered extensive documentation form both parties and began hearings. However, the proceedings were prematurely and somewhat abruptly ended on December 9 citing the Chief Justice's impending retirement and the scheduled holidays. Quite problematically, the court also declared that the proceedings conducted thus far would be disregarded and a new bench constituted by the incoming Chief Justice would proceed afresh.

The judicial year 2016 and the tenure of Chief Justice Jamali thus ended with a whimper, accurately symbolizing the equivocations of the apex court in the face of challenging constitutional crises.

MAJOR CASES

The few cases of constitutional significance decided by the Supreme Court in 2016 reveal the absence of a coherent judicial agenda. Several of these cases represent significant retrenchment of the Supreme Court's role or its refusal to exercise robust review of governmental action.

Separation of Powers

As noted earlier, one of the most critical issues falling under the head of the separation of powers concerns the role of the military. Formally, the military is a subordinate agency of the executive but has historically enjoyed tremendous influence over foreign and national security policymaking even under civilian governments. In 2016, the Supreme Court continued to turn a blind eye towards the military's *de facto* power. For instance, a bench headed by Chief Justice Jamali upheld the convictions and award of capital punishment to proclaimed terrorists by military courts established pursuant to the 21st Amendment.[5] The court claimed a rather narrow jurisdiction to review the record of the decisions of the military courts and disavowed appeals on the merits of individual cases. The court further held that the trials by military courts did not contravene the right to fair trial under Article 10-A of the Constitution. This is highly problematic given the weak procedural safeguards, lack of transparency and the heavy reliance on confessions and secret evidence by the military courts.

[4] Moeen Cheema, "Election Disputes" or Disputed Elections?: Judicial (Non-)Review of Elections in Pakistan' in P J Yap (ed), *Judicial Review of Elections in Asia* (Routledge 2016).

[5] Hasnat Malik, 'SC upholds death penalty for 16 terrorists' (The Express Tribune, 30 August 2016) https://tribune.com.pk/story/1172316/sc-upholds-death-penalty-16-terrorists/.

As regards the civilian government in contrast, a rare decision of the court in 2016 can be highlighted as deepening the democratic process in Pakistan. In *Mustafa Impex*, the court was called upon to define federal government and who can exercise the powers vested in the federal government.6 Article 90 states that 'the executive authority of the Federation shall be exercised … by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister.' Essentially, the question before the court was whether the Prime Minister could, independently of the Cabinet and while exercising a discretionary authority, make fiscal decisions on behalf of the federal government. The court held that the federal government includes the Prime Minister and his Cabinet, and even though the Prime Minister is first amongst equals he cannot solely act on behalf of the federal government without the approval of the Cabinet. The court further held that the powers of the federal government could not be delegated to a subordinate official and financial notifications issued by the Secretary of the Finance Division without the approval of the Cabinet were void. This judgment ended the established practice of department secretaries exercising powers of the federal government without prior Cabinet approval. It also compelled the Prime Minister to convene regular meetings of the Cabinet. While the reality of the ruling party, which is dominated by the Sharif family is such that cabinet meetings will continue to be largely rubber-stamping exercises, this decision nonetheless compels formal consultation with the Cabinet on the exercise of executive and fiscal powers of the federal government.

Rights and Freedoms

In a criminal appeal decided in late 2015 and reported in early 2016, the Supreme Court made the first categorical pronouncement on vigilante action against those accused of blasphemy. The misuse of blasphemy laws has become an issue of grave concern as there have been several gruesome cases involving unfounded accusations of blasphemy or religious desecration which resulted in mob violence and killings of those accused. While many such incidents have involved accusations against people belonging to religious minorities – especially Christians and Ahmadis – several cases have involved blasphemy allegations against Muslims as well. In one such case a police guard killed the late governor of Punjab Salman Taseer after he criticised the abuse of blasphemy laws in a case involving a Christian woman and called for changes in the legislation. In the final appeal in the *Mumtaz Qadri case*, a bench of the Supreme Court upheld the conviction and the award of capital punishment.7 Notably, the court held that criticizing blasphemy law was not tantamount to committing blasphemy itself. Furthermore, it dismissed the plea of provocation, held that the vigilante killing of a person accused of blasphemy was unjustifiable murder and even reinstated the original charge under the anti-terrorism legislation given the circumstances in which the murder had been committed by a police guard in a public place. The court subsequently dismissed a review petition which had attempted to raise questions of Islamic law on the basis that these had not been argued in the original appeal.8 In addition to its significant precedential value in cases of vigilante violence in the aftermath of blasphemy accusations, the case also demonstrated the courts capacity to deal with highly contentious terrorism incidents.

Foreign Relations

In August 2015, a three-member bench of the Supreme Court headed by the then Chief Justice Jawad S Khawaja declared the issuance of licenses to hunt the endangered Houbara Bustard to be illegal on the grounds that the practice not only violated federal and provincial laws but also relevant commitments under international law. Despite the protected nature of this rare bird species, the provincial governments of Balochistan and Sindh had issued such licenses to visiting Arab dignitaries and the federal government argued for the continuance of this practice before the Supreme Court on the basis that this was vital for maintaining friendly relations with important allies in the Middle East.

Merely a few months after this decision, the concerned provincial governments and the federation filed a review petition in the case. By this stage, Justice Jawad S Khawaja had retired and had been replaced by Justice Jamali. Exercising his discretion in the constitution of the bench, Chief Justice Jamali departed from established convention and rules and constituted a larger bench of five judges to hear the review petition. Even more exceptional was the decision not to include one of the other judges from the original bench in the review petition.

By a majority of 4-1, the larger bench reversed the original decision of the Supreme Court and reinstated the licenses.9 Justice Qazi Faez Isa, who had authored the first decision, now wrote a scathing dissent criticizing the decision to constitute a larger bench, the exclusion of the other serving judge and the reversal on the basis of a palpable error on the face of the record.

This case provided clear evidence of ideological affinity between and the willingness on the part of the Jamali-led court to placate the government. It also provided indication of problematic personal and possibly business links between the Sharif family and Arab royals, an issue that became explicit as the Panama case dragged on. When it appeared that the Sharif family would fail to provide any proof of how it generated and transferred funds to invest in multiple steel mills in gulf states, from the sale of which it had ultimately acquired the London properties, a prominent member of the Qatari royal family produced a letter of dubious veracity claiming that the funds had been provided by him as profits of investments by the Prime Minister's late father decades earlier. The Sharif family's unduly close links with Saudi and Gulf royalty have emerged as a source of

[6] *Messers Mustafa Impex, Karachi v. Government of Pakistan,* P.L.D. 2016 S.C. 808.

[7] *Malik Muhammad Mumtaz Qadri v. State*, P.L.D. 2016 S.C. 17.

[8] *Malik Muhammad Mumtaz Qadri v. State*, P.L.D. 2016 S.C. 146.

[9] *Government of Punjab v. Aamir Zahoor-Ul-Haq*, P.L.D. 2016 S.C. 421.

concerns in an agreement by Pakistan to purchase LNG from Qatar at seemingly inflated prices as well as the government's willingness to support the foreign policy objectives of the Saudi government in the Middle East even when this does not appear to be in Pakistan's best interests.

Other Decisions Impacting Judicial Power

Upon assuming office, Chief Justice Jamali declared 2016 to be the year of judicial accountability. However, the Chief Justice failed to make any stride towards reinvigorating the Supreme Judicial Council, the constitutional body mandated to hold judges accountable. Nonetheless, one decision of the court went some way towards instituting good administrative practices in the judiciary. In the *Islamabad High Court case*, the Supreme Court entertained a petition under its Original Jurisdiction questioning the legality of administrative appointments, promotions and transfers at the time of the founding of the High Court of the capital territory.[10] The Supreme Court found several instances of irregularities and breaches of rules in the appointment and transfer of the administrative staff in the High Court. As a consequence, one judge of the Supreme Court who had been the chief justice of the High Court during the impugned period resigned from his office. The case set an important precedent for transparent and meritocratic processes in the appointments, promotions and transfers of administrative staff not only in the courts but also other public organizations. In addition, a handful of *suo motu* cases taken up by Chief Justice Jamali nominally continued the practice of the court taking up human rights issues based on media reports. There is no clear pattern or logic to these rare *suo motu* actions beyond a minimal assertion of the court's power to undertake such actions.

Postscript on the Panama Case

In January 2017, a reconstituted five-member bench of the Supreme Court took up the issue of the Panama leaks, corruption charges against the Prime Minister and his family, and his potential disqualification—matters that had been belatedly and grudgingly taken up by the Jamali-led bench in late 2016 and had been left unresolved after the consumption of considerable court time. After regular hearings, the bench reserved its judgment on February 23. On April 20, after a delay of nearly two months, the bench published its much-awaited judgment according to which Prime Minister Nawaz Sharif narrowly avoided immediate disqualification.[11] Instead, by a narrow majority of 3-2, the court ordered the creation of a Joint Investigation Team composed of members from various civilian and military agencies to investigate the charges of corruption and money laundering against the Prime Minister and his family. While only the two judges in the minority found sufficient basis to disqualify the Prime Minister without further investigation, all the members of the bench recorded adverse observations against him. It appears that the majority of the Supreme Court bench essentially decided to kick this political football further down the field, thereby ensuring that the Panama leaks controversy will continue to dominate Pakistan's politics for at least a few months.

The majority decision in the Panama case saga represents to some extent a hangover of the reluctant constitutionalism of Chief Justice Jamali's tenure. Billed by some as the anti-Chaudhry court, the Jamali-led Supreme Court tried to make a virtue of indecision and lack of purpose by claiming a righteous form of judicial restraint. Its ultimately futile attempt to stand fully apart from political controversies that only an impartial and credible judiciary may resolve highlights the lasting legacy of the Chaudhry era. Pakistan's superior judiciary has irreversibly evolved from a peripheral institution to a central player in constitutional politics and statecraft. The strength of the dissents in the Panama case may indicate that in the coming years the Supreme Court may finally learn to embrace its prominent role and adjudicate challenging constitutional controversies with credibility.

[10] *Muhammad Akram v. Registrar, Islamabad High Court*, P.L.D. 2016 S.C. 961.

[11] Haseeb Bhatti and Naveed Siddiqui, 'Panamagate verdict: PML-N declares "victory", Supreme Court orders JIT probe of Sharif family' (The Dawn, 20 April 2017) https://www.dawn.com/news/1327961/panamagate-verdict-pml-n-declares-victory-supreme-court-orders-jit-probe-of-sharif-family.

Philippines

DEVELOPMENTS IN PHILIPPINE CONSTITUTIONAL LAW

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INTRODUCTION: CALM BEFORE THE STORM

It was, for a very long time, revered as an institution untainted with corruption. But the Court squandered its reputation when, in 1973, it ruled in favor of extra-constitutional revision of the Constitution and allowed a dictatorship to take root and flourish. Ferdinand Marcos railroaded the adoption of a new constitution by creating citizens' assemblies which, by a show of hands, allegedly approved his constitution. This was accomplished in an atmosphere of restricted civil liberties brought on by Marcos's imposition of martial law.

The Supreme Court avoided confrontation with Marcos by invoking the "political question" doctrine—claiming that the issues raised before it were better decided by other branches of government. The post-Marcos 1987 Constitution empowered the Court to determine whether there has been an abuse of discretion on the part of other branches of government, thereby weakening the political question doctrine.

Because it had opted to support Marcos, the Philippine Supreme Court will always be under public scrutiny.

THE CONSTITUTION AND THE COURT

The Constitution of the Republic of the Philippines is thirty years old. It was drafted in 1986 after Ferdinand Marcos was forced out of office by days-long massive protests, and ratified overwhelmingly the following year. The Constitution was a response to the abuses of the Marcos regime, containing several innovations that are designed to strengthen the separation of powers, as well as checks and balances.

Some of the clearest attempts to prevent a reprise of dictatorial experience were the innovations to strengthen the judiciary. This was imperative because of the Supreme Court's role in sanctioning and sustaining the dictatorship.

Constitutionally barred from seeking a third term, Marcos called for a constitutional convention to rewrite the Constitution and adopt a parliamentary form of government, which would then allow him to rule as Prime Minister. Marcos then attempted to railroad the adoption of the Constitution, ignored procedures for the amendment or revision of the Constitution, and created "citizens' assemblies" (which included children) to signify their consent by raising their hands. In *Javellana v. Executive Secretary*, a majority of the Supreme Court members ruled that the Constitution was not validly ratified, although the Court also ruled that the new Constitution was already in force through the acquiescence of the people. It was a political question, not a legal one, and not something that could be decided by the Court. The Court would later use the "political question doctrine" to sanction almost every act by Ferdinand Marcos, allowing him to pervert the rule of law.

The 1987 Constitution expanded judicial power to include the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and *to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentali-*

ty of the government. This was designed to prevent courts from resorting to the political question doctrine and to rule on the merits of the case.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The Supreme Court is stronger under the 1987 Constitution, reviewing acts of the Executive and Legislative branches and striking them down on the ground that there was an abuse of discretion on their part. The Court is quick to point out, however, that the Constitution did not completely extinguish the political question doctrine. In 2016, the Court faced its first major case questioning an act of President Rodrigo Duterte—the burial of former President Marcos in the Libingan ng mga Bayani (Heroes' Cemetery). In that case, the petitioners argued that the burial of Marcos at the LNMB should not be allowed because it rewrites the history of revolting against an authoritarian ruler and it condones the abuses committed during the Martial Law regime, which would violate the letter and spirit of the Constitution, which they described as a "post-dictatorship charter" and a "human rights constitution".

The Court held that the decision to have the remains of the former president interred at the Libingan ng mga Bayani was not a justiciable controversy because it involved a political question. According to the Court, the President decided a question of policy based on his wisdom that it would promote national healing and forgiveness. The Court held that his acts were consistent with the Constitution, pertinent statutes, international human rights laws, and jurisprudence.

Duterte will likely cross paths with the Supreme Court again. Unlike Marcos, who wanted the judiciary to provide the legal scaffolding for his work, Duterte despises checks and balances. When the Chief Justice wrote him about the constitutional procedures that should be followed in cases involving judges allegedly involved in illegal drugs, he told the Chief Justice: "I'm giving you a warning. Don't create a crisis because I will order everybody in the Executive department not to honor you." He accused the Chief Justice of interfering with his job and threatened to declare martial law.

The Philippines presently finds itself under this atmosphere of increased tension between the President and the Courts.

MAJOR CASES

Separation of Powers

Another constitutional change introduced in the 1987 Constitution was the creation of the Judicial and Bar Council (JBC), which vets aspirants to the judiciary and submits a list of names from which the President can nominate aspirants to judgeships. It reduces the President's discretion and theoretically prevents the President from packing the Court with friends.

In a case involving multiple vacancies in the Sandiganbayan (a special court created to deal with graft cases), the JBC clustered nominees in six separate lists. Then President Benigno Aquino III disregarded the clusters when he appointed the Justices to fill the vacancies. His acts were challenged before the Supreme Court. The Court sided with the President and held that the JBC, in sorting the qualified nominees into six clusters, one for every vacancy, could influence the appointment process beyond its constitutional mandate of recommending qualified nominees to the President. Clustering impinges upon the President's power of appointment as well as restricts the chances for appointment of the qualified nominees because (1) the President's option for every vacancy is limited to the five to seven nominees in the cluster; and (2) once the President has appointed from one cluster, then he is proscribed from considering the other nominees in the same cluster for the other vacancies. The said limitations are utterly without legal basis and in contravention of the President's appointing power.

Rights and Freedoms

The Committee on Trade and Related Matters (CTRM) of the National Economic and Development Authority held a meeting where it resolved to recommend to then President Gloria Macapagal-Arroyo the lifting of the suspension of the tariff reduction schedule on petrochemicals and certain plastic products, thereby reducing the Common Effective Preferential Tariff rates on certain products. A stakeholder in the petrochemical industry filed a case to compel the CTRM to provide the minutes of the meeting that led to the CTRM's recommendation. The trial court dismissed the case and the issue that was elevated to the Supreme Court was whether the CTRM may be compelled to furnish the petitioner with a copy of the minutes of the meeting based on the constitutional right to information on matters of public concern and the State's policy of full public disclosure. The Court affirmed the dismissal of the case.

According to the Court, two requisites must concur before the right to information may be compelled by writ of *mandamus*. First, the information sought must be in relation to matters of public concern or public interest. Second, it must not be exempt by law from the operation of the constitutional guarantee. There is a need to strike a balance between the right of the people and the interest of the Government to be protected. In this case, the need to ensure the protection of the privilege of non-disclosure is necessary to allow the free exchange of ideas among Government officials as well as to guarantee the well-considered recommendation free from interference of the inquisitive public.

Another case involved a Davao City ordinance which imposed a ban against aerial spraying as an agricultural practice. The Filipino Banana Growers and Exporters Association challenged the constitutionality of the ordinance, alleging that it was an unreasonable exercise of police power and a violation of the equal protection clause, and amounted to the confiscation of property without due process of law. The Court ruled in favor of the respondents on all counts, holding the ordinance unconstitutional.

The City justified the prohibition against aerial spraying by insisting that the occurrence of drift causes inconvenience and harm to the residents and degrades the environment. The Court noted, however, that drift occurs

regardless of how pesticides are released. Another flaw in the Ordinance was that it required the maintenance of the 30-meter buffer zone regardless of the area of the agricultural landholding, geographical location, topography, crops grown, and other distinguishing characteristics that ideally should bear a reasonable relation to the evil sought to be avoided.

An election-related case involved Rappler, Inc., which filed a petition for certiorari and prohibition against respondent Andres Bautista, in his capacity as Chairman of the Commission on Elections, to nullify a part of the Memorandum Agreement on the 2016 presidential and vice-presidential debates. Rappler claimed that they were being executed without or in excess of jurisdiction and that they were violating its fundamental constitutional rights. The parts sought to be nullified allowed the debates to be shown or streamed on other websites, and allowed a maximum of two minutes of excerpt from the debates to be used for news reporting or fair use by other media or other entities. Rappler contended that it was being discriminated against because the MOA granted radio stations the right to simultaneously broadcast live the audio of the debates, even if they were not obliged to perform any obligation under the MOA. Despite this, Rappler and other online media entities were denied the right to broadcast by live streaming the audio online. The Court partially granted the petition, allowing the debates to be livestreamed unaltered on other websites, including Rappler's, subject to the copyright condition that the source be clearly indicated.

In ruling for Rappler, the Supreme Court held that the presidential and vice-presidential debates are held to assist the electorate in making informed choices on election day. The political nature of the national debates and the public's interest in the wide availability of the information for the voters' education certainly justify allowing the debates to be shown or streamed on other websites for wider dissemination, in accordance with the MOA.

The debates should be allowed to be livestreamed on other websites, including the petitioner's, as expressly mandated in the MOA. The respondent, as representative of the Commission on Elections (COMELEC), which provides over-all supervision under the MOA, including the power to "resolve issues that may arise among the parties involved in the organization of the debates," should be directed by this Court to implement Part VI (C), paragraph 19 of the MOA, which allows the debates to be shown or livestreamed unaltered on petitioner's and other websites subject to the copyright condition that the source is clearly indicated.

Foreign, International and/or Multilateral Relations

The Enhanced Defense Cooperation Agreement (EDCA) authorizes US military forces to have access to and conduct activities within certain "Agreed Locations" in the country. It was not transmitted to the Senate, on the executive's understanding that it was not necessary. The Department of Foreign Affairs (DFA) and the US Embassy exchanged diplomatic notes confirming the completion of all necessary internal requirements for the agreement, after which it was ratified by President Benigno S. Aquino III. The petitioners challenged the procedure by which EDCA became law.

The Court upheld the constitutionality of EDCA because the President has the choice of entering into executive agreements instead of treaties, provided the law is confined to the adjustment of details regarding existing arrangements with foreign military forces. EDCA fulfills this requirement, as it is consistent with the content, purpose and framework of the existing Mutual Defense Treaty and the Visiting Forces Agreement. The only exception is when the agreement involves allowing foreign military bases and troops, which should be done through a treaty duly concurred in by the Senate.

The Court also had occasion to rule that a British national wrongly accused of rape could not ask the courts to enforce a United Nations Human Rights Committee View that under International Covenant on Civil and Political Rights, the Philippines should compensate him for his detention. The Court held that there must be an act more than ratification to make a treaty applicable in the Philippines. The Court explained that while the Philippines is a signatory to the ICCPR and the Optional Protocol, nowhere in these instruments does it say that the View of the Committee forms part of the treaty.

Other Cases

Among the most significant cases decided by the Supreme Court involved the citizenship of Grace Poe, a Senator and presidential candidate in the May 2016 elections.

On March 8, 2016, the Philippine Supreme Court promulgated a landmark decision holding that Senator Grace Poe, a foundling, is a natural born citizen and eligible to run for President in the May 2016 national elections.

Poe had been naturalized as a citizen of the United States in 2001 after being petitioned by her husband, who has dual citizenship. After her father's death, however, she gave up US citizenship and entered public life, serving briefly as the chair of the Movie and Television Regulatory and Classification Board. Thereafter, she for Senator in 2010, garnering the highest number of votes.

Immensely popular, political parties were eyeing Poe as a potential candidate either as President or as a Senator. Her status as a foundling, however, posed serious problems, because according to the Philippine Constitution, a Senator and the President must be natural born citizens.

When Poe filed her certificate of candidacy for President on October 15, 2015, a petition was filed to have it cancelled on the ground that she satisfied neither the citizenship nor residency requirements of the Constitution. The COMELEC ruled against Poe. Three other petitions filed to disqualify Poe from the elections on the same grounds were decided against her.

Poe brought the COMELEC rulings to the Supreme Court, and in a 9 to 6 ruling, the Court reversed decisions of the COMELEC and held that Poe satisfied both the citizenship and the ten-year residency requirements and was qualified to be a candidate for President in the May 2016 elections.

The challenge to Poe's citizenship rested on the fact that foundlings are not expressly mentioned as citizens in any of the country's Constitutions. On this point, the majority of the Supreme Court held that "As a matter of law, foundlings are, as a class, natural-born citizens. While the 1935 Constitution's enumeration is silent as to foundlings, there is no restrictive language which would definitely exclude foundlings either." The Court examined the intent of the framers of the Constitution and found that there was an attempt to include foundlings in the enumeration of natural born citizens in the Constitution. This was not carried out "not because there was any objection to the notion that persons of 'unknown parentage' are not citizens but only because their number was not enough to merit specific mention."

The Court could not discern any "intent or language permitting discrimination against foundlings" and instead found that all three Constitutions guarantee the basic right to equal protection of the laws and exhort the State to render social justice. It cited provisions in the present Constitution that do not show any intent to discriminate against foundlings "on account of their unfortunate status."

On Poe's residency, the Court criticized the COMELEC for reckoning her residency from the date stated in Poe's "sworn declaration in her COC [certificate of candidacy] for Senator." The COMELEC said that the statement was an admission that her residence in the Philippines began only in November 2006, falling short of the ten-year residency requirement.

This, said the Court, ignores case law that holds that it is the fact of residence, not the statement of the person, that determines residence for purposes of compliance with the constitutional requirement of residency for election as President. The Court explained that when Poe made the declaration in her COC for Senator that she has been a resident for a period of six years and six months counted up to the 13 May 2013 elections, "she naturally had as reference the residency requirements for election as Senator which was satisfied by her declared years of residence." In other words, Poe had written down the period that satisfies the residency requirements for Senator; but there was evidence showing that she had established her residency earlier still.

Chief Justice Lourdes Sereno, in her concurring opinion, explained her approach to addressing the absence of any reference to foundlings in the Constitution. She said that in interpreting the Constitution, the Court "should strive to give meaning to its provisions not only with reference to its text or the original intention of its framers." She cited ideals enumerated in the Preamble of the Constitution—their intent to "promote the general welfare"; to "build a just and humane society"; and to "secure the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace." She concluded that any construction that would detract from these fundamental values cannot be countenanced. Using her approach, she opined that a declaration that foundlings are not natural-born citizens is unconscionable and would effectively render all children of unknown parentage stateless and would place them in a condition of extreme vulnerability. Depriving them of citizenship would leave foundlings without any right or measure of protection.

The legality of Poe's election as a Senator was decided in another case. Rizalito David, a losing candidate in the 2010 senatorial elections, challenged her qualifications as a Senator before the Senate Electoral Tribunal (SET). The SET ruled in Senator Poe's favour and this decision was elevated to the Supreme Court.

The Supreme Court upheld the SET's conclusions, saying that they are in keeping with a faithful and exhaustive reading of the Constitution, one that proceeds from an intent to give life to all the aspirations of all its provisions.

The SET was confronted with a novel legal question: the citizenship status of children whose biological parents are unknown, considering that the Constitution, in Article IV, Section 1 (2) explicitly makes reference to one's father or mother. It was compelled to exercise its original jurisdiction in the face of a constitutional ambiguity that, at that point, was without judicial precedent. Acting within this void, the Senate Electoral Tribunal was only asked to make a reasonable interpretation of the law while heedfully considering the established personal circumstances of the private respondent. It could not have asked the impossible of the private respondent, sending her on a proverbial fool's errand to establish her parentage, when the controversy before it arose because the private respondent's parentage was unknown and has remained so throughout her life.

The SET knew the limits of human capacity. It did not insist on burdening the private respondent with conclusively proving the one thing that she has never been in a position to know throughout her lifetime. Instead, it conscientiously appreciated the implications of all other facts known about her finding. Therefore, it arrived at conclusions in a manner in keeping with the degree of proof required in proceedings before a quasi-judicial body: not absolute certainty, not proof beyond reasonable doubt or preponderance of evidence, but "substantial evidence, or that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion." The Court held:

> Equality, the recognition of the humanity of every individual, and social justice are the bedrocks of our constitutional order. By the unfortunate fortuity of the inability or outright irresponsibility of those who gave them life, foundlings are compelled to begin their very existence at a disadvantage. Theirs is a continuing destitution that can never be truly remedied by any economic relief. If we are to make the motives of our Constitution true, then we can never tolerate an interpretation that condemns foundlings to an even greater misfortune because of their being abandoned. The Constitution cannot be rendered inert and meaningless for them by mechanical judicial fiat....
>
> It is the empowering and ennobling interpretation of the Constitution that we must always sustain. Not only will this

> manner of interpretation edify the less fortunate; it establishes us, as Filipinos, as a humane and civilized people.

The petition was dismissed, and the Court held that the SET did not act without or in excess of its jurisdiction or without grave abuse of discretion in holding that Poe-Llamanzares was a natural-born citizen qualified to hold office as Senator of the Republic.

CONCLUSION

The Supreme Court's plate in 2016 was a standard mix of cases implicating both the structure of government and the people's rights. Some cases touched upon the national elections held in May of that year. On this score, the Court performed well by ruling on the qualifications of foundlings for national offices, and ensuring that the public be afforded every opportunity to make informed decisions.

The results of the elections will make 2017 more interesting. President Duterte's approach to governance will trigger litigation that will reach the Supreme Court. More than 8,000 suspected drug users or pushers have been killed without the benefit of due process; there are no warrants of arrest, and no trials. His top critic, a Senator who conducted an investigation of the "war on drugs," is now in jail. The Vice-President, also a critic of the drug war, is being threatened with impeachment. Most members of Congress have aligned themselves with the President. The Supreme Court is the only institution that can serve as a check on the President.

The rule of law in the Philippines will be tested very soon. There are cases challenging the President's anti-drug program pending before the Supreme Court and the Office of the Ombudsman. The Court will be at a crossroads: in a position to either reprise its role in 1973 and bend to the Executive's will or stand its ground and serve as a legitimate check on government excesses.

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Poland

DEVELOPMENTS IN POLISH CONSTITUTIONAL LAW

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INTRODUCTION

In 2015-2016, the Polish constitutional scene was reshaped beyond recognition. The Polish Constitutional Tribunal (hereinafter referred to as "Tribunal") was emasculated to the point that constitutional review was rendered meaningless and reduced to mere rubber—stamping of the majority. In normal times, review of the constitutional jurisprudence would comprise "ordinary" constitutional controversies that made their way onto the Tribunal's docket. Yet, given the unprecedented attack from the ruling majority on the Tribunal's stature and functions and the constraints of space, the authors had to make a difficult choice of skipping the "business as usual" case law[1] and instead focusing entirely on the "existential jurisprudence" of the Tribunal. The "existential jurisprudence" aims at safeguarding the essence of judicial review in Poland and saving the Tribunal from complete emasculation. When the institution's very survival is on the line, everything else must be pushed to the background.

THE CONSTITUTION AND THE CONSTITUTIONAL COURT

The Polish Constitution was adopted in 1997. The Constitution opens with an inclusive Preamble that provides, *inter alia*, fundamental axiological signposts for constitutional interpretation: "*We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good - Poland […] Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage […], Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities, We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland".* Building on this, the Constitution is organised in XIII Chapters, of which most important are Chapter I (Republic), II (freedoms, rights and duties); III (sources of law); IV (Legislative branch composed by the lower chamber (Sejm) and upper chamber (Senate)); V (President of the Republic); Chapter VI (executive branch of government); Chapter VII (local government). Judicial power is

[1] Nevertheless, for the sake of completeness, it must be mentioned that the Tribunal had decided some interesting cases in this category of "ordinary controversies". In normal constitutional times they would merit our attention. For example, case K 1/13 (elucidating the principles on the creation of trade unions; judgment of 2 June 2015); K 12/14 (right of a physician to refuse performing an operation inconsistent with his conscience; 7 October 2015); P 31/12 (lustration of the judges, 2 April 2015); Kp 1/15 (supervision of the Ministry of Justice over the courts); P 1/14 (pension scheme, 3 November 2015).

regulated in Chapter VIII (Courts and Tribunals). The Polish Constitutional Tribunal's mandate is spelled out in art. 188-197.[2]

DEVELOPMENTS AND CONTROVERSIES IN 2016

2015-2016: Anni horribili of the Polish Constitutional Tribunal

Polish elections on 26 October 2015 completely reshaped the political landscape, bringing back to power the right-wing conservative party Prawo i Sprawiedliwość (PiS, which reads in English "Law and Justice"), which was ousted from power in 2007. The Tribunal was the first victim of the narrative by PiS, whereby the Poland of today is in dire need of some major political and moral overhaul. The newly elected majority, acting in unison with the President, took no less than one month to dismantle the Tribunal by refusing to honor the election of the judges made by the old Parliament and to swear them in, and instead electing their own "good judges" by arrogating the power of constitutional review and by retroactively voiding the term of office of the current President and Vice President of the Tribunal. In the process, most fundamental principles of Polish constitutional order—the rule of law, legality, separation of powers, independence of the judiciary, the supremacy of the Constitution and the constitutional review by the Tribunal—have been now *de facto* obliterated.

The ruthlessness with which the Tribunal has been captured by the majority, and the persistence with which it has been thwarting the unconstitutional attempts to pack it and disable it, tell a story of democracy and institution in distress. In 2015 and 2016, the Tribunal was defending itself against attacks by the political power on its institutional status and judicial independence. What started as "court-packing" though, soon transformed into an all-out attack on the judicial review and checks and balances. This attack has been unprecedented in scope, efficiency and intensity. With the Court fighting back, the majority resorted to a device unheard of in Europe: refusal to publish judgments delivered by the Tribunal. According to Article 190(2) of the Constitution, rulings of the Tribunal are to be immediately published in the official publication in which the original normative act was promulgated. The Tribunal's case law of 2016 confirmed that all judgments must be published, as required by the Constitution. Yet, the Government persistently refused to publish judgments rendered by the Tribunal in 2015 and 2016, claiming that they were vitiated by procedural errors and lacked a legal basis. The unconditional publication of the Tribunal's judgments between 10 March 2016 and 30 June 2016 was also found by the Venice Commission to be the condition sine qua non for any viable constitutional settlement. The Venice Commission regarded the refusal to publish the judgment of 9 March 2016 (case K 47/15) that disqualified court-packing as unconstitutional and contrary to the principle of the rule of law. For the Commission, such refusal constitutes an unprecedented move that further deepens the constitutional crisis.

Separation of powers, judicial independence and effective functioning of the Constitutional Tribunal are keywords underpinning the jurisprudence of the Tribunal. While December judgments have now been formally published after protracted wrangling between the President of the Tribunal and Government officials, a dangerous precedent of cherry picking has been set. Despite publication, to this day they have not been implemented and respected with the President of the Republic being steadfast in refusing to swear in the three judges elected constitutionally by the old Sejm and the Government's refusal to publish the Tribunal's judgments becoming a daily weapon of power against "unwanted" case law.

As of this writing, with the new law on the status of the judges in place and the Tribunal's bench finally captured and staffed with the henchmen of the ruling party, the curtain has fallen on judicial review and the rule of law in Poland.

MAJOR CASES

2015-2016: Existential jurisprudence[3]

On 3 December 2015 (case K 34/15), the Constitutional Tribunal examined the application submitted by a group of Members of the Polish Parliament regarding the articles of the Constitutional Tribunal Act, which regulates, among others, the election of Constitutional Tribunal judges, the status of these judges and the proceedings before the Constitutional Tribunal. The Constitution imposes an obligation to elect a Constitutional Tribunal judge on the lower house of Polish Parliament in the term of office during which the post of the Constitutional Tribunal judge was made vacant. The election of a Constitutional Tribunal judge cannot be conducted somewhat in advance. The Tribunal found that regulation of the Constitutional Tribunal Act is incompatible with the Constitution to the extent of providing the competence for the lower house of Polish Parliament of the previous term of office (2011-2015) to elect two judges to fill the vacant posts of judges whose term of office ended on 2 and 8 December. But the articles regulating the election of three judges to fill the vacant posts of Constitutional Tribunal judges whose term of office ended on 6 November 2015 were found to be compatible with the Constitution.

Consequently, the ruling of the Constitutional Tribunal implies that the legal base for electing the successors of the two judges whose term of office ended on 2 and 8 December is regarded as unconstitutional. Therefore, these two judges, who were elected, cannot take their office. Meanwhile, the legal base for appointing and voting by the lower house of Polish Parliament on the election of three constitutional judges in place of the judges whose term of office ended on 6 November 2015 raises no constitutional doubts. This election was conducted by the lower house of Polish Parliament in the term of office during which the posts were made vacant. In addition, the Tribunal held that articles regarding the oath-taking by the Constitutional Tribunal judge before the President of

[2] English text of the 1997 Constitution is available at http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[3] This section should be read in light of the *Introduction* above.

Poland imposed an obligation on the head of state to accept such an oath immediately. Any other interpretations of this article are bound to be unconstitutional. Moreover, the Constitution doesn't provide for the President to have a possibility of refusing to accept an oath from the newly elected Constitutional Tribunal judge, and the eventual concerns raised by the head of state regarding the constitutionality of the articles, on the ground of which the election of Constitutional Tribunal judges had been conducted, can be evaluated solely by the Constitutional Tribunal. Despite a lack of statutory articles which could specify the term of accepting the oath it must be understood that the President has to fulfill his obligation immediately.

Articles regulating the appointment of President and Vice-President of the Constitutional Tribunal by the President of Poland were ruled to be compatible with the Constitution. According to the Constitution, the President of the Republic of Poland is obligated to appoint the President and Vice-President of the Constitutional Tribunal among candidates chosen by the General Assembly of the Judges of the Constitutional Tribunal. The President doesn't have authority to freely choose the candidates to be appointed to the aforementioned posts. An obligation is imposed on him to appoint one of the previously proposed candidates for these posts.

Furthermore, the Tribunal held compatibility with the Constitution of providing retired Constitutional Tribunal judges with the formal immunity, which indicates that the constitutional judges can be held criminally liable (excluding delinquencies) or deprived of freedom only upon the consent of the General Assembly of the Judges of the Constitutional Tribunal. Retired judges of all types of courts in Poland are entitled to such immunity. This protection has a special meaning for constitutional judges as their term of office is relatively short. Accordingly, they rule on compatibility with the Constitution of the law adopted by politics and they solve disputes over authority between central constitutional public authorities, and in consequence are more likely to be exposed for the eventual repercussions coming from politicians not satisfied with the Constitutional Tribunal judgment.

On 9 December 2015 (case K 35/15), the Constitutional Tribunal examined the applications of a group of Members of Polish Parliament, the Ombudsman, the National Council of the Judiciary and the First President of the Supreme Court, regarding the amendment of the Constitutional Tribunal Act. The statute introduces terms of office in the exercise of the function of the President of the Constitutional Tribunal with a possibility of reelection. The Tribunal held that the procedure of filling leading positions, to the extent in which the amendment provides for a possibility for reelection regarding the position of the President of the Constitutional Tribunal, gives the executive authority room for unlawful interfering with the activity of a Constitutional Tribunal. The Tribunal agreed with the applicant's charge about the unconstitutionality of the statutory provision, which provides for the person elected to be a judge of the Tribunal to take an oath before the President within 30 days of the election. According to the Tribunal, establishing such a time limit for taking an oath violates the rule that the Constitutional Tribunal judge must be allowed to take an oath immediately after the election. A provision was found as incompatible with the Constitution as well, stating that "taking an oath initiates the term of office of the Constitutional Tribunal judge." Such a solution-the initiation of term of office of the Tribunal's judge to be made dependent on taking an oath-would result in postponing the start of a judge's term of office, and would lead to an indirect participation of the President in the procedure of appointing a Constitutional Tribunal judge, for which the Constitution doesn't provide. Another statutory provision which was regarded unconstitutional provided for the expiration of the existing President and Vice-President of the Constitutional Tribunal's "term of office" after three months from the amendment law's entry into force. The Tribunal held that the article in question was, in fact, an unlawful interference of the lawmaker with the judicial power sphere and it violated the rule of the Tribunal's independence from other powers. The Tribunal admitted that it is conceivable for the legislature to change the length of the term of office of both President and Vice-President, and the voiding of a term of office that already started to run impinges on the prerogative of the President to appoint the President and Vice-President of the Tribunal. The judgment puts great stock in with provisions on the status of the President and Vice-President of the Constitutional Tribunal, in particular as regards their terms of office are closely linked with the principle of the independence of the Tribunal as such. The legislature may depart from the hitherto adopted solution and may determine the length of the term of office in the case of the President or Vice-President of the Tribunal in a more fixed way. However, amending Law constitutes interference in the scope of the constitutional competence to appoint the President and Vice-President of the Tribunal, which is vested in the President of the Republic of Poland. The Tribunal agreed with the view presented by the applicants that the legislature's termination of the terms of office of the incumbent President and Vice-President of the Tribunal violates the principle of the independence of those authorities, and thus infringes Article 10 in conjunction with Article 173 of the Constitution, Article 194(1) and (2) as well as Article 7 of the Constitution.

On 11 August 2016 (case K 39/16), the Tribunal thwarted yet another attempt at court-packing when it examined the compatibility with the Constitution of a new statute of 22 July 2016 on the Constitutional Tribunal. In this case, the Tribunal built on its previous unpublished (case K 47/15)[4] and *unimplemented* (K 34/15 and K 35/15) judgments. In view of the repetitive nature (the ruling party pressed ahead with the second court-packing despite the fact that most of the provisions were already declared unconstitutional in K 47/15) of most of the claims and duplicity of the subject-matter, the Tribunal felt strong enough to decide the case

[4] In this case, the Tribunal dealt with the amendments adopted on 22 December 2015 by the Sejm (lower house of the Parliament) to the Law on the Constitutional Tribunal. The amendments aimed again at limiting the Tribunal's review functions and debilitating its procedural capacities.

by way of a reasoned order rather than a judgment. The order emphasized that most of the provisions in the new Law replicated the Tribunal found unconstitutional in its judgment given on 9 March 2016. The Tribunal reiterated that rulings of the Tribunal must be published immediately in the shortest possible time given the circumstances of each case. Government authorities have no discretion but to publish all rulings of the Tribunal. A fortiori, the Tribunal criticized in the strongest possible words the practice of singling out its rulings that will be published in the Journal of Laws. The Tribunal saw through the intentions of the Sejm. The Sejm performed a review of individual rulings and concluded that judges behind these rulings acted ultra vires. Therefore, the refusal to publish these "negatively reviewed" rulings would be held to be justified and, as a result, make the future publication of the Tribunal rulings dependent on the consent of the Legislative branch. For the Tribunal, this was an inadmissible encroachment by the executive on the competencies of the Constitutional Tribunal and aimed at the stigmatization of the judges who decided these cases. Such practice runs afoul of the standards of the state governed by the Rule of Law (*Rechtstaat*) and is alien to the legal culture to which the Republic of Poland belongs. The Tribunal was clear: all rulings are unconditionally binding and must be published. As for the vexing problem of the Tribunal's composition, the order simply referred to the constitutional interpretation already made in December 2015 judgments and calls on the state authorities to bring to an end the situation of disrespect of the Tribunal's rulings. The Tribunal strongly expressed that the legislator must not elect new judges when there is no vacancy as was the case here. Forcing the President of the Tribunal to allow three judges elected by PiS would be unconstitutional and "incompatible with the judgments of the Court which are binding on all state authorities, the Tribunal and its President included."

When analysed together, the existential jurisprudence in response to "clipping the wings" of the Tribunal and procedural court-packing stands for the following: "in the context of the Tribunal's systemic position and the unique nature of its competence, it is particularly justified that proceedings before the Tribunal should be effective and would result–within a reasonable period of time–in issuing a final ruling, especially in cases that are of significance for the functioning of the organs of the state as well as for the exercise of rights and freedoms enshrined in the Constitution. This follows from the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution. Consequently, a statutory model of proceedings before the Constitutional Tribunal needs, on the one hand, to take account of the unique nature of the Tribunal's systemic function and, on the other, ensure efficiency in the exercise of the Tribunal's powers."[5]

On 7 December 2016 (case K 44/16), the Constitutional Tribunal examined the application submitted by a group of Members of Polish Parliament regarding the rules of appointing the President and Vice-President of the Constitutional Tribunal. The Tribunal held that the statutory injunction for the General Assembly of the Judges of the Constitutional Tribunal to propose to the President three candidates to the position of President and Vice-President of the Tribunal doesn't violate the Constitution. Only the correlation between the number of candidates proposed to the President, the precise number of votes to which the Tribunal judges are entitled during the election of candidates and the rules governing this election have an impact on the scope of competence given to the General Assembly of the Judges of the Tribunal as well as on the capacity for this authority to perform its constitutional functions. The Tribunal stated that proposing candidates to the President, performed by a collegial body, must take the form of a resolution which requires for its validity support by a majority of voting judges. Representation may be ensured either by an election in which every judge is entitled to have a such number of votes that is identical with the number of candidates or through a separate voting on each candidate where every judge holds only one vote. The Tribunal regarded as candidates for the position of President and Vice-President of the Tribunal, in the constitutional meaning of this term, only those candidates who received support from a majority of voting judges. Significantly, only such candidates ought to be considered as having the support of the General Assembly of the Judges of the Tribunal.

CONCLUSION

2015-2016 saw an unprecedented attack on the Polish Constitutional Tribunal, judicial independence and the rule of law. Importantly, this attack has not been premised on dissatisfaction with the overall *performance* or particular acts of the Tribunal, but rather struck at its very *existence*. We are not dealing with some hasty decisions of the majority as a result of transient dissatisfaction with the Tribunal's case law. If this were the case, we would not have reason to sound the alarm: political tinkering with unwanted decisions by Constitutional Courts happens all the time and everywhere. This forms part of a larger and more sophisticated plan aimed at debilitating possible pockets of resistance and independence, curbing democracy, the rule of law and the division of powers.[6]

The experience of the Polish Constitutional Tribunal shows how constitutional capture and the piecemeal undermining of the liberal democratic state pose new challenges for the rule of law and external constraints imposed on the domestic *pouvoir constituant*. As forcefully argued by K. L. Scheppele and L. Pech, "consolidation of majoritarian autocracies […] represents more of an existential threat to the EU's existence and functioning than the exit of any of its Member States."[7] Constitutional capture plays a pivotal role in disabling the checks and bal-

[5] Judgment in K34/15, point10.3 of the reasons, and repeated in K47/15, point 5.3.2. of the reasons.

[6] See also T. T. Koncewicz, *The "emergency constitutional review" and Polish constitutional crisis. Of constitutional self-defence and judicial empowerment* (2016), Polish Law Review Vol. 2(1).

[7] L. Pech, K. L. Scheppele, *Poland and the European Commission, Part I: A Dialogue of the Deaf?* p. 2 available at http://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/.

ances. Constitutional capture makes a sham of a constitutional document as it strips it of its limiting and constraining function. Yet constitutional capture is not a one-off aberration. It is a novel threat to the rule of law as it is not limited to one moment in time. It is a process of incremental taking over the independent institutions and the liberal state. Hungary is a prototype of a "captured state," and one would be right in assuming that the Commission had learned from its passivity and acquiescence to V. Orban's tactics of capturing the state and independent institutions. The lesson was loud and clear and yet missed by the Commission, as the Polish case shows the only way to derail constitutional capture or to "constitutionally recapture the unconstitutional capture" is to act preemptively before the capture is complete. Waiting on the sidelines, talking to the perpetrators and hoping for their change of heart only emboldens and entrenches the regime. The constitutional capture as a process needs time, so time plays a pivotal role in striking back at the capture and thwarting it in the building-up process, not later. The regime knows that and will do anything to buy more time to entrench the capture and make the recapture very unlikely.

The recurrent themes that go beyond the "existential jurisprudence" of the Tribunal are the rule of law, separation of powers and exclusiveness of constitutional review vested with the Tribunal. The judgments[8] make perfectly clear that the Tribunal was fully aware of the critical juncture in which it found itself deciding these cases and fully understood the dangers inherent in the belief that the political will of the new majority could replace decisions of the Constitutional Court with a constitutional monopoly of adjudication. Under this belief, moral doubts of the parliamentary majority would suffice to set aside the law, which was validly adopted and upheld by the Court. It would be sheer power that dominates, with constitutional considerations relegated to the margin. So, unsurprisingly, the Tribunal stressed that in the case of constitutional doubts, other branches of government are not to act freely, but must submit these doubts to the Tribunal for an authoritative interpretation.

While the constitutional controversies "here and now" needed solving, the long-term importance of the judicial resistance merits particular attention. The Tribunal stood up for the "balanced constitution" in which separation of powers is more than a mere fig leaf, and for limited government, both of which have a strong tradition in Polish constitutional thinking. In Poland in 2015-2016 we witnessed the redrawing of constitutional lines. For the very first time since its birth back in 1986, the very survival of the Tribunal was on the line. The particular constellation of lucky events that allowed it to survive in the past came to an end. The time finally came to admit that the Polish Constitutional Tribunal did not manage "to get away with it this time." Its self-defense and steadfast loyalty to the constitutional document were not enough against no-holds-barred political power. The Tribunal we used to know is gone. It is comforting to know, though, that in the darkest of times it never faltered and backed down and was always ready to stand up for the constitutional essentials. The "existential jurisprudence" it managed to build over the last year in response to the attack on its independence and the rule of law is something we must look up to and see it as a reflection of the best constitutional traditions Poland has to offer. That is a lot moving forward while waiting for better constitutional times. Let there be no doubt that they will eventually come and, with them, a full vindication of Polish Constitutional Tribunal.

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[8] The relevant part of the judgment in K 34/15 reads: "The Tribunal has vital duties pertaining to safeguarding the supremacy of the Constitution, protecting human rights and freedoms as well as preserving the rule of law and the separation of powers".

Romania

DEVELOPMENTS IN ROMANIAN CONSTITUTIONAL LAW

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INTRODUCTION

In 2016, as well as in the last 15 years, the Romanian Constitutional Court's case law remained at the core of the constitutional debate, especially as regards the enforcement of fundamental rights, but also the relationship between state powers. With a technocratic Government in place and political parties busy to reposition themselves on the political scene for the local elections in June and parliamentary ones in December, the year 2016 was quite paradoxical. Main controversies did not concern elections or parties, and the Romanian Constitutional Court (hereinafter RCC) continued to constitutionalize large portions of political life mainly by moralizing public officials and authorities.

THE CONSTITUTION AND THE COURT

The Romanian post-communist Constitution was adopted after the fall of the totalitarian regime in December 1989. The Constitution was approved by referendum in December 1991 and has been amended once, in 2003. Its text expresses the commitment of Romania to the principles of the rule of law, separation of powers, democracy, respect for fundamental rights and freedoms, and a market economy.[1] Ever since 1991, the country has struggled to give life to these principles. In 1993, Romania became a member of the Council of Europe, in 1994 the Parliament ratified the European Convention on Human Rights, and since 2007 it has been a member state of the European Union. Romania's membership in the EU has been finalized under a supervisory process—the Cooperation and Verification Mechanism,[2] which initially targeted aspects pertaining to EU acquis together with problems related to the independence of the judiciary and currently addressed only these last ones, especially the irreversibility of anti-corruption policies. If in the field of independence of justice progress has been fast and notable, the fight against corruption, particularly against high-level corruption, remains a sensitive issue.

The Romanian constitutional system is semi-presidential, largely inspired by the French one, albeit with significant differences. The republican form of government, although introduced by the communist totalitarian power in 1947, has been maintained by the current Constitution and included among the unamendable provisions. The President of the Republic, although directly elected by the people, has more limited powers than their French counterpart. The design of the presidential institution was a result of reminiscent fears from the communist past, when one person came to impersonate the whole power at political and state levels, becoming a dictator.[3] Therefore, although the people gained their right to elect the President, the latter should see their powers balanced by a relatively strong Parliament.

The Romanian Parliament is bicameral, with both Chambers—Chamber of Deputies and Senate—directly elected by the people. The Prime-Minister, who is nominated by the President and appointed by the Parliament in a "vote of confidence," leads the Government. The Constitution details the relationship between Parliament and Government

[1] For a detailed insight, see Bianca Selejan-Guțan, *The Constitution of Romania. A Contextual Analysis*, Oxford, Hart Publishing, 2016.

[2] https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm_en.

[3] E.S.Tănăsescu, "The President of Romania or the slippery slope of a political regime", European Constitutional Law Review n°1/2008, p. 64-97.

in a separate chapter, including the power of the Parliament to dismiss the Government by adopting a motion of censure. The Government, at its turn, can engage its responsibility before the Parliament and can adopt delegated legislation (ordinances and emergency ordinances). The constitutional design of the legislative delegation and its actual use and misuse in practice have been some of the most sensitive issues in the last 25 years. This is also one of the most controversial "chapters" in the case law of the RCC.

The 1991 Constitution introduced as a novelty in the Romanian constitutional design the Constitutional Court. The Court is a reflection of the Kelsenian model of constitutional review in Romania, although the country has known, between 1911 and 1947, a judicial review based on the American model. The Constitutional Court is especially important for its role in the constitutionalization of the legal system, with a mostly positive role over the years. The powers of the Court include judicial review (*ex ante* and *ex post,* via the referral or "exception" of unconstitutionality) of primary legislation (laws and Government ordinances), review of Parliament's Standing Orders and other parliamentary resolutions, of international treaties and constitutional amendment draft laws. The Court can also rule on elections, constitutional-legal conflicts between authorities and the constitutionality of political parties.[4]

The Constitutional Court is independent from the judiciary (which has as *apex* court the High Court of Cassation and Justice) and from the other state powers. It is composed of nine judges, six of which are designated by the Parliament (three by each Chamber) and three by the President of Romania.

The semi-political nature of the Court, given by the political appointment of judges, as well as some of its powers, has been a factor of politicization of its case law. However, the

Court is seen as an important guarantee of the rule of law in the Romanian constitutional system.

MAIN CONTROVERSIES IN THE YEAR 2016

Notwithstanding local and parliamentary elections held in June and in December 2016 respectively, main controversies and societal debates in Romania focused rather on issues pertaining to the identity of the Constitution and the threshold between moral and legal norms. Thus, the issue of same-sex marriage stirred passions among NGOs and constitutional judges alike while the legal regime of criminal repression and incompatibilities of both civil servants and elected dignitaries provided a large share of the case law of the Constitutional Court.

Mixing arguments related to an originalist interpretation of the Constitution, constitutional identity of Romania and religion, the "Coalition for the Family" (an NGO) decided to start a popular initiative meant to revise the Constitution in order to replace the phrase *The family is founded on the freely consented marriage of the spouses* in Article 48 with *The family is founded on the freely consented marriage of a man and a woman*. It is not clear to what extent the 2,6 million Romanians who signed the initiative all through the spring and summer of 2016 were aware of the European and international context framing the issue of same-sex marriage, with some countries legalizing it (Belgium, France), others accepting it via judicial review (USA, Taiwan) and others still rejecting such a possibility (Croatia). The fact remains that they largely exceeded the threshold required by Article 150 of the Constitution, according to which a revision can be initiated by at least 500.000 citizens having the right to vote. The procedure for the revision of the Constitution requires that the RCC perform an *ex officio* control of any such initiative. In its *Decision* n°*580/2016*, the Court noted that the initiative only refers to the legal institution of marriage, as regulated by Article 48, and not to the family life, which is protected by Article 26 of the Constitution. Therefore, it argued that the initiative does not suppress the right to marriage, nor does it diminish its guarantees, while leaving intact the respect of the private, intimate and family life, thus not contradicting the "eternity clause" (Article 152) of the Romanian Constitution which entrenches *inter alia the fundamental rights and freedoms of citizens and their safeguards*. Amid contestation from a large part of the population, which believes that the concept of family is larger than marriage between a man and a woman, this popular initiative for the revision of the Constitution has been used in electoral campaigns both for local and parliamentary elections. Indeed, none of the political parties dared to risk a confrontation with Christian churches present in Romania (orthodox, Catholic and protestant), although some of their members or even leaders did voice concern or invoke tolerance. As a result, a vote in Parliament and, eventually, a referendum to in/validate the revision of the Constitution are expected during the first half of 2017.

But same-sex marriage is an issue for Romanian society also when its legally binding value has to be merely recognized in Romania. Thus, in November 2016 the RCC addressed from the European Court of Justice (ECJ) a preliminary question pertaining to the free circulation of persons, as regulated through Directive 2004/38/EC, in relation with a same-sex third country national spouse. This was the first time that the Romanian constitutional judge entered a direct dialogue with the ECJ but, in fact, it provided the constitutional judge with a possibility to delay its decision in a case that dealt with the recognition in Romania of a homosexual marriage legally contracted abroad. Moreover, the RCC resolved to this procedural artifice only *in extremis*, after not being able to reach a decision in 12 months of deliberation, the case being put back on roll twice. The preliminary question shows that the RCC is aware of the case law of the ECJ in *Maruko*, *Römer* or *Parris*, where the ECJ declared that "as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States", and in *Carpenter* and *Metock*, where the ECJ held that there is a right for citizens of the European Union to be joined or accompanied by family mem-

[4] Bianca Selejan-Guțan, op.cit., pp.172-181.

bers, even if they are third-country nationals, irrespective of where they are coming from and irrespective of the legality of their previous residence in another Member State. However, the RCC hopes it will not have to bear alone the full responsibility whatever the outcome of the case in front of it might be. Clearly, this is a test case not only for the RCC but also for the Romanian Constitution and society at large, not only due to the way in which it relates to basic values engrained in the fundamental law, such as pluralism and tolerance, but also because of the deep societal division is has induced.

As for the criminal repression and the immunity of public officers, continuing the trend noticed in 2015 particularly with regard to members of Parliament, in 2016 the issue enlarged to civil servants, locally elected dignitaries and notaries. Thus, the RCC had to admit that the situation of MPs is different from that of locally elected dignitaries as far as *incompatibilities* are concerned: while MPs cannot be held administratively responsible for incompatibilities because they enjoy parliamentary immunity (Decision n°132/2016), locally elected people see their mandate terminated upon the notification of their incompatibility (Decisions n°175/2016, n°544/2016). However, when it comes to the *criminal repression* of misdeeds, the RCC made no difference between locally elected dignitaries (Decision n°66/2016, n°536/2016), civil servants (Decision n°188/2016) and even notaries (Decision n°582/2016): they all see their mandate or labor relationship terminated whenever they are convicted to a criminal sentence, irrespective of whether they actually go to prison or they are under judicial control. In fact, the case law of the RCC is quite nuanced because it has to take into account a variety of particular cases. For instance, when both MPs and locally elected people are convicted and put under judicial control, the complementary sanction of banning them from continuing to exercise the professional activity which made possible the criminal conduct cannot be enforced in the same way for MPs and for those locally elected (Decision n°336/2016). Or, vice-mayors are in a different situation then local councilors with regard to incompatibilities with specific commercial activities (Decision n°13/2016). Overall, in 2016, it seems that the RCC started a vast operation of moralizing public officials and imposing higher standards of behavior in public offices, to the great satisfaction of large portions of the population. Under these circumstances, it is even more difficult to understand how it was possible that the mayor of Baia Mare, an important city in the northwest of Romania, to be elected despite the fact that he was under the suspicion of criminal deeds and in the custody of police during the very day of local elections. In fact, once the results of the elections were announced, he was accompanied to the city hall to take the oath and then taken back again in the custody of the police, only to be suspended from office[5] and later released under house arrest.

CASE LAW

Relations between Public Authorities

2016 was the year of "the technocratic Government" in Romania. Following the fire that caused the death of 64 people in a nightclub called "Colectiv" in November 2015, mass demonstrations forced the resignation of the executive then in power amid revelations of vast corruption in various public sectors. The entire political class reached a consensus that a technocratic Government should be installed for one year to give political parties the necessary respite to organize and position themselves in view of local and parliamentary elections regularly scheduled in 2016. Under these circumstances, the case law of the CCR displayed two main tendencies with regard to the interaction between public authorities; namely, to preserve and even enhance the discretionary powers of Parliament and to dribble issues pertaining to a balanced budget as required by the European "fiscal compact" ratified by Romania in 2013.

Thus, the Constitutional Court rejected any attempts to limit the legislative powers of Parliament, such as establishing the legal regime of policemen through administrative orders of the Minister of Internal Affairs (Decision n°244/2016) or establishing the legal regime of employees of the national system of penitentiaries through administrative orders of the Minister of Justice (Decision n°803/2016). Also, criminalizing conducts is the privilege of the legislative power, so when investigating the crime of abuse in public office, prosecutors can only refer to laws and delegated legislation and not to other kind of normative acts (Decision n°405/2016).

The Constitutional Court declared Parliament the supreme *locus* of democracy also in relation to attempts made by the technocratic Government to limit its appetite towards expenditure based on the obligations assumed by Romania under the European "Fiscal compact," particularly during an electoral year. Towards the end of 2016, it became clear that the RCC does not consider the balanced budget rule as bearing constitutional standing or relevance. Therefore, on rare occasions (Decisions n°22/2016, n°593/2016 and n°764/2016), the Court ruled that Parliament is obliged to request information from Government whenever a legislative initiative implies changes in the national budget in accordance with Article 111 of the Romanian Constitution and not because this could have an impact on the balanced budget as assumed by Romania through the ratification of the Fiscal Compact. However, in all other cases (Decisions n°593/2016, n°620/2016, n°765/2016, n°767/2016, n°795/2016), the Court declared that the obligation to make sure that incomes do match expenditures belongs with Government, and the Parliament would see its decisional powers limited were it obliged to observe such restrictions or to respect the requests coming from the Executive. While *prima facie* this may look as if the RCC is granting higher constitutional protection to the political rather than technocratic authority, it may also be an expression of a certain disregard for the international obligations assumed by Romania, particularly within the European Union.
This is even more puzzling since it stands in contrast with another interesting feature of the RCC case law during 2016. The tendency started already before, but in 2016 there

[5] http://www.nineoclock.ro/mayor-catalin-chereches-suspended-after-he-was-sworn-in/.

was a statistically high frequency of references made to guidelines and other reports or documents issued by the European Commission for Democracy through Law (better known as the Venice Commission as it meets in Venice), an advisory body of the Council of Europe on constitutional matters. Twenty-four decisions issued in 2016 mention various advisory documents of the Venice Commission; in the overwhelming majority of cases the argument being used is to reject the claim presented in front of the RCC. It is interesting to note that in 16 cases[6] the Code of Good Practice in Electoral Matters has been used in order to reject all contestations regarding the law on local elections or local referendum (Decision n°361/2016) while the same has been true only once for parliamentary elections (Decision n°737/2016).

Fundamental Rights and Freedoms

Similar to 2015, in 2016, the Romanian Constitutional Court (RCC) had a rich case law regarding fundamental rights and freedoms. However, unlike in 2015, in 2016 the Court did not focus so much on the new Criminal Code (CC) and Code of Criminal Procedure (CCP). Some landmark decisions were adopted in this respect, especially as regards access to justice, but the overall number of decisions regarding the codes was significantly lower than in 2015. In all decisions presented below, the Constitutional Court made extensive use of the case law of the European Court of Human Rights.

1. Access to Justice, Principle of Equality

One of the recurring issues in the rights-based constitutional review practiced by the Romanian Constitutional Court is access to justice. The 2016 case law made no exception and a few decisions stand out on this issue. In *Decision* n°. *24/2016,* the Court held that the exclusion from judicial review of the decision by which the preliminary chamber judge or any court order precautionary measures in a criminal case entail a violation of access to justice because the persons affected by the measures do not benefit from guarantees to defend their property rights. Therefore, the principle of access to justice is infringed.

The Court also considered the respect of the access to justice in administrative matters. Thus, *Decision* n° *34/2016* brought about the issue of administrative jurisdictions, which, according to the Constitution, are optional. The Court held in this case that a legal provision that made compulsory a procedural remedy in matters related to the material responsibility of military persons, a remedy that was decided by a special administrative jurisdiction, transformed the optional character of such jurisdictions into a binding one, which is contrary to Article 21 of the Constitution on access to justice.

The Constitutional Court ruled on access to justice using the principle of equality in *Decision* n° *540/2016.* The impugned legal provision Article 434 (1).1 of the Code of Criminal Procedure excluded the judicial decisions given in appeal by the High Court of Cassation and Justice (Supreme Court of the land) from being challenged by an extraordinary way of appeal—the cassation appeal (*recurs in casatie*). This exception was considered by the Constitutional Court a discrimination based on the criterion of the court that rules on the appeal. Thus, both the accused and the other parties to the criminal trial (the prosecution and the parties to the civil action) are discriminated against by this special exception, the constitutional dispositions on access to justice and equality being infringed.

2. Right to Liberty and Security

In the matter of the right to liberty and security, the Constitutional Court was called to assess the constitutionality of some dispositions of the CCP on the preventive measure of subjecting the accused to legal constraints during a criminal trial (*control judiciar*). However, this time the Court did not declare the direct unconstitutionality of the challenged text, but ruled by an "interpretative" decision, *Decision* n° *614/2016*. Thus, the Court stated that Article 215[1] CCP is constitutional only if applied in line with the Code's provisions that ensure the right to defense and to the complaint against the measure at the moment of extending the measure and not only at that moment.

3. Clarity and Predictability of the Law

One of the favorite themes of the Constitutional Court's case law in 2016 was the assessment of clarity and predictability of legal provisions, especially in the field of criminal law. For example, in *Decision* n° *23/2016,* the Court declared that the lack of clarity of a text from the Code of Criminal Procedure has the effect of infringing the constitutional principle of access to justice. Thus, the expression "absence of a *legitimate interest*" [emphasis added] that, according to Article 318 CCP, would justify the withdrawal of criminal pursuit in case of certain offenses, was ambiguous, as it was not expressly defined in the Code. Consequently, the text does not fulfill the requirements of clarity and predictability, imposed by the general principle of legality (Article 1 §3 of the Constitution) and by the case law of the European Court of Human Rights. This lack of clarity would entail that the prosecutor substitutes the courts because the decision to end the criminal pursuit is not judicially reviewable. Therefore, the Constitutional Court held that the legal provision that allows the withdrawal of criminal pursuit by the prosecution, without any review by a court, would equate with the exercise, by the prosecutor, of the jurisdiction that actually belongs to courts, infringing the constitutional text according to which "justice is achieved through the High Court of Cassation and Justice and through the other courts established by law" (Article 126).

The most famous decision in this category is by far *Decision* n° *405/2016*. The decision concerned the Criminal Code, i.e. the criminal offense of "abuse of office". The Court assessed the legal texts that incriminate this corruption offense through the lens of the standards of the European Court of Human Rights that are incorporated into Romanian law and also from the perspective of the constitutional provisions on the rule of law: equality and the right to a fair trial. Thus, the Court found that the Criminal Code text lacked clarity and predictability, as it provided that "abuse of office" to "defectively fulfill" by a public servant of his/her official duties. The expression "defectively fulfill" was considered too vague and the Court in-

[6] See decisions n°246, n°286, n°287, n°288, n°289, n°290, n°292, n°354, n°355, n°356, n°357, n°358, n°359, n°360, and n°534 all of 2016.

dicated that it should read "fulfills *by infringing the law*" for clarity. Moreover, the Court explained in detail the intended meaning of the term "law", which was not defined in the challenged legal text: in order to engage the criminal responsibility, "law" must be understood in the narrow sense of "act of Parliament or delegated legislation (ordinances adopted by the Government)". Therefore, in the Court's view, an act infringing any other normative act than a piece of primary legislation should not be considered a criminal offense. While acknowledging that "the Parliament is free to decide the criminal law policy of the state" and that the Court itself "does not have the competence to engage in the field of law-making and of the criminal policy of the state", the Constitutional Court held that this policy must be made according to the constitutional principles and values, among which is the predictability of the law. In the *obiter dictum* of the same decision, the Court made other clarifications regarding the notion of "criminal act" from the point of view of the offense of abuse of office. Despite all these arguments, the Court did not specifically declare the impugned legal text unconstitutional. It adopted an "interpretative decision" instead by saying that the referral of unconstitutionality is admitted (a verdict that usually applies for rulings of unconstitutionality), but the text is *constitutional* "as long as is interpreted" as imposed by the Court in the *obiter dictum.*

CONCLUSION

This report shows that in 2016, in the absence of political turmoil, the constitutional debate in Romania shifted to an identitarian discourse on the constitutional definition of the notion of "family". At the same time, the lack of political battles between the parliamentary majority and the technocratic Government led to the absence of requests to solve constitutional conflicts and to the focus of the Court on the constitutionality of legislation and fundamental rights. The Court reiterated some of its previous jurisprudential developments of principle, especially as regards the quality of the laws: respect of the principle of bicameralism, clarity and predictability, and continued to make extensive references to European Human Rights law and soft law (ECtHR case law, documents of the Venice Commission).

Singapore

DEVELOPMENTS IN SINGAPOREAN CONSTITUTIONAL LAW

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INTRODUCTION

Constitutional law in Singapore in 2016 was dominated by two major themes—the appropriate division of powers within government and how best to legally ensure minority representation in government. One persistent framework used to explain and justify judicial caution is the green light versus red light approaches to judicial review.[1] While initially used by Harlow and Rawlings to conceptualize administrative law, this framework has been extended to constitutional cases in Singapore.[2] Indeed, one way to understand the judiciary's approach to constitutional law is to see it through the lens of the "green-light" approach whereby the judiciary is not seen as the first line of defense in ensuring good governance. The public should "seek good government through the political process and public avenues rather than redress bad government through the courts".[3] This contrasts with the "red-light" view of public law—"where the courts exist in a combative relationship with the Executive, functioning as a check on the latter's administrative powers".[4]

THE CONSTITUTION AND THE COURTS

The Constitution and Singapore's Political System

A former British colony and later a former member state of the Federation of Malaysia, Singapore became an independent, sovereign republic on 9 August 1965, with a political system based on the Westminster parliamentary system encapsulated within a written constitution containing a bill of rights. Many changes have been made to Singapore's parliamentary system since independence. These "tailor-making" exercises entailed amending the Constitution to introduce two new types of parliamentarians – the Non-Constituency Members of Parliament (opposition candidates with the highest percentage of votes in their respective constituencies but who did not win the plurality); and Nominated Members of Parliament (non-partisan parliamentarians selected from certain fields of interest such as culture, industry, community service, and the labour movement).[5] In addition, the Group Representation Constituencies ("GRCs") were introduced in 1984 to ensure a minimum level of minority representation in Parliament.[6] In contrast to what

[1] See Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009).

[2] See *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 ("*Jeyaretnam*").

[3] Ibid, [48].

[4] Ibid, [49].

[5] Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Rep) ("Constitution"), Art 39(1)(c) and the Fifth Schedule.

[6] Constitution, Art 39A, which states that the GRC scheme is for the purpose of ensuring "the representation in Parliament of Members from the Malay, Indian and other minority communities".

are now called Single Member Constituencies, where voters return one candidate to Parliament, in a GRC, voters cast ballots for teams of candidates. At least one member of each team must be from a minority community. Lastly, the office of the President was transformed in 1991 from a purely ceremonial head of state to an elected one with some (but still limited) discretionary powers. These discretionary powers include powers to veto attempts by the Government to deplete the nation's past financial reserves; and to veto unsuitable appointments or dismissals of key public officers (*e.g.*, judges, the Attorney-General, the Chief of Defence Force, and the Commissioner of Police).[7] Constitutional amendments taking effect in 2017 have, among other things, made the qualifications for presidential candidates more stringent and introduced the concept of "reserved elections", which are elections reserved at first instance for candidates from designated minority communities[8] – another move to secure diversity in institutions of governance (see further discussion below).

THE CONSTITUTION AND THE COURTS

Singapore does not have a specialized constitutional court. Like private law matters, public law issues are dealt with primarily by the High Court and Court of Appeal, respectively the lower and upper divisions of the Supreme Court, and to a much more limited extent by the State Courts (the nation's subordinate courts). Cases are generally first brought before the High Court by way of judicial review, the available remedies being prerogative orders (mandatory orders, prohibiting orders, quashing orders, and orders for the review of detention) and declarations. A right of appeal lies from the High Court to the Court of Appeal, the highest appellate court. Judges are appointed to the Supreme Court by the President with the advice of the Prime Minister.[9] A number of constitutional provisions and common law rules seek to ensure the independence of the Supreme Court.[10] For instance, judges hold office till the age of 65, may only be removed from office on proof of misbehaviour or inability to properly discharge the functions of the office that has been established by an independent tribunal, may not have their remuneration and other terms of office altered to their disadvantage, and have immunity from lawsuits in most situations.

Article 100 of the Constitution provides an alternative procedure for constitutional issues to be resolved. It provides that the President may refer to a tribunal of at least three Supreme Court judges "any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise".[11] This is a fairly limited procedure as the President lacks personal discretion to refer constitutional questions to the tribunal and is required to act on the Cabinet's advice, and it has been suggested by the Court of Appeal that the procedure is only intended for resolving disputes between constitutional organs. However, the Tribunal's findings do not bind the Government.[12] The Article 100 procedure has only been used once since it was introduced.[13]

DEVELOPMENTS AND CONTROVERSIES IN 2016

Separation of Powers

The doctrine of the separation of powers is a cornerstone of Singapore's constitutional arrangement. While not specifically mentioned in the Constitution, the existence of this constitutional principle may be inferred from the separate vesting of executive, legislative, and judicial power.[14] The separation of powers has also been judicially affirmed as "a fundamental doctrine of the Constitution"[15] and as part of the Constitution's basic structure.[16] It is therefore undisputed that the Constitution is structured upon and incorporates the doctrine of the separation of powers.

The proper division and balance of power among the different branches of government remains a persistent issue in Singapore's constitutional law. Most cases thus far involve the contentious issue of the proper balance between judicial power and executive power. This is complicated by the fact that the cases often involve questions of the "appropriate measure of deference, respect, restraint, latitude or discretionary area of judgment" that courts should give the Executive.[17] Indeed, the task of demarcating the boundary between the judicial and executive branches has been described as "one of the most complex in all of public law and goes to the heart of the principle of the separation of powers".[18]

Courts have thus far tended to give due regard to executive judgment in what they call polycentric decisions.[19] For instance, national

[7] Constitution, Pt XI, Arts 22, 22A and 22C.

[8] Constitution, Art 19B.

[9] Constitution, Art 95 read with Art 22(1)(a).

[10] Constitution, Art 98.

[11] Constitution, Art 100(1).

[12] *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476, [103].

[13] *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803.

[14] Constitution, Arts 23, 38 and 93.

[15] *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, [134] (*Phyllis Neo*).

[16] *Mohammad Faizal bin Sabtu v PP* [2012] 4 SLR 947, [11]-[13] (*Mohammad Faizal*), most recently cited with approval in *Prabagaran a/l Srivijayan v Public Prosecutor* [2017] 1 SLR 173 (CA) at 200, [56] (*Prabagaran*). See also *Phyllis Neo* (n. 15), [134].

[17] Lord Woolf *et al*, *De Smith's Judicial Review* (7th edn, Sweet & Maxwell, 2013), para 11-004.

[18] Ibid.

[19] *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453, [98].

security is traditionally an area in which the courts have undertaken a less intense standard of review. This, however, does not mean that courts would not scrutinise executive decisions affecting national security. In *Tan Seet Eng v AttorneyGeneral*,[20] the Court of Appeal held that while Parliament has placed the power to impose detention without trial in the hands of the Executive which must be satisfied that the prescribed criteria are met, it is for the Court to determine whether the detention is lawful, although the Court cannot substitute its view for the Minister's on how the discretion should be exercised.[21] Significantly, the Court held that even for "high policy" matters that are typically nonjusticiable, the courts can inquire into whether decisions are made within the scope of the relevant legal power or duty and arrived at in a legal manner.[22] This case concerned a detention without trial under the Criminal Law (Temporary Provisions) Act ("CLTPA").[23] The Court ordered the release of the applicant because the grounds for his detention did not establish whether or how the match-fixing had an impact on public safety, peace, and good order *within* Singapore. According to the Court, the CLTPA only permitted detention where the detainee's acts were harmful *in* Singapore. The applicant was re-detained less than a week later with an amended order that took into account the Court's judgment. No further challenge has been brought on the new order.[24]

This decision asserts the Court's position as a coequal branch of government[25] and affirms a substantive role for the Court in reviewing legality even in polycentric matters. Notably, several weeks after the Court of Appeal's judgment, the Ministry of Home Affairs of its own initiative reviewed the detention orders of three other detainees who were involved in match-fixing activities and, in light of the decision, concluded that their detention orders ought to be revoked.[26] This interaction between the judiciary and the Executive can be said to reflect a dialogic approach to upholding the legality of governmental action in accordance with the respective roles of each branch of government.

In comparison, the courts have been cautious in not overstepping their self-policed boundaries between judicial power and legislative power. In *Lim Meng Suang v Attorney-General*,[27] a case concerning the constitutionality of a criminal provision against acts of "gross indecency" between male persons, the Court said it could not have regard to "extra-legal" considerations and should not attempt to operate as a "mini-legislature".[28] Certain considerations such as the "tyranny of the majority", the absence of harm, the immutability and/or intractable difficulty of changing one's sexual orientation, and the safeguarding of public health were more appropriate for Parliament to take into account. This self-imposed boundary between legal and extra-legal arguments delineates judicial competence from what is seen as highly contentious and political issues, which the Court sees as the domain of politics. Whether such a distinction can be so neatly made is debatable, and indeed constitutional courts in some other jurisdictions would generally regard such arguments as entirely legitimate for judicial consideration.

Protection of Minorities

A key event in 2016 was the convening of a constitutional commission to review and recommend changes to the elected presidency, including how to ensure that minorities will be periodically elected to Presidential office. The Constitutional Commission is only the second to be convened to consider amendments to the Constitution since Singapore's independence. In its report, the Commission recommended a model of reserved elections for the presidency whereby particular elections could be reserved for candidates of a specific racial group if there has not been an officeholder from that group for five consecutive terms of six years each. This move to ensure minority representation seeks to reinforce the presidency's symbolic function as a unifying figure for all racial groups. Historically, the presidency has been taken to be a symbol of multiracialism and the (initially nominated) presidency was rotated among the four major ethnic groups in Singapore— Malay, Eurasian, Indian, and Chinese. Majoritarian systems of elections, however, do not lead to such a neat distribution. Understandably, this emphasis on the symbolic function of the office sits uneasily with the elected nature of the presidency, as reserved elections necessarily restrict political choices. The 2017 presidential elections will be reserved for candidates from the Malay community, which has not yet had a representative as President since the office was made an elected one.[29]

In line with its broad constitutional aim of ensuring minority protection, Singapore also signed the International Convention on the Elimination of All Forms of Racial Dis-

[20] [2016] 1 SLR 779 (*Tan Seet Eng*).

[21] Ibid, [97].

[22] *Tan Seet Eng* (n. 16)*,* [106].

[23] The CLTPA empowers the Minister for Home Affairs to order the detention without trial for a period of not more than a year a person who has been associated with activities of a criminal nature if the Minister deems it necessary in the interests of public safety, peace, and good order.

[24] "Alleged match-fixer Dan Tan re-arrested", The Straits Times, (1 December 2015) http://www.straitstimes.com/singapore/courts-crime/alleged-match-fixer-dan-tan-re-arrested accessed 17 April 2017.

[25] *Tan Seet Eng* (n. 20)*,* [90].

[26] Ministry of Home Affairs, "MHA Statement on Three Members of Match-fixing Syndicate Released from Detention and Placed on Police Supervision Orders" (18 January 2016) https://www.mha.gov.sg/Newsroom/pressreleases/Pages/MHA-Statement-on-Three-Members-of-Match-fixing-Syndicate-Released-from-Detention-and-Placed-on-Police-Supervision-Orders.aspx accessed 4 March 2017.

[27] [2015] 1 SLR 26 (CA).

[28] Ibid, [173] (original emphasis).

[29] Siau Ming En, "Next presidential election to be reserved for Malay candidates", The Straits Times (9 Nov 2016) http://www.todayonline.com/singapore/next-presidential-election-be-reserved-malay-candidates accessed 18 April 2017.

crimination (ICERD) in 2015. It expects to ratify the convention in 2017. However, any domestic effect to the ICERD must be and has yet to be specifically legislated.[30] As the Court of Appeal has explained, since treaties are signed by the Executive without the need for prior legislative approval, they cannot be self-executing as this would intrude into Parliament's legislative powers.[31]

MAJOR CASES

Rights and Freedoms

1. Protection from Arbitrary Deprivation of Life

2016 featured many constitutional challenges arising from amendments to the Penal Code and Misuse of Drugs Act ("MDA"), providing for persons guilty of certain forms of murder and drug trafficking to be, in certain circumstances, sentenced to life imprisonment and caning instead of a death sentence. Prior to these amendments in 2012, the death sentence was mandatory for these offences.

In *Prabagaran,*[32] the Court of Appeal upheld the constitutionality of the amendments to the MDA introducing these discretionary sentencing powers if the accused drug trafficker was a mere courier and the Public Prosecutor certifies that he had "substantively assisted" in disrupting drug trafficking activities. The applicants had not been denied protection from deprivation of life except "in accordance with law" under Article 9(1) of the Constitution. The Court observed that the applicants had all been given opportunities to provide information to assist. Natural justice, entailed in the concept of "law", did not also require that they have a chance to address the Public Prosecutor on whether they had rendered substantive assistance, which turned on factors they would be in no position to comment on. Further, the requirement for substantive assistance was not too absurd or arbitrary to be "law" because it bore a rational relation to the purpose of the provision, which was to enhance operational effectiveness. Poignantly, the Court of Appeal pointed out that if the applicants succeeded in showing that the new provision was unconstitutional, their death sentences would remain untouched because, apart from the new provision, the death penalty would have been mandatory.

2. Death Penalty and Finality

A distinct theme in several cases was the Court's concern with finality as an integral aspect of justice, even in capital cases. In *Kho Jabing v Public Prosecutor*[33] ("*Kho Jabing (criminal motion)*"), the Court of Appeal set a high standard for reopening a concluded criminal appeal, specifically that there had to be sufficient material on which it could be concluded that there had been a miscarriage of justice. Notably, raising new legal arguments involving constitutional points did not automatically entitle an applicant to a review of his concluded appeal. Rather, constitutional arguments also had to be based on new and compelling material that showed the decision to be demonstrably wrong or tainted by fraud or breach of natural justice. The same touchstone applied to cases involving the death penalty. It was observed that once capital cases received the anxious and searching scrutiny they deserve, and the avenues of appeal or review have run their course, "attention must then shift from the legal contest to the search for repose".[34] The Court's motivating concern was to protect the integrity of the judicial process as well as to prevent the damage that an endemic "culture of self-doubt" may do to public confidence.

In subsequent decisions, the Court of Appeal strongly discountenanced attempts to delay the execution of a death sentence imposed by law at the eleventh hour where no real issue of merit was raised. Following *Kho Jabing (criminal motion)*, the Court of Appeal heard and dismissed a second criminal motion filed two days before Kho's rescheduled execution date which again sought to set aside his death sentence. The same day, two civil applications were filed to stay Kho's execution on account of constitutional challenges, although only one proceeded. In *Kho Jabing v Attorney-General,*[35] the Court of Appeal refused the stay, opining that the fresh civil application was an abuse of process because it traversed the same ground already determined in prior criminal motions. Having decided in *Kho Jabing (criminal motion)* that the test for determining if a person convicted of murder ought to be sentenced to death[36] was normatively defensible, the Court declined to reopen the inquiry of whether the same test was too vague to be considered as "law" under Article 9 – the substance of this challenge had been addressed. There was also no merit to his allegations of retrospectivity and unequal treatment.

Chijioke Stephen Obioha v Public Prosecutor[37] dealt with another application to set aside a death sentence as a constitutional violation, filed two days before the execution date. The Court of Appeal dismissed the application on the ground that it was an abuse of process; the procedural history showed that the applicant had filed multiple applications in dribs and drabs to prolong matters *ad infinitum* when he had ample opportunity to present motions based on the arguments being advanced. The Court further observed that the time taken to review the death penalty regime and time afforded to the applicant to avail himself of the new provisions could not amount to undue delay that converted death row into a form of cruel and inhuman punishment in itself.

[30] See *Yong Vui Kong v PP* [2015] 2 SLR 1129, where the Court of Appeal took a strictly dualist view of international law.

[31] Ibid, [45].

[32] *Prabagaran* (n. 16).

[33] [2016] 3 SLR 135.

[34] Ibid [50].

[35] [2016] 3 SLR 1273.

[36] The test, laid down in Kho's original re-sentencing appeal, was that the death sentence would be appropriate where the offence "outraged the feelings of the community": *PP v Kho Jabing* [2015] 2 SLR 112, [44], [86], and [203].

[37] [2017] 1 SLR 1.

Separation of Powers

The principle of separation of powers remains a developing area in Singapore law.

1. Ouster Clauses and Judicial Power

Among the issues that remain unresolved is whether ouster clauses violate the principle of separation of powers and the constitutional vesting of judicial power in the courts. Under Article 93 of the Constitution, judicial power is "vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force". This question was considered but not resolved by the Court of Appeal in *Per Ah Seng Robin v Housing and Development Board*.[38] The Court noted that the Singapore courts have declined to give effect to ouster clauses on several occasions, and that there is much academic commentary arguing that ouster clauses should not be enforced insofar as such clauses seek to oust the courts' jurisdiction to review *justiciable* matters.[39] However, in this case, the court declined to come to a firm conclusion as the respondent did not rely on the ouster clause in question.

2. Demarcating Judicial and Executive Power

Where legislation assigns power that is judicial in nature to the Executive, this is inconsistent with Article 93 of the Constitution. However, ascertaining the nature and scope of judicial power has always been a difficult task, particularly since the Constitution does not define judicial power. In the 2012 decision of *Mohammad Faizal*, the Court described several key indicia of judicial power as premised on the existence of a controversy; entailing the courts to make a finding on the facts as they stand; and entailing the court to apply the relevant law to the facts to determine the rights and obligations of the parties concerned for the purposes of governing their relationship for the future.[40] *Mohammad Faizal* also established that the power to prescribe punishment is part of legislative power while the exercise of such discretion as conferred by statute to inflict legislatively-prescribed punishments on offenders is a judicial function.[41] Consequently, "no punishment prescribed by the legislative branch can intrude into the sentencing function of the courts".[42]

This issue was revisited in *Prabagaran* (see above). The applicants argued that it was a breach of the constitutional principle of the separation of powers for a statute to prescribe an executive decision (*ie*, the Public Prosecutor's certification) as a precondition to the Court's discretion to sentence particular offenders. The contention was that this effectively allows the Executive to select the punishment to be imposed on an offender. While the Court of Appeal accepted that some forms of legislative allocation of powers to the Executive could be in breach of the principle of separation of powers, it did not consider the impugned provisions to be the case: the power to pronounce the sentence remained with the court and there were good reasons why the Executive was best placed to make an operational assessment of substantive assistance. The Public Prosecutor's discretion is limited to the question of whether the prescribed criterion is satisfied, as a precondition to the exercise of the Court's sentencing powers,[43] and is not tailored to the punishment that he thinks should be imposed on the offender. Consequently, the Court held that the Public Prosecutor's decision on whether to grant a certificate of substantive assistance could be challenged, but only on the grounds of bad faith and malice.[44]

3. Substantive Legitimate Expectations

The emerging doctrine of substantive legitimate expectations also raises issues of separation of powers. The doctrine of substantive legitimate expectation in essence binds public authorities to representations about how they will exercise their powers or act in the future. In 2014, the High Court held in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* ("*Chiu Teng*")[45] that the upholding of legitimate expectations was "eminently within the power of the judiciary" and that substantive legitimate expectations should be recognised as a stand-alone head of judicial review.[46] In *SGB Starkstrom Pte Ltd v Commissioner for Labour,*[47] the Court of Appeal considered but declined to either affirm or reject the doctrine as laid down in *Chiu Teng*. However, the Court made important remarks about the constitutional foundations of judicial scrutiny of administrative decisions.

First, from the Court's perspective, the core issue was whether the Executive or the judiciary was *the appropriate body* to decide whether one party's legitimate expectation should prevail over the countervailing public interests. It recognised that such a determination would often involve polycentric considerations because it would affect third parties who would have stood to benefit from the public authority's change in position. Second, the court expressed concern that acceptance of the doctrine could cause a redefinition of the "approach to the doctrine of separation of powers and the relative roles of the judicial and executive branches of Government".[48] It suggested that, between the extreme poles of enforcing a substantive legitimate expectation and completely ignoring it, there are intermediate options that

[38] [2016] 1 SLR 1020.

[39] Ibid [64]-[66].

[40] Ibid [27].

[41] Ibid [45].

[42] Ibid [49].

[43] Ibid [76].

[44] *MDA*, section 33B(4). As recognised by the Court of Appeal in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [76], the Public Prosecutor's decision can also be challenged on grounds of unconstitutionality.

[45] [2014] 1 SLR 1047.

[46] Ibid [113].

[47] [2016] 3 SLR 598 ("*SGB Starkstrom"*).

[48] Ibid [59].

may be more suited to the current conception of the separation of powers in Singapore.[49] Significantly, these intermediate options were all *procedural* protections aimed at ensuring that due consideration is given to an agency's prior representations, short of interfering with the substance of executive action. While the status of the doctrine remains unsettled, it has the capacity to ensure better governance within the executive branch as the Executive is likely to exercise caution in making representations and to have regard to its prior representations in its decision-making process. To this extent, the judgment may be regarded as encouraging good governance in accord with the green light theory of judicial review.

CONCLUSION

In conclusion, the year 2016 saw a continuingly evolving relationship between the political branches of government and the judicial power of review. While the courts generally showed a significant amount of trust in the political branches, in line with the "green-light" approach, they nonetheless asserted their judicial power to review executive and legislative acts where deemed necessary. One may view the judicial pronouncements as the courts coming into their own as a coequal branch of government and navigating the appropriate scope of their powers. Indeed, what is clear is that the courts will review executive action to ensure legality. As the Court of Appeal aptly stressed in *Tan Seet Eng*, where a matter is clearly unlawful, the question of judicial deference "simply does not arise".[50]

[49] These include requiring the public authority to confirm that it has considered its representation or to give reasons for its assessment that the legitimate expectation should be defeated. To this list, one may add a more proactive duty to consult parties to whom representations have been made. To decide when such procedural duties are applicable, the High Court's definitions of a qualifying representation and expectation can be instructive(see *Chiu Teng* (n. 71), [119]). See Sundaresh Menon CJ, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 for extra-judicial comment.

[50] See *Tan Seet Eng* (n. 20), [106].

Slovakia

DEVELOPMENTS IN SLOVAK CONSTITUTIONAL LAW

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THE CONSTITUTION AND THE COURT

Slovakia became independent in 1993, with the peaceful dissolution of the Czech and Slovak Federal Republic. Its Constitution, adopted already in 1992, fashioned a parliamentary model of government and constitutional supremacy. It divides the state powers between the National Council (NC), a unicameral legislature composed of 150 MPs; the government; the presidency; and the judiciary.

An amendment to the Constitution in 1999 introduced direct election of the president to the initial design. However, it is the government that wields most executive powers and bears the responsibility for their exercise to the NC. The Constitutional Court of the Slovak Republic (CC) is the principal guardian of the Constitution (Art 124). A special body, the Court is separate from the general judiciary.

The Constitution can be amended by a qualified majority of 90 MPs, whereby the NC turns into the constitution-maker. The Constitution has already been changed 16 times since its adoption (Figure 1), with the last direct amendment adopted on March 30, 2017.

Most of the amendments were fairly inconsequential, but a few managed to stir the institutional equilibrium: the introduction of the popular presidential election (1999); a major pre-EU constitutional overhaul in 2001; establishment of the Judicial Council to enhance the independence of the judiciary (2001); or the introduction of Ombudsman. These changes had important knock-on effects that still resonate within the fabric of Slovak constitutional law. The practice of constitutional government was not yet "liquidated" at the end of the millennium, and relationships especially within the executive, between the directly elected president and government of the time, proved to be problematic. The CC oft needed to guard and interpret the Constitution in conflicts, as well as mediate between the political branches at the same time.

The CC was established to serve as the last check in constitutional disputes. It wields powers to 21 different types of proceedings (the newest one is to review executive pardons; March 2017 amendment). The Court hears cases in the plenary sessions, or in one of its four three-member Senates. The most prominent of the Court's powers is an abstract constitutional review. The Court acts as the Kelsenian negative legislator (Art 125) to review parliamentary legislation against the Constitution and its material principles. Second, the CC is the ultimate interpreter of the Constitution in interpretive disputes (Art 128), thereby, perhaps, acting as the "junior" partner of the constitution-maker.[1] Both constitutional interpretation and review are vested in the Plenum and enjoy generally binding effect (*erga omnes*). The Senates conduct the concrete review in cases of alleged violation of individuals' constitutional rights (Art 127).

The CC normally seats 13 judges, appointed for non-renewable 12-year terms (Art 134). The NC nominates a double number of candidates for each vacancy on the Court by a

[1] To paraphrase Aharon Barak, *The Judge in Democracy (Princeton University Press 2006). This is observable in the pattern of constitutional interpretations, which come in periods of amendment dead spots. But constitutional interpretation has its limits.*

simple majority, and the president then selects and appoints one of the two nominees. But even this relatively straightforward process became a source of serious tension between the NC and president.[2] The ongoing conflict (see the 2015 YiR report) has left the Court incomplete for well over two years.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The issue that has continuously "irritated" Slovak constitutional politics has been the so-called Mečiar's amnesties. Vladimír Mečiar, the prime minister in 1994-1998, was also acting president in March-October 1998. The Constitution then allowed the government to shift almost complete presidential powers to the PM during the vacant presidency, including the power to grant pardons and amnesties. Which is what Vladimír Mečiar did. His amnesties halted criminal investigations under the pretense of "achieving civil peace." They caused major public outrage, and further enhanced the perception of abuse of state powers by elites.[3]

"Mečiar's Amnesties"

PM Mečiar got into numerous severe conflicts with the former president, Michal Kováč, in the mid-90s. In November 1994, the German court issued an arrest warrant for Michal Kováč Jr., the president's son, for an alleged 2 million USD fraud.[4] But Slovakia did not have an extradition agreement with Germany at the time, thus, allegedly, the Slovak Intelligence Service (SIS) dragged Kováč Jr. to Austria in an undercover operation in August 1995. The SIS officers tied Kováč Jr., made him drunk, and had taken him to Austria (per prosecutor's indictment) so that he might be later extradited to Germany. It is believed that the abduction was orchestrated by the director of SIS, nominated to the office by Mečiar, and that Mečiar at the very least knew about the operation.

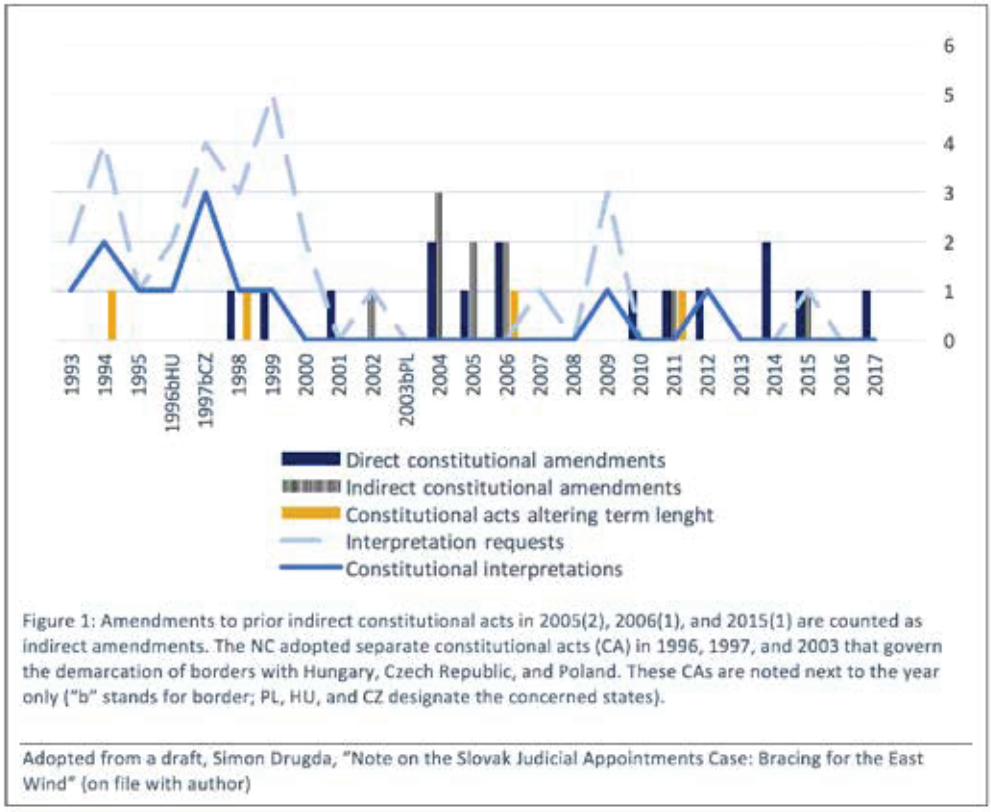

Figure 1: Amendments to prior indirect constitutional acts in 2005(2), 2006(1), and 2015(1) are counted as indirect amendments. The NC adopted separate constitutional acts (CA) in 1996, 1997, and 2003 that govern the demarcation of borders with Hungary, Czech Republic, and Poland. These CAs are noted next to the year only ("b" stands for border; PL, HU, and CZ designate the concerned states).

Adopted from a draft, Simon Drugda, "Note on the Slovak Judicial Appointments Case: Bracing for the East Wind" (on file with author)

In 1998, then acting president Mečiar issued two amnesties. On March 3, 1998, he issued the first amnesty (No. 55/1998 Coll. of Laws) by which he *inter alia* prohibited to commence or to continue criminal proceedings in all cases connected with the abduction of Kováč Jr. On July 7, 1998, Mečiar issued the second amnesty (No. 214/1998 Coll. of Laws) to clarify the confused wording and interpretation of the first amnesty. He introduced "suspicion" for the perpetration of the concerned criminal offenses into the wording of the original Act. However, a new government emerged from the imminent 1998 general election. The new PM, Mikuláš Dzurinda, still an interim president, abolished both Mečiar's amnesties in relevant parts. This decision was challenged before the CC, and one of the Court Senates decided that the president could not lawfully revoke an amnesty that had been already granted. The same rationale applied to other state institutions.[5] The CC further held that the legal positions of the amnestied individuals could not be lawfully altered (I. ÚS 30/99).

The criminal investigation proceeded notwithstanding the CC decision, but in 2002 the competent courts, including the Supreme Court, finally refused the indictment because of the amnesties. The criminal case was dismissed as *res judicata*.

Constitutional Amendment

The NC tried to abolish the controversial amnesties, but until March 30, 2017, these efforts brought no legal consequences. Finally, in 2017, the NC amended the Constitution (No. 71/2017 Coll. of Laws) to create a unique mechanism for abolishing the past and future presidential amnesties and pardons. First, the amendment introduces the possibility that the NC can abolish, by a 3/5 majority, any amnesty or pardon that violates the principles of the rule of law and democracy. The NC does so by a resolution, published in the Collection of Laws. Second, such a resolution also annuls all legal effects of final decisions in attendant crimes, which would ordinarily preclude prosecution.[6] Third, the NC decision to abolish an amnes-

[2] Tomáš Ľalík, "Constitutional Court Crisis in Slovakia: Still Far Away from Resolution," Int'l J. Const. L. Blog, August 5, 2016.http://www.iconnectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution

[3] The NC tried to abolish the amnesties on eight separate occasions. See also the CC decisions in I. ÚS 30/99, *I. ÚS 40/1999; decisions on constitutional complaints in II. ÚS 31/1999, II. ÚS 69/1999, II. ÚS 80/1999, I. ÚS 48/99; and the ECtHR decision in* Lexa v. Slovakia, no. 54334/00, 23 September 2008.

[4] INTERPOL had also issued a warrant for Kováč Jr.

[5] Senates could interpret the Constitution prior to 2001.

[6] This was explicitly extended to the amnesties and a pardon that President Kováč gave to his son, because of the statute of limitations.

ty or pardon will be *ex officio* automatically sent to the CC for a review. The Plenum must review the resolution in 60 calendar days. If the Court does not decide by this time, the NC's decision is constitutional by default. The case of Mečiar's amnesties is currently pending before the CC.

Implications for Practice

A few remarks on the change are necessary. The NC has elevated itself above the other branches of the government, but especially above the executive. The Parliament can review, based on its political and legal judgment, whether the president and the government exercised their powers in comport with the Constitution. The amendment thus enables the legislature at the expense of the executive, and ultimately also to the judiciary. Moreover, the mechanism is also complicated and opaque, since the process now involves all major institutions. The presidential amnesty power was already (1) subject to the government countersignature, but can be now (2) abolished by the NC, and in the end also (3) reviewed by the CC. The amnesty power is fettered to the extent that it will not often be used.

Second, the possibility to *ex-post* abolish pardons and amnesties leaves the legal situation of those benefiting from the acts uncertain. Theoretically, even amnesties issued in 1945 are subject to repeal. The constitutional practice does not rule this out. International human rights obligations concerning the finality of decisions (*res judicata*), the *ne bis in idem* principle, legitimate expectations, or the right to have a fair trial can now be possibly also at stake. The amendment was adopted with an implicit notion that cases will likely end up before the ECtHR.[7]

Third, even though the CC automatically reviews the NC's resolution on the amnesties, an absolute majority (7) of all 13 judges is still necessary to overrule the decision.[8] This is an unlikely feat with the peculiar situation on the Court, which consists of only 10 judges. The quorum for decisions does not decrease. This technical hurdle further tips the scales in favor of the Parliament.

Fourth, the gravity of the offense pardoned by Mečiar's amnesties was not likely to drastically impinge on the constitutional order. Their abolition on the other hand, likely violates the principles of the rule of law (chiefly non-retroactivity). The abduction of a single person, who went missing for several hours and was later found unharmed, although morally and legally reprehensible, is by no means a crime against humanity, as defined by Art. 7 of the Rome Statute of the International Criminal Court.[9] Therefore, the case must be distinguished from *Barrios Altos*, *Gelman,* or *Marguš* cases, or amnesties after the "dirty war" in Argentina.

COURT DECISIONS IN 2016

The CC has not yet published its annual statistics for the year 2016 at the time of writing this paper, but there is data that might be of at least a rough guidance for comparativists when extrapolated for the whole year. The Court received 8 978 applications in the first six months of 2016 and addressed 8978 cases at the same time.[10] A single judge decided 569 cases per month on average in the first half-year. The Plenum decided six judicial review cases on merits in 2016.[11] The average length was projected to increase last year from the 9,02 months in 2015, and 8,15 months in 2014, due to vacancies on the Court and backlog.[12] Yet most of its docket is up to date. The oldest pending cases before the CC were two petitions from 2013.

Notwithstanding the general salience of plenary decisions, the Court's primary activity (in absolute figures) lies with the Senates. The overwhelming majority of cases before the CC are constitutional complaints. Since the YiR report on the year 2015 focused entirely on plenary decisions, we focus on the decision-making in the Senates in 2016 to compensate for the omission.

Senate Decisions in the Year 2016

In late December, the CC heard a case of two judges that were recalled because they reached the age of 65 years (**II. ÚS 298/2015**). The Constitution recognizes two types of a judicial recall: obligatory and optional. The latter form further distinguished between a Judicial Council (JC)[13] recommendation to the President to recall a judge either due to bad health (the inability to work for more than a year) or upon reaching the age of 65 (Art 147.2 of the Constitution). The two former judges claimed a violation of their right to access to public offices (Art 30.4 of the Constitution). In their view, the JC did not explicitly recommend the President to have them recalled, and the President did not provide sufficient reasons for his decision. But the Court did not find a violation of the Art 30.4 since the JC is neither obliged to present a list of judges exceeding the age limit nor does the President have a constitutional obligation to act on such a recommendation. The CC upheld the JC motions as qualified for a recall. The President had sufficiently engaged his competences when he explicitly referenced to constitutional provisions regulating the recall process.

[7] In Hart's terms, this might have been a "frankly retrospective law." HLA Hart, "Positivism and the Separation of Law and Morals" Harv. L. Rev. (1957) 619.

[8] As with other plenary decisions per Art 131.1.

[9] But compare Art 80 and 120.13 of the Constitution of Ecuador, which excludes cases of force disappearance from the benefit of amnesties or pardons; and provisions against forced disappearance in Latin American constitutions. Art 27.5(b) of the Constitution of Eritrea prohibits the grant of pardon or amnesty to persons who, "acting under the authority of the State, have committed illegal acts."

[10] Pre-2016 pending cases have increased the aggregate number. Press release no. 46/2016 https://www.ustavnysud.sk/documents/10182/1270912/TI_info_46_2016/f43f8875-4d04-4a4a-b8d7-f29421c66499.

[11] Calculated for the period 1/3/2016- 4/6/2016. The CC was down by one further judge since the end of February. The remaining ten had to divide the remainder of his work (107 filings). Press release no. 40/2016 https://www.ustavnysud.sk/documents/10182/1270912/TI_info_40_2016/07492b21-95a5-449a-9a64-7398812236ba.

[12] The Court has received 135 324 petitions in its third term (2007-2016); sevenfold the number of applications filed in the previous two terms combined. Press release no. 41/2016 https://www.ustavnysud.sk/documents/10182/1270912/TI_info_41_2016_/659bea3c-5f9f-428b-b7ca-36b9a0b87a36.

[13] On the JC, see generally David Kosař, Perils of Judicial Self-Government in Transitional Societies (CUP 2016).

The JC was also involved in another interesting case concerning the organizational powers of its president and the obligation to provide reasoned decisions (**III. ÚS 588/2016**). A candidate for a vacant seat on the General Court of the EU for Slovakia lodged a constitutional complaint against the JC decision that denied his application. He was rejected in a secret ballot without the Council giving reasons for the decision. The applicant also claimed that the JC president unlawfully postponed, by 15 days, the second round of public hearings to find suitable candidates for the Slovak nomination. The applicant was statutorily barred from taking part in that call but would be otherwise eligible for another run if the selection process failed. It was bound to fail since no one was proposed. The applicant argued that the postponement was arbitrary, *ultra vires*, and violated his right to good administration.

The CC, however, found the complaint ill-founded. The Court reasoned that JC decisions do not constitute individual legal acts and as such need not give reasons due to the character of the vote (secret ballot) and the fact that even non-legal arguments can play a role in the election process. Moreover, neither the Constitution nor any statutory law allows an appeal against such decision. The election process is otherwise transparent. Public hearings are recorded and uploaded on-line, decisions are publicized together with minute-books from the sessions. As for the postponement of the hearing, the CC held that even though the statutory law does not envisage such power for the president, it is still among her implicit powers as it relates to organizational competences. But the president must not exceed 120 days for holding a session.

In the year 2016, a question arose whether the Parliament can debate specifics of an ongoing high-profile criminal case with explicit reference to suspects (**II. ÚS 146/2016**). The case concerned the infamous Gorilla scandal: a political corruption scandal in Slovakia in 2005-2006. The applicant before the CC claimed that the National Council (NC) had violated several of his rights (right to private life, right to a fair trial, presumption of innocence, etc.) by adopting a declaration on the scandal but also when MPs named him *the* primary suspect in the scandal during an extraordinary session of the NC. The applicant also argued that although never officially charged with any offense, he felt as if he, in fact, was "substantively charged" due to the conduct of public authorities and parliamentarians' accusations. The CC dismissed the complaint, having found that the applicant was not individually and intensely affected by the acts and statements of the NC. He became a publicly known figure through his own conduct. The CC stressed that the main function of any parliament – to discuss, *parler* – constitutes an objective constitutional value in itself. The NC may discuss any issue of public importance and MPs cannot be held civilly liable for making statements in session. The declaration issued by the NC was of declaratory (political) nature without mentioning the applicant. However, the Parliament can violate individual human rights if it exceeds its competence or arrogates constitutional powers of other branches.

In the case **I. ÚS 689/2014**, the CC reviewed lower court decisions where the applicant (a judge) had a civil action dismissed. The suit concerned comments made by an MP on the national news: "It is absurd that a criminally prosecuted judge is still on the bench. This is evidence that in today's judiciary corrupted judges triumph." The CC emphasized the dignity and the right to private life of the applicant:

> It is especially human dignity, good reputation, and name or personal honor that preclude a person to be treated as an object in the relevant legal relation. Human dignity is a value horizontally incomparable with other constitutional values or societal norms, and it is irrecoverable by other goods; less so by values quantified or identifiable by money.

The Senate accented the presumption of innocence that protects an individual until found guilty and criticized the formalistic approach of lower courts, which imposed an overly excessive burden of proof on the applicant to demonstrate suffered loss and limitation of her right to private life.

The application of the EU law to the domestic legal order, namely the extent of compensation in civil liability cases arising from car accidents, came before the CC in the case **III. ÚS 666/2016**. An insurance company claimed a violation of the right to a fair trial and the right to property against lower courts because of their extensive interpretation of "damage." Lower courts had found that damage includes non-material harm caused by traffic accidents, referring to the CJEU judgment *Haasová* (C-22/12). The applicant had to compensate 26.000 EUR the insured person for a violation of personal rights and the suffering caused by a loss of a close person in a car accident. The insurer argued for a restrictive interpretation of the term damage in the Slovak legislation; the CJEU itself refers to national law to determine whether a compensation in such civil liability cases also covers non-material damage (*Haasová*, para 59). The CC ruled the complaint ill-founded. Lower courts constructed damage in an extensive way by a reference to the case law of the CJEU and doing justice to the interpretation of national law in conformity with the EU law. The CC also referred to *Haasová* (para 58), where the CJEU subsumed road traffic accidents in the national law under civil liability law to which three different EU directives on insurance for civil liability in respect of the use to motor vehicles apply. Moreover, the Slovak Civil Code regulates various aspects of damage to health that have immaterial connotations. While the case law of the Supreme Court on this subject remains divergent, the CC upheld the challenged lower court decisions as constitutionally tenable.

Undue Delays in Proceedings

Constitutional complaints against excessive length of proceedings in court have gained a steady notoriety in the jurisprudence of the Court. These cases have among the highest success rate and continue to draw the attention of the Court and media. 86% of all cases before the CC between 2002-2010 were constitutional complaints and of 80,6% of those involved the claim that the applicant's case

was not settled within a reasonable time.[14] The Court found a violation of the rights of applicants to a fair trial within the reasonable time in 263 cases in the year 2016. Twenty-nine of the cases lasted over 16 years ("extreme delays") while in 28 cases the CC found repeated violations (the so-called "repeat delays").

The Senate decision **II. ÚS 612/2015** may work as an illustrative example of this genus of cases. This dispute was not the longest but was distinct to the extent of the CC's involvement.[15] The District Court in Čadca took 18 years and four CC judgments to close the case. The CC considers the totality of circumstances of a case of excessive length of proceedings, but accents three criteria: (1) legal, factual, and procedural complexity of the case;[16] (2) parties' conduct (which may determine the remedy); and (3) conduct of the lower court. It is not just an inaction of the competent authority that may cause undue delays. The CC recognizes that courts bear responsibility for an effective and fair trial that leads to a successful vindication of the winning party's right. Thus, a court needs to instruct experts,[17] witnesses, and the parties to act expeditiously,[18] and deter itself from unnecessarily amassing evidence in excess. The court must further ensure that the publication of a decision follows promptly after its oral pronouncement, and is quickly delivered to the parties.[19] Neither do personnel changes on the court that has jurisdiction to try the case relieve the state of its responsibility for the excessive length of proceedings.[20] Finally, criminal cases constitute a special subset of cases within the genus, when even a delay of several weeks can constitute a violation of the right to fair trial within reasonable time.[21]

The cases on excessive length of proceedings are important because parties to a dispute and the public overall lose confidence in the effective exercise of justice when faced with widespread actions and omissions by public authorities that contribute or directly result in unnecessary delays. The reputation of judges dissipates in proportion to the decline of trust in the judiciary. Prof Richard Fallon noted in his well-known paper that the authoritative legitimacy of judicial pronouncements is not a logical necessity.[22] Yet the non-compliance of lower courts in the 28 cases seems to be compelled more by a backlog and the force of inertia.

The CC runs a project to improve the efficacy of implementation of its decisions on constitutional complaints that should help, in the long run, to reduce the number of instances when the ECtHR finds Slovakia in violation of the Convention.[23] The Court monitors the enforcement of its decisions through repeat notifications in six-month intervals and naming and shaming. The Court monthly publishes online those lower court decisions that had been found in breach of the state's positive obligations, along with the name of a presiding judge.[24]

CONCLUSION

The CC decisions have been broadly respected. In recent years, however, the friction between the representative branches of the government and the CC caused disturbances, and the Court has been sporadically attacked as political, illegitimate, or simply wrong.[25] No decision has been openly disregarded, but there have been gestures of resistance to the CC's authority. The counter-majoritarian anxieties in Slovakia seem certainly less acute than in comparative perspective.[26] Criticism of the Constitutional Court has become, perhaps, a canon of politicians to focus attention elsewhere, and a way of affordable position taking.[27] Slovakia starts to pick up on the trend, but will hopefully not let the fates of Polish and Hungarian Constitutional Courts repeat.

[14] 40 876 complaints in the observed period.

[15] See prior decisions: I. ÚS 327/09, I. ÚS 78/2011, III. ÚS 121/2013.

[16] This criterion concerns also the (1a) object of a dispute such as a suit for inheritance or property claims.

[17] I. ÚS 23/2016 (finding a lower court responsible for delay caused by a notary).

[18] I. ÚS 523/2015 (finding that litigants have a procedural obligation to contribute to achieving the purpose of legal proceedings in responding timely to the instructions the court).

[19] I. ÚS 96/2016 (finding 13-month latency unreasonable).

[20] II. ÚS 408/2015 (rejecting repeated allocation of file to several judges as a justification for delays).

[21] See e.g. I. ÚS 5/2016, I. ÚS 237/2015.

[22] Richard Fallon, "Legitimacy and the Constitution," 118 Harvard Law Review 1787, 1831.

[23] Art 6.1 ECtHR; Art 48.2 of the Constitution in domestic law.

[24] Press release no. 20/2017 https://www.ustavnysud.sk/c/document_library/get_file?uuid=bb2716bd-626b-402b-a83c-ba2330480479&groupId=10182.

[25] Most recently in connection to the abolition of Mečiar's amnesties by MPs, and by President Kiska concerning the controversy with judicial appointments. Critics conflate legal, moral, and sociological legitimacy.

[26] Tomasz Tadeusz Koncewicz, "Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense," Int'l J. Const. L. Blog, December 6, 2015, http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense accessed on April 15, 2017; on Hungary see generally Armin von Bogdandy and Pal Sonnevend, *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania (Hart 2015).*

[27] Mark A. Graber, "A Tale Told by a President," 28 Yale Law & Policy Review: Inter Alia 13 (2010).

Slovenia

DEVELOPMENTS IN SLOVENIAN CONSTITUTIONAL LAW

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INTRODUCTION

The year 2016 was symbolic for the Constitutional Court and the Slovenian constitutional order as it marked the celebration of the 25th anniversary of the Constitutional Court in an independent and democratic state.[1] The role and the importance of the Constitutional Court in the Republic of Slovenia cannot be overstated. It is widely considered as one of the very few institutions of the Slovenian state that has managed to preserve its institutional integrity and independence.[2] It has not only lived up closely to the highest rule of law standards but it has also succeeded in countering many corrosive effects that the rule of law and democracy in Slovenia have been subject to due to the unfinished project of democratic transition combined with the contemporary economic crisis. Different than several Central and Eastern European states which have been in the critical international spotlight due to their constitutional backsliding, Slovenia, despite its many problems with the failed,[3] diminished, corporatist democracy,[4] which exhibits a great discrepancy between the rule of law on books and that in practice, has escaped almost any international attention. The reason for that might be also sought in the preserved capacity of the Constitutional Court to act as a final rule of law bulwark against the pervasive attempts of informal, but not infrequently also formal, capture of the state. The Slovenian Constitutional Court has thus succeeded in preserving the meta-framework of constitutional democracy while many of the sub-systems inside it have fared much worse.[5]

THE CONSTITUTION AND THE COURT

The Constitution of the Republic of Slovenia was adopted on 23 December 1991, six months after Slovenia had declared independence. The Constitution, introduced by a preamble, which is followed by the normative part, divided into ten chapters, is recognized as a modern constitution. It does not only guarantee an extensive catalogue of human rights and fundamental freedoms but it is also based on the principles enshrined in European constitutional legal orders, such as the principle of democracy, the rule of law, the principle of a social state, and the principle of the separation of powers. Human dignity,

[1] Jadranka Sovdat (ed), *Constitutional Court of the Republic of Slovenia – 25 Years*, [International Conference, Bled, Slovenia, June 2016, Conference Proceedings] (Constitutional Court of the Republic of Slovenia, Ljubljana 2016).

[2] Bojan Bugarič, Alenka Kuhelj, Slovenia in Crisis: A Tale of Unfinished Democratization in East-Central Europe, *Communist and Post-Communist Studies*, 2015, no. 4, vol. 48, str. 273–279.

[3] Matej Avbelj, *Failed Democracy: The Slovenian Patria Case – (Non)Law in Context* (July 4, 2014). Originally published in Slovenian in the journal *Pravna praksa*, as Matej Avbelj, Zadeva Patria – (ne) pravo v kontekstu, *Pravna praksa*, No. 26, July 3, 2014. Available at SSRN: https://ssrn.com/abstract=2462613 or http://dx.doi.org/10.2139/ssrn.2462613

[4] See Bojan Bugarič, Alenka Kuhelj, supra note 2.

[5] For an overview, see in particular the chapters by Jernej Letnar Černič, Jan Zobec and Matej Avbelj in: Michal Bobek (ed), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Hart, Oxford 2015).

as the source and the common expression of all human rights, forms the foundation of the Slovenian constitutional order.[6] The important milestones were also the integration of Slovenia into the Council of Europe in May 1993, the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR), and the accession to the European Union in May 2004.

The role of the guardian of the constitutional order is entrusted to the Constitutional Court. This Court is the highest (as well as autonomous and independent) body of the judicial power with a number of competences intended to ensure the protection of constitutionality, legality, human rights, and fundamental freedoms. It decides on certain jurisdictional disputes; on the accountability of the President of the Republic, the President of the Government, and individual ministers; on the unconstitutionality of the acts and activities of political parties; and on appeals in the procedure for confirming the election of deputies. The Constitutional Court Act adopted in 2013 further vested in the Constitutional Court the power to decide in disputes on the admissibility of a legislative referendum.

However, the two most frequently used powers of the Constitutional Court are to assess the conformity of laws and other regulations with the Constitution and to decide on constitutional complaints. With regard to the review of the constitutionality and legality of regulations, a subsequent constitutional review is established in the Slovenian constitutional order, i.e. the review of constitutionality of acts that have already entered into force. The only exception is the preliminary control when assessing whether international treaties that are in the process of ratification conform with the Constitution. A constitutional complaint may be lodged due to a violation of human rights or fundamental freedoms against individual acts by which state authorities, local community authorities, or bearers of public authority decided on the rights, obligations, or legal entitlements of individuals or legal entities. The Constitutional Court decides on a constitutional complaint, as a general rule, only if all legal remedies have been exhausted and if it has been lodged within 60 days of the day the individual act is served.

In all proceedings, the decisions of the Constitutional Court are binding[7] and are constitutive of the Slovenian living Constitution. When the Constitutional Court decides whether a law is consistent with the Constitution or whether human rights or fundamental freedoms of individuals were violated in procedures before state authorities, it also regularly considers the ECHR and the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR).[8] The Constitutional Court can apply the ECHR directly as the underlying reason for its decision or, as a general rule, it considers it indirectly through the standpoints of the ECtHR when interpreting the provisions of the Slovenian Constitution.[9] The duty of the Constitutional Court is also to take account of European Union law and to consider the case law of the Court of Justice of the European Union (hereinafter referred to as the CJEU). The relevant constitutional foundation for the position of European Union law in the Slovenian legal system is Article 3a of the Constitution.

DEVELOPMENTS AND CONTROVERSIES IN 2016

In 2016, the Constitutional Court received 1,092 constitutional complaints and 228 applications for a review of the constitutionality and legality of regulations.[10] The year 2016 discontinued the downward trend, which started in 2009. The Constitutional Court received a total of 1,324 cases, which represents an 8.2% increase of the received cases. With regard to the cases resolved, it should be underlined that in 2016 the Constitutional Court resolved less cases than in 2015 (1,094 cases compared to 1,197 cases, which entails an 8.6% decrease). There were 870 constitutional complaints and 214 petitions and requests for a review of constitutionality resolved. At the end of 2016, the Constitutional Court had a total of 1,219 unresolved cases remaining. The important statistical information remains the number of cases that the Constitutional Court resolved by a decision on the merits. In 2016, the Constitutional Court adopted a substantive decision in 42 constitutional complaint proceedings (out of 870 resolved constitutional complaints) and in 38 proceedings for a review of constitutionality and legality (out of 214 reviews of constitutionality and legality).[11]

In the year 2016, Slovenia amended its Constitution in order to protect—as one of the first European states—access to drinking

[6] See Decision of the Slovenian Constitutional Court No. U-I-109/10 of 26 September 2011, para. 7.

[7] For more on the position and organisation, the jurisdiction and the procedure before the Constitutional Court, see the Constitutional Court Act and the Rules of Procedure of the Constitutional Court, available at http://www.us-rs.si/en/.

[8] For more on the cooperation of the Slovenian Constitutional Court with the ECtHR, the Court of Justice of the European Union, and other constitutional courts, see, Verfassungsgerichtshof Österreich, *XVIth Congress of the Conference of European Constitutional Courts: The Cooperation of Constitutional Courts in Europe: Current Situation and Perspectives* (Volume II, Verlag Österreich, Wien 2014), pp. 923–942. On the status of the ECHR in the Slovenian legal order and on the case law of the ECtHR in relation to Slovenia see Jan Zobec, Slovenia: Just a Glass Bead Game? In: I. Motoc and I. Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press, Cambridge 2016), pp. 425–456.

[9] Verfassungsgerichtshof Österreich, supra note 8, p. 925. By Decision No. U-I-65/05 of 22 September 2005 (para. 7), the Constitutional Court specifically underlined that when assessing the constitutionality of a law it must take into consideration the case law of the ECtHR, regardless of the fact that it was adopted in a case in which Slovenia was not involved in proceedings before the ECtHR.

[10] Besides cases involving a review of the constitutionality and legality of regulations and general acts issued for the exercise of public authority and cases involving constitutional complaints, the Constitutional Court in 2016 also received four cases involving jurisdictional disputes.

[11] Detailed statistical data and graphic representations are presented in the 2016 Annual Report, available at http://www.us-rs.si/media/rsus_letnoporocilo_2016__splet.pdf.

water.[12] Under newly proclaimed Article 70a, everyone has the right to drinking water. Water resources shall be a public good managed by the state and used to supply the population with drinking water and water for households.[13] The discussion and the exchange of views in the process of adopting this constitutional change and after its proclamation involved some differing opinions as to the need for such a constitutional amendment and the reasons behind its adoption.[14]

The year 2016 ended with domestically and internationally highly debated proposed legislative amendments to the Slovenian Aliens Act, according to which the Slovenian National Assembly would be entrusted with the power to act if the changed circumstances in the migration field were deemed necessary due to a threat to public order or national security. The adoption of these legislative amendments at the beginning of 2017 indicated the possibility to challenge their constitutionality before the Constitutional Court.

MAJOR CASES

Among those constitutional complaints and reviews or petitions of the constitutionality and legality of regulations that have been decided in the year 2016, seven decisions are mentioned. It is worth adding that only important parts of these decisions are emphasized. These decisions are separated in two headings.[15]

Rights and Freedoms

1. Decision No. U-I-115/14, Up-218/14 of 21 January 2016

Search on the premises of a lawyer's offices – Lawyer's right to privacy – Proportionality

In this case, the Constitutional Court reviewed the constitutionality of the Criminal Procedure Act and the Lawyers Act. The applicant's main allegation was that the mentioned acts do not regulate the search on the premises of a lawyer's offices, his personal home, and personal vehicles in a way that would guarantee the protection of the right to privacy and the confidentiality of the lawyer-client relationship.

This was the first case in which the Constitutional Court had the opportunity to define the content of the lawyer's privacy. The role of a lawyer is indispensable when providing legal assistance to its clients, including representation in court proceedings. The right to a lawyer is therefore generally regarded as a constituent part of the right to a fair trial. The Constitutional Court stressed that the constitutional protection of the lawyer's privacy is not his privilege. Instead, it is meant to protect and safeguard his clients and in the end their right to a fair trial. The foundation of the lawyer-client confidentiality lies in the performance of the lawyer's work. The Constitutional Court established that the lawyer's right to privacy has several aspects deriving from this confidential relationship. The spatial aspect of privacy does not protect the space itself, but the privacy therein. The confidentiality of the lawyer-client relationship also serves as an equalizer as it evens out the differences between, on the one hand, a person who does not need legal assistance and does not have a lawyer and, on the other hand, a person who is represented by a lawyer. The Constitutional Court established that, *inter alia*, the challenged regulation disproportionately interferes with the lawyer's privacy, because the goal of effective prosecution of criminal offences could equally be achieved by a less severe interference. The Constitutional Court consequently held that the investigative acts at the premises of lawyers and law firms that were not suspects of a criminal offence were carried out on the basis of an unconstitutional statutory regulation.

2. Decision No. U-I-289/13 of 10 March 2016

Right to strike – Military personnel – Duty of national defence

This case deals with the right to strike during the performance of military service. The Defence Act stipulates that military personnel in the performance of military service are prohibited from striking. The Constitutional Court reviewed the applicants' allegations of an unacceptable interference with the right to strike, protected by Article 77 of the Constitution, since the Constitution allows only limitations on the right to strike but not a prohibition of strike. The Constitutional Court stressed that the defence of the inviolability and integrity of the national territory as well as fulfilling international obligations in the field of defence could only be possible by a continuous and unhindered performance of military service. The Constitutional Court thus held that this constitutional duty to participate in the national defence entails that the military personnel is excluded from the right to strike.

3. Decision No. U-I-68/16, Up-213/15 of 16 June 2016

Right to family life – Same-sex partnership – Right to non-discriminatory treatment

In the case at issue, there was a fundamental question of whether the statutory regulation of the position of family members of applicants for international protection signifies discriminatory treatment, prohibited by the first paragraph of Article 14 of the Slovene Constitution. The challenged provision did not explicitly cite same-sex partners (registered partners and same-sex partners who live in a long-term partnership with applicants) among persons that can be family members. The Constitutional Court made abundant references to the case law of the ECtHR and reiterated its previous decision (No. U-I-212/10 of 14 March 2013) that it

[12] See the Constitutional Act Amending Chapter III of the Constitution of the Republic of Slovenia, which was adopted on 25 November 2016 and entered into force on 25 November 2016 (Official Gazette of the Republic of Slovenia No. 75/16).

[13] Article 70a of the Constitution reads as follows: "Everyone has the right to drinking water. Water resources shall be a public good managed by the state. As a priority and in a sustainable manner, water resources shall be used to supply the population with drinking water and water for household use and in this respect shall not be a market commodity. The supply of the population with drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis."

[14] See, for more, several articles in the Slovenian journal *Pravna praksa:* Jakob Ahačič et al, Zapis pravice do čiste pitne vode v slovensko ustavo, *Pravna praksa*, No. 1, January 7, 2016, pp. 13–14; Blaž Kovač, Pravica do pitne vode: papir prenese vse, z njim pa si lahko tudi kaj obrišemo, *Pravna praksa*, No. 5, Februar 10, 2017, pp. 10–11.

[15] For an English translation of mentioned decisions, please, see http://odlocitve.us-rs.si/en/.

is undisputable that in today's society, loving and lasting relationships are established by same-sex and different-sex couples alike. The partners in an unregistered same-sex partnership are bound by similar close personal ties as common-law spouses. It thus follows that the position of same-sex partnerships is comparable to the position of partnerships between different-sex persons (spouses or partners in registered same-sex partnerships) in protecting the right to family life in procedures for granting international protection.

Given that the provision of the International Protection Act did not allow same-sex partners to be included among the persons who may be considered as family members of an applicant for international protection, the Constitutional Court established the inconsistency of this provision with the right to non-discriminatory treatment in the exercise of the right to family life.

4. Decision No. Up-407/14 of 14 December 2016
Freedom of expression – Right of honour and reputation – Human rights in collision
The Constitutional Court decided on the constitutional complaint of the complainant, i.e. the press undertaking, against decisions of the Higher Court and the Supreme Court, issued in civil proceedings. The complainant published an article in the satirical section of its weekly periodical, together with a photograph of a well-known Slovene politician (the plaintiff in civil proceedings) and his family alongside a photograph of the German Nazi propaganda minister Joseph Goebbels and his family. The Constitutional Court examined the admissibility of the standpoints on which the Higher Court and the Supreme Court based their decisions in the case at issue. The Constitutional Court made abundant references to the criteria adopted in its previous case law as well as those adopted by the ECtHR (see, for example, judgements in the cases of *Von Hannover v. Germany (No. 2)*, nos. 40660/08 and 60641/08, of 7 February 2012 and *Axel Springer AG v. Germany*, no. 39954/08, of 7 February 2012).

The Constitutional Court ruled that the publication of the photographs did not contribute to a debate of general interest, instead it exceeded the debate. The comparison with the symbol of Nazism can undoubtedly be regarded as a harsh value judgement. It could still be acceptable, yet only if the complainant would have demonstrated sufficient factual basis for such. The Constitutional Court, however, found that the complainant did not even mention any factual basis for such value judgement emerging from the comparison between the two mentioned photographs. With regard to the above, the Constitutional Court dismissed the constitutional complaint as unfounded.

5. Decision No. U-I-28/16 of 12 May 2016
Migrant and refugee crises – Armed forces empowered with special (police) powers – Principle of clarity and precision of regulations
In this case, the Constitutional Court reviewed the constitutionality of the amendment to the Defence Act. In light of the tighter security situation and with a goal of mitigating the current EU migrant and refugee crises (that have an impact on Slovenia as a Schengen Area member state with an external Schengen border with Croatia), the provisions of this Act empowered members of the Slovene Armed Forces with special (police) powers. The applicant challenged the consistency of certain statutory provisions with the principle of clarity and precision of regulations as one of the principles of a state governed by the rule of law (Article 2 of the Slovene Constitution).

The Constitutional Court reiterated its position that the invoked principle of clarity and precision of regulations requires that their content and purpose be determined using established methods of interpretation and the conduct of the authorities who have to implement these rules is determinable and predictable. As the content of the powers and open-textured legal terms from the challenged statutory provisions can be construed through established methods of interpretation, the Constitutional Court did not establish an inconsistency of these provisions with the Constitution. It held that it is possible to determine the content of powers of the members of the Slovene Armed Forces granted by the Defence Act in order to cooperate with the Slovene Police in the context of a wider protection of the state border.

The Constitutional Court further stressed that the exercise of certain powers by the members of the Slovene Armed Forces under the Defence Act does not signify a decision on the rights, obligations, or legal entitlements of individuals. In fact, such powers are bare deeds of the members of the Slovene Armed Forces when performing their duties. Article 25 of the Constitution does, hence, not guarantee the right to appeal against such deeds.

6. Decision No. U-I-295/13 of 19 October 2016
Financial crisis – The reference for a preliminary ruling – Right to judicial protection
In this case, the Constitutional Court for the first time referred questions on the validity and the interpretation of European Union acts to the Court of Justice of the European Union (hereinafter referred to as the CJEU) for a preliminary ruling and therefore stayed the proceedings until the CJEU adopted its judgement in the case of *Tadej Kotnik and others v. Državni zbor Republike Slovenije*, C-526/14, on 19 July 2016 (ECLI:EU:C:2016:570). The assessment of the Constitutional Court focused on the consistency of the challenged provisions of the Banking Act with several constitutional principles and rights, namely the prohibition of retroactivity (Article 155 of the Constitution), the principle of trust in the law (Article 2 of the Constitution), the right to private property (Articles 33 and 67 of the Constitution), and the right to judicial protection (first paragraph of Article 23 of the Constitution).

Foreign, International and/or Multilateral Relations

In its decisions, the Constitutional Court very often refers to the ECHR and to the ECtHR case law, both in constitutional complaint proceedings and in the procedures for the review of the constitutionality of gen-

eral legal acts.[16] Since Slovenia's accession to the European Union in May 2004, the Constitutional Court, when exercising its competences also respects legal order of the European Union and takes into consideration the case law of the CJEU. Therefore, during its proceedings, the Constitutional Court diligently reviews and studies the case law of the ECtHR and/or the CJEU before it adopts each of its important decisions, even though this may often not be evident from its decisions.[17] Many of the decisions mentioned in this report, albeit being divided into different chapters, referred to the ECHR and to the case law of the ECtHR. Moreover, as mentioned already, in its case No. U-I-295/13, the Constitutional Court referred questions on the validity and the interpretation of European Union acts, for the first time, to the CJEU for a preliminary ruling.[18] As in previous years, the Constitutional Court continues to stress the obligations of the courts with regard to the preliminary ruling procedure before the CJEU.

7. Decision No. 384/15 of 18 July 2016
European arrest warrant – Case law of the CJEU – Failure to take a position on the motion to submit the case to the CJEU for a preliminary ruling
The Constitutional Court assessed the constitutional complaint of a complainant with regard to whom the three-judge panel of the District Court allowed his surrender to Germany on the basis of the European arrest warrant, and the Higher Court agreed with this decision. The important constitutional issue involved in this case was the complainant's allegation that the courts had not expressly taken a position on his motion to submit the case to the CJEU.

The Constitutional Court has already emphasised in its case law that the CJEU is a court in the sense of an independent, impartial court constituted by law (as referred to in the first paragraph of Article 23 of the Slovene Constitution). This human right also guarantees that in the event a question of the interpretation of European Union law and/or the validity of secondary European Union law should arise in a dispute, it is the CJEU that is competent under Article 267 of the Treaty on the Functioning of the European Union to reply thereto. In the case at issue, the courts failed to take a position on the complainant's motion to submit the case to the CJEU for a preliminary ruling. The Constitutional Court therefore abrogated the challenged decisions and remanded the case to the District Court for new adjudication.

CONCLUSION

On the basis of the review of the Constitutional Court's activities in 2016, it can be concluded that the Court continues to play a central role in laying down and upholding the legal foundations of the Slovenian state. By regarding the Constitution as a living document, the Court has been successful in bringing the cases and controversies, sometimes also of a highly political nature, inside the valid constitutional framework, contributing its fair share to the improvement of constitutional democracy in Slovenia. In so doing, the Court has preserved its status as of one of the most influential institutions in Slovenia and has also, following the principle of dialectical openness, striven to be an active member in the European as well international judicial dialogue.

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[16] If a particular right guaranteed by the ECHR is also guaranteed by the Constitution to an equal or greater degree, the Constitutional Court assesses the challenged statutory provision or the alleged violation of a human right only from the viewpoint of the provisions of the Constitution. If the Constitution does not guarantee a particular human right or it guarantees such to a lower degree than the ECHR, the Constitutional Court conducts the assessment of the alleged violation or the disputed legislation from the viewpoint of its consistency with the ECHR.

[17] See Verfassungsgerichtshof Österreich, supra note 4, pp. 923–942.

[18] See the CJEU case of *Tadej Kotnik and others v. Državni zbor Republike Slovenije*, C-526/14, on 19 July 2016 (ECLI:EU:C:2016:570).

South Korea

DEVELOPMENTS IN SOUTH KOREAN CONSTITUTIONAL LAW

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INTRODUCTION

Since the founding of the Republic of Korea in 1948 until the 1980s, Korea was under authoritarian government. Korea democratized in 1987, and the Constitutional Court was established the following year. The Korean Constitutional Court is dedicated to democratization and the improvement of human rights in Korean society, which reflects in the character of the Court. The year 2017 is the 30th anniversary of democratization.

The year 2016 was one of the most important years in the history of Korean constitutional law. Late in the fall, President Geun-hye Park became embroiled in a political scandal, dubbed the "Choi Soon-sil gate," which resulted in a strong backlash from the people. The president was suspected of leaking state secrets to her longtime friend and private aide, Soon-sil Choi. The people protested against President Park and demanded her resignation. The impeachment bill of President Park was approved by the National Assembly on December 9, and the Constitutional Court had to decide if Park deserved to be impeached within 180 days. All eight judges of the court unanimously approved the impeachment on March 10 and President Park was officially impeached from office.

This article examines the system of constitutional review and the structure of the Korean Constitutional Court before introducing some cases. Subsequently, the major cases from 2016 will be introduced. The problems and tasks of the Korean Constitutional Court and the Constitution will be discussed in conclusion.

THE CONSTITUTION AND THE COURT

The political system in the Republic of Korea has been changed frequently by presidents since its foundation in 1948. The system of constitutional review has also changed drastically. For instance, the First Republic, the Syng-man Rhee administration, established the Constitutional Council for Constitutional review. The Second Republic, the only parliamentary cabinet system implemented in the history of Korea, planned to build the Constitutional Court instead. However, the Second Republic was short-lived due to the military coup led by General Chung-hee Park, who later became president, and the Constitutional Court was never established. During the Third Republic, the Chung-hee Park administration, the Supreme Court conducted the constitutional review. The Fourth Republic, during which President Park's power strengthened, and the Fifth Republic, the Doo-hwan Chun administration, re-established the Constitutional Council from the First Republic. However, during the authoritarian regime, the Constitutional review was not actively exercised, and only a few cases took place during the First and Third Republics.

In 1987, Korea was democratized, and the Constitution amended. The Constitutional Court was established the following year. According to the Korean Constitution, the Constitutional Court consists of nine Justices, three nominees each chosen by the National Assembly, president, and Supreme Court. Choosing three nominees each from three different power centers was instituted

to maintain the equilibrium of power. Each Justice serves a term of six years and can be reappointed (Article 112(1)).[1] Six Justices' concurrence is required for a decision on unconstitutionality, impeachment, dissolution of a political party, and constitutional complaint (Article 113(1)). As of March 20, the terms of two Justices expired: President Han-chul Park left in January, and Justice Jung-me Lee left in March. Although there are only seven Justices for now, it is still mandatory to obtain the concurrence of six Justices to decide on unconstitutionality.

The Korean Constitutional Court has jurisdiction over five matters: the constitutionality of law, impeachment, dissolution of a political party, disputes about the jurisdictions, and constitutional complaint (Article 111). The Court deals with the constitutionality of a law and constitutional complaints most frequently. There has been only one major case on the dissolution of a political party: the dissolution of the Unified Progressive Party in December 2014. There were two cases of impeachment. The first was against former President Moo-hyun Roh in 2004, which was overturned. The latter was against former President Geun-hye Park in 2017.

The design of the Korean Constitutional Court seems similar to that of Germany. However, there are some structural differences between the Korean Constitutional Court and German Federal Constitutional Court. First, unlike the German Federal Constitutional Court, the Korean Constitutional Court does not allow initiation of a constitutional complaint regarding decisions made by ordinal courts in Korea (Constitutional Court Act, Article 68 (1)). Second, the Korean Constitutional Court does not have the authority to decide on the constitutionality of the law if there is not a concrete lawsuit. Third, in Korea, plaintiffs can directly initiate a constitutional complaint in the Constitutional Court to decide on the constitutionality of the law if the ordinal court does not send the case to the Constitutional Court, despite the plaintiffs demand to do so.

In the Korean Constitutional Court,"the Principle of Proportionality" is entrenched as a criterion for Constitutional review in the field of fundamental rights.[2] This principle was derived from Article 37 (2) of the Constitution, which decrees that "The freedoms and rights of citizens may be restricted by the Act only when necessary for national security, the maintenance of law and order or for public welfare." The Justices examine four points: "correctness of purpose," "appropriateness of procedure," "minimality of damage," and "balance of benefit and protection of law." The Act becomes unconstitutional if the reviewed Act violates any one of these points.

DEVELOPMENTS AND CONTROVERSIES IN 2016

There is also a difference in the binding of decisions of the Korean Constitutional Court and that of Germany. According to Article 31 (1) of the German Federal Constitutional Court Act, "The decisions of the Federal Constitutional Court shall be binding upon federal and Land constitutional organs as well as on all courts and administrative authorities."[3] On the other hand, Article 47 (1) of the Korean Constitutional Court Act decrees, "Any decision that an Act is unconstitutional shall be binding upon courts, and other state agencies and local governments." Therefore, there are controversies with respect to whether "Modified Form of Decisions," especially the decision of limited unconstitutionality described later, can be binding for courts and other state agencies and local governments.[4]

The forms of decisions of the Korean Constitutional Court consist of constitutionality and unconstitutionality as well as "Modified Form of Decisions." Modified form of decisions is defined as various forms of decisions given in cases where it is necessary to respect the legislative and prevent disorder by giving a decision of unconstitutionality despite recognizing unconstitutionality of the law.[5] There are three types of modified form of decisions by the Korean Constitutional Court: "Decision of Limited Constitutionality," "Decisions of Limited Unconstitutionality," and "Decision of Unconformity." Limited constitutionality is the decision that pertains only to certain interpretations as constitutional. Limited unconstitutionality is the decision that considers that the concerning laws can be unconstitutional depending on their interpretation.[6] The decision of unconformity is similar to the decision of unconstitutionality but allows the concerning act to be valid for a certain period. Currently, decisions of limited constitutionality are not given.

Since the Constitutional Court was established after the Supreme Court, there have been disagreements between the two courts. For instance, since Article 47 (1) of the Constitutional Court Act decrees that the decision of unconstitutionality binds courts and other state agencies and local governments, the Supreme Court insists that the decision of limited unconstitutionality by the Constitutional Court cannot bind the ordinal courts as the Constitutional Court is only allowed to decide whether an act is constitutional and specific interpretations of the act are the jurisdiction of the Supreme Court. Essentially, the Supreme Court still often applies the act, which was already determined to be limited unconstitutional. To solve these difficult situations, the Constitutional Court decided that

[1] The English version of the Constitutional Law of the Republic of Korea and the other Acts are available at the website of the Korea Legislation Research Institute: http://elaw.klri.re.kr/kor_service/main.do accessed 29 March 2017

[2] Byong-ro Min, "Current State and Tasks of Constitutional Review in Korea" in Hideyuki Ohsawa and Go Koyama (eds) *American Constitution in East Asia* (Keio University Press 2006) p. 84 (in Japanese)

[3] The English version of the German Federal Constitutional Court Act is available at the website of the German Federal Constitutional Court: http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1 accessed 29 March 2017

[4] Leo Mizushima, "Constitution-Compatible Interpretation in Comparative Perspective: Korea" (2017) 78 Comparative Law Journal p.90 (in Japanese)

[5] Yong-Sung Kwon, *Constitutional Law: A Textbook* (Bobmun Sa 2010) p. 115 (in Korean)

[6] Although the Korean Constitutional Court considers that decisions of limited constitutionality and unconstitutionality are substantially similar, some scholars insist that the characteristics of both decisions are quite different. (e.g. Young Huh, *Rules of Constitutional Litigation* (Pakyoung Publishing 2006) pp. 181-185 (in Korean); Jong-sup Chong, *Constitutional Litigation* (Pakyoung Publishing 2006) p. 304 (in Korean))

Article 68 (1) of Constitutional Court Act will be considered limited unconstitutional if plaintiffs are not allowed to initiate a constitutional complaint regarding the decisions of the courts in cases where the ordinal court adopted the act that has already been interpreted as unconstitutional by modified form of decisions of the Constitutional Court.

MAJOR CASES IN 2016

Separation of Powers

Impeachment of President Geun-hye Park (2017. 3. 10. – 2016 Hun-Na 1)

On December 9, the National Assembly passed the impeachment bill for President Geun-hye Park. Though the National Assembly listed 13 violations of the Constitutions and Acts, the Constitutional Court structured them into five points during their deliberation: violation of national sovereignty, abuse of power as president, violation of criminal law such as bribery, violation of the duty of the people's life protection at the Sewol ferry disaster, and violation of freedom of speech. Among these, the first three points are related to the interference in state affairs by Soon-sil Choi. The Constitutional Court dismissed the Sewol ferry disaster and did not recognize the violation of freedom of speech. Though the Court did not recognize the abuse of power on the appointment to officer, the Court recognized that President Park abused her power because she accommodated Choi's conveniences. All eight Justices unanimously decided on the impeachment of President Park on March 10, 2017. It was the first time that the Constitutional Court had decided on the impeachment of a president.

Rights and Freedoms

Constitutionality of Excluding English Education for First and Second Graders at Private Elementary Schools (2016. 2. 25. – 2013 Hun-Ma 838)

Among the major cases at the Korean Constitutional Court, these are the prominent examples of decisions of constitutionality. On February 25, the Constitutional Court decided that the Ministry of Education, Science and Technology's (MEST, currently referred to as the Ministry of Education (MOE)) notice 2012-31 II, which excluded English classes from the curriculum for the first and second grade of elementary school, is constitutional. Although the first and second graders are not required to study English according to the notice from MEST, 32 of 76 private elementary schools taught English to first and second graders. The Minister of MEST decided to reduce the intensity of English education, and the local education officer of the Seoul Sungbuk District Office of Education demanded the cooperation of local schools. The parents of pupils attending private schools insisted that the decision violated the children's right to education. The Constitutional Court decided that the notice does not violate the parents' right to educate their children because first- and second-grade students would find it difficult to learn Korean if they study English at the same time.

Constitutionality of Considering Mass Media and Faculty Members as "Public Officials" and Prohibiting Them from Being Involved in Bribery (2016. 7. 28. – 2015 Hun-Ma 236, 412, 662, 763 (combined))

On July 28, the Constitutional Court decided that Article 2 of the "Improper Solicitation and Graft Act"[7] is constitutional. According to Article 2 of the Act, "public officials, etc." are prohibited from being involved in bribery. The Article defined faculty members of private schools and mass media professionals as "public officials, etc." Faculty members of private schools and mass media professionals insisted that this violated their rights of action and equality. The Constitutional Court, however, rejected this and suggested that the social impact of faculty members and the mass media were so enormous that they must preserve their integrity as public officials.

Constitutionality of the Term "Other Disgraceful Conduct" in Military Criminal Act (2016. 7. 28. – 2012 Hun-Ba 258)

On July 28, the Constitutional Court decided that Article 92-5 of the Military Criminal Act is constitutional. The plaintiff, a senior officer who violated Article 92-5 of the Military Criminal Act, was sentenced to six-months' imprisonment; however, the sentence was suspended through a stay of execution for a year. He was accused of allegedly touching his junior officer's crotch 13 times. According to Article 92-5 of the Military Criminal Act, "A person who commits anal intercourse with any person prescribed in Article 1 (1) through (3) or other disgraceful conduct shall be punished by imprisonment with labor for not more than two years." The plaintiff insisted that the term, "other disgraceful conduct" is too vague. The Constitutional Court, however, explained that the Military Criminal Act was amended in 2009 and articles on punishment with respect to rape and quasi-rape were inserted. Therefore, the Court decided the Article was constitutional because the term "other disgraceful conduct" can be interpreted as "the behavior that public can feel aversion, being against sexual morality, and fulfill sexual satisfaction though not to the extent of rape or quasi-rape." In this case, four of nine Justices dissented.

Constitutionality of Limiting the Taking the Bar Examination to Only Five Times (2016. 9. 29. – 2016 Hun-Ma 47)

On September 29, the Constitutional Court decided that Article 7 (1) of "National Bar Examination Act" is constitutional. The Article decrees that it is possible to take the Bar Exam five times within five years after earning a Juris Doctorate from a law school. One of the plaintiffs took the exam from 2012 and was not able to pass the exam until 2016, and lost the eligibility. The plaintiff insisted that the Article violates equal rights because the other national examinations, such as for physicians and pharmacists, do not have a limitation on the number of attempts. The other plaintiff earned a Juris Doctorate, but could not take the exam in 2016 because she was pregnant. Since Article 7 (2) of the Act only decrees that "the period of military service shall not be included in the period of application for the Exam under subparagraph (1)," the plaintiff insisted that the Article violates

[7] Improper Solicitation and Graft Act is also called the "Kim Young-ran Act" because the bill was initially introduced by Young-ran Kim, former chairperson of the Anti-Corruption and Civil Rights Commission.

the welfare and rights of women secured by Article 34 (3), and violates the protection of mothers secured by Article 36 (2). The Constitutional Court explained that it takes a long time to prepare for the Bar Exam compared to other national exams. Therefore, limiting the number of attempts can prevent talented people from wasting time and thus, the Article can be interpreted as rational and constitutional. On the other hand, the Constitutional Court did not decide if Article 7 (2) is constitutional because the Court mentioned that it is too late for the plaintiff to initiate a constitutional complaint.

Unconstitutionality of Registration of Personal Information of Ex-Sexual Offenders (2016. 3. 31. – 2015 Hun-Ma 688)

The Constitutional Court decided the following cases as unconstitutional. On March 31, the Constitutional Court decided that Article 42 (1) of the "Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes" is unconstitutional. According to the Article, the person finally declared guilty of crimes such as obscene acts by using means of communication shall be subject to registration of personal information. The plaintiff was prosecuted for allegedly sending an e-mail that caused a sense of sexual shame in a 14-year-old girl. He was declared guilty and sentenced to pay a fine of one million Korean Won and ordered to take a 40-hour sexual violence prevention program. The plaintiff initiated a constitutional complaint that Article 42 (1) of the Act violated his right of self-determination on personal information. The Constitutional Court decided that the Article exceeded the minimality of the violation because the Article decrees that all persons who are declared guilty are subject to registrations regardless of the gravity and characteristics of their crimes. The Constitutional Court deemed that plaintiff's violated benefit, and the obtained social interests by the Article, are not balanced and decided that it was unconstitutional. In this case, however, three Justices expressed opposition.

Unconstitutionality of Limiting Ex-Sexual Offender's Right to Work at Child or Juvenile Related Institutions and Facilities with Disabled Persons (2016. 3. 31. – 2013 Hun-Ma 585 • 786, 2013 Hun-Ba 394, 2015 Hun-Ma 199 • 1034 • 1107 (combined), 2016. 7. 28. – 2015 Hun-Ma 915)

On March 31, the Constitutional Court gave a decision of unconstitutional in some other cases regarding the rights of ex-convicts of sexual crimes. According to Article 44 (1) of the "Act on the Protection of Children and Juveniles against Sexual Abuse," ex-convicts who had committed sexual crimes and sexual offenses against children or juveniles are prohibited from working at a child or juvenile-related institution for 10 years. The plaintiffs insisted that the Article violates their freedom of occupation. The Constitutional Court recognized "correctness of purpose" and "appropriateness of procedure," and ruled the Article as unconstitutional because banning ex-convicts to work for 10 years based on the assumption that they will repeat their offences is a violation of the "minimality of damage" and "balance of benefit and protection of law."

On July 28, the Constitutional Court decided that Article 59-3 (1) of the "Act on Welfare of Persons with Disabilities," which prohibited ex-convicts who had committed sexual crimes and sexual offenses against children and juveniles from working at facilities for persons with disabilities for 10 years, was unconstitutional.

Unconstitutionality of the Term "Job Detrimental to Public Health or Public Order" in the Act on the Protection, etc. of Temporary Agency Workers (2016. 11. 24. – 2015 Hun-Ga 23)

The cases discussed above seem to indicate that the Korean Constitutional Court is relatively generous to ex-convicts of sexual offenses. The Court, however, did not take kindly to foreign, female, temporary workers being involved in the sex industry. On November 24, the Constitutional Court ruled Article 42 (1) of the "Act on the Protection, etc. of Temporary Agency Workers" as unconstitutional. The plaintiff was sentenced to eight months' imprisonment at the first trial for sending a foreign, female, temporary agency worker to a nightclub to engage in prostitution. Article 42 (1) of the Act decrees that "each person, who assigns a worker to place him/her in a job detrimental to public health or public order, shall be punished by imprisonment for not more than five years or by a fine not exceeding 50 million won." The plaintiff insisted that the term "job detrimental to the public health of public order" is vague. The Constitutional Court ruled the Article unconstitutional due to the "Principle of Clarity."

Recognizing Traffic Accidents during Commute as "Accident on Duty" (2016. 9. 29. – 2014 Hun-Ba 254)

Decisions of unconformity made by the Constitutional Court were observed in 2016. On September 29, the Constitutional Court decided unconformity to the Constitution on Article 37 (1) of the "Industrial Accident Compensation Insurance Act." The plaintiff broke his fingers in a car crash while on his way home by bicycle. Although he applied to the Korea Workers' Compensation and Welfare Service for medical care benefits, he was rejected because the accident during the commute was not considered an accident while on duty. On the other hand, Article 29 of the "Enforcement Decree of the Industrial Accident Compensation Insurance Act" decrees that accidents that occur while using transportations provided by the employer are deemed accidents on duty. The plaintiff, therefore, insisted that Article 37 of the Act violates the principle of equality secured by the Constitution. The Constitutional Court decided that the Act is unconstitutional because there is no relevant reason to separate commuters into those taking transportation provided by employers and others.

Foreign, International, and Multilateral Relations

Constitutional Complaint on GSOMIA with Japan (2016. 12. 6. – 2016 Hun-Ma 1007)

On December 6, the Constitutional Court dismissed the Constitutional complaint on the "Agreement Between the Government of Japan and the Government of the Republic of Korea on the Protection of Classified Military Information (GSOMIA)." The Court pointed out that it is necessary that the violated plaintiff's fundamental rights be violated for the plaintiff to initiate a Constitutional complaint. Although the plaintiff insisted that some sec-

tions within the Ministry of National Defense are plotting invasive war by concluding the GSOMIA, the Court considered that the complaint is too vague to be discussed in terms of specific fundamental rights.

CONCLUSION

The impeachment bill of President Geun-hye Park, passed last December, made 2016 one of the most prominent years in the history of Korea. President Park was impeached in March 2017. The impeachment process made readily apparent problems in the Constitution, and it is inevitable that these will be discussed. I outline three.

First, it is important to discuss the weakening of the Korean imperial presidency. It was convenient for presidents to take strong leadership decisions and propel the nation towards development in the period of authoritarian governments. Strong presidents, it seems, tend to give in to corruption. For instance, many of the former presidents were unable to spend their retirement peacefully as most of them and their families were accused of bribery. To prevent corruption, the parliamentary system may be an alternative to the presidential system. Since elections for National Assembly members and the president occur at different times, the Government often faces "cohabitation." Two of the last three Korean administrations have experienced cohabitation, and the impeachment bill against the president was passed during both. Adopting a parliamentary government can help to improve the recurrent conflict between the legislative and executive branches, and smooth governance.

Second, it is questionable whether the Constitutional Court is qualified to decide on the impeachment of a president. Although the Justices of the Constitutional Court are co-selected by each government branch, they are not elected by the people. It might therefore seem inappropriate, for the Justices to decide on the impeachment of a popularly elected president. To optimize the institutional arrangement, the jurisdiction to impeach the president should be with a body that traces pedigree to the people.

Third, although not directly related to the impeachment of President Park, the conflict between the Constitutional Court and Supreme Court poses a difficult problem for Korean constitutional law. The conflict sometimes leads to situations where the fundamental rights of the people are disregarded. It is imperative that both courts learn to cooperate.

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Spain

DEVELOPMENTS IN SPANISH CONSTITUTIONAL LAW

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INTRODUCTION

The Spanish legal year 2016 was affected by two notable political and institutional issues: a caretaker government that lasted ten months on the one hand; on the other, a growing disagreement between the Government of Catalonia (the Generalitat) and the State Government.

From January 2016 to the end of October 2016, a caretaker government governed Spain. It was presided over by Mariano Rajoy. The simple explanation for this new phenomenon in modern Spanish democracy is the failure of various parliamentary groups to reach agreements among themselves. Neither of the two groups who had traditionally been in the majority in Spain, the PP (Partido Popular - Popular Party) or the PSOE (Partido Socialista Obrero Español - Spanish Socialist Workers Party) commanded sufficient support to form a government. A more detailed explanation and the cause of this situation is that the makeup of Parliament has experienced a significant change with the arrival of two new political forces, Podemos (We Can) and Ciudadanos (Citizens). This fragmentation of the Parliament has led to the formalization in the Constitutional Court of practically unprecedented disputes between constitutional bodies.

The other significant narrative thread in Spanish political and constitutional life in 2016 was doubtless the so-called "Catalan question." The tension between the central Government and the Generalitat was compounded by the latter's announcement, backed by the absolute pro-independence majority in the Catalan Parliament, of a referendum on independence. This announcement implied that the referendum should preferably be held with the prior agreement of the State; otherwise, the threat was to hold a unilateral independence referendum before the end of 2017 (no doubt we will be able to read about the outcome in next year's report, as whatever the outcome, there will be work for the Court as a result). The intensification of political activities by Catalan institutions towards independence on the one hand, and on the other, the refusal of the Government to enter into a dialogue about the possibility of a referendum, made the Constitutional Court a protagonist in a dispute which, despite being predominantly political, needed resolution in the legal arena. Further details will follow in this report.

On similar lines, the Constitutional Court examined the constitutionality of the Organic Law regulating its own functioning, which was amended in 2015 with the aim of fostering the effectiveness of its rulings. As will be seen below, and despite the questions this reform raised in the Venice Commission, the Constitutional Court validated the legitimacy of the new regulations.

THE CONSTITUTION AND THE COURT

The Spanish Constitution does not prescribe a closed model of constitutional law but rather grants organic law broad freedoms in this area. Recently, Organic Law 15/2015, amending Organic Law 2/1979 on the Constitutional Court, introduced significant additions related to the power of the Constitutional Court to enforce its own rulings and, in 2016, the Constitutional Court looked

at the constitutionality of its own Organic Law by having to respond to two appeals on the grounds of unconstitutionality against said Law. It upheld the Law in rulings STC 185/2016 and 215/2016.

Organic Law 15/2015 explains, in its preamble, that its objective is to regulate new instruments aimed at ensuring the effectiveness of Constitutional Court decisions as an essential guarantee of the rule of law principle. This Law gives the Constitutional Court additional powers to ensure its rulings are carried out. It establishes the supplementary application of Administrative Appeal Courts Law and opens the possibility for the Court to notify whatever authority or public employee of its decisions, set down in a specific procedure for cases of non-compliance, and empowers the Court to impose fines and suspend public employees or authorities responsible for non-compliance. The Court may also charge the Government with carrying out its rulings.

More specifically, Organic Law 15/2015 grants the Constitutional Court the power to:

1) Impose recurring fines of three to thirty thousand euros on authorities, public employees, or private individuals who fail to comply with Court rulings, being able to repeat the fine until full compliance is achieved;
2) Agree on the suspension of authorities or public employees of the administration responsible for non-compliance for the time needed to ensure compliance with Court decisions;
3) Subcontract the enforcement of its decisions. In this case, the Court may require the collaboration of the central Government in order to adopt appropriate measures to ensure compliance with the Court's decisions;
4) Gather appropriate individual testimony to assign criminal liability to the appropriate party.

In ruling STC 185/2016, the Constitutional Court upheld these measures, reasoning that the Spanish Constitution does not contain any provision on the matter of enforcement of Constitutional Court decisions. Therefore, it is a matter of the Organic Law to design a model by which the Court may ensure the effectiveness of its rulings, as any judge shall be provided with the power to enforce its own decisions. Otherwise, the Court would lack one of the essential aspects of the exercise of judicial power and with it, the necessary power to ensure the supremacy of the Constitution while being the ultimate constitutional authority and its ultimate guardian.
At its plenary session on 10-11 March 2017, the Venice Commission of the Council of Europe issued an evaluation of these provisions. According to the Venice Commission's Opinion, the judgments of Constitutional Courts are binding because of the supremacy of the Constitution. Any public official who refuses to enforce a judgment of the Constitutional Court violates the Constitution, the principle of separation of powers and the rule of law. The Opinion aims to confirm that the goal of the reform is legitimate.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The position of the Constitutional Court during the past year was clearly marked by two circumstances which called for the Court to be involved in unprecedented situations. The first circumstance was the completely new direct call on the part of legitimate constitutional bodies (the Government, the Congress of Deputies, the Senate, and the General Council of the Judiciary) for the Court to settle disputes between them. Especially noteworthy, therefore, was the dispute raised by the Congress of Deputies following the Government's refusal to submit itself to parliamentary control of the lower chamber. This dynamic conflict has not stopped with the investiture of the new Government because its unstable parliamentary position does not offer sufficient protection for some of the functions of political management conferred to the Government by the Constitution. The same dynamic has already led to a dispute with the Congress of Deputies in the year 2017. If political fragmentation continues, this pattern will probably be confirmed. In this way, the Court will consolidate effectively important functions that had always remained latent, namely the settlement of disputes between constitutional[1] bodies and the legal resolution of the highest political disputes between majority and minority.

The second circumstance that pushed the Court to unexplored constitutional ground was a novel coda added to the relationship between the Constitutional Court and the Autonomous Communities, especially Catalonia, following the new course taken since 2012. This development was connected to the recent incorporation of new sets of powers in ordering the execution of its rulings (Organic Law 15/2015 ruled to be in accordance with our fundamental law in rulings STC 185/2016 and 215/2016), the most significant aspects of which have been reiterated in the previous section. In reality, this modification represents an additional step (and a qualitatively substantial innovation) in the long history of the Constitutional Court as a defining actor in the processes of territorial distribution of power. It has been well outlined how one of the circumstances of our fundamental law has been the deconstitutionalization of the autonomic[2] model. This situation has always pushed the Constitutional Court to clarify both the rules of the territorial distribution of power and the determination of the jurisdictions of the State and the Autonomous Communities in terms of specific[3] activities. One may see, therefore, that the territorial model in Spain is what the Constitutional Court says it is.

It is true that this model has significant limitations (and puts the Court in the middle of unadvisable permanent polemics), although there is a robust answer in the legal frame-

[1] There had only been two in the history of the Court, rulings 45/1986 and 234/2000.

[2] P. CRUZ VILLALÓN, "La estructura del Estado, o la curiosidad del jurista persa", *Revista de la Facultad de Derecho de la Universidad Complutense nº 4, 1981, pp. 53 -63.*

[3] For more on this period, see the evaluation by E. AJA FERNÁNDEZ y C. VIVER I PI-SUNYER, "Valoración de 25 años de autonomía", *Revista española de derecho constitucional, nº 69, 2003 pp. 69-113.*

work. The political process unleashed in Catalonia since 2012 is a challenge to a legal framework that the Catalonian political majority (as resulted from the 2012 regional elections) believes to be exhausted. This constitutional unfaithfulness automatically involves the authority of the legal body that protects the settled constitutional framework: the Constitutional Court. The Court has therefore been in the eye of the storm dealing with the construction of the autonomic State (which has allowed it to gain legitimacy for years). It continues to be so now that it is responding to a very serious political and legal crisis, subject as it is now to an explicit attempt of delegitimisation by institutions such as the Parliament of Catalonia.

The year 2016, principally marked by difficulties in forming a central Government, may be seen as the latest chapter of this crisis, characterized up to now by the absence of political solutions and recourse to the Constitutional Court as the guardian of the Constitution to put the brakes on initiatives which aim to ignore it.

This is the general context which allows us to understand that the dispute with Catalonia was the most significant development in the 2016 Constitutional Court's case law. It was, without a doubt, the most important constitutional controversy, and it reverberated through the most significant decisions handed down by the Constitutional Court, whether deciding on the constitutionality of laws, being the final protection of fundamental rights, or resolving purely jurisdictional disputes. It is important to note that the Court has sought to deal with issues starting from a paradigm stated in STC 259/2015,[4] which insists on the impossibility, in a constitutional system, of opposing democratic principles and the rule of law. Guided by this principle, the Court has distinguished cases in which the constitutional model itself is in question – such as initiatives which explicitly deal with a constitutional process or those in Catalonia which aim to create what may be considered structures of an independent state – from cases related to Catalan regulatory initiatives which are not explicitly linked to the so-called process of disconnection. In the former cases, the Constitutional Court unanimously declared the unconstitutionality of the challenged acts. In the latter cases, the Court experienced the greatest internal dissent. Finally, we must not forget to note that some judges have roundly rejected the new role given by the modification of the Organic Law regulating the Court (dissenting opinions in STC 185/2016), from which one may deduce a not insignificant discrepancy in the model of constitutional jurisprudence established by our fundamental law.

MAJOR CASES

Separation of Powers

1. Criteria for distribution of jurisdiction and selection of applicable law

In 2016, the Constitutional Court, in rulings 102 and 116/2016, made an important decision related to the applicable laws concerning the distribution of jurisdiction between the State and Autonomous Communities. The Galician Parliament passed a regional law, Law 5/1997, on Local Administration, which was a literal copy of the national statute, Law/1985, regulating the Local Government System. Both required municipalities willing to merge to adopt the decision to merge with 2/3 majority. Later, the national Government amended Law 7/1985 with the passing of Law 57/2003 and lowered the majority for such merging of municipalities to a simple majority. As a consequence of this legislative change, and in the absence of agreement between the law in the Autonomous Community of Galicia and central Government legislation, various courts submitted questions of unconstitutionality to the Constitutional Court in order to have the legislation in the Autonomous Community of Galicia declared invalid.

The Constitutional Court affirmed that in the regulations for "local government" there are two distinct jurisdictions: the central Government regulates *basic legislation*, and Autonomous Communities *develop* basic legislation of the central Government. Nonetheless, in the view of the Constitutional Court, whenever Autonomous Communities limit themselves to a literal reproduction of basic central Government legislation in their own internal legislations, in case of amendment of the central Government legislation, Courts may rule the Autonomous Community legislation inapplicable, with no need to refer the question to the Constitutional Court. In this case, the prevailing clause must be applied as set out in the Spanish Constitution.

2. Conflicts of jurisdiction

In 2016, the Constitutional Court continued to dedicate part of its jurisprudence to the resolution of conflicts involving the Autonomous Community of Catalonia and its political struggle for independence. Ruling STC 128/2016 responded to the request for an appeal on the grounds of unconstitutionality raised by the Spanish President regarding various precepts of the Catalan parliamentary law 3/2015, on fiscal, financial, and administrative measures. The Court declared various additional provisions of the law unconstitutional (e.g. nº 24 which entrusted the government of Catalonia with the creation of a catalog of strategic infrastructure) as they were oriented toward encouraging the so-called "process of disconnection from the State".

In judicial ruling ATC 141/2016, the Court deemed the activity of the Study Commission for the Constitutional Process created by the Catalan Parliament to be "an attempt to give validity to the so-called Catalan constitutional process, whose unconstitutionality was declared in ruling STC 259/2016". Unanimously, the Constitutional Court demanded that the Catalan Parliament respect the Constitution. A new resolution in the Catalan Parliament meant that on 1 August 2016 the Court announced its suspension and initiated the processes for adopting the measures in art. 92 LOTC (Organic Law on the Constitutional Court) for ensuring com-

[4] "In the social and democratic rule of law described by the Constitution of 1978 it is not possible to oppose democratic legitimacy and constitutional legality to the detriment of the latter: the legitimacy of an act or policy of a public power consists basically of its conformity to the Constitution and legal order. Without conformity to the Constitution there can be no argument of legitimacy whatsoever. In a democratic idea of power there is no more legitimacy than that found in the Constitution". STC 259/2015. FJ 5

pliance with the Constitution, warning the public powers of the possible consequences they risked, including criminal liability. Constitutional Court Order 170/2016 was on similar lines.

The Constitutional Court again pronounced about Catalonia in its decision 184/2016. In this case, the Tribunal considered a request of unconstitutionality raised by the Catalan governing body regarding various articles in Law of State 36/2015, on national security. According to the Generalitat, this law does not adequately safeguard the participation of the Autonomous Communities in decison-making bodies or processes as described in the law, considering that Catalonia is an Autonomous Community, which has its own police force. However, the Court concluded that the interpretation and jurisdictional attribution in the Law regarding defence, public safety, and civil protection was constitutional because, although not specific in some aspects, it does permit the participation of Autonomous Communities as it also does in the process of declaring a situation a matter of national security, a power conferred on the President.

Rulings 66, 67, 68, and 84/2016 responded to conflicts of jurisdiction raised by various Autonomous Communities against Royal Decree-law 14/2012, passed by the central Government, providing urgent measures to rationalize public spending in education. The Autonomous Communities alleged that, firstly, the decree-law did not comply with the constitutional requirement of "extraordinary and urgent need". The Court rejected this claim, arguing that when the decree-law was enacted, there was an exceptional need to correct the public deficit in order to comply with obligations of international fiscal agreements. The Constitutional Court also dismissed the second allegation, that the State had encroached on the Communities' jurisdiction over non-university education by setting teaching hours. For the Court, decree-law 14/2012 is supported by the fact that the Spanish Constitution gives central Government jurisdiction over "basic rules" for the development of the right to education.

Ruling STC 41/2016 responded to the appeal on the grounds of unconstitutionality raised by the Extremadura Assembly against various articles of Law 27/2016, on rationalization and sustainability of local administration. This was the first ruling of the Constitutional Court on this significant reform of local administration. The ruling struck down various articles of that law as unconstitutional. In particular, the Court struck down provisions imposing centralisation of responsibilities that had traditionally been given over to local entities, related to social services, primary health-care, and abattoirs. The Court concluded that these responsibilities might be transferred to the local or autonomous-community level, depending on what the Autonomous Communities decide, as they have jurisdiction in these areas.

Rights and Freedoms

1. Freedom of expression

Ruling STC 226/2016 was a novel piece of case law in the area of freedom of expression within political parties. The complainant, a militant socialist, had made some very critical, even offensive, remarks in a newspaper following the party's suspension of elections that should have been held to decide the candidate for mayor of Oviedo (Asturias). The party punished her, and she appealed. The Constitutional Court rejected the complainant's claims, on the consideration that the party had exercised its powers of punishment within the law of associations. The Court gave significant weight to the requirement for members to be loyal to the party and to not, by their expression, produce a negative, hostile image of the party, given the public nature of the organization.

Ruling STC 112/2016 was on a particularly relevant matter, which outlines the position of freedom of expression in democratic Spain. In this case, the Constitutional Court ruled on whether the punishment imposed for glorifying terrorism due to participation in a tribute to a deceased member of the ETA terror group violated freedom of expression. The Court based its decision on the doctrine of *hate speech* from the European Court of Human Rights. The Constitutional Court decided that despite Spanish democracy not prohibiting demonstrations of anti-democratic ideologies, the expressions used in that case, inciting to violence, met the criteria of hate speech. Consequently, those expressions were not protected by freedom of expression in a democratic state.

2. Participation in public affairs

Rulings STC 107/108 and 109/2016 responded to various appeals for protection of rights raised against the resolution of the Mesa (governing body) of the Parliament of Catalonia which granted the "proposal of a resolution on the initiation of a political process in Catalonia as a consequence of electoral results". This process being initiated is tantamount to the beginnings of disconnection from the State, and the claimants, members of various parliamentary parties, believed that said resolution violated their right to participate in public events by obliging them to participate in a parliamentary initiative that was manifestly unconstitutional, as the Constitutional Court had ruled on various previous occasions. The Constitutional Court found that the challenged resolution did not infringe the claimants' rights, as parliamentary governing bodies cannot rule on the constitutionality of parliamentary initiatives that they are presented with. Only in exceptional cases can they rule initiatives inapplicable based on unconstitutionality when that is evident.

3. Effective legal protection

Ruling 83/2016 responded to an especially important question for the control of limitations imposed on fundamental rights when states of the exception provided in the Constitution are declared. The Court answered an appeal for protection of fundamental rights raised against the Supreme Court decision which denied its jurisdiction over testing the validity of Royal Decree 1673/2010. Following this Royal Decree, the Spanish Government declared a state of alarm, for the first time in Spain, for the normalization of essential aerial public transport in response to the paralysation of airspace due to an air-traffic controllers strike. The Constitutional Court ratified the Supreme Court's lack of jurisdiction as, despite Royal Decrees being laws with regulatory status passed by

the Government, the Royal Decree which specifically declares a state of exception would have the status of a law, as states of exception as described in Article 116 of the Spanish Constitution suspend and alter the application of laws. Because of that, limitations to fundamental rights due to states of exception fall under the jurisdiction of the Constitutional Court, and not ordinary administrative courts.

4. The right to health

In ruling 139/2016, the Court responded to the appeal on the grounds of unconstitutionality raised by the Parliament of Navarra against various articles of Decree-law 16/2012 on urgent measures to guarantee the sustainability of the national health service and improve the quality and safety of its services. The Court determined that it is not unconstitutional for foreigners without residence permits in Spain to be excluded from the free public health service. The Court concedes that the legislature can adjust the conditions of service provision for the aforementioned medical care.

Foreign, International, and/or Multilateral Relations

Ruling 85/2016 responded to an appeal on the grounds of unconstitutionality raised by the Autonomous Community of the Canary Islands against Law 2/2014, on external action and services of the State. The challenged law defines "out of state action and services" as the combined activities of public administrations undertaken externally, executed in agreement with the objectives established by central Government. The Autonomous Community of the Canary Islands believed that the definition of the concept of external action represents a suppression of the autonomy of Autonomous Communities, allowing central Government to encroach on their jurisdiction. The Court considered that Law 2/2014 is covered by central Government jurisdiction defined in the Spanish Constitution in relation to "international relations"; specifically, in the inherent faculty of coordination of central Government, as subject to international law, in a territorially decentralized system.

Ruling STC 228/2016 responded to an appeal on the grounds of unconstitutionality raised by the President against various articles in Parliament of Catalonia Law 16/2014, on external action and relations with the European Union. In this ruling, the Court, applying the consolidated constitutional doctrine, recognized the possibility that Autonomous Communities may undertake activities with an external aspect, as long as they respect the exclusive jurisdiction of the State in matters of international relations. Along these lines, the ruling stated that Autonomous Communities might not sign treaties, represent the State abroad, or create international obligations which compromise the international responsibilities of the State. Applying this doctrine, the Constitutional Court struck down articles aimed at promoting the establishment of "bilateral" relations between Catalonia and other countries as unconstitutional, along with that provision that shaped the so-called "public diplomacy" of the Generalitat.

CONCLUSION

The vague definition of the territorial model in the Constitution has traditionally produced many disputes between the State and the Autonomous Communities regarding, amongst other things, the interconnection between competences allocated to them. Controversies did not spare competences allocated exclusively to the central State by Article 149 of the Constitution. It was the Constitutional Court takes to define *ad cesium* challenged vertical divisions of competences. The dispute between the State and Autonomous Communities has grown in recent years due to two factors: a) the economic crisis, and b) the Catalan struggle for independence. In 2016, the Constitutional Court had the opportunity to deal with such matters.

With regards to the first question, throughout 2016 the Court continued to rule on whether the measures taken by the State to reduce spending as a result of international agreements have encroached on the jurisdiction of Autonomous Communities. Different cases made it clear that the Court has not always been able to come up with clear criteria to determine what is a matter for the State and what is a matter for the Autonomous Communities in areas of common policy. The rather vague wording used by the Constitution to define State competences such as "general management of the economy", "basic legislation", and "development of fundamental rights" allowed the Court to uphold State interventions against the Autonomous Communities, despite the fact that the Constitution and the Statutes of Autonomy also grant them some jurisdiction over economic matters and fundamental rights in their own territory.

Secondly, the struggle for sovereignty in Catalonia has not only caused various jurisdictional disputes between the Autonomous Community of Catalonia and the State but has also triggered an important debate in the Court concerning the model of constitutional jurisdiction provided by the Spanish Constitution. In two of its most important decisions (186 and 215/2016), the Court ruled that the power to enforce its own decisions is consistent with the Constitution. This power was introduced in the Law on the Constitutional Court in response to repeated non-compliance with the Court's rulings by Catalonia. However, the dissenting opinions given by various judges demonstrate that even the Court's own role in the State is open to discussion. In short, constitutional jurisprudence in 2016 showed that the position of the bodies and institutions of the decentralized State is contentious, as is the position of the body called to rule on it.

In 2016, the Court continued to endorse the application of the European Court of Human Rights' doctrine of hate speech. This doctrine supported the Constitutional Court's decision determining the position of freedom of expression in the democratic State in application of the theory of balancing of rights, underlining the doctrine of hate speech. However, the inclusion of these doctrines within the dogma of fundamental rights assumed by the Spanish Constitution may be somewhat problematic. It remains to be seen how this legal pattern develops in the coming years.

Sweden

DEVELOPMENTS IN SWEDISH CONSTITUTIONAL LAW

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INTRODUCTION

Politically, the migration situation in Europe played a large role in Swedish politics throughout 2016. Several of the measures adopted by the Swedish Parliament and Government in order to cope with the situation have constitutional implications, touching upon, for example, border control and the division of powers between the state and municipalities. The impact of the new EU data protection regime on Swedish law has also been devoted a lot of attention, most recently as a result of the decision by the CJEU on December 12, 2016, in the Tele2 case.

Sweden is a parliamentary democracy, the Instrument of Government (IG) (*Regeringsformen*), 1:1, 4, 6, and a unitary state with a constitutionally protected local self-government. The power and status of local authorities are regulated in the constitution (IG 1:1(2), ch. 14), although the legislature has explicitly abstained from laying down a constitutional definition of the scope and meaning of local self-government.[1] The local authorities' taxation right (IG 14:4) together with the statement in IG 14:2 that local authorities are responsible for local and regional matters of public interest based on the principle of local self-government, is the primary expression of local self-government. All matters concerning the competence and responsibility of local authorities, including principles concerning the organization and working procedures of local authorities together with local taxation, must be regulated by an act of law (IG 14:2, 8:2(3)). An explicit reference is made to the principle of proportionality in IG 14:3 which states *Any restriction in local self-government should not exceed what is necessary with regard to the purpose of the restriction*. Local authorities have no regulatory powers based on the constitution; a delegation from the Parliament (*Riksdag*) is necessary. Such a delegation can be direct from the *Riksdag* to local authorities (IG 8:9) or indirect via the Government (IG 8:10).

THE CONSTITUTION AND THE COURTS

The Swedish court system is composed of administrative courts and courts of general jurisdiction. There are also a number of specialized courts such as the Labour Court and the Patent and Market Courts but they will not be dealt with here. Our focus will be on the case law of the Supreme Court (*Högsta Domstolen* (HD))[2] and the Supreme Administrative Court (*Högsta förvaltningsdomstolen* (HFD)). Sweden does not have a constitutional court. Judicial review is decentralized and exercised only in concrete cases.[3] According to IG ch. 11 art. 14, a court shall not apply a provision that conflicts with a provision of fundamental law or other superior statutes. The same applies if a procedure laid down in law has been set aside in any important aspect when a provision was adopted. Should a court find such a violation, that specific provision will not be applied in that particular case. Swedish courts cannot

[1] See Kommunallagen 2:1, see also prop 2009/10:80 p. 210 ff.

[2] Four decisions by the Surpreme Court in 2016 dealt with matters of constitutional law, see NJA 2016 s. 680, NJA 2016 s. 649, NJA 2016 s. 320, NJA 2016 s. 212.

[3] The Supreme Administrative Court confirmed this rule in HFD 2016 ref. 59.

declare a rule null and void. In addition, public bodies exercise judicial review, IG 12:10.

At the latest reform of the Instrument of Government (2010), IG 11:14 was changed. The former requirement that any violation of a statute by, for example, a regulation, had to be *obvious* for the latter to be declared non-applicable was removed. The "obvious-rule" served to protect the prerogative of the legislature. The new IG 11:14 para. 2 states that "In the case of review of an act of law under paragraph one, particular attention shall be paid to the fact that the *Riksdag* is the foremost representative of the people and that fundamental law takes precedence over other law". As a result of Sweden being a parliamentary democracy, the role of courts and hence their exercise of judicial review has been comparatively limited historically. However, the Swedish EU-membership and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) becoming Swedish law in 1995 changed the setting. More than 20 years later it is clear that the role of Swedish courts in both constitutional law issues and otherwise has been strengthened in relation to the legislature.

On the issue of constitutional interpretation, Swedish courts will usually give greater weight to the preparatory works of the constitutional documents, such as the Government's proposal of a bill to Parliament and the Parliament's written report on such a proposal. This is still the case in most areas of constitutional interpretation. However, recent case law has shown willingness for a more dynamic approach when it comes to issues that touch upon the protection of constitutional rights and when there are obvious lacunas in the legislation. For example, a violation of a constitutional right has been found to give the individual concerned a right to economic compensation through tort-law even when no clear legal basis for such a right exists in the legislation on torts or in the constitution.[4] If this extensive application of tort-law in connection with constitutional rights is a more general trend or more due to the very special circumstances in the cases in point remains to been seen. One important question concerning methods of constitutional interpretation is the status of the principle of proportionality within the review exercised by administrative courts. Recent case law leads to the conclusion that the space for reviewing administrative decisions' proportionality is determined by the law.[5] If the law leaves no room for proportionality assessments it will not be possible to make such an assessment.[6] Taken together one could argue that this weakens the principle of proportionality as a constitutional principle to be applied by the courts.

DEVELOPMENTS AND CONTROVERSIES IN 2016

On December 21, 2016, the CJEU delivered its preliminary ruling in the Tele2 Sverige AB v. Post- och telestyrelsen case.[7] The ruling set off an intense and lively debate in Sweden on the relationship between national law and EU law, on the one hand, and how the ruling of the CJEU in *Digital Rights Ireland and Others* (C293/12 and C594/12) should be interpreted, on the other hand. The Swedish request for a preliminary ruling was made in the proceeding concerning an order sent by Post- och telestyrelsen (PTS) to Tele2 Sverige requiring the latter to retain traffic and location data in relation to its subscribers and registered users. The request concerned the interpretation of Art. 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11), read in the light of Articles 7 and 8 and Article 52(1) of the Charter of Fundamental Rights of the European Union. As a result of the ruling in *Digital Rights Ireland and Others* (C293/12 and C594/12), Tele2 Sverige informed the PTS that it would cease, as from 14 April 2014, to retain electronic communications data covered by the Electronic Communications Act, and that it would erase data retained prior to that date. On April 29 the same year, the Ministry of Justice appointed a special reporter with the main task to assess Swedish data protection laws in the aftermath of the *Digital Rights Ireland and Others* decision. The reporter found that Swedish legislation on data retention was in congruence with EU law and the ECHR.[8] As a result, the PTS ordered Tele2 Sverige to start the retention of data again in accordance with national legislation. Tele2 was of the opinion that the reporter had misinterpreted the *Digital Rights Ireland and Others* decision and that the Swedish legislation was in violation of the EU Charter. As a result, Tele2 challenged the PTS-order in the Stockholm Administrative Court. The Administrative Court ruled against the applicants and Tele2 appealed. The Appeal Administrative Court referred the case to the CJEU. The main question was whether the Swedish legislation (the Electronic Communications Act) was in conformity with the derogation from the general prohibition against data retention laid down in Art. 15(1) of Directive 2002/58, read in the light of *Digital Rights Ireland and Others* and Art. 7, 8, and 52(1) of the Charter. After reaching the conclusion that the Swedish legislation in this particular case falls under the scope of the Directive, the Court moved on to interpret Art. 15(1) of the Directive. According to the CJEU, the derogation in Art. 15(1) must be interpreted strictly and it stated that the grounds for derogations listed in it are exhaustive (para. 89-90). The CJEU concluded that national legislation that provides for a general and indiscriminate retention of all traffic and location of data of all subscribers and registered users relating to all means of communication for the purpose of fighting

[4] NJA 2014 s. 323 and NJA 2014 s. 332.

[5] HFD 2015 ref. 16. See 2015 ICON-Report on developments in Swedish constitutional law.

[6] Thomas Bull, "Rättighetsskyddet i Högsta förvaltningsdomstolen", SvJT 2017 s 216, 218.

[7] The Swedish Case in the Joined Cases C-203/15 and C-698/15.

[8] DS 2014:23.

crime is not in congruence with Art. 15(1) of the Directive read in the light of Art. 7, 8, 11, and 52(1) of the Charter (para. 112). The matter is still to be decided by the Appeal Administrative Court in Stockholm.

The question whether the UN Convention on the Rights of the Child (CRC) should be incorporated into Swedish law by adopting a legal act has been investigated by a State Inquiry Commission. Its report was submitted at the beginning of 2016 and it recommended that the CRC together with its two Optional Protocols be incorporated into Swedish law.[9] Sweden is already bound by the CRC as a matter of international law. If the CRC is to be incorporated into Swedish law, the CRC will become applicable national law, and not only a supportive legal source. It will also mean that the CRC can fill in lacunas in the law and should there be a conflict of legal norms, the CRC will precede lower-ranking legislation and provisions. Additional advantages are, reportedly, that it will send a clear political signal; it will stimulate a right-based approach to issues related to children and their well-being, and it will bring pedagogical advantages. Sweden is a dualist state and by tradition international conventions have been transformed, meaning that they have been translated and reformulated in order to be, piece by piece, integrated into the existing legal system.[10] The ECHR is, so far, the only exception to this rule. The proposal to do the same with the CRD has met heavy criticism. Some of the main arguments against incorporation are the vague formulations in several of the articles of the CRC, the cost it will bring with it to incorporate due to, for example, an increased amount of complaints, and the special assistance that will be required when children to a larger extent are expected to be heard as witnesses etc. Another concern is how the CRC is to be applied in migration law cases involving children. Moreover, if compared with the ECHR, the CRC has no supranational court that will guide it in the interpretation of the Convention.

On November 12, 2015, the Swedish Government decided to close the borders temporarily as a result of a request from the Migration Board.[11] The decision has been continuously renewed, at the beginning of every month, but since June 2, 2016 these decisions are not taken on a monthly basis. The legal basis for that is found in Art. 29 of the Schengen Borders Code. According to the latest decision, the Swedish border is closed until May 10, 2017. The Swedish constitution is silent on matters of civil emergencies that might pose a threat to public order and national security. Emergency matters are therefore regulated in the form of statutes. On December 21, 2015, a temporary law entered into force (Lag (2015:1073) om särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet). The law gives the Government the powers to adopt temporary measures in emergency situations in the form of identity control on busses, trains, or ships entering Sweden from another state (3 §). A decision to impose such measures is valid for six months. The law will end at December 12, 2018. A first-draft proposal was presented to the Council on Legislation on December 5, 2015. This draft gave the Government broader powers, including the power to close roads, bridges, etc., that connect Sweden with foreign territory, than the bill that was finally adopted.[12] The Council on Legislation, when exercising *abstract a prio* review of the bill, had two major concerns with the draft.[13] The first concern was related to the procedural aspects of the legislative process. The Council concluded that the bill was put together hastily and that it did not serve its purpose, i.e. to handle the challenges that the increased number of migrants posed to society at large and at the same time secure the right to asylum. The Council on Legislation stated that all concerned parties had not been allowed enough time to review the proposed bill and its consequences in accordance with IG 7:2.[14] The second major concern was related to the scope and content of the bill and its impact on individuals' rights and freedoms. The Council basically argued that the bill gave the Government broad emergency powers without reflecting on basic rule of law principles such as the right to judicial redress and the protection of privacy rights. The Council suggested changes to the bill that would limit the emergency powers of the Government. These suggestions were adhered to when the law was adopted. In 2016, the Swedish National Audit Office (SNAO), which is a central part of the Parliament's control power, conducted an audit of the enforcement of the Government's decision to impose border control up till the summer of 2016. The SNAO found that the purpose of the temporary border control and how to achieve that purpose was not sufficiently described in the decision by the Government. As a result, the implementation was left to the Police, and the Police did not have an overall strategy or guideline of how to implement the decision. Therefore it was left to the individual officers and their commanding officers to decide how to implement the decision. The main criticism put forward by the SNAO was that the delegation chain had been direct from the Government to the operative level within the Police without any control as to whether the measures taken had served their purpose, or whether they were in accordance with the law.[15]

On March 1, 2016, a new law entered into force according to which municipalities were required to accept migrants that have been granted residence permits (Lagen (2016:38 om mottagandet av visa nyanlända invandrare för bosättning). This created a controversy based on different views on the scope of the

[9] SOU 2016:19.

[10] Iain Cameron, *An Introduction to the European Convention on Human Rights*, Iustus, Uppsala (2014) 31-32.

[11] Regeringsbeslut 11:13, Ju2015/08659/PO.

[12] Prop. 201516:67 p 25.

[13] The Council on Legislation, 7 December 2015, available in prop. 201516:67.

[14] "In preparing Government business, the necessary information and opinions shall be obtained from the public authorities concerned. Information and opinions shall be obtained from local authorities as necessary. Organisations and individuals shall also be given an opportunity to express an opinion as necessary". IG 7:2.

[15] RIR 2016:26 p 18.

local self-government. The Council on Legislation concluded that the draft had an obvious impact on the scope of local self-government; that the preparatory works to the constitutional rules on local self-government require a careful assessment of the measure, especially its impact on local self-government and whether it is necessary to achieve the aspired goals. After reaching the conclusion that such an inquiry and assessment had been made by the Government when presenting its draft bill, the Council on Legislation stated that there was nothing that led it to conclude that the draft was in violation with the principle of proportionality as laid down in the constitution.[16]

The challenges to the Rule of Law and to the independence of the judiciary that several EU Member States have experienced recently, in particular Poland and Hungary, have revitalized the debate on the role and independence of the judiciary in Sweden.[17] The question is politically sensitive taking into consideration Sweden being a parliamentary democracy and a social welfare state, guided primarily by the will of the people as expressed in general elections. The judiciary is considered a counter-majoritarian institution, whose powers and influence need to be kept strict, which also explains the dominating methods of interpretation, such as a relatively strict adherence to the letter of the law and strong emphasis on preparatory works together with deference to the legislature, and a lack of judicial activism in Sweden. However, due to the internationalization, Europeanization, and fragmentation of the law, difficult situations of interpretation, not foreseen by the legislature, end up before the courts. The courts have been forced to become more active and the scope for what could be perceived as value-based assessments has become broader. As a result, the courts might become positive, instead of negative, legislatures. This concern was recently voiced in relation to the incorporation of the CRC.

MAJOR CASES

Separation of Powers and Judicial Review

In HFD 2016 ref 59, the Supreme Administrative Court ruled on whether a decision by an administrative authority (Svenskt Kraftnät) to divide Sweden into four districts in order to regulate and facilitate trade on Nord Pool was to be considered an administrative decision in an individual case (*förvaltningsbeslut i ett enskilt fall*), or a general legal norm (*föreskrift*). A company had challenged the legality of the decision. There is no judicial redress concerning general norms, since such decisions according to the preparatory works are not suitable for judicial review. Therefore the HFD had to answer the question whether the decision was a general norm or a decision in an individual case before it could proceed to assess the legality of the decision. The HFD ruled that the decision was a general norm, for the following reasons: the decision applies throughout the whole Swedish territory, it is binding for all actors on the Nord Pool, and finally it affects a large and unlimited number of transactions every day and for an unlimited time period. Since Swedish law does not allow for abstract judicial review, and there is no judicial redress against general norms, the legality of the decision could not be challenged.

Rights and Freedoms

In HFD 2016 ref 8, the question was whether a data bank created by a consortium of gas stations containing data on cars was legal. The data bank was to be managed by employees at gas stations. Every gas station was to be equipped with a camera photographing all cars. In case of someone not paying for the gas their register number would be registered in the data bank, and as a result they would be denied to buy gas in the future without pre-paying. The HFD concluded that the data concerned personal data related to crimes. According to Swedish law, only administrative authorities are allowed to handle such data, if not an explicit exception is decided by the Swedish Data Protection Agency. In this case privacy rights were at stake and the scope for such an exception should be limited according to the HFD. The HFD concluded that the data bank was to be handled and controlled by employees at gas stations. Entering data would be done after visual observations only and on the basis of alleged crimes. Due to the high number of actors involved, the apparently wide margin of error, and the fact that data banks related to crimes as a main rule are to be managed by administrative authorities, the HFD concluded that the obvious risks concerning violations of privacy rights could not justify an exception to the main rule in this particular case.

In two cases, the HFD[18] had to decide on what constitutes a civil right within the meaning of Article 6 ECHR. The first case concerned a decision taken by the Swedish Agency for Youth and Civil Society concerning a request for grants. The Swedish-Turkish National Association applied for a state grant. The application was denied and in the decision it was stated that the decision could not be appealed. The Association still appealed to the Administrative Court, claiming they had a right to appeal taking into consideration hat the decision concerned a civil right according to Art. 6(1) ECHR. The second case raised the question whether decisions concerning parking permits for persons with disabilities were a civil right for the purpose of Art. 6(1) ECHR and hence whether there should be a right to judicial review. According to the case law of the HFD, state-funded grants fall under Art. 6(1) ECHR if the right to such a grant is stipulated by law; the criteria are laid down in the law, thus limiting the scope for discretionary assessments; and as a main rule all associations are entitled to such a grant.[19] Moreover, the right to judicial review of administrative decisions is considered a fundamental rule of law principle and therefore the presumption is in favor of a civil right according to Art. 6(1) ECHR.[20]

[16] The Council on Legislation, 2015-11-04, available in Swedish at http://lagradet.se/yttranden/Ett%20gemensamt%20ansvar%20for%20mottagande%20av%20nyanlanda.pdf. Last accessed 2017-04-20.

[17] See ,for example ,Fredrik Wersäll, "Ökad domarmakt och makten över domstolarna", SvJT 2017 s 1.

[18] Nr. 3784-15, 4047-15.

[19] HFD 2011 ref. 10.

[20] HFD 2011 ref. 22.

In both cases, the HFD found that Art. 6(1) ECHR was applicable. In the first case, the Court referred to its case law in HFD 2011 ref. 10. In the latter case, the HFD equaled the parking permit with a social benefit and stated that there were no authoritative reasons for not considering the benefit a civil right, taking its case law in HFD 2011 rf. 2 into consideration.

On June 10, 2016, the District Court in Stockholm[21] delivered its ruling in the so-called Roma Register case. This was the first time a court decided on the matter which since 2013 has been lively debated in Sweden. Several non-judicial control bodies have already declared the register to be illegal[22] and to be a register primarily based on ethnic identity.[23] The legal question is whether the right to not be discriminated against on the basis of ethnicity has been violated. The District Court ruled in the affirmative, interpreting the Swedish Law (Polisdatalagen 2:10) in conformity with Art. 8 and 14 ECHR. The Chancellor of Justice (representing the State) appealed. The position of the State is currently that the register is in violation of Art. 8 and 14 ECHR as the law stands after Biao v. Denmark[24] but that it is not in violation with Swedish law, and the damages therefore should be lowered.

CONCLUSION

Developments in Swedish Constitutional Law in 2016 reflected the Swedish Constitution's standing in the Swedish legal order. Several important political matters related to or with an impact on constitutional principles took place but these matters were not primarily framed as constitutional issues. The closing of the Swedish borders as a result of the migration situation, the relationship between EU law and national law concerning privacy rights and data protection, and the incorporation of the CRC into Swedish law could serve as three examples. One explanation could be that by tradition, the Swedish constitution has had the status as an instrument for the government. Rules on the division of powers and functions between the legislature, the executive, the administration, and courts have been the main focus of the constitution. However, slowly the chapter on rights in the Swedish Instrument of Government has increased in importance, due to, for example, the Europeanization of national law.

[21] T 2978-15 et al.

[22] Säkerhets och Integritetsskyddsnämnden (SIN), dnr. 173-2013, 15 november 2013.

[23] Diskrimineringsombudsmannen (DO), GRA 2013/67, 20 februari 2013, Justitieombudsmannen (JO), dnr. 5205-2013.

[24] Biao v. Denmark, no. 3859/10.

Taiwan

DEVELOPMENTS IN TAIWANESE CONSTITUTIONAL LAW

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INTRODUCTION

Democratic election is both the fruit of and the moving force for Taiwan's changing constitutional landscape. It has been so since Taiwan set out on the metamorphosis from the fossilized Republic of China (ROC) regime to the present vibrant democracy in the 1980s. While the first presidential election by popular vote in 1996 sowed the seeds of the transformational constitutional revision in 1997, both the presidential elections in 2000 and 2008 resulted in "party turnover," setting off stormy constitutional politics. Engaging in constitutional politics, reluctantly or not, the Taiwan Constitutional Court (TCC) has played a crucial role in the development of constitutional law in Taiwan.[1]

2016 was no exception. The election of the first female president, Tsai Ing-wen of the Democratic Progressive Party (DPP), on January 16, 2016, brought about Taiwan's third party turnover. And, the DPP controlled the Legislative Yuan (Legislature) for the first time in history. With the tectonic change in the political landscape, presidential transition, transitional justice, same-sex marriage, and pension reform, to name just two pairs, were all on the reform agenda and may well impact constitutional development. Moreover, the coincidence of President Tsai's taking office and the vacancy of seven justices of the TCC in 2016 not only changed the TCC's composition but also brought it from its ten-year-long dormancy back to the center of the new constitutional dynamics set off by the 2016 elections and the forthcoming reforms.[2]

This paper suggests that the issues arising from the new constitutional landscape opened by the January elections remain unsettled, paving the way for the TCC's intervention in the future. Apart from the introduction to the Constitution and the TCC, Section II notes the constitutional politics of judicial appointment in 2016; Section III discusses the constitutional controversies surrounding transitional justice and same-sex marriage, especially the interrelationship between the politics of judicial appointment and same-sex marriage; and Section IV summarizes the TCC case law of 2016.

THE CONSTITUTION AND THE COURT

Mirroring its convoluted modern history, Taiwan has been governed by an ROC Constitution since 1947, soon after it was placed under the China-led belligerent occupation following Japan's unconditional surrender to the Allied Forces at the end of World War II in 1945. The ROC Constitution was passed by a Constituent National Assembly (including a small delegation from Taiwan) on December 25, 1946 in China and came into effect a year later. At that time, China was already engulfed in a civil war between the Communists and the Nationalists (also known as Kuomintang (KMT)). To fight against the mounting Communist insurgency, the ruling KMT pushed through the "Temporary Provisions" according to the provision for constitutional amendment in May 1948 while the first constitutional government was still taking shape. Thus, the nascent ROC Constitution was essentially

[1] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003) 106-57.

[2] Ming-Sung Kuo, "Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics" (2016) 25 *Wash Int'l LJ* 597, 625-34, 640-41.

suspended with the add-on counter-insurgency Temporary Provisions further expanded. In the meantime, a decree of regional martial-law rule was declared for Taiwan in May 1949 when the defeated KMT forces fled to Taiwan. Despite the continuing wartime status, Taiwan was placed under a four-decade-long quasi-military dictatorship by the ROC Government afterwards.[3]

Following escalating democratic demonstrations and the parallel political reforms, including the lifting of martial law in 1987, the dictatorial Temporary Provisions were eventually repealed in 1991. A series of constitutional amendments have since been enacted in seven rounds of constitutional revision.[4] The Constitution was last amended in 2005. Appended to by "Additional Articles," the original Constitution of 1947 has been substantially rewritten to fit with the democratic island-nation of Taiwan, only to leave the designation ROC unchanged.

The TCC—initially called the Council of Grand Justices—was inaugurated in 1948 when the ROC Government was seated in Nanjing, China. Under the KMT-dominated party-state regime, the role of the TCC was substantially limited. Yet, since the lifting of martial law on July 15, 1987, the TCC has transformed itself into the guardian of the constitutional order.[5] Until the end of 2016, the TCC rendered 743 Interpretations in total: 216 Interpretations (including Interpretation Nos. 1 and 2 dated January 6, 1949 when it was still seated in Nanjing) were promulgated during the 1949-87 martial-law rule, whereas 527 Interpretations were issued afterwards. Despite the recent decline in productivity over the past decade,[6] the TCC has continued to play an important role in constitutional politics.

According to Articles 78 and 79 of the Constitution, the TCC has two primary functions: to interpret the Constitution and to unify the interpretations of statutes and ordinances. As its full designation connotes, the TCC gains its recent public recognition mainly through its jurisdiction over constitutional interpretation. The Constitutional Interpretation Procedure Act of 1993 (CIPA) provides that the TCC exercise jurisdiction over constitutional interpretation on receiving petitions from (1) the central or local government agencies; (2) at least one-third of the Legislators; or (3) the people (individuals or corporate entities) in relation to constitutional rights. The first two referral routes are similar to the "abstract norm control" procedure in the German Federal Constitutional Court Act. Besides, the TCC recognizes the German-styled "concrete norm control" procedure in Interpretation No. 371 (1995): any judge sitting in all instances may suspend the proceedings before her and refer the constitutionality of the statute applicable to the pending case to the TCC provided that she ascertains that the statute is unconstitutional.

The CIPA requires a two-thirds majority of the attending justices with a quorum of two-thirds of the total membership to decide the constitutionality of statutes. In contrast, a simple majority of those present with a quorum of two-thirds of the justices is required to declare an administrative regulation or a municipal ordinance unconstitutional. As regards the TCC's jurisdiction over the unification of the interpretations of statute and ordinances (uniform interpretations), the CIPA provides that both the government (central and local) and the people have standing. Uniform interpretations can be rendered by a simple majority of the justices present with a reduced quorum of half of all the justices. Apart from constitutional and uniform interpretations, the Additional Articles of the Constitution (AAC) further invest the TCC with jurisdiction over the dissolution of anti-constitutional political parties and the trial of the impeachment of the President and the Vice President. The TCC has never been requested to adjudicate an impeachment case or to dissolve a political party to date.

Since its early days, the operation of the TCC has been modeled on the continental style of judicial review. Despite the distinct referral procedures, the TCC renders interpretations as advisory opinions on constitutional principles or rulings on the question of constitutionality as well as uniform interpretations with general effect in the style of "abstract review." The TCC traditionally conducted its business in the ambience of a privy council without the procedural characteristics of judicial proceedings. Although the TCC has been granted the discretion to hold public oral hearings since 1993, only nine out of 743 interpretations were rendered following oral hearings as of 2016.

The TCC currently comprises fifteen justices, two of whom also serve as the President and the Vice President of the Judicial Yuan, the administrative body of the whole judiciary, respectively. The power to nominate justices is vested in the President and appointments are made with the consent of the Legislature. Each justice is appointed for a staggered term of eight years and prohibited from serving consecutive terms (AAC, Article 5, Section 2).

After President Tsai Ing-wen took office on May 20, 2016, there has been a substantial change in the membership of the TCC. Five justices were scheduled to leave office on the completion of their eight-year term at the end of October. In the meantime, the President and the Vice President of the Judicial Yuan decided to step down considering increased calls for their early resignation. Thus, President Tsai nominated seven justices to fill the vacated seats left by former KMT President Ying-Jeou Ma's appointees. During the confirmation hearings, the nominees were pressed by the Legislators to answer the highly controversial issues concerning the sovereignty of Taiwan and its relations with China in the future. More important, a wide range of current constitutional issues also came to the fore in the legislative vetting.

[3] Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* 28-36 (Hart 2016).

[4] Ibid 36-48.

[5] Ginsburg (n 1).

[6] Kuo (n 2) 626.

Among them were the contentious issues about same-sex marriage and transitional justice. All of the nominees were confirmed by the DDP-controlled Legislature despite the KMT caucus's attempted obstruction.

Notably, President Tsai nominated a former justice, Professor Hsu Tzong-li, who sat on the TCC bench from 2003 to 2011, to be the President of the Judicial Yuan and the chief justice. From the above-mentioned constitutional ban on justices serving consecutive terms, some commentators inferred that this nomination was unconstitutional. However, doubt about the constitutionality of Hsu's nomination was eventually deflected given that Hsu's two appointments were not consecutive. President Hsu and the other six justices took office on November 1 following the legislative consent on October 25.

DEVELOPMENTS AND CONTROVERSIES IN 2016

As noted in the Introduction, the results of the elections in January 2016 created tectonic changes in the Taiwanese political landscape, giving rise to further constitutional controversies. Two subjects stand out from the post-election constitutional controversies: transitional justice and the legalization of same-sex marriage (LSSM).

Transitional Justice

Echoing the experience of those countries undergoing democratic transition, transitional justice has been one of the central themes of the democratic movement in Taiwan.[7] Among the numerous issues surrounding transitional justice is the question of the so-called "ill-gotten party assets," which is inseparable from the KMT's privileged status under the party-state regime. As the longtime ruling party in a virtually one-party state,[8] the KMT has built a business empire comprising vast real estate, companies, investments, and other assets since taking control of Taiwan in 1945. Extensive investigations have established that the KMT accumulated its fortunes either through favorable policies under the cover of law or simply by other illicit means at the expense of the State, especially during its uninterrupted rule from 1945 to 2000 in Taiwan. There have been continuous public calls for the restitution of those KMT-owned "ill-gotten" assets to the State coffers by special legislation as part of transitional justice. As the KMT continued to control the parliament after it lost the presidential election in 2000, the DPP-led legislative effort to divest the KMT of its illicit assets was defeated time and again. Moreover, as the KMT was perceived as continuing to finance its political activities with party assets, the issue of ill-gotten party assets became the rallying call for the rival DPP in electoral campaigns, including the lead-up to the 2016 elections.

With its historical electoral victories in January 2016, the majority DPP soon in February introduced the legislative bill of "The Settlement of the Ill-Gotten Assets of Political Parties and Their Affiliates Act" (Ill-Gotten Assets Act) as part of its grand legislative agenda on transitional justice when the KMT still held executive power. Despite the KMT's fierce parliamentary obstruction and street demonstrations, the bill was pushed through in July and came into force in August following the presidential promulgation.

The issue of ill-gotten party assets was hardly resolved with the passage of legislation. As the KMT is the intended target despite the facially neutral provisions, the Ill-Gotten Assets Act raises complex constitutional issues surrounding transitional justice. Before the "Ill-Gotten Party Assets Settlement Committee" (Settlement Committee) was inaugurated, the KMT caucus had made a referral to the TCC in regard to the constitutionality of the Ill-Gotten Assets Act even if it fell short of the CIPA-required procedural threshold of one-third of Legislators.[9] Notably, in its referral, the KMT not only challenged the Ill-Gotten Assets Act but also questioned the constitutionality of the foregoing threshold on the grounds of its undue limitation on minority parties. The TCC dismissed the referral on the procedural ground. Nevertheless, with the Settlement Committee expanding investigation and the KMT continuing to resist by legal and political means, the issue of ill-gotten party assets is likely to work its way up the process of appeal, instigating the TCC to tackle the constitutional issues surrounding transitional justice before long.

Legalization of Same-Sex Marriage

LSSM is the second front of constitutional politics opened by the 2016 elections. Antidiscrimination has long been on the agenda of the civil rights movement and the petition for the LSSM can be traced back to the mid-1980s when democratization was just setting out. Yet, the same-sex marriage question did not move up the civil rights agenda until the 2000s, when several private member bills were introduced for its legalization in the Legislature. Besides, individual gay couples continually filed legal challenges on the definition of marriage in the Civil Code in the hope that same-sex marriage would be legalized through statutory or constitutional interpretation, but to no avail. In the meantime, social movement for antidiscrimination and gay rights continued to gain momentum while concerns about the impact of same-sex marriage on family values also began to surface, calling for the provision for partnership instead of marriage for gay couples. Afterwards, the progress towards the LSSM seemed to have plateaued as the legislative effort was stalled in 2014.

Thanks to the unrelenting effort of activists, the DPP presidential candidate Tsai Ing-wen pledged to support "marriage equality" preceding the 2016 elections. In contrast to divesting the KMT of its ill-gotten party assets, however, the non-partisan LSSM issue was not high on the Tsai administration's agenda in terms of the lack of consensus both within and without her party. Even so, more Legislators were vociferous about supporting the cause of same-sex marriage in the new

[7] Jau-Yuan Hwang, "Transitional Justice in Postwar Taiwan" in Gunter Schubert (ed), *Routledge Handbook of Contemporary Taiwan* (Routledge 2016).

[8] New parties were banned until 1987. Before the official ban was lifted, there were only two token lawful political parties apart from the hegemonic KMT.

[9] A request for a constitutional interpretation needs the support of at least thirty-eight of the Legislature's 113 members. The KMT caucus has only thirty-five seats.

Legislature than its predecessor. Against this backdrop, the President's TCC nomination in October presented itself as the unexpected catalyst for breaking the stalemate on the LSSM.

It was no surprise that Legislators would expect the judicial nominees to not only answer legal questions but also address policy issues such as the LSSM. Yet, most of the seven nominees lent their support for LLSM expressly in the confirmation hearings without dodging it. This was regarded as a strong endorsement, breathing new life into the legislative drive for the LSSM. In the meantime, the annual LGBT Pride Parade scheduled for October 2016 was expected to become a popular demonstration for the LSSM. In light of the shift in public opinion, new private member bills were introduced in the parliament. Suddenly the same-sex marriage question topped the political agenda.

On the other hand, this also brought about angry homophobic reactions. A series of counter-demonstrations were held while rival social forces were mobilized to stem the tide of the same-sex marriage movement. As the private member bills were under scrutiny in early November, public hearings turned into violent brawls in the Legislature. With public support for same-sex marriage continuing to grow, however, the focus was shifting from the question of legalization to how it could fit into the current legal system: would special legislation governing same-sex marriage vis-à-vis the revision of the marriage provision in the Civil Code be another form of statutory discrimination?

Leaving this issue unsettled, all the private member bills cleared the committee stage on December 26 and were referred to all party caucuses for a one-month-long compulsory reconciliation before they proceeded to the next stage. Clearing the committee stage did not suggest that the LSSM bills would muster the support of the majority of Legislators. It is in the stage of second reading at the plenary session that all important legislative issues are resolved. Notably, in the meantime, two of the petitions challenging the constitutionality of the provisions that imply the preclusion of same-sex marriage in the Civil Code were admitted by the TCC in 2016 pending its decision. It remains to be watched whether Taiwan will join the countries that recognize same-sex marriage by legislation or those where the judiciary has taken the lead invalidating the statutory preclusion of same-sex marriage.[10]

MAJOR CASES

Over the past decade, the TCC usually received around 450-600 new petitions annually. More than 90% of the petitions came from the people. In 2016, the TCC handed out nine Interpretations and dismissed a total of 429 petitions. Although the dismissed cases are generally done within one year of their submission, it would take the TCC three years or longer to reach decisions on the merits of those admitted cases. As of the end of 2016, there were 375 leftover petitions pending the TCC's decisions.[11]

Among the nine Interpretations rendered in 2016, two of them are on non-constitutional, legal issues. The other seven concern two main constitutional issues: judicial remedy (or due process of law) and land rights. Interpretation Nos. 736, 737, 741, and 742 all involve judicial remedy while Nos. 739 and 742 are on land rights. The only exception to the above two categories is No. 738, which is on occupational and business freedom. One of the two non-constitutional/uniform Interpretations, No. 743, also concerns the land rights issue, which will also be commented on below.

Judicial remedy, in light of due process of law, has been one of the TCC's favorite issues over the years. Even under the authoritarian era lasting until the late 1980s, the TCC had made several early successful strikes by mandating judicial remedies for civil servants, students, and taxpayers, among others. By holding on to the procedural due process of law, the TCC has carefully and skillfully constructed a judicial forum to entertain the idea of the rule of law, at least in its formalistic sense, which the yet-to-be-tamed State would find difficult to oppose overtly.

Evidence

Interpretation No. 737 was petitioned by a criminal defense lawyer and his client on their access to the evidence and relevant documents presented by public prosecutors to the court for the writ of pre-trial detention. The petitioners attacked the constitutionality of Article 33, paragraph 1 of the Criminal Procedural Act, which provides for the right of such access for defense attorneys during the trial stage only. Thus, both suspects and their defense attorneys are excluded from such access during the pre-trial stage. During the pre-trial court procedures for the writ of detention, both suspects and their defense attorneys are notified of the mere "facts" alleged to support the specific grounds of detention.

In Interpretation No. 737, the TCC found unconstitutional the said and other related provisions of the Criminal Procedural Act, but still valid for up to one year or until being amended by the Legislature, whichever comes first. In its reasoning, the TCC first emphasized the importance of physical integrity and the right to judicial remedy as guaranteed by Articles 8 and 16 of the Constitution. Considering the severity of the harm on the suspects inflicted by the pre-trial detention, the TCC stipulated that the principle of due process of law be strictly followed in the detention process. Provision of the mere facts related to detention's ground, in the opinion of the TCC, is not enough for the proper exercise of suspects and their attorneys' rights to effective criminal defense. Even the principle of non-publicity concerning criminal investigation procedures and the prevention of the possible dangers of destroying or forging evidence and the risks of conspiring with co-offenders or witness could only justify the partial limitation of, but not the complete ban on, suspects and their attorneys' access rights to evidence.

[10] The TCC announced that a public hearing would be held for the two admitted pending petitions on March 24, 2017. According to the CIPA and the TCC's procedural rules on public hearings, the TCC must make its ruling within sixty days after hearing oral arguments.

[11] Statistics of the new and decided cases before the TCC in 2016 (in Mandarin) www.judicial.gov.tw/constitutionalcourt/P05.asp accessed January 31, 2017.

Interpretation No. 737 is a decision trying to correct a long-disputed legislative defect of Taiwan's criminal procedures. It does strengthen the rights of criminal defendants and their right to counsel. In the similar spirit of judicial remedy, Interpretation No. 741 aims to fix a procedural loophole arguably left by the TCC's previous decisions.

Judicial Remedies

Interpretation No. 741 originated from several petitioners whose motions for retrial were denied by the Supreme Administrative Court (SAC) on the ground that they were not the petitioners of Interpretation No. 725 and therefore could not be its beneficiaries. In Interpretation No. 725, the TCC ruled unconstitutional a court precedent of the SAC, which denied the motions for retrial for those cases whose applicable laws were declared "unconstitutional but valid for a certain period of time" until being amended by the Legislature. Interpretation No. 725 overrules the said SAC precedent and demands post-final judicial remedies (including retrial and/or extraordinary appeal) be granted to the petitioners. However, Interpretation No. 725 does not expressly grant such post-final remedies to the petitioners of other Interpretations which also find applicable laws in dispute "unconstitutional but valid for a certain period of time." The SAC thus read Interpretation No. 725 in its most restrictive sense and allowed motions for retrial to the named petitioners of Interpretation No. 725 only. In Interpretation No. 741, the TCC reiterated the intention of Interpretation No. 725 is to grant such post-final remedies to the petitioners of all such Interpretations which find relevant applicable laws "unconstitutional but valid for a certain period of time."

No. 741 clarifies a long-disputed issue in Taiwan: should the courts continue to apply the laws found "unconstitutional but valid for a certain period of time" before their amendment by the Legislature? The answer is clearly NO, after Interpretation Nos. 725 and 741. On the other hand, Interpretation No. 741 also illustrates the continuing tension between the TCC and the ordinary courts of final instance (including the SAC and the Supreme Court). Since the 1980s, the final courts have been reluctant and even resistant to allow the post-final judicial remedies for those winning petitioners of the TCC Interpretations. Over years, the TCC has taken pains to force the final courts to grant such extraordinary remedies while limiting such remedies available to those winning petitioners only. Other losing parties, if not filing their own petitions, of the same or similar cases ruled under the same applicable laws will not be granted the benefit of such extraordinary remedies. In this sense, favorable decisions of the TCC will only produce limited retroactive effect on those parties who did actually fight their cases all the way to the TCC. Such limited effect remains true even after Interpretation Nos. 725 and 741.

Land Rights

On the part of the land rights cases, Interpretation No. 743 stands out and deserves comments too. Despite being a non-constitutional decision, this Interpretation concerns a highly controversial legal issue: could a private property originally taken by the government for public use (e.g., the construction of the subway system) be transferred to another private individual or entity in the name of public interest (e.g., economic development)?

Like many other countries, Taiwan governments, central and local, have been increasingly resorting to a variety of public-private joint ventures, such as BOT, BT and PPP, for the construction of public transportation and other infrastructure. Not surprisingly, the traditional requirement of taking for public use has been relaxed to permit taking for public interest, which is often mixed with economic development and private interests.

Article 7 of Taiwan's Mass Rapid Transit Act permits the competent authorities to take (expropriate) private lands adjacent to the mass rapid transit system for joint-venture development, and then transfer such lands to private developers. In a station project near Taipei City, the local government first expropriated a large scale of adjacent lands from private citizens in the name of building a subway station. Although the government did make public its intended goal of joint-venture development in the future, the plan and details of such development were not specified and disclosed at all. Without such information, those affected land owners were unable to determine whether to participate in the then mysterious development plan or accept the compensation for the taking of their lands. This development plan then grew into a monster project disproportionately larger and profitable than it first appeared. Those land owners, feeling fooled, sued for the revocation of the taking and the damages, among others. As more details surfaced, this project turned out to be a messy political scandal.

In Interpretation No. 743, the TCC ruled in favor of those land owners, holding that the lands taken for public use may not be transferred to the third party (developers) for business purposes, unless expressly authorized by statutes and giving the affected land owners a prior and specific public notice of such development purpose. As the taking of the lands in dispute occurred more than two decades ago, the revocation of the taking seems infeasible now, considering the complexity of current land ownership. It remains to be watched how this case will be settled in the long run among the local government, the developer, and those original land owners.

CONCLUSION

The development of constitutional law in 2016 was like a multi-act constitutional play culminating in the LSSM drive. Democratic election, judicial appointment, and extrajudicial politics set the stage for this constitutional play while the President, Legislators, judicial nominees, and activists play the leading roles in the unfolding drama. In this light, the TCC appeared to be the bland deuteragonist, playing the institutional supporting role. Yet, as suggested above, with the issues surrounding various reforms translated into constitutional questions, the TCC may well take center stage in the next play. With the upcoming judicial fights in sight, the play of constitutional development in 2016 was best entitled "The Clouds Are Gathering." To be continued…

Thailand

DEVELOPMENTS IN THAI CONSTITUTIONAL LAW

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INTRODUCTION

Since its reinstatement in 2008, Thailand's Constitutional Court has been operating under immense pressure from political instability. Thailand's ongoing political conflict has resulted in a deeply divided society, and the Constitutional Court has failed to help stabilize it. It is even considered a contributive part of the conflict. Controversial decisions, as well as personal scandals, drew heavy criticism that eroded public trust. The conflict reached its peak in 2014 when a coup d'etat broke out. The junta, known as the National Council of Peace and Order (NCPO), banned all political activities and thus 2014 to 2016 was the Court's halcyon period. But this hiatus is only the eye of the storm.

Throughout its 20 years of operation, the Constitutional Court has witnessed the rise and fall of its credibility.[1] In 1997, Thailand carried out a major political reform aiming to consolidate democracy since the country had been stuck in a vicious cycle of elections and military interventions for 70 years.[2] Corruption allegations undermined civilian governments' credibility, making Thailand's democracy vulnerable to military intervention. To restore trust, the 1997 Constitution designed a stronger checks-and-balances system by introducing the Constitutional Court and other independent watchdog agencies. Together, these bodies scrutinize, investigate, and prosecute corrupt politicians. Thus, the Constitutional Court was assigned the duty to guard the constitution and enforce the rule of law.[3]

The Constitutional Court could be better understood as two different courts: a pre-2006 court and a post-2006 court, separated by the 2006 coup. The first Court began in 1998. Although its impression was that of a conservative court, it gave a promising start with a few decisions that promoted people's rights and liberties.[4] But its attempt to curb corruption proved unsuccessful because it often deferred to the government.[5] This problem was more acute during the administration of Thaksin Shinawatra, the tycoon-turn-prime minister who was accused of human rights violations, cronyism, and corruption.[6] Eventually, when the 2006 coup took place, this unpopular Court was suspended and replaced by the *ad hoc* Constitutional Council.

The 2007 Constitution redesigned the Constitutional Court to be more politically isolated and powerful.[7] Judges' personal attitudes also seemed to be more skeptical of politicians. The post-2006 Court was thus more aggressive in reviewing the government's actions. Although this aggressive scruti-

[1] Thawinwadee Burikul et al., รายงานผลการสำรวจความคิดเห็นของประชาชนต่อการบริการสาธารณะ และการทำงานของหน่วยงานต่างๆ พ.ศ.๒๕๔๗ และสรุปผลการสำรวจ พ.ศ. ๒๕๔๖-๒๕๕๗ [King Prajadhipok's Institute Poll on Public Opinion on Public Services 2003-2014] (King Prajadhipok's Institute 2015) 153.

[2] Duncan McCargo, 'Introduction: Understanding Political Reform in Thailand' in Duncan McCargo (ed) *Reforming Thai Politics* (NIAS 2002) 1-3.

[3] *Reforming Thai Politics* 9-10.

[4] Andrew Harding & Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart 2011) 176-180.

[5] *The Constitutional System of Thailand* 180-182.

[6] See Pasuk Pongpaichit & Chris Baker, *A History of Thailand* (CUP 2edn 2014) 262-267; Tom Ginsburg, 'Constitutional Afterlife: the Continuing Impact of Thailand's Postpolitical Constitution' (2009) 7 ICON 83, 96-97.

[7] *Constitutional Afterlife*, 93 & 100-101.

ny satisfied the anti-Thaksin faction, others voiced concerns that the Court appeared biased.[8] As a result, the Constitutional Court became a highly-polarized institution, enjoying praises and at the same time suffering attacks.

Contrary to the first Court, the anti-Thaksin establishment considered the Court their friend. The NCPO allowed the Court to remain in operation. But only a few cases reached the Court. Its main task was to participate in the juntas political process such as drafting the upcoming constitution and relevant laws.

THE CONSTITUTIONS AND THE COURT

By 2016, the Constitutional Court had lived through four constitutions. The 2016 Court was the product of the 2007 Constitution, which shared the goal of eradicating corruption with its 1997 predecessor. Undue political intervention and insufficient authority of the Constitutional Court were identified as the culprits of corruption. Therefore, the 2007 Constitution reduced political oversight and broadened jurisdiction into what had formerly been considered the executive prerogative, such as treaty-making and emergency power.[9] However, despite all efforts to empower the Court, Thai democracy quickly descended into chaos. The NCPO abolished the 2007 Constitution. Although the 2014 Interim Charter brought no change in its structure and jurisdiction, the prohibition to review the NCPO severely incapacitated the Court.

Composition of the Constitutional Court

The Constitutional Court has only one panel of nine judges with law and non-law backgrounds. Unlike the closed system of other courts, the recruitment of Constitutional Court judges involved representation of political branches. Candidates are recruited through a complicated process. The Supreme Court nominates three Supreme Court judges while the Supreme Administrative Court nominates two of its members.[10] The nomination commission selects four other candidates with two being legal experts and the other two political science experts.[11] The nomination commission is an *ad hoc* body, comprised of the President of the Supreme Court, President of the Supreme Administrative Court, Speaker of the House of Representatives, Leader of the Opposition, and one representative of each watchdog agency.[12] While the nomination commission appears to be a combination of the judiciary, legislative, and independent bodies, the overall recruitment is tilted in favor of the judiciary. Political oversight of the nomination is significantly reduced compared with that in the 1997 Constitution, where members of political parties and lay representatives sat on the commission.[13] The Senate must confirm all nine judges before taking office.

The qualification of a nominee is stringent.[14] He or she shall acquire Thai nationality by birth and be the age of 45 or more. He or she must have been a minister, a nomination commissioner for a watchdog agency, a director-general of a department-level agency or its equivalent, a professor, or a practicing lawyer of at least three years prior to a nomination. A nominee must have never been impeached or imprisoned. Most importantly, three years before a nomination, he or she shall not be a member of a political party.

Once appointed, a judge is subject to strict prohibitions and requirements to maintain his or her integrity.[15] But he also enjoys a high level of independence. The term lasts nine years and is non-renewable.[16] Apart from retirement at 70, only a few causes could remove a judge from his office before the term is complete. A judge can be disqualified only if he or she is found to hold a position prohibited by the Constitution, impeached by three-fifth of the Senate's vote, or sentenced to an imprisonment term.[17]

The upcoming 2017 Constitution, the Court's fifth constitution, will bring a change in its composition as it replaces one law and one political science expert with two high-ranking civil servants.[18] The introduction of bureaucrats to the bench indicates the NCPO's desire to have more control in electoral politics.

Jurisdiction of the Constitutional Court

Before 1997, the Court of Justice had a general jurisdiction over all disputes. The system was considered inadequate to provide check-and-balance because judges had not been trained to adjudicate public law cases. The 1997 Constitution drafters overhauled the judicial system to create courts that were specialized in constitutional and administrative disputes, the Constitutional Court and Administrative Court respectively. The Constitutional Court heard disputes in four main areas: reviewing law and law-making, settling jurisdictional disputes, eradicating corruption, and protecting democratic values.

First, the Court reviewed the constitutionality of law and law-making. It scrutinized both content and legislative procedure of a statute, an organic law, and an emergen-

[8] Duncan McCargo, 'Peopling Thailand's 2015 Draft Constitution' (2015) 37 Contemporary Southeast Asia 329, 335-336; Eugenie Merieau, 'Thailand's Deep State, Royal Power and the Constitutional Court (1997-2015)' (2016 46 Journal of Contemporary Asia 445, 459-461.

[9] Bjoern Dressel, 'Judicialisation of Politics or Politicisation of the Judiciary? Considerations from Recent Events in Thailand' 23 The Pacific Review 671, 677-678; Constitutional Afterlife, 100-101.

[10] Constitution B.E. 2550 (200) s. 204 (2007 Constitution).

[11] 2007 Constitution, s. 204.

[12] 2007 Constitution, s. 206.

[13] *The Constitutional System of Thailand* 168.

[14] 2007 Constitution, s. 205.

[15] 2007 Constitution, s. 207.

[16] 2007 Constitution, s. 208.

[17] 2007 Constitution, s. 209.

[18] Constitution B.E. 2560 (2017) s. 200 (2017 Constitution).

cy decree.[19] If the law disproportionately encroached upon the rights and liberties of Thais, or if the legislative procedure was not properly observed, the Constitutional Court shall declare that particular section, or the whole act, unconstitutional and void. After 2007, the Court could also decide if an international treaty into which a cabinet was entering had a significant impact on Thailand's national security, economy, or society, and, thus, required parliamentary consent.[20]

Second, the Constitutional Court was assigned to settle intra-agency jurisdictional disputes. The 1997 Constitution created several new watchdog agencies that were not under the Legislative or Executive branches. The dispute involving two or more parties from the National Assembly, the Cabinet, and these independent agencies, but not courts, may be sent for the Court's consideration.[21]

Interestingly, fighting corruption was the only area where the Constitutional Court's power was reduced. The Court could disqualify politicians who were found to violate the conflict of interest prohibitions.[22] However, the Court no longer had the authority to hear the asset disclosure case after it acquitted Thaksin Shinawatra in 2001.[23] The duty was assigned to the Supreme Court instead.

Finally, the Constitutional Court acted as the guardian of the constitution and democracy. The Court may order a person or a political party to halt an activity that it deems detrimental to the government, constitutional principles, or democratic values.[24] In addition to holding such activity, the Constitutional Court may dissolve a political party if considered to have attempted to overthrow the government or acquire power through undemocratic means.[25] Executives of the dissolved party shall receive a five-year ban from politics.

The Constitutional Court successfully exercised its judicial review of law and jurisdictional disputes, but it failed to restore transparency and uphold democracy. Since 2007, the Constitutional Court has played a greater role in promoting rights and liberties of Thais by striking down statutes that violate basic civil rights.[26] Unfortunately, this achievement was overshadowed by several controversies when it boldly invalidated elections and dissolved key political parties as well as disqualified prime ministers and banned hundreds of politicians.[27] The paradoxical performance brings its professionalism and neutrality into question.

Under the 2014 Interim Charter, the Constitutional Court can still hear cases concerning judicial review of the law, and jurisdictional dispute settlement.[28] Nonetheless, the absolute status of the NCPO means only a small number of cases has reached the Court.

DEVELOPMENTS AND CONTROVERSIES IN 2016

There was no major controversy over the Constitutional Court in 2016 because all attention went to the NCPO after having seized power from the elected Prime Minister, Yingluck Shinawatra in 2014. However, the Court's reputation still suffers from years of entanglement with politics. Since its reinstatement in 2008, almost all major decisions of the Constitutional Court became *cause celebre*. The situation peaked twice, first in 2008 and again in 2012-2014, both periods of which coincided with Thaksin's proxy winning the office. Thus, the Court could not avoid criticism and accusation that it had sided with the anti-Thaksin faction.

In 2008, the Constitutional Court launched a series of party dissolutions that finally paved the way for the Democrat Party, Thaksin's political enemy, to become the government.[29] In 2012, the Constitutional Court exercised its judicial review vis-à-vis the popular Yingluck Shinawatra, Thaksin's youngest sister. Thrice the Court blocked Yingluck from fulfilling her election campaign by amending the 2007 Constitution.[30] Repeatedly reiterated that a mere election did not equate democracy, the Court clearly displayed distrust in the majority's wisdom. Critics called these decisions "judicial coup."[31]

In late 2013, Yingluck introduced an amnesty bill that would indiscriminately pardon all parties in the political conflict. The bill proved unpopular to all parties because it cleared Thaksin of corruption charges as well as terminated an investigation of the military's deadly crackdown on pro-Thaksin protestors in 2010. The anti-amnesty bill protest quickly escalated to the anti-Shinawatra protest under the name of the People's

[19] 2007 Constitution, s. 211 & 184.

[20] 2007 Constitution, s. 190.

[21] 2007 Constitution, s. 214.

[22] 2007 Constitution, s. 265-269.

[23] See *The Constitutional System of Thailand,* 181.

[24] 2007 Constitution, s. 68.

[25] 2007 Constitution, s. 237.

[26] Kla Samudavanija. ขอบเขตอำนาจหน้าที่ศาลรัฐธรรมนูญเพื่อส่งเสริมการปกครองในระบอบประชาธิปไตยและคุ้มครองสิทธิเสรีภาพของประชาชน [Scope of Power and Duty of the Constitutional Court for Promotion of Democratic Rule and Protection of Civil Rights and Liberties] (King Prajadhipok's Institute 2015) 239-265; see 12/2552 [2009], 15/2555 [2012], 12/2555 [2012], 17/2555 [2012] Const. Ct. Decision.

[27] See Khemthong Tonsakulrungruang, 'Thailand: an abuse of judicial review' in Po Jen Yap (ed) *Judicial Review of Elections in Asia* (Routledge 2016); Khemthong Tonsakulrungruang, 'Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict' (2017) 26 Washington International Law Journal, fourthcoming.

[28] Interim Charter B.E. 2557 (2014), s. 45.

[29] See 'Thailand: an abuse of judicial review'; Marc Askew, 'Confrontation and Crisis in Thailand' in Marc Askew (ed) *Legitimacy Crisis in Thailand* (King Prajadhipok's Yearbook Project, Silkworm Books, 2010) 31-43.

[30] *Entrenching the Minority*.

[31] *Thailand's Deep State*, 449.

Democratic Reform Council (PDRC). The PDRC demanded Yingluck to unconditionally resign, suspend an election indefinitely, and establish the non-partisan government to reform the country. Yingluck responded by dissolving the House. The Democrat party, which was leading the PDRC, boycotted the election while the PDRC vowed to obstruct it.[32]

The Election Commission (EC) was reluctant to organize an election so it consulted with the Constitutional Court whether an election could be postponed. The Court agreed that a re-schedule was possible, but only if that resolution was made jointly by the government and the EC.[33] Yingluck resisted, so the EC half-heartedly proceeded. Unsuccessful in blocking the election, the PDRC succeeded in blocking voting on election day. PDRC protesters blocked the venues and assaulted voters so voting could not take place in some constituencies.[34] The Ombudsman, per the PDRC's request, asked the Court to review the election. Blaming the government for failing to foresee obstructions, the Court invalidated the 2014 election on a technical ground of not being able to complete within one day.[35]

By then, Thailand had no functioning parliament or cabinet. The PDRC occupied several government offices. The EC foot-dragged a discussion on the possibility of another election. The Court shortly delivered another blow by disqualifying Yingluck from being a caretaker PM because of a conflict of interest charge.[36] Thailand reached a constitutional deadlock with no functioning government or an election within sight. Amidst all confusions, a few days later, the army carried out the coup.

Concerns about the Court's neutrality arose as early as shortly after the 2007 Constitution came into effect. Bjoern Dressel warned that the attempt to assign the judiciary to safeguard politics might have ended up politicizing this supposedly neutral arbiter.[37] More recently, Eugenie Merieau saw the Court as the key mechanism that drove the Deep State, a network of traditional elites that operated outside the control of a democratically elected government.[38] Veerayuth Kanchoochat described this behavior as reign-seeking, a phenomenon where non-elected technocratic and bureaucratic institutions compete with politicians for control of power.[39] Legal scholars also noticed procedural irregularities as well as arbitrary reasoning which seemed to depart from their usual precedents.[40] These studies suggested that the Constitutional Court was utilizing its judicial power to help the powerful minority of technocrats and traditional elites to control the grassroots majority. The 2013-2014 crisis that led up to the coup was not coincidental. Events were well coordinated by protesters, the opposition party, watchdog agencies, and the Constitutional Court.[41] After the month-long protest significantly delegitimized the government, court decisions were deliberately delivered to catalyze the coup.

Perhaps the Constitutional Court in 2016 was controversial not because of what it did, but what it did not do. The Court refrained from scrutinizing the NCPO, which oppressed the rights and liberties of Thais as well as weakened the rule of law. Instead, the Court cooperated with the NCPO in sustaining the oppressive regime. A retired judge was invited by the Constitution Drafting Committee (CDC).[42] It delivered a few decisions that facilitated the NCPO's grip on power. The 2017 Constitution even expanded the role of the Constitutional Court. Where a constitutional dispute occurs, and there is no applicable provision, the Constitutional Court President shall convene a panel of the legislative, executive, judiciary, and independent watchdog agencies to resolve to a "democratic convention" to be applied to that case.[43] This judicial turnaround fueled more criticism and condemnation.

MAJOR CASES

The Constitutional Court heard only six cases in 2016. Two decisions dissolved inactive political parties while one confirmed the presumption of innocence. Three of them concerned the constitution-making process, one of which caught much public attention because of its implication in the development of Thai politics.

In August 2016, Thailand was to vote on the new constitution draft. The referendum became a symbolic battle between the NCPO, who backed the constitution-drafting process, and its dissidents who regarded the charter the "fruit of the poisonous tree." Moreover, the constitution draft was criticized for its bad design that destabilized the party system as well as entrenched the

[32] Duncan McCargo, 'Thailand in 2014: The Trouble with Magic Swords' (2015) Southeast Asian Affairs 335, 338-341.

[33] 2/2557 [2014] Const. Ct. Decision.

[34] *Thailand in 2014: The Trouble with Magic Swords,* 341-343.

[35] 5/2557 [2014] Const. Ct. Decision.

[36] 9/2557 [2014] Const. Ct. Decision.

[37] See *Judicialisation of Politics or Politicisation of the Judiciary?*

[38] See *Thailand's Deep State*.

[39] See Veerayooth Kanchoochat, 'Reign-seeking and the Rise of the Unelected in Thailand' (2016) 46 Journal of Contemporary Asia 486.

[40] See ขอบเขตอำนาจหน้าที่ศาลรัฐธรรมนูญเพื่อส่งเสริมการปกครองในระบอบประชาธิปไตยและคุ้มครองสิทธิเสรีภาพของประชาชน; 'Thailand: an abuse of judicial review'.

[41] See the revelation of Suthep, the PDRC leader, that he and the army commander, Prayuth Chan-ocha, had been planning the coup for some time before the actual event in *Thailand in 2014: The Trouble with Magic Swords,* 345.

[42] Judge Supoj Kaimook.

[43] 2017 Constitution, s. 5. However, King Vajiralongkorn, shortly after ascending the throne in December, refused to approve the new charter. He requested some amendments including Section 5. The final version has not been revealed to the public. See Eugenie Merieau, 'Thailand's New King is Making a Power Grab' (The Diplomat 4 February 2017) http://thediplomat.com/2017/02/thailands-new-king-is-making-a-power-grab/?utm_content=buffer97131&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer accessed 6 March 2017.

junta's control of upcoming governments.[44] The junta-appointed Legislative Assembly passed the Referendum Act to regulate this hotly contested referendum. However, the NCPO opponents argued that the Act did not neutrally assist the referendum process, but rather, helped the junta silence its critics. The Referendum Act criminalizes a person who distributes materials deemed distorted, violent, impolite, threatening, or instigating another person to vote one way or the other. The ambiguous language of the law made campaigning against the draft impossible because any information that differed from the junta's official statements was conveniently considered distorted. Anti-junta activists challenged the Act at the Constitutional Court for violating their freedom of expression.

In the first half of the verdict, the Constitutional Court recognized Thailand's obligation under international law and the democratic custom to protect all kinds of freedom, including freedom of expression. Only when the state needed to protect higher values such as national security or public order could it restrict such freedom. But such restrictions must be in accordance with the constitution. Namely, the restrictions must be in the form of statutes and must be proportional to public interest gained from such measure. The Court then recognized the importance of the referendum as a political process for citizens to determine their fates and ruled that discussions should be allowed.

However, in the second half of its reasoning, where the Court discusses the language of the Act, it ruled that the restriction of freedom of expression in the Act was constitutional.[45] The Court acknowledged the objective of the law as to hold a free and fair referendum. Distorted information must not wrongly influence the public. The Constitutional Court admitted that the language of the law was vague, but ruled that this vagueness was necessary for a flexible and effective enforcement of the law. The concern of this vagueness was outweighed by the negative effect of wrong information on an uninformed audience and disruption to the harmonious and amicable atmosphere of the country. Moreover, because the Act does not have minimum punishment, it allows a judge to reduce the sentence to as low as possible, and a convict would still be eligible to redress through an ordinary appeal. Thus, the possible negative consequence of the Act was mitigated.

The Constitutional Court's decision endorsed the NCPO's position in cracking down dissent and contributed to the NCPO's victory.[46] The majority of Thai voted for the constitution draft, which would come into effect in 2017.

CONCLUSION

By 2016, the Constitutional Court had lost its reputation as a neutral arbiter. Fighting corruption and restoring the rule of law became hollow mantras to justify its hostility toward a democratic government as the Court actively cooperated with the corrupt and opaque regime of NCPO. The Court has proved to the public that it was one of the most powerful and decisive players in Thai politics. Unfortunately, the Court did not wish to guard the Constitution or protect the already fragile democracy.

The 2007 Constitution was written upon distrust of elected politicians, so it created an almost invincible Constitutional Court. When the Court became arbitrary, the public had no mechanism to hold it accountable. The 2017 Constitution would do little to address this problem, so Thailand's democracy is in greater trouble than ever with corrupt politicians on one side and the arbitrary Court on the other. Once democracy resumes and the first general election is held, the Constitutional Court will again find itself in a political whirlwind.

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[44] Leena Rikkilä Tamang, 'Political Implications of the Draft Constitution of Thailand: A Conversation with Prof. Tom Ginsburg and Mr. Khemthong Tonsakulrungruang' (*IDEA* 28 July 2016) http://www.idea.int/news-media/news/political-implications-draft-constitution-thailand-conversation-prof-tom-ginsburg accessed 2 March 2017.

[45] 4/2559 [2016] Const. Ct. Decision.

[46] 'Thailand jails activists for campaigning to reject constitution in referendum' (The Guardian 25 June 2016) https://www.theguardian.com/world/2016/jun/25/thailand-jails-activists-for-campaigning-to-reject-constitution-in-referendum accessed 2 March 2017.

Turkey

DEVELOPMENTS IN TURKISH CONSTITUTIONAL LAW

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INTRODUCTION

At the beginning of this century, Turkey was a candidate for being a member of the European Union. In the name of harmonization, in 2001 and 2004, many laws and some important parts of the 1982 Constitution, which was written and enacted after the military intervention, were amended, changed or annulled.[1] The AKP (Adalet ve Kalkınma Partisi – Justice and Development Party), a brand-new party which has emerged from the ashes of the Islamic-rooted RP (Refah Partisi – Welfare Party), took power between these two important amendments. They had, in the beginning, an agenda which pretended to combine on the one hand a modern, liberal Islam which is respectful of human rights and democracy. On the other hand, they followed an economic policy towards modernization and opening to the global economy. Under the charismatic leadership of Recep Tayyip Erdoğan, the party followed a "Muslim democratic" agenda similar to its Christian counterparts in Europe until 2008. But since then, this agenda's "democratic" part has been gradually forgotten or ignored, and the AKP became a more centralized and authoritarian government. The Gezi uprising in May-June of 2013 against the authoritarian politics of the government; the judicial operations against some ministers and their sons for corruption allegations; which are described as a coup of the Fethullah Gülen Terror Organization (once an ally) by the AKP Government, in December of the same year; the temporary loss of power in the general elections of June 2015 and, as a result, the collapse of peace talks with the Kurds in 2015 strengthened governmental oppression in Turkey. 2016, especially after the failed coup attempt[2] in July, was a year shaped by the extended power of the executive organs and the political split. Of course, the Constitutional Court of Turkey has also been affected by this extension and split.

The influence of the president on the Constitutional Court has always been a problem in Turkey. The Constitution of 1982, which created a more powerful presidency than in a normal parliamentarian system, accepted this organ as a trustable, independent, impartial and "supra-political" referee and gave the president the power to appoint, after some filtrations, all the constitutional judges. But the reality has not been in conformity with the theory and presidents' choices have always been criticized for being politically motivated instead of being made according to judicial competences and merits. This critique is naturally valid also for the presidency of Erdoğan.

THE CONSTITUTION AND THE COURT

The 1961 Constitution established the Constitutional Court of Turkey, which started to function in 1962. Although that Constitution was a product of an anti-democratic military intervention, the Court was modeled on the European constitutional justice practice as a response to the anti-democratic executive practices of unstoppable misuse of governmental powers in the 1950-1960 period. Like

[1] To have an idea about how important these changes were, please look at this article by Prof. Levent Gönenç: http://dergiler.ankara.edu.tr/dergiler/64/1536/16861.pdf.

[2] Main opposition party CHP (Cumhuriyet Halk Partisi – Republican People's Party) and some other groups think that it's a coup "controlled" by the government to create an authoritarian regime after the failure.

most European Constitutional Courts, it exercises *a posteriori* control over the conformity of laws to the Constitution and, since 2012, on constitutional complaints brought by individuals who argue that state authorities violated one or several of their rights written in the Constitution and[3] the European Convention on Human Rights.

The power to review the constitutionality of laws was endowed solely to the Constitutional Court by the 1961 Constitution. In the beginning, there were no limitations to this review, including constitutional amendments. Therefore the Court accepted that it had the right to review the substantial and formal constitutionality of constitutional amendments. But after the military note to the government on 12 March 1971, the right to substantial review by the Court was banned. During the 1970s, the Court bypassed this ban with the aim of protecting unamendable articles by saying that "an amendment which amends an unamendable article cannot be proposed, and this is a formal impossibility. I analyze the substance to understand if there is such an impossibility but, if yes, I annul the amendment due to the formal unconstitutionality." The response of the constituent power of the Constitution of 1982 to this jurisprudence was to describe in detail what a "formal review of constitutional amendments" is. The Court bowed to this limitation until 2008, the year when it annulled the use of headscarves by female students in universities. That decision made the government fly into a fury, and the composition, powers and structure of the Court were changed considerably by a constitutional referendum in 2010. The number of judges increased from 11 to 17, and the President had the chance to appoint several judges close to him to the Court. Since then, the controversy between the Court and the executive branches of the country has decreased at the expense of the independence of the Court.

In the 1982 Constitution, the Constitutional Court, being one of the highest constitutional organs, was on a par with the Grand National Assembly and the executive and placed as the first judicial organ among "the High Courts". Articles 146-153 of the Constitution are dedicated to the composition, duties, working methods of the Constitutional Court and other issues concerning constitutional review. A Law on Establishment and Rules of Procedures of the Constitutional Court (No. 6216, 30 March 2011), spelling out the provisions of the Constitution, stipulates its organization, independence, proceedings, disciplinary infractions and disciplinary proceedings.

DEVELOPMENTS AND CONTROVERSIES IN 2016

2016 was a stressful year for the Turkish Constitutional Court. Especially after the failed military putsch on July 15th, the burden on the shoulders of the Court to be the protector of rights and freedoms and the rule of law has created a weight on it. We should say that during and after the turmoil of the failed military intervention, the Court did not pass the test of being a trustworthy institution of a real democracy. One of the reasons for this failure is, of course, the removal of two members of the Court by its decision.[4] In the aftermath of the failed coup, the Court announced that members Alparslan Altan and Erdal Ercan were removed from office on the grounds of their connection with the terrorist organization FETÖ/PDY ("Fethullah Gülen" Terror Organization/Parallel State Structure), which was—allegedly—behind the coup.[5] One could justify removing them if linked to the anti-democratic movement, but this decision had no grounds other than a police investigation on these two members. In the lack of a criminal court's final decision, that removal itself meant the principle of presumption of innocence was violated by the highest court of Turkey, which has the duty, besides analyzing the constitutionality of laws, to protect the main principles of human rights and democracy.

Although it was a challenging year, the Court gave some important decisions too. You can find the Turkish Constitutional Court's action for annulment decisions below in the first part. And in the second part, you can read an important decision the Court made on a constitutional complaint in which a system was created that has diminished the number of Turkish cases in front of the European Court of Human Rights since September 2012. The quality of the decisions of the Court on constitutional complaints was developing until this year, but it is not so anymore, especially after the failed coup attempt. Unfortunately, neither the European Court of Human Rights nor other European institutions backed human rights as powerfully as they should have against the Turkish Government due to the fragile balance between these two sides under the circumstances of the failed coup and the emerging problem of illegal immigrants escaping from Syria's civil war.

MAJOR CASES

Applications for Annulments

1) Judgment on application related to law on full-day employment

The provisions of the law which amends Law no. 2547 and Law no. 2955 and which prohibits civil servants and members of the Turkish Armed Forces from establishing their own office, workplace and clinic to practice their profession or work self-employed or from working at a workplace that is owned by real persons, private law legal entities or professional organizations with public office status, or foundation higher education institutions[6] were brought to the Constitutional Court by the main opposition party, CHP (Cumhuriyet Halk Partisi – Republican People's Party), on the grounds of the right to life and state's obligation to en-

[3] This is an "and", not "or".

[4] http://www.anayasa.gov.tr/icsayfalar/duyurular/detay/50.html (In Turkish)

[5] It is still not proved by a court decision that there is such a terrorist organization and that organization acted in July 15th by using their members in the Turkish military. But since years, it was publicly well known that the government was supported by religious cleric Fethullah Gülen's movement by human resources and financially. More than 100.000 public workers who have been fired from the public sector in the aftermath of the coup shows this link clearly.

[6] In Turkey, foundations are able to found higher education institutions like universities but they are not allowed to aim to have benefited from it. So, there is no "private university" in Turkey, but instead only "foundation universities".

sure that everyone leads a healthy life physically and mentally as secured under Constitution. The law was criticized especially by Faculty of Medicine members with their own private surgery practices. In Turkey, it is common for Faculty of Medicine members to have private practices and attract some of their patients who do not want to be treated in university campuses with others and who can pay for their access to private surgery. But of course, it creates some extra burdens on them, and it is sometimes heard that some of the members ignore their faculty duties due to their workloads.

The Constitutional Court declined to annul the provisions above by saying that teaching staff must primarily carry out the duties of educating and carrying out applied studies at undergraduate, graduate and postgraduate levels based on secondary education, conducting scientific research, issuing publications and training and acting as consultants to students. The Court emphasized that the legislative organ has the right and power to regulate and introduce certain limitations on the working conditions of teaching staff by taking their titles and status into consideration, intending to provide better education and health services at universities.

Meanwhile, the provisions of the same law which prescribe that doctors, dentists or the instructors at medical schools practicing their profession or working self-employed under the scope of working restrictions shall terminate such employment within three months after the publishing of the law in the Official Gazette, and those who fail to do so will be deemed to have resigned and will be discharged from the university, were annulled by the Constitutional Court on the grounds of the principle of legal security and certainty. The Court stated that full-time employed teaching staff, due to their convictions and expectations of their self-occupation after such judicial decisions, have planned to work freely outside universities and they have planned their economic and social lives relying on these circumstances. The decision also stated that it contradicts equity and justice to force teaching staff to terminate the activities and engagements they had planned relying on the expectations and convictions of the continuation of legal status. Therefore, the Court concluded that it was not constitutional to impose on them such heavy sanctions as being deemed resigned and discharged from the university, and annulled only that part of the amending law.

2) Judgment on application related to the expropriation of intellectual and artistic works by issuing a Council of Ministers' decree

The first paragraph of Article 47 of Law on Intellectual and Artistic Works is related to the expropriation of those works, which are considered important for the culture of the country. Before the amendment, there were two conditions to expropriate intellectual and artistic works: exhaustion of the examples of the work and lack of will of the right holders to republish it. After it, the new conditions for the expropriation were the death of the author and the payment of an appropriate fee to the right holders before the expiry of the term of protection and a Council of Ministers' decree. In other words, the amendment allowed the government to issue a decree expropriating the rights of intellectual and artistic works that can be still used or sold by the heirs of their creators.

The main opposition party alleged that there is no public interest in the expropriation of works, which are available in the market and cannot be claimed unavailable, through the payment of an appropriate fee to be determined by a single party and that such a practice would infringe on the essence of the right to property. The petition also alleged that a monopolized supply of intellectual and artistic works, which can be accessed by the public without any obstacle, through methods and to the extent prescribed by the state contradicts freedom of expression and dissemination of thought and the freedom to access thought and information.

The Court accepted that the expropriation of authors' rights to intellectual and artistic works aimed to ensure the continued public supply of the works, which are deemed important for the culture of the country. But in the decision, it was also stated that the expropriation of rights on works which can be accessed by the public through heir transactions, thereby depriving the owner of his/her property, does not constitute a necessary means to achieve that aim. The Court also mentioned that the criterion "being important for the culture of the country" is vague and can be misused.

Regarding freedom of expression, the Court noted that the discretion to determine the form, means and extent of publication of an intellectual and artistic work shall belong to the author's heirs after his/her death and that this is an inseparable aspect of the right to disseminate thoughts and opinions, which are an essential element of freedom of expression.

Consequently, the Constitutional Court decided that the amendment was contradictory to the right to property, which is regulated by Article 35 of the Constitution, and constituted a disproportionate interference to the freedom of expression and freedom of science and arts. The Court annulled the amendment.

3) Judgment on application related to the decree laws issued under the state of emergency

Five days after the failed putsch, on 20 July 2016, President Erdoğan and the Council of Ministers declared a nationwide state of emergency. Article 148 of the Constitution explicitly states that decree laws issued during a state of emergency shall not be brought before the Constitutional Court alleging their unconstitutionality.[7] It seems that this regulation gives the executive organ an uncontrollable and limitless power during the state of emergency.

The Constitutional Court of Turkey, in 1991,[8] decided that the state of emergency is regulated by the Constitution, which means that this is a judicial measure and, consequently, it cannot be out of the scope of judicial scrutiny. Therefore, the Court bypassed the

[7] "…decree laws issued during a state of emergency, martial law or in time of war cannot be brought before the Constitutional Court alleging their unconstitutionality as to form or substance…"

[8] Decisions No: E.1990/25, K.1991/1; No: E.1991/6, K.1991/20; No: E.1992/30, K.1992/36 and No: E. 2003/28, K.2003/42.

explicit ban of Article 148 and declared, in several cases, that it has the right to determine whether the regulations made under the title of "decree laws issued under the state of emergency" are indeed in the nature of emergency decree law as specified in the Constitution and exempted from constitutionality review. Thus, the Court examined the constitutionality of those regulations that are not considered to be of such nature. That jurisprudence determined three conditions to bypass the ban and start to do that examination: 1) The decree law goes beyond to set a temporary measure as the nature of the state of emergency obliges. 2) It surpasses the territory of the state of emergency. 3) It is not proportional to the reasons and aims of the declared state of emergency. In this case, the Court accepted that this would mean a misuse of the power to issue decree laws during a state of emergency and reviewed their constitutionality on the basis that they were in substance ordinary decree laws. Consequently, it had accepted the requests brought by the main opposition party before it and annulled some state of emergency decree laws.

Some of the decree laws issued after the declaration of a state of emergency in 2016 contained measures related to the structure of some institutions and organizations, changes in ordinary laws that would continue to have effects after the termination of the state of emergency, the sacking name-by-name of thousands of public workers and academics, and the closure of some leftist radio and television stations and newspapers. Therefore, CHP, the main opposition party, argued that these kinds of provisions of decree laws cannot be regarded as decree laws issued in respect of matters necessitated by the state of emergency and should be subject to judicial review. It was accordingly maintained in the petition that the mentioned provisions were in breach of the preamble and some articles of the Constitution.

The Court, in its actual judgment, accepted with no doubt that it had the discretion to qualify the legal characterization of a rule brought before it as it did in the 1990s but continued by saying that the qualification made must not result in going beyond the framework drawn by the Constitution. The Constitutional Court judges who thought that the previous approach rendered the prohibition of constitutional review of emergency decree laws as to form and substance set out in Article 148 of the Constitution completely meaningless overruled their jurisprudence. For this purpose, they made a very positivist interpretation of the Constitution: "Having regard to the wording of Article 148 of the Constitution, the purpose of constitution-maker and the relevant legislation documents, it is clear that decree laws issued under a state of emergency cannot, under any name, be subject to constitutionality review". So, the Court declined to proceed on the examination of the substance of the impugned provisions included in the decree laws issued under the state of emergency declared after the failed coup attempt of the 15th of July and dismissed the request for the annulment of them for lack of jurisdiction.[9]

Constitutional Complaints

Judgment on the right to liberty and security of person, and freedom of expression and the press in Erdem Gül and Can Dündar application.

Some trucks belonging to the secret security service of Turkey (MIT – Millî İstihbarat Teşkilatı) which were carrying weapons had been stopped by gendarmerie in Adana (South of Turkey, close to the Syrian border) on 19 January 2014. A nationalist newspaper named *Aydınlık*, which is followed by a relatively small extremist group, in its issue on 21 January 2014, published an article and a photograph related to the occurrence. The incidents related to the stopping and searching of these trucks and their contents and the destination of their freight were a matter of debate by the public for a long period.

Sixteen months later, just ten days before the general elections on 7 June 2015, Can Dündar, the director-general of a well-known and prestigious newspaper close to CHP named *Cumhuriyet* (*The Republic*), published photographs and information related to the weapons and ammunitions found in the trucks. The same day, on 29 May 2015, the Chief Public Prosecutor's Office made a press statement and announced that a prosecution had been initiated on the charges of "providing documents regarding the security of the state, political and military espionage, unlawfully making confidential information public and making propaganda of a terrorist organization". Then, on 1 June 2016, President Erdoğan, during a televised program in TRT (state radio-television), said "I ordered my lawyer. The person who made this news a special report, I think, he will pay a hard price for it". On 12 June 2016, the Ankara representative of *Cumhuriyet* prepared and published another news article on the same incident.

In the general election, no party won a majority in Parliament and negotiations to form a coalition collapsed. A new general election was organized on the 1st of November and that time AKP, which was in power since 2002, obtained more than half of the seats in Turkish Parliament. After the formation of the government and approximately six months after the press statement of the Chief Public Prosecutor, the applicants were detained on charges of "deliberate support for organizational objectives of an armed terrorist organization FETÖ/PDY".

Can Dündar and Erdem Gül claimed that there was no justification for their detention, which was based only on the news that they published, and that no evidence except for the news articles was adduced against them. Therefore, they alleged that they were unlawfully deprived of their liberty, and their rights to liberty and security and freedom of expression and the press were violated.

The Court, based on the fact that similar news was published with photos approximately sixteen months earlier in another newspaper, stated that the grounds of the detention measure did not specify whether the publication of the similar news later by the applicants

[9] For a critical view of this decision please look at the article (two parts) of Dr. Ali Acar published in ICONnect Blog: 1) http://www.iconnectblog.com/2017/03/the-hamartia-of-the-constitutional-court-of-turkey-part-i/ and 2) http://www.iconnectblog.com/2017/04/the-hamartia-of-the-constitutional-court-of-turkey-part-ii/

continued to pose a threat to national security. In this context, the Court said, the facts of the case and the grounds of the decision on detention did not sufficiently explain why it was "necessary" to implement the detention measure on the applicants.

Apropos of the freedom of expression and press, the Court mentioned the Nedim Şener v. Turkey Case of the ECHR and stated considering that, the only fact adduced as the basis for crimes the applicants were charged with was the publishing of the relevant news articles. The Court concluded that such a severe measure as detention, which did not meet the criteria of lawfulness, could not be considered proportionate and necessary in a democratic society.

Consequently, the Court ruled that the applicants' rights had been violated and rendered the release of the journalists. Presently, Can Dündar lives in exile in Germany and manages the news website ozguruz.org (We are free).

CONCLUSION

In 2016, the imbalance between the legislative, executive and judicial powers of Turkey became more obvious and clear. The executive's domination, by the aid of the charismatic leadership of President Recep Tayyip Erdoğan, gained some more positions against the two other powers. The Constitutional Court of Turkey, which is the highest judicial organ that should be the supervisor of this balance, was also affected by this repositioning. It is clear that the Court, especially after the declaration of the state of emergency, was not be courageous enough to either annul the laws approved by the legislative organ dominated by the AKP Government or to correct the violations of human rights of the citizens by the executive organ. Particularly through the rejection of the control of the constitutionality of the decree laws issued during the state of emergency, the Court created an unstoppable executive organ. The Court left the fundamental human rights and supremacy of the constitution unprotected and, *ipso facto*, rejected its *raison d'*être. The only hope that one who believes in democracy and the rule of law can have in Turkey, for now, is the end of the state of emergency and some normalization shortly.

United Kingdom

DEVELOPMENTS IN UK CONSTITUTIONAL LAW

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INTRODUCTION

The idea of 'union' was the central constitutional focus for the United Kingdom in 2016. The nature of the United Kingdom (UK) as a multinational state was radically overhauled by the Scotland Act 2016 and by the bill that became the Wales Act 2017. But 2016 will surely be best remembered for the referendum held on membership of the European Union (EU) and the dramatic decision taken by the British people to leave a union that has exerted such an extensive influence over the British constitution since 1973.

In this report, we reflect upon these developments and the interactions between devolution and 'Brexit'. In light of the radical changes to the internal territorial union and the UK's external union with Europe, we can surely say that 2016 was a seminal moment in the development of the modern United Kingdom constitution to rank alongside 1885, 1911, 1922, and 1997.

THE CONSTITUTION AND THE COURT

The unentrenched nature of the British Constitution, the evanescent boundaries between 'constitutional' law and ordinary law (and between law and politics more widely), and the less central role for the courts in a system where Parliament is supreme marks the United Kingdom as an outlier in a world of increasingly detailed and judicially regulated constitutions.

The defining characteristic of the UK constitution is parliamentary supremacy, which means that the courts have traditionally taken a back seat in constitutional matters. This changed to some extent with the Human Rights Act 1998, which gave the courts more interpretive discretion without introducing the power to strike down statutes.[1] Membership of the European Union has proved difficult for the courts in terms of reconciling parliamentary supremacy with the self-declared supremacy of EU law.[2] But it is notable that the courts have been very careful not to overstep their proper constitutional position. This is evident when we look at devolution. The courts have taken a light touch to policing the boundaries of competence of the devolved territories–Scotland, Wales, and Northern Ireland–with few cases coming before the courts, and these rarely raising issues of major controversy.

Nonetheless, flexibility and pragmatism are appropriately viewed as the defining virtues of the British constitutional tradition.[3] In this context, constitutional change has taken place through ordinary legislation, supported

[1] Human Rights Act 1998 ss 3-4.

[2] *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1991] 1 AC 603; (*HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

[3] See e.g. G Marshall, 'The Constitution: Its Theory and Interpretation' in V Bogdanor (ed.), The British Constitution in the Twentieth Century (Oxford University Press, 2003) 33.

by a network of prerogative power (the royal prerogative power was originally exercised by the reigning monarch, but is now generally exercised by Government ministers in the name of the Sovereign[4]), and constitutional conventions which are not legally enforceable. Since the courts have not been central players in constitutional change as they have elsewhere, it is therefore particularly notable that the major cases which emerged in the context of the Brexit referendum have focused entirely upon the issue of Parliament's supremacy and its interaction with the devolution statutes, the prerogative power, and constitutional conventions.

DEVELOPMENTS AND CONTROVERSIES IN 2016

The main controversy in 2016 was the Brexit referendum and its aftermath. But in this section we will also discuss changes to the devolution settlements for Scotland and Wales, which are also very significant but which have tended to be overlooked in light of the EU referendum.

Brexit

The Conservative Party's success in the 2015 general election required it to make good on its campaign pledge to hold a referendum on the UK's continued membership of the EU,[5] and the referendum was duly held on 23 June 2016. The unexpected 'Leave' vote – by a slim margin of 52% to 48% – has led to the resignation of Prime Minister David Cameron and left the next Government, under Prime Minister Theresa May, charged with the complex task of achieving a divorce from the EU that complies with UK constitutional law, EU law, and wider commitments under international law (particularly as regards the Good Friday Agreement, a bilateral international treaty between the UK and Ireland in 1998, which, with the accompanying Northern Ireland Act 1998 passed by the UK Parliament, established a peace settlement in Northern Ireland).

The process of withdrawal from the EU is governed by Article 50 of the Treaty on European Union (TEU).[6] As the UK is the first state to seek to leave the EU, the precise requirements and procedure to be followed under Article 50 are unclear and have been the subject of much discussion at both the national and EU levels. The prospect of Brexit has also sparked renewed discussions of profound constitutional change within the UK, not only through an official request by the Scottish Government for the authority to hold a second independence referendum,[7] but also in calls for constitutional change for Northern Ireland.[8] Below, we will return to the litigation provoked by the June referendum.

Devolution Developments

Scotland Act 2016

The Scotland Act 2016 provides the Scottish Parliament with a set of new powers that will make it one of the most autonomous sub-state legislatures in the world. It considerably extends the powers already provided for in the Scotland Acts of 1998 and 2012. The Scottish Parliament acquires a range of additional competences in policy areas such as taxation, welfare, unemployment services, transport, energy efficiency, fuel poverty, and onshore oil and gas extraction. It is the provisions on taxation that have attracted the most attention. In light of the Scotland Act 2016, Scotland will acquire far more fiscal responsibility.[9] In particular, it has been given extensive powers in relation to income tax raised in Scotland which is important in symbolic as well as practical terms. This builds upon the more modest tax powers which were included in the 2012 Act, a number of which are still to be implemented.

The 2016 Act also changes the constitutional status of the Scottish Parliament, providing: 'The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements'.[10] It is difficult to see what constitutional effect this might have, given the UK's doctrine of parliamentary sovereignty,[11] but the very statement could be a steer to the courts to consider Scottish devolution now to be an entrenched arrangement at the level of constitutional principle.[12]

English Votes for English Laws (EVEL)

The Scotland Act was the culmination of the promise of more powers for the Scottish Parliament in light of the independence referendum in 2014, in which 45% of voters opted for independence. From this process what also emerged was resentment within England at how devolution continued to expand with no account of the constitutional position of England.

This resulted in a change to parliamentary procedure known as 'English Votes for English Laws' (EVEL). The system was introduced in 2015 through an amendment to the Standing Orders of the House of Commons.[13]

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[4] See generally T Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge University Press, 2015).

[5] See *The Conservative Party Manifesto 2015* http://bit.ly/1FPYN2z 72ff.

[6] A brief summary of the process is provided in T Lock and TG Daly, Legal Implications of Brexit and the British Bill of Rights (Edinburgh Law School and Bingham Centre for the Rule of Law) 20.

[7] The request was made by a letter from First Minister Nicola Sturgeon to Prime Minister Theresa May dated 31 March 2017, the text of which is available at http://bit.ly/2p1RXb0. See also S Tierney, 'A Second Independence Referendum in Scotland: The Legal Issues' U.K. Const. L. Blog (13 March 2017) https://ukconstitutionallaw.org/.

[8] See e.g. T Reidy, 'Scottish Independence and a United Ireland: A Brexit Game of Gaelic Games?' Irish Politics Forum (21 March 2017) http://bit.ly/2oG1vaS.

[9] House of Lords Constitution Committee, 'Proposals for the devolution of further powers to Scotland', 18 March, 2015, para 95. http://bit.ly/2oaUEml.

[10] Scotland Act 2016, s.1.

[11] M Elliott, 'The Draft Scotland Bill and the sovereignty of the UK Parliament', Public Law for Everyone blog, 22 January 2015 http://bit.ly/2p20QBn.

[12] K Campbell, 'The draft Scotland Bill and limits in constitutional statutes' U.K. Const. L. Blog (30 January 2015) http://ukconstitutionallaw.org.

[13] R Kelly, 'English votes for English laws', House of Commons Library Briefing Paper No. 7339, 2 December 2015: http://bit.ly/1MEnEHC.

It seeks to address the 'West Lothian Question'.[14] This question refers to whether Westminster MPs from Northern Ireland, Scotland and Wales should be able to vote on matters that affect only England while MPs from England are unable to vote on matters that have been devolved to the devolved legislatures.

EVEL attempts a procedural solution within the law-making process of the UK Parliament, by giving a veto, respectively, to the whole House of Commons and to a Grand Committee of Welsh and English MPs. The Speaker is given a role in deciding which Bills or provisions of Bills fall within the ambit of the new procedure. In legislation affecting only England (or England and Wales), English (or English and Welsh) MPs are offered a vote, although the whole House of Commons retains a power to reject these votes. Conversely, English (or English or Welsh) MPs can also veto Bills over devolved matters affecting England (or England and Wales) that have been approved by the whole House.[15]

Reviews of the complex system in operation, while raising deep philosophical questions,[16] have broadly noted that it is too early to draw definitive conclusions about its strengths and weaknesses, although it will not be long before the internal territorial implications of withdrawing from the European Union will pose severe tests for EVEL.[17]

Wales Act 2017

The process of making major changes to the devolution settlement in Wales continued throughout 2016, culminating in the Wales Act 2017.[18] It introduces a reserved powers model of devolution for Wales.[19] In provisions similar to those in the Scotland Act 2016, it provides for the permanence of Welsh institutions of government, including through the requirement of a referendum for the abolition of the National Assembly. It recognises the convention ('the Sewel convention'[20]) that the UK Parliament will not normally legislate in areas of devolved competence, even though it retains the legal power to do so (such a provision is also to be found in the Scotland Act 2016). It also devolves further legislative and executive powers over a range of competences to Wales, including over elections, onshore petroleum, road transport, ports, electricity generation, equal opportunities, marine conservation, and some other more specific powers.

Another noteworthy feature of the 2017 Act is the recognition of a distinctive body of Welsh law. Unlike Scotland and Northern Ireland, which have long had separate judicatures and bodies of law, Wales belongs to the single legal jurisdiction of England and Wales. The purpose of the new provision is to recognise the body of distinctive primary and secondary legislation enacted by the Welsh Assembly since the advent of devolution, which forms part of the laws of the jurisdiction of England and Wales, but which applies only to Wales.[21]

Constitutional innovations such as the provisions concerning permanence and consent, however, have to be understood in the context of the doctrine of parliamentary sovereignty, which continues to be the fundamental rule of the UK constitution.[22] This means that a future Parliament can legally change any existing legislation, including those of a constitutional character, through ordinary legislative procedure. Nevertheless, the fact that Parliament has given a commitment to the principle that the Scottish and Welsh institutions can no longer be abolished except through a referendum in each territory respectively seems to be a form of contingent entrenchment that reinforces the political limits, and arguably the legal limits, of the UK Parliament's legislative capacity.

MAJOR CASES

The main focus in 2016 was upon significant litigation concerning Brexit. Two separate strands of litigation have addressed the issue of consent in the initial stage of the process of withdrawing from the EU, set out in Article 50 TEU: (i) two cases brought before the High Court in Northern Ireland concerned whether, under the existing devolution framework, the consent of the Northern Ireland Assembly was required to trigger the UK's exit (with implications for the devolved nations more generally); and (ii) the *Miller* case before the High Court of England and Wales concerned whether authorisation was required from the UK Parliament to trigger Article 50. Both strands of litigation were joined for hearing before the Supreme Court in December 2016, which issued a judgment in January 2017.

The High Court of Northern Ireland decision in McCord's Application

The judicial review applications considered in the *McCord* litigation advanced five main issues for the Court's consideration.[23] First, it was argued that the executive prerogative in

[14] P Bowers, 'The West Lothian Question', House of Commons Library Standard Note SN/PC/2586, 18 January 2012: http://bit.ly/2oywNjd.

[15] M Elliott and S Tierney, 'House of Lords Constitution Committee Reports on 'English Votes for English Laws' U.K. Const. L. Blog (2 November 2016): http://bit.ly/2p1ZaYB.

[16] See e.g. B Guastaferro, 'Disowning Edmund Burke? The Constitutional Implications of EVEL on Political Representation', U.K. Const. L. Blog (2 May 2016): http://bit.ly/2pf4BQC.

[17] House of Lords Constitution Committee, 'English Votes for English Laws', 6th Report of Session 2016-17, 2 November 2016, HL Paper 61: http://bit.ly/2pzK9tf; UK Government, 'Technical Review of the Standing Orders Related to English Votes for English Laws and the Procedures they Introduced', March 2017, CM9430: http://bit.ly/2oxbz5k.

[18] For background, see Wales Governance Centre and The Constitution Unit, 'Challenge and Opportunity: The Draft Wales Bill 2015', February 2016: http://bit.ly/2oskuDm; A Cogbill, 'The Wales Bill 2016: A Marked Improvement but there are Fundamental Questions Yet to be Resolved', The Constitution Unit Blog, 26 July 2016: http://bit.ly/2os8z8B.

[19] P Bowers, 'Wales Bill 2016-17', House of Commons Library Briefing Paper No. 07617, 13 June 2016: http://bit.ly/2pfcLIQ.

[20] A Trench, 'Legislative consent and the Sewel convention', Devolution Matters Blog, March 2017: http://bit.ly/29o6xTA.

[21] Ibid.

[22] Ibid.

[23] *McCord's (Raymond) Application* [2016] NIQB 85: http://bit.ly/2fN1ZXF.

respect of foreign relations and treaty-making had been displaced by the Northern Ireland Act 1998, read together with the Belfast Agreement and British-Irish Agreement, which not only established the distinctive Northern Ireland (NI) power-sharing and human rights arrangements, but also did so on an irreplaceable assumption of continuing UK membership of the EU. In the applicants' view, immediate changes would occur in these arrangements, including rights deriving from EU law, by even the initial step of a notification of withdrawal under Article 50 TEU. Since the prerogative cannot be used to change domestic law, the applicants contended that the UK Government needed prior parliamentary sanction in the form of an Act of Parliament to trigger Article 50.

The Court, however, was unable to find any legal provisions applicable to Northern Ireland that expressly or impliedly displaced the prerogative in respect of the UK's relationship with the EU, even though the fact of EU membership was assumed at the time the 1998 Act and other Agreements were put in place. Moreover, the Court did not agree that the mere act of triggering Article 50 would affect any existing rights; although this may well happen in the future, albeit through legislation giving effect to the terms of the UK's eventual withdrawal.[24]

If an Act of the UK Parliament was needed for triggering Article 50, the applicants argued, secondly, that by convention there needed to be a 'Legislative Consent Motion' passed by the NI Assembly before the UK Parliament could act. Given the High Court's finding on the first issue that the UK Government has authority under the prerogative to act, this was perhaps superfluous. But it nevertheless considered the question whether triggering Article 50 would affect a devolved matter, and concluded it did not; that is, within the scheme of devolved ('transferred') or reserved ('excepted') matters under the 1998 Act, triggering Article 50 concerned relations with the EU institutions, which is an excepted or UK competence.[25]

The third argument averred that even if the prerogative was available to the UK Government, a number of public law restraints would apply to its exercise to ensure that the Government took all relevant considerations into account – including the unique constitutional arrangements of the NI within the UK and the need to uphold EU law so long as the UK remained a member-state – and that it would not give excessive consideration only to the referendum result. The Court questioned the justiciability of many of the contentions on this ground, concluding that triggering Article 50 would be a decision of high policy taken at the highest levels of the state, pursuant to a state-wide referendum, that would be inappropriate for judicial review.[26]

The last two of the applicants' arguments also found no favour with the Court. Briefly, these were that the decision to trigger Article 50 would be in violation of the 1998 Act's provisions requiring the Secretary of State for Northern Ireland to assess the measure's impact on equal opportunities in NI; and that the Good Friday Agreement gives rise to a substantive legitimate expectation that the constitutional status of NI would not be altered without a referendum. The Court found that triggering Article 50 was not a matter for the NI Secretary but for the Prime Minister and other members of the UK Cabinet.[27] Similarly, it held that any referendum provision in the Good Friday Agreement was about NI remaining within the UK, rather than the UK's relationship with the EU.[28] These matters were all appealed to the Supreme Court (see below).[29]

The High Court judgment in the Miller case

Parallel to the litigation in Northern Ireland, the applicants in *R (Miller) v Secretary of State for Exiting the European Union* argued that the UK Government's plan to trigger the process of leaving the EU under Article 50 TEU through exercise of the royal prerogative power is unacceptable under UK constitutional law. They contended that the initiation of the process required statutory authorisation from Parliament on the basis that the prerogative has been displaced by the European Communities Act 1972, which was enacted to facilitate the UK's entry into the European Economic Community in 1973.

At first instance, the High Court issued a judgment of 3 November 2016[30] holding that the triggering of Article 50 TEU does require the statutory authorisation of Parliament. The judgment was met with fury by the anti-EU press, including the *Daily Mail*'s now infamous front page decrying the High Court judges as 'enemies of the people'.[31] The headline was widely criticised as failing to respect the independence of the judiciary and was the subject of over 1,000 complaints to the Independent Press Standards Organisation.[32]

The UK Government appealed the decision to the UK Supreme Court, which heard the case on 5-8 December 2016, joining it to the appeal against the High Court of Northern Ireland in the *McCord* case.

The Supreme Court judgment

On 24 January 2017, the Supreme Court handed down its decision in the joined ap-

[24] Ibid: [65] – [108].

[25] Ibid: [109] – [122]

[26] Ibid: [123] – [136]

[27] Ibid: [137] – [146]

[28] Ibid: [147] – [157]

[29] See also C Harvey, 'Northern Ireland's Transition and the Constitution of the UK', U.K. Const. L. Blog (12 December 2016): http://bit.ly/2nKZ9YZ.

[30] [2016] EWHC 2768 (Admin).

[31] 'Enemies of the people: Fury over "out of touch" judges who have "declared war on democracy" by defying 17.4m Brexit voters and who could trigger constitutional crisis' *Daily Mail* 4 November 2016 http://dailym.ai/2et5SQE.

[32] 'Daily Mail's "Enemies of the People" front page receives more than 1,000 complaints to IPSO' *Independent* 10 November 2016 http://ind.pn/2fAxn9S.

peals against the judgments in *Miller* and *McCord*.[33] In a joint majority decision of 8 judges (with 3 judges issuing separate dissents), the Supreme Court upheld both judgments.[34]

Regarding the matters raised in *Miller*, the Supreme Court upheld the judgment of the High Court requiring that Parliament must pass an act authorising the Government to notify the UK's intention to withdraw from the EU under Article 50 TEU. The judgment, like the first instance judgment, was framed as an analysis of the constitutional relationship between the Parliament and the Executive, focused on detailed analysis of the nature of the royal prerogative power exercised by Government ministers.

The main question centred on two foundational rules: (i) the Executive cannot, through exercise of the royal prerogative, change domestic law;[35] and (ii) the making and unmaking of international treaties is a foreign relations matter that falls within the competence of the Executive. The Court considered that use of the prerogative power to vary the content of EU law (arising from new EU legislation) could not be equated to the 'fundamental change in the constitutional arrangements of the UK'[36] occasioned by exit from the EU, that the absence of any express conferral of power to the executive to withdraw from the European Community (now Union) under the 1972 Act meant that such a power did not exist, and that individual rights enjoyed as a result of EU membership would be affected as soon as Article 50 was triggered.[37]

Regarding the devolution-specific arguments raised in *McCord*, the Court dismissed the appeal against the judgment of the High Court of Northern Ireland (as well as similar arguments advanced by the Scottish Government before the Supreme Court), by holding that the consent of the devolved legislatures is not required for the triggering of Article 50.

The Supreme Court's analysis centred on the constitutional status of the 'Sewel convention' (that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature), which is referred to expressly in the Scotland Act 2016. The Supreme Court, while recognising that the Sewel Convention can play a fundamental role in the constitutional framework concerning devolution, took the view that its enforcement was a political matter, reflecting the systemic tendency to avoid judicial resolution of matters ruled by convention. With regard to Northern Ireland specifically, the Supreme Court dismissed the additional argument that the consent of the people of Northern Ireland was required to take Northern Ireland out of the EU, based on Article 1 of the Northern Ireland Act 1998, which provides that Northern Ireland shall not cease to be a part of the UK without the consent of the people.[38]

The three dissenting judges (Lords Reed, Carnwath, and Hughes) took no issue with the majority's decision on the devolution framework, but disagreed fundamentally with the majority on the requirement for parliamentary authorisation to trigger exit under Article 50 TEU. Lord Reed, for instance, stressed that the principle that the conduct of foreign relations is a matter for the Crown is "so fundamental" that it can be overridden solely by an express legislative provision or by necessary implication,[39] and considered that the 1972 Act in no way precluded the use of the prerogative power to trigger Article 50 TEU, given that the domestic effect accorded to EU law by Parliament in enacting the 1972 Act was 'inherently conditional' on the UK's membership of the EU, the 1972 Act itself imposes no requirement of UK membership of the EU, and that the 1972 Act had not changed in any way the fundamental sources of domestic law or the principle of parliamentary sovereignty.[40]

The Supreme Court's judgment was not met with the same level of vituperation as the High Court judgment, and was hailed (by some) as 'the most significant constitutional judgment for a generation' and 'a triumph for Britain's judicial system and the Supreme Court'.[41] The pro-Brexit media turned their attention to the potential derailing of Brexit in Parliament. Nevertheless, the Supreme Court's centrality in resolving this constitutional dispute has brought virtually unprecedented scrutiny to an institution that does not have the power to strike down statutes.

CONCLUSION

The decision to leave the European Union will put great strain upon Parliament and Government as they seek to extricate the UK from over 40 years of EU membership and the tens of thousands of laws emanating from Brussels. It will also put great strain upon the territorial constitution, particularly as the Brexit decision has served to revitalise nationalism in both Northern Ireland and Scotland.

The courts played a role in the *Miller* case where they intervened to clarify the power of Parliament in relation to important prerogative powers and constitutional conventions. It is likely that they will continue to have influence as Brexit is achieved and as the new territorial statutes for Scotland and Wales take effect. But the main challenges ahead are political. The new devolution settlements for Scotland and Wales have brought with them a range of powers that are now shared

[33] [2017] UKSC 5.

[34] A useful summary can be found in 'Robert Craig: Miller Supreme Court Case Summary' U.K. Const. L. Blog (26 January 2017) http://bit.ly/2oP2BP0.

[35] This includes legislation enacted by Parliament and the common law.

[36] [78].

[37] [40] – [57].

[38] [126] – [135].

[39] [194].

[40] See in particular [177].

[41] See R Greenslade, 'How the press reacted to the article 50 verdict' *The Guardian* 25 January 2017 http://bit.ly/2ofFsHJ.

with the central Government while Northern Ireland remains a very delicate situation where devolution is both volatile and fragile. The real task facing the UK constitution in the coming years is that of intergovernmental relations. The UK Government must seek to manage Brexit negotiations in a way that is attentive to the reality of the UK as a multinational state. Otherwise the process of leaving one union – the European Union – could serve to undermine fatally the UK's own internal unions.

Zambia

DEVELOPMENTS IN ZAMBIAN CONSTITUTIONAL LAW

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INTRODUCTION: ZAMBIA'S CONSTITUTIONAL COURT: A DIFFICULT BIRTH

On 5th January 2016, the Republican President signed the Constitution of Zambia (Amendment) Act No. 2 of 2016 into law. The Amendment Act repealed every provision in the 1991 Constitution (as amended in 1996) other than the entrenched Bill of Rights and Article 79 (alteration clause), which have remained intact since 1991. It is not an easy marriage. The Constitution in place is the conservative 1991 Constitution as a base for the 2016 amendments which are much more democratic in outlook. For instance, Zambia's Constitutional Court is created under the 2016 amendments. In terms of its basic structure and major principles, the amended Constitution is widely feted as the best Constitution in the country's history. Its practicality, however, has been widely questioned.

Since inception, the new Court has heard a number of cases. While there is much interest in the Court and how it seeks to advance democratic values, there is little understanding of how such a court should be constituted and perform its functions. This weakness extends even to members of the Bar and the Bench, seriously undermining the potential of the Court to succeed.

The review that follows examines more closely a few of the most significant problems experienced with understanding, accepting and applying the amended Constitution in an era that includes a Constitutional Court. The problems raised by the review include the process of enactment of the amended Constitution; the content of substantive provisions in the Constitution; the composition of the Court Bench; and the efficacy of the procedures of the Court. Where possible, the problems are viewed through the lens of the Constitutional Court's own decisions and its own words.

THE CONSTITUTION AND THE COURT

The Constitutional Court of Zambia occupies a central place in the legal and political affairs of Zambia. It was created under Article 127 of the amended Constitution and has wide jurisdiction as stated in Article 128. Subject to Article 28, the Court has original and final jurisdiction to hear matters relating to the interpretation of the Constitution; matters relating to violations or contraventions of the Constitution; matters relating to the President, Vice-President or election of the President; appeals relating to election of Members of Parliament and councillors; and questions as to whether or not a matter falls within the jurisdiction of the Court.

Under Article 121, the Court ranks equivalently with the Supreme Court and under Article 122 its powers of adjudication are subject only to the Constitution and the law. However, administratively, the President of the Court is ranked below the Chief Justice and the Deputy Chief Justice, who both sit on the Supreme Court. Article 127 states that the Court has an establishment of thirteen judges, three of whom constitute a quorum and five of whom constitute the full Court for purposes of adjudicating. The Constitutional Act No. 8 of 2016 and the Constitutional Court Rules in S.I.35 of 2016 give effect to the constitutional provisions.

Enactment of the Constitution

The fact that the constitutional amendments that created the Constitutional Court were not holistic led to selective acceptance of the revisions. While the Court was accepted as evidenced by the cases instituted before it, the validity of other provisions was challenged on the basis of the process of amendment. In the case of *Godfrey Miyanda v Attorney General 2016/CC/0006*, questions were raised about the validity of the constitutional enactments introduced by the 2016 amendments. First, the words 'We the people…do hereby solemnly adopt and give ourselves this Constitution' in the Preamble were said to be untrue as no referendum was held to adopt the Constitution prior to amendment.

The Petitioner contended that since a referendum is the mode by which the people express their will and since no such referendum was held, the people had in fact not expressed their approval and adoption as indicated. The Court found that the only aspect of amendment of the Constitution which has to be referred to a referendum is the Bill of Rights and Article 79 itself. The remainder of the Constitution can be amended by the people's duly elected representatives sitting in Parliament. Thus the words 'We the people…' encompass legitimate actions taken by Parliament on behalf of the people.

A second claim was that the constitutional amendments effected by Act 2 of 2016 as exemplified by various specific provisions that the petitioner isolated were unconstitutional. The Court found once again that the claim had no merit as the alteration clause, Article 79, permits Parliament to amend any part of the Constitution other than the Bill of Rights and Article 79 itself provides a specific procedure which was followed. The Court held that '[a]n amendment becomes part of the Constitution itself upon its passing.'

The incongruity between the un-amended Bill of Rights and the 2016 amendments leading to the disempowerment of the Court by law is a source of confusion about the meaning of certain fundamental principles, namely as to which court has jurisdiction over what; and how and by whom a particular provision of the Constitution is to be interpreted and applied. Thus, at inception the Court was inundated with actions relating to the Bill of Rights when they are supposed to be commenced in the High Court and appealed directly to the Supreme Court, bypassing the new Court of Appeal which lies between the High Court and the Supreme Court, and the Constitutional Court, which ought to hear human rights cases ordinarily.

In *Murthy Gajula v Attorney General 2016/CC/0005*, *Hellen Mwale and Another v The Attorney General and Another 2016/CC/0007* and *Gordon White and 5 Others v The Attorney General 2016/CC/0026,* all human rights cases, the Constitutional Court had to dismiss the actions for want of jurisdiction. There are also obvious errors. In *Miyanda v Attorney General,* the definition of 'discrimination' given in Article 266 of Act 2 of 2016 was found to differ from the definition in Article 23 falling within the Bill of Rights, forcing the Court to recommend deletion of the definition in Article 266.

DEVELOPMENTS AND CONTROVERSIES IN 2016

Controversies about the Constitution and the Constitutional Court have been many and varied. Not all have reached the courtroom. Two examples of such un-litigated controversies will suffice. The first relates to the composition of the Constitutional Court Bench and its competence. It began at the Court's inception and has been kept alive by a lack of understanding of the special nature of a Constitutional Court. The fact that the Constitution is also fraught with bad drafting and has to be interpreted in a politically charged environment has not helped.

Under the Constitution, Article 141 requires that judges of the Constitutional Court should be of proven integrity and be legal practitioners of 15 years standing with specialized training or experience in human rights or constitutional law. Few Zambians are aware that constitutional courts are generally composed of a minority of career judges and a majority of law professors and former governmental officials and elected politicians.[1] Aiming for a Constitutional Court that would have more than the usual litigation lawyer in its ranks, the Judicial Service Commission (JSC) ignored the many applications it received from senior members of the Bar and decided to head hunt. Its nominees turned out to be persons who had not applied for the positions but had either spent their careers on the higher Bench or had pursued an academic career building their constitutional and human rights expertise.

Many disappointed applicants criticised the JCC's decision and one legal practitioner went so far as to write to the Republican President urging him to reject the JCC's nominees on the grounds that they did not meet the 15 years of practice, which practice in his view had to be at the Bar. He claimed that being a legal practitioner did not include serving on the Bench or teaching in an academic institution. And yet no provision in the law says so and no Zambian case provides such an interpretation. Recklessly, he ensured that his erroneous statements were widely published in the press, thereby influencing public opinion and causing serious and long-lasting damage to the integrity of the nominees and public confidence in the new Court.

Although not publicly acknowledged, gender may also have been at play. The fact that the nominees were predominantly female was cause for criticism in many circles that felt that because of the political nature and 'maleness' of many of the cases coming before the Court, such cases would be more competently handled by male judges drawn from the predominantly male senior members of the Bar. Despite the furor surrounding the appointments, the Parliamentary Select Committee accepted the nominees and recommended that Parliament ratify them for appointment by the Republican President.

[1] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 816, 824

The second controversy relates to the effect of the 2016 amendments on Zambia's common law legacy, which despite the constitutional order remains the foundation of the entire legal system. As a former British protectorate, Zambia falls within what is known as the post-colonial constitutional model. The most salient feature of such a model is the '…ongoing struggle between absorption and rejection of the former coloniser's… identities'.[2] Great anxiety therefore arose over the meaning of Article 7 and the rationale behind it, found on pages 12-13 of the Report of the Technical Committee on Drafting the Zambian Constitution (TCDZC) dated 30th April 2012. Article 7 states that the Laws of Zambia consist of the Constitution; laws enacted by Parliament; statutory instruments; Zambian customary law which is consistent with the Constitution; and the laws and statutes which apply or extend to Zambia, as prescribed.

The rationale states that Article 7 is intended to specify what constitutes the Laws of Zambia so that only such specified laws apply in Zambia. The TCDZC resolved to exclude doctrines of equity and decisions of superior courts from the Laws of Zambia for the reason that doctrines of equity are principles of law which a country is not obliged to apply. With regard to decisions of superior courts, the TCDZC observed that Parliament is the only state organ mandated to enact laws in Zambia and that the Courts' mandate is to interpret law.

The issue was widely debated by the legal fraternity, including members of the Bench. in the months leading up to and in the immediate aftermath of the 2016 constitutional enactments. The debate showed that while the majority of the legal fraternity do not want the Constitution which is the flagship of Zambia's sovereignty, to contain a declaration that they are still subject to the reign of English law and English judges, they at the same time recognise the practical difficulty of prohibiting its application. Case law, including case authorities from England, the sub-Region and further afield, therefore remain persuasive sources before all the courts of record and both courts and legal practitioners have continued to cite them without legal challenge.

MAJOR CASES

As the Constitutional Court is somewhat disabled by its exclusion from adjudicating on human rights disputes (the most important function of the modern constitutional court[3]), its most significant work has been in the area of separation of powers.

Separation of Powers

The Court's first major case in this area arose because of changes made by Parliament, on the recommendation of the Government, to the draft Constitution during the enactment of the 2016 amendments. *Stephen Katuka (in his capacity as Secretary General of the United Party for National Development (UPND) and the Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others 2016/CC/0010/0011* essentially challenged the amendments that justified continued stay in office and receipt of emoluments and other benefits by cabinet and provincial ministers after the dissolution of Parliament on 12th May 2016.

According to the cabinet and provincial ministers, their continued stay in office was based on Articles 116 (3) (e) and 117 (2) (d), which provided that one of the ways in which a minister vacates office is when a new President comes into office. In their view, this meant that they could stay in office until the next Republican President was sworn in. The case divided the nation, with supporters of the ruling party arguing that the continued stay in office of the ministers was legal whilst civil society and opposition parties considered it to be illegal and unfair as it gave the ruling party a campaigning advantage in the run up to the elections.

The Court took a purposive approach to the relevant provisions. In a unanimous decision, it found that provisions relating to the life of Parliament are applicable to the tenure of the ministers once Parliament made appointment to ministerial positions dependent on membership of Parliament. The draft Constitution had stated that ministers were to be appointed from outside Parliament, hence the linked provision that they could stay in office until another President assumed office. In the Court's own words at pages J67-J69:

> [T]he literal interpretation of the provision leads to absurdity because on one hand, the Constitution says ministers will be appointed from among members of Parliament and, yet, on the other, it appears to allow for the continuation of ministers in their cabinet portfolios following the dissolution of Parliament when the foundation upon which their ministerial positions stand, namely membership of Parliament, has been removed…the respondents were appointed to their portfolios from Parliament which has since been dissolved, we find that the claim that they should continue holding their portfolios until another person assumes the office of President after the dissolution of Parliament is clearly not what Parliament could have intended. Had that been the intention, clear provision could have been made in the Constitution to that effect because a provision requiring a radical departure from the position which prevailed before the amendment of the Constitution where cabinet ministers vacated their office upon dissolution of Parliament is so important that it could not have been left to speculation or conjecture. Parliament ought to have made express provision in the two Articles to the effect that, notwithstanding the dissolution of the National Assembly, the ministers and provincial ministers would continue in office until the president elect assumed office.

The Court then ordered the ministers to vacate their offices and pay back the emoluments received after Parliament was dis-

[2] Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013)

[3] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 816, 823

solved. It was a popular decision. Under the leadership of President Lungu, the ruling party accepted the decision and it began to look as if the Court would be an effective check on the Executive and fill in the gaps left by Parliament.

Elections

This quickly changed with the second case relating to the presidential election petition handled by the Court in August to September 2016. *Hichilema and Another v Lungu and Others 2016/CC/0031* proved to be more problematic for the Court itself and for the country at large.

Zambia's general elections, held on 11th August 2016, were the first under the amended Constitution. Following the announcement of the winner of the presidential election, a petition was filed by the losing candidates, Mr Hakainde hichilema and his running mate Mr Geoffrey Bwalya Mwamba, accusing the winners, Mr Edgar Chagwa Lungu and his running mate Mrs Inonge Mutukwa Wina, and the Electoral Commission of Zambia of manipulating the election results and declaring the wrong person as winner.

The Constitutional Court attempted to hear the case but subsequently terminated it through a judgment of the majority against two dissenters when the constitutional time limit ran out before a single witness had been heard. The failure of the petition paved the way for the swearing into office of Mr Lungu. What transpired during the currency and immediate aftermath of the abortive petition points to the many substantive and procedural bottlenecks that have dogged the Constitutional Court in its first year of life and it necessitates further analysis.

The attack on the competence of the Constitutional Court judges that began with their appointment was revived and became a central part of charges of incompetence filed against the judges by the cadres and busybodies. The hearing of the charges against the judges is currently ongoing. However, was the Court applying a doable provision of the law? Could any court really hear the petition within the stipulated 14 days on the same facts and law? It is highly unlikely. What transpired (all of which is a matter of public record available in the official transcript of proceedings) and a review of the law proves the Court was faced with an impossibility.

A presidential election petition is provided for in Article 101 of the Constitution. The relevant parts read:

> (4) A person may within seven days of the declaration made under clause (2), petition the Constitutional Court to nullify the election of a presidential candidate who took part in the initial ballot on the ground that—*(a)* the person was not validly elected; or *(b)* a provision of this Constitution or other law relating to presidential elections was not complied with.
>
> (5) The Constitutional Court shall hear an election petition filed in accordance with clause (4) within fourteen days of the filing of the petition.
>
> (6) The Constitutional Court may, after hearing an election petition—*(a)* declare the election of the presidential candidate valid; *(b)* nullify the election of the presidential candidate; or *(c)* disqualify the presidential candidate from being a candidate in the second ballot.
>
> (7) A decision of the Constitutional Court made in accordance with clause (6) is final.

The Constitutional Court Rules provide for a pre-trial process which if fully exploited means that the 14 days would expire before the actual hearing of a petition can begin. Order 9/1/1 of the Rules states that '[e]xcept as otherwise provided in these Rules, the petitioner or applicant shall serve the respondent with the originating process within five days of filing or such time as the court may direct'. This provision is not ousted by the Additional Rules for Presidential Election petitions under Order 14/2/1, which says '[t]he respondent shall within five days of service of a petition, respond to the petition by filing an answer' and Order 14/1/3 which says 'the petitioner may reply to the respondent's answer within two days of being served with the answer and opposing affidavit'. This adds up to 12 days, which are yet subject to Article 269 of the Constitution and Order 15/6 on the computation of time. Article 269 and Order 15/6 do not in the computation of time include the day of the happening of an event but include Saturdays and Sundays except where the period of time does not exceed six days. Furthermore, Order 15/7 allows the Court to extend time set by the Rules or its own decisions but not time specifically limited by the Constitution.

When all this is taken into account, the time under the Rules providing for pre-trial process comes to 12 working days or 16 calendar days. This does not include the time needed for exchange of bundles of pleadings and documents or discovery as provided by Order 14/3/2. It also does not take into account the possibility of interlocutory applications, which are not excluded by Order 14. The hearing of evidence envisaged by the Rules can only begin after the pre-trial process is complete. What then follows is a trial. That the said hearing is a full trial is evident from Orders 14/1/3/b and 14/3/4. The ambiguity of the constitutional provision is further complicated by the clear disconnect between the provision and the Rules.

What happened in reality closely mimicked the Rules even though the Court tried to abridge the time for the pre-trial process in order to create more time for the actual trial. The election petition was filed on Friday 19th August 2016. The last of the respondents was served on Tuesday 23rd August 2016. The single judge of the Court directing pre-trial proceedings then issued directions on 24th August giving the respondents five days in which to file and serve and the petitioners two days in which to reply; which both parties did, taking the time to the end of August 2016.

An attempt by the Court to have the hearing commence on the 1st of September 2016 was rejected by the petitioners, leaving the hearing to commence on Friday the 2nd September 2016, which was the 14th day since the filing of the petition. On that day, several applications were made including three major

ones renewed by the petitioners before the full Court. By the evening of that final day, the Court, having ruled on all the motions raised, reiterated its call on the petitioners' lawyers to present their first witness. The calling of even one witness would have arguably arrested time-enabling the Court to continue the hearing into the following week. Instead, the petitioners' lawyers withdrew their representation on the grounds that they could not effectively prosecute their case within the time remaining. The petitioners, in person, then made an application for time in which to engage fresh counsel. The Court had no option but to adjourn the matter to the following week.

On Monday 5th September 2016, the Court did not proceed with the trial. In a ruling by the majority, it terminated the proceedings by interpreting Article 101(5) literally so that the provision necessitated that a matter be concluded within 14 calendar days. The majority Bench ruled that the petitioners could not cry foul as their lawyers had persistently delayed the proceedings by failing to serve the respondents in time, by making numerous interlocutory applications during the pre-trial process and then renewing the applications before the full Court on the date of hearing, and finally by abandoning their clients at the last moment.

The majority Bench acted prudently. The Court had before it 68 witnesses, 11 lawyers from nine law firms for the two petitioners and 20 private and state attorneys for the four respondents as well as thousands of pages of documents and video recordings. The Rules provide for a full trial to take place, judgment following which is final, making the stakes high enough to entail that each witness would likely be cross-examined and re-examined by any number of counsel on the pre-filed witness statement. The country was holding its breath as under Article 105(2) (b) the President-elect can only be sworn in after the petition is concluded. No meaningful hearing could take place under the tense atmosphere prevailing.

Two of the five judges hearing the case dissented on the ground that a purposive approach would have permitted a more satisfactory result by ensuring that the main purpose of Article 101(5), the hearing of an election petition, actually took place. Ending the matter on a procedural technicality created an absurdity preventing the Court from rendering one of the conclusive decisions spelt out in Article 101(6). In the opinion of the dissenting judges, the 14 days enshrined in the Constitution was an impossibility which should have been tempered by a holistic reading of the Constitution. It is trite that the Constitution makes it mandatory in Article 267 for the Court to take into account the Bill of Rights; to promote its values and principles; to permit development of the law; and to contribute to good governance. Article 118(2) (e) in fact provides a mandatory caution against adhering to technicalities that result in injustice. And Article 271 empowers the Court to use its implied powers to ensure that it fulfills its mandate, which to the two dissenting judges meant hearing a dispute on the merits.

Although much of the criticism directed at the Court accuses it of failing to interpret Article 101(5) at the beginning of the proceedings in order to give clear guidance, the Court cannot be faulted. Zambia applies the adversarial system. The Court could not provide such an interpretation without one or other of the parties first moving the Court to do so. Neither party moved the Court. The Court may have powers to move itself but that can only happen rarely and certainly not in relation to a highly contentious point as was the case in the petition before it. Such initiative by the Court would have led to accusations of bias by whichever side the resulting interpretation disappointed.

The impossibility of the 14 days is confirmed when the 2016 petition hearing is compared to the 2001 petition, which took over three years to conclude. *Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138* did not raise the same levels of public anxiety because there was no constitutional time limit to raise false expectations and unduly constrain the Court. There was no hold placed on the swearing into office of the President-elect. There was no additional pressure in the form of parallel actions such as that instituted in 2016 under Article 104 demanding that the President-elect hand over power to the Speaker whilst his election was under challenge.

CONCLUSION

Zambia's Constitutional Court faced numerous challenges throughout 2016 because of a widespread lack of understanding of the nature and function of such a court. The legality of the 2016 amendments was challenged as well as the Court's competence. The Constitution itself and its attendant Rules as well as misconceived public attacks directed at the Court greatly undermined its standing and independence. It will be an uphill battle for the young Court to establish itself as a *tour de force* in promoting the democratic dispensation promised by the amended Constitution. Much will depend on how the Court handles itself over the course of 2017.

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